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International Law and Constitutional Law: International Court of Justice and Executive Power-Interpreting and Implementing International Treaty Obligations

Denitsa R. Mavrova

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INTERNATIONAL LAW AND CONSTITUTIONAL LAW:
INTERNATIONAL COURT OF JUSTICE AND EXECUTIVE
POWER—INTERPRETING AND IMPLEMENTING
INTERNATIONAL TREATY OBLIGATIONS
Medellín v. Texas, 128 S. Ct. 1346 (2008)

I. FACTS

In 1994, Jose Ernando Medellín, a Mexican national, was convicted of capital murder and sentenced to death in a Texas state court for the gang rapes and murders of two Houston teenagers.¹ The rapes and subsequent murders took place on June 24, 1993.² Medellín was arrested five days later, on June 29, at approximately 4:30 a.m.³ Following the arrest, local law enforcement officers gave Medellín *Miranda* warnings, but failed to advise him of his Vienna Convention right to seek assistance from the Mexican consul and to notify the Mexican consulate of his detention.⁴ A few hours later, Medellín gave a detailed written confession.⁵ Medellín was convicted of capital murder and sentenced to death.⁶

In 1997, the Texas Court of Criminal Appeals affirmed the conviction and sentence.⁷ Medellín subsequently filed a state application for post-conviction relief with the state trial court, arguing his conviction and sentence should be vacated as a remedy for the violation of his Vienna Convention rights.⁸ The trial court denied relief, finding the claim concerning Medellín’s Vienna Convention rights to be procedurally defaulted, as Medellín did not raise the claim at trial or on direct appeal.⁹ The trial court

1. *Medellín v. Texas*, 128 S. Ct. 1346, 1354 (2008).

2. *Id.* At the time of the crime, Medellín was a member of the “Black and Whites” gang. *Id.* To prevent the victims from identifying the gang members who took part in the rapes, Medellín personally murdered at least one of the girls by strangling her with her own shoelace. *Id.*

3. *Id.*

4. *Id.* Although Medellín had lived in the United States most of his life, he was still a national of Mexico. *Id.*; see also Brief for Petitioner at 6-7, *Medellín v. Texas*, No. 06-984 (June 28, 2007) (stating that Medellín told the arresting officers he was born in Mexico and informed the Harris County Pretrial Services he was not a citizen of the United States).

5. *Medellín*, 128 S. Ct. at 1354.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*; see also Christopher N. Lasch, *The Future of Teague Retroactivity, or “Redressability,” After Danforth v. Minnesota: Why Courts Should Give Retroactive Effect on New Constitutional Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1, 63 (2009) (explaining

also rejected the claim on the merits, holding Medellín failed to show actual prejudice arising from the alleged Vienna Convention violation.¹⁰ The Texas Court of Criminal Appeals affirmed.¹¹ In 2001, Medellín filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Texas.¹² The district court denied the petition stating Medellín's Vienna Convention claim was procedurally defaulted.¹³ The district court further held Medellín had failed to show that any alleged violation of his Vienna Convention rights impacted the validity of his conviction and sentence.¹⁴ Medellín appealed.¹⁵

In 2003, Mexico initiated proceedings against the United States before the International Court of Justice (ICJ) on behalf of fifty-one Mexican nationals, including Medellín.¹⁶ The International Court of Justice issued its decision in *Case Concerning Avena and Other Mexican Nationals*¹⁷ while Medellín's application for a certification of appealability was still pending in the Fifth Circuit Court of Appeals.¹⁸ The ICJ held that by failing to inform the fifty-one Mexican nationals of their Vienna Convention rights, the United States violated Article 36(1)(b) of the Vienna Convention.¹⁹ Accordingly, the ICJ held that the United States was obligated to provide, by means of its own choosing, review and reconsideration of the convictions

that the procedural default rule prohibits a party from raising claims in post conviction proceedings that "could or should have been raised on direct review").

10. *Id.* at 1354-55.

11. *Id.* at 1355.

12. *Id.* (citing Medellín v. Cockrell, Civ. Action No. H-01-4078 (S.D. Tex. June 26, 2003)).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 1352-53. The ICJ is the primary judicial organ of the United Nations. *Id.* at 1353. Established in 1945, the ICJ serves as the international tribunal for adjudication of disputes between member states. *Id.* at 1352, 1353. The United States and Mexico are both parties to the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention. *Id.* at 1353. The Optional Protocol states, in relevant part, that "disputes arising out of the interpretation or application of the Vienna Convention . . . 'lie within the compulsory jurisdiction of the ICJ.'" *Id.* It further provides that any party of a dispute, which is also a party to the Optional Protocol, may properly bring a claim before the ICJ. *Id.* At the time Mexico initiated proceedings before the ICJ, both parties submitted themselves to the compulsory jurisdiction of the ICJ with respect to any disputes arising from the application and interpretation of the Vienna Convention. *Id.*

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

18. *Medellín*, 128 S. Ct. at 1355.

19. *Id.* Article 36(1)(b) of the Vienna Convention on Consular Relations states that a detained foreign national must be informed of his right to consular notification and, if requested by him, the authorities of the receiving state (here, the United States) must, without delay, inform the consulate of the sending state that a national of that state has been arrested or detained in any manner. Vienna Convention on Consular Relations, art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 (ratified by the United States on Nov. 24, 1969) [hereinafter Vienna Convention].

and sentences of the affected Mexican nationals, regardless of Texas' state procedural default rules.²⁰ The Fifth Circuit Court of Appeals, however, denied a certificate of appealability, holding that the Vienna Convention did not confer individually enforceable rights, and Vienna Convention claims were subject to state procedural default rules.²¹ Following the Fifth Circuit's decision, the United States Supreme Court granted certiorari.²²

In 2005, before the Supreme Court could hear oral arguments, President George W. Bush issued a Memorandum to the United States Attorney General.²³ The President declared that the United States would discharge its international obligations under *Avena*, by having state courts provide the required review and reconsideration to the fifty-one Mexican nationals named in *Avena*.²⁴ Relying on the President's Memorandum, Medellín filed a second petition for a writ of habeas corpus in the Texas Court of Criminal Appeals.²⁵ The United States Supreme Court subsequently dismissed Medellín's petition for certiorari as improvidently granted.²⁶ The Court dismissed the petition for certiorari because the state court proceedings might have provided Medellín with the review and reconsideration ordered by the ICJ.²⁷ The Texas Court of Criminal Appeals dismissed Medellín's second state habeas application as abuse of writ, holding that neither the President's Memorandum, nor the ICJ decision, could remove the state procedural bar on Medellín's application for relief.²⁸ The United States Supreme Court again granted certiorari.²⁹

II. LEGAL BACKGROUND

The Supremacy Clause of the United States Constitution provides, "all Treaties . . . which shall be made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State

20. *Medellin*, 128 S. Ct. at 1355 (citing *Avena*, 2004 I.C.J. at 72).

21. *Id.* (citing *Medellin v. Dretke*, 371 F.3d 270, 279-80 (5th Cir. 2004)).

22. *Id.* (citing *Medellin v. Dretke (Medellin I)*, 544 U.S. 660, 661 (2005) (*per curiam*)).

23. *Id.*

24. *Id.* The full text of the President's Memorandum reads as follows:

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

Id.

25. *Id.* at 1356 (citing *Ex parte Medellin*, 223 S.W.3d 315, 322-23 (Tex. Crim. App. 2006).

26. *Id.*

27. *Id.*

28. *Id.* (citing *Ex parte Medellin*, 223 S.W.3d at 352).

29. *Id.*

shall be bound thereby.”³⁰ The complex decision of *Medellín v. Texas*³¹ implicates numerous relevant treaties. First, the applicable sections of the Vienna Convention, the Optional Protocol, and the United Nations Charter are examined. Then, the distinction between self-executing and non-self-executing treaties is explained.³² The role of the Executive in the implementation of international treaties is analyzed next. Finally, a discussion of proceedings before the International Court of Justice, including the *Case Concerning Avena and Other Mexican Nationals*, and the United States Supreme Court’s response to *Avena*, is provided.

A. THE RELEVANT TREATIES: INTERPRETATION AND IMPLEMENTATION

The first section introduces treaties relevant to the United States Supreme Court’s decision in *Medellín v. Texas*, which include the Vienna Convention on Consular Relations, the Optional Protocol to the Vienna Convention, and the United Nations Charter. An examination of what makes international treaties self-executing or non-self-executing is then provided. The examination of the principle of self-execution is followed by an analysis of the Executive’s role in the implementation of these treaties.

1. *The Relevant Treaties: The Vienna Convention, the Optional Protocol, and the United Nations Charter*

The Vienna Convention was drafted in 1963 to promote open relations among nations.³³ In 1969, upon the advice and consent of the Senate, the United States ratified the Vienna Convention on Consular Relations.³⁴ Article 36 of the Convention on Consular Relations facilitates consular functions among the member states.³⁵ The Article contains two provisions, particularly relevant to the understanding of *Medellín*’s claim for the violation of his Vienna Convention rights.³⁶ First, Article 36(1)(b) requires the signatory nations to the Convention to inform arrested foreign nationals of their right to request assistance from their nation’s consulate.³⁷ Second, Ar-

30. U.S. CONST. art. VI, cl. 2.

31. 128 S. Ct. 1346 (2008).

32. See generally Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 604-06 (2008) (discussing the difference between self-executing and non-self-executing treaties and the United States Supreme Court’s precedent relevant to making that distinction).

33. Vienna Convention, *supra* note 19, preamble, at 77, 79.

34. *Id.* preamble, at 77.

35. *Id.* art. 36, at 100-01.

36. *Id.*

37. *Id.* art. 36(1)(b), at 101.

ticle 36(2) requires that the rights referenced in subsection one be exercised in conformity with the laws and regulations of the arresting State, provided these laws and regulations give full effect to the purposes for which the rights are intended.³⁸

At the time the Supreme Court heard *Medellín*, the United States was also a party to the Optional Protocol to the Vienna Convention.³⁹ Article I of the Optional Protocol compels member states to submit all disputes arising out of the interpretation and application of the Vienna Convention to the compulsory jurisdiction of the International Court of Justice.⁴⁰ The Article further provides that any party to a dispute may bring the dispute before the ICJ, given that the party is also a party to the present Protocol.⁴¹ By ratifying the Optional Protocol, the United States agreed to submit itself to the specific jurisdiction of the ICJ with respect to any claims arising under the Vienna Convention.⁴²

The third and final treaty relevant to the Supreme Court's decision in *Medellín*, the United Nations Charter (U.N. Charter), provides that each member of the United Nations undertakes to comply with the decision of the ICJ in any case to which it is a party.⁴³ In addition, annexed to the U.N. Charter is the Statute of the International Court of Justice (ICJ Statute).⁴⁴ The ICJ Statute sets the organizational structure of the Court and provides the governing procedures for cases brought before the ICJ.⁴⁵ Furthermore, the ICJ Statute states that an ICJ judgment is final and has binding force as to the parties of a particular case.⁴⁶ Once the relevant treaties have been

38. *Id.* art. 36(2), at 101.

39. Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 369 T.I.A.S. No. 6820 [hereinafter Optional Protocol].

40. *Id.* art. I, at 326.

41. *Id.*

42. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 339 (2006). On March 7, 2005, following the ICJ decision in *Avena*, the United States withdrew from the Optional Protocol to the Vienna Convention. *Id.* (citing Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (Mar. 7, 2005)).

43. Charter of the United Nations art. 94(1), June 26, 1945, 59 Stat. 1051, available at <http://www.un.org/en/documents/charter/index.shtml> [hereinafter U.N. Charter].

44. Statute of the International Court of Justice art. 1, June 26, 1945, 59 Stat. 1055, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=o> [hereinafter ICJ Statute].

45. *Id.* art. 59-60, at 1062-63.

46. *Id.* According to the ICJ Statute, a State may consent to ICJ jurisdiction in one of two ways: (1) the State may consent to the ICJ's general jurisdiction, including jurisdiction over any dispute arising out of a general international treaty or law; or (2) it may consent to specific jurisdiction over a particular category of disputes. *Id.* In 1985, the United States withdrew from the general jurisdiction of the ICJ. *Id.* (citing U.S. Dept. of State Letter and Statement Concerning Termination of Acceptance of ICJ Compulsory Jurisdiction (Oct. 7, 1985)). As previously mentioned, in 2005, the United States also withdrew from the specific jurisdiction of the ICJ with respect to disputes arising out of the interpretation and application of the Vienna Convention.

identified, the next step for courts is to inquire whether the treaty is self-executing, that is, judicially enforceable.⁴⁷

2. *Self-Executing and Non-Self-Executing Treaties*

The United States Supreme Court, in *Foster v. Neilson*,⁴⁸ introduced for the first time the concept of self-execution.⁴⁹ The distinction between self-executing and non-self-executing treaties is examined through the framework established in *Foster*.⁵⁰ In *Foster v. Neilson*, the Supreme Court examined an 1819 treaty between the United States and Spain.⁵¹ The relevant treaty provision stated that grants of land made by Spain shall be ratified and confirmed to the grantee.⁵² The Court held that the treaty was non-self-executing because the language “shall be ratified” demonstrated that the treaty contemplated further legislative action.⁵³ Non-self-executing treaties, the Court stated, required action by the political—not the judicial—branch and could be enforced only by implementing legislation.⁵⁴ On the contrary, the Court explained that a self-executing treaty operated of itself, without legislative aid.⁵⁵ A self-executing treaty was thus equivalent to an act of the legislature and was automatically binding on the courts of the United States.⁵⁶ The distinction between self-executing and non-self-executing treaties established in *Foster* continued to be the governing principle for Supreme Court decisions, although the distinction proved difficult to apply.⁵⁷

In *Igartua-De La Rosa v. United States*,⁵⁸ residents of Puerto Rico brought suit against the United States, alleging their inability to vote in

Sanchez-Llamas, 548 U.S. at 339 (citing Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (Mar. 7, 2005)).

47. See Vázquez, *supra* note 32, at 628 (discussing the concept of self-execution and the exception of non-self-execution).

48. 27 U.S. 253 (1829), *overruled on other grounds by* United States v. Percheman, 32 U.S. 51 (1833).

49. *Foster*, 27 U.S. at 314.

50. See discussion *infra* Part II.A.2 (explaining the difference between the principles of self-execution and non-self-execution).

51. *Foster*, 27 U.S. at 310.

52. *Id.*

53. *Id.* at 315.

54. *Id.*; see also *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (holding that a non-self-executing treaty could be carried into effect only through an act of the legislature).

55. *Foster*, 27 U.S. at 314.

56. *Id.* at 315; see also *Whitney*, 124 U.S. at 194 (stating that only self-executing treaties have the same legal effect as an act by the legislature).

57. See Vázquez, *supra* note 32, at 633 (explaining that nations do not concern themselves with questions of domestic implementation when negotiating international treaties).

58. 417 F.3d. 145 (1st Cir. 2005) (en banc).

presidential elections ran contrary to certain international treaty obligations assumed by the United States.⁵⁹ The First Circuit Court of Appeals acknowledged the numerous treaties signed by the United States over the years and recognized the treaties comprised international commitments.⁶⁰ The Court, however, held that the treaties could become domestic law only if they were self-executing or if Congress enacted implementing statutes.⁶¹ Thus, in rejecting the petitioners' claim, the First Circuit Court of Appeals reaffirmed the long-standing principle that international treaties are not binding domestic law unless they are self-executed or legislatively implemented.⁶² The First Circuit further held that a federal court could not find the United States in violation of its treaty obligations where the President negotiated a non-self-executing treaty and Congress had refused to adopt implementing legislation.⁶³ To hold otherwise, the First Circuit stated, would be an attempt to undermine the constitutional allocations of power and would constitute an attempt by a federal court to do what both the President and Congress have expressly declined to do—give the treaty domestically binding legal effect.⁶⁴ The First Circuit failed to address, however, the power of the Executive to bind domestic courts in the absence of implementing legislation by Congress.⁶⁵

3. *The Authority of the Executive in Implementing International Treaties*

Supreme Court decisions provide limited guidance on the President's "Article II treaty-implementation authority [] to circumvent ordinary legislative process and preempt state law."⁶⁶ However, as with any other governmental power, the President's authority to act with respect to international treaty obligations arises from either an act of Congress or from the Constitution itself.⁶⁷ Justice Jackson's concurrence in *Youngstown Sheet &*

59. *Igartua-De La Rosa*, 417 F.3d at 146-47.

60. *Id.* at 150.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. See discussion *infra* Part II.A.3; see also Ernest A. Young, *Supranational Rulings as Judgments and Precedents*, 18 DUKE J. COMP. & INT'L L. 477, 514-15 (2008) (discussing the President's power to execute treaties).

66. *Medellin*, 128 S. Ct. at 1390 (Breyer, J., dissenting) (discussing the lack of precedent concerning the authority of the Executive to preempt contrary state law pursuant to a ratified treaty); see also *Barclays Bank PLC v. Franchise Tax Bd. Of California*, 512 U.S. 298, 329 (1994) (refusing to consider "the scope of the President's power to preempt state law pursuant to authority delegated by a statute or a ratified treaty"); but see *United States v. Pink*, 315 U.S. 203, 230-31 (1942) (stating that state law must yield if inconsistent with provisions of international treaties).

67. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

*Tube Co. v. Sawyer*⁶⁸ provides the framework for evaluating executive action in this area.⁶⁹

In *Youngstown*, Justice Jackson explained that the President's ability to act could be placed in one of three broad categories.⁷⁰ In the first category, where the President acts pursuant to an express or implied authorization of Congress, the President's authority is at its maximum, for it includes all of his or her Article II powers plus all the powers that Congress can delegate to the Executive.⁷¹ In the second category, where the President acts in the absence of either a congressional grant or denial of authority, the President has all of his or her Article II powers plus any powers that fall in the "twilight zone," or, the powers that overlap with those of Congress.⁷² Finally, where the President acts in contravention of the will of Congress, the Executive's power is at its minimum, as the President can only rely on the exclusive Article II powers—those that belong to the President and the President only.⁷³ Thus, the authority of the Executive to implement treaties and give binding domestic effect to the judgments of the ICJ depends on whether the President acts pursuant to, in the absence of, or contrary to the will of Congress.⁷⁴ In the past decade, the ICJ has heard and ruled on the implementation of United States' treaty obligations in proceedings concerning nationals of Paraguay, Germany, and Mexico.⁷⁵

B. PROCEEDINGS BEFORE THE INTERNATIONAL COURT OF JUSTICE

Proceedings against the United States for Article 36 violations under the Vienna Convention have been brought before the ICJ on three separate occasions—first, by Paraguay in 1998, then by Germany in 1999, and finally, by Mexico in 2003.⁷⁶ In each case, the authorities of the United

68. 343 U.S. 579 (1952).

69. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

70. *Id.*

71. *Id.*

72. *Id.* at 637.

73. *Id.*

74. See generally discussion *infra* Part II.A.3 (examining the *Youngstown* framework in the context of the President's treaty-implementation authority).

75. See discussion *infra* Part II.B (discussing proceedings against the United States brought before the International Court of Justice).

76. See generally Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Provisional Measures Order of Apr. 9) (holding the United States in violation of Article 36(1)(b) of the Vienna Convention by failing to inform the arrested foreign national of his right to consular notification under the Convention); see also *LaGrand* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27) (stating the United States had an obligation under the Vienna Convention to inform the detained foreign nationals of their right to consular notification); *Avena*, 2004 I.C.J. at 17 (explaining the United States violated the Vienna Convention on Consular Relations by failing to inform the Mexican Consulate of Medellín's arrest and detention).

States arrested a national of the respective foreign State and subsequently convicted and sentenced that foreign national to death.⁷⁷ After a series of unsuccessful appeals in each case, the affected foreign state brought suit on behalf of its nationals before the ICJ.⁷⁸ In all three cases, the ICJ found that the United States had breached its obligation under the Vienna Convention by failing to inform the arrested foreign nationals of their Convention-given right to consular notification.⁷⁹ Moreover, in *LaGrand*⁸⁰ and *Avena*, the ICJ held that to remedy the Article 36 violations, the United States was obligated to review and reconsider the convictions and sentences of the affected foreign nationals, notwithstanding procedural default rules.⁸¹

1. *Paraguay Initiates Proceedings Against the United States Before the ICJ*

In 1993, a Virginia state court convicted Angel Francisco Breard, a Paraguayan national, of murder and sentenced him to death.⁸² Following his conviction and sentence, Breard filed a petition for writ of habeas corpus in a federal district court, raising for the first time his Vienna Convention claim.⁸³ The United States District Court for the Eastern District of Virginia denied the petition as procedurally defaulted because Breard failed to raise the claim at trial or on direct appeal.⁸⁴ The execution date was set for April 14, 1998.⁸⁵ On April 3, 1998, Paraguay initiated proceedings against the United States alleging Breard was not informed of his Vienna Convention right to contact the Paraguayan consular office in violation of Article 36(1) of the Convention.⁸⁶ In addition, Paraguay argued that the United

77. See, e.g., *LaGrand*, 2001 I.C.J. at 475 (discussing the arrest of two German nationals in relation to a first-degree murder and attempted armed robbery and their subsequent convictions and death sentences).

78. See, e.g., *Vienna Convention on Consular Relations*, 1998 I.C.J. at 249 (stating that Paraguay instituted proceedings with the ICJ following Breard's unsuccessful appeals in the United States' courts).

79. See, e.g., *LaGrand*, 2001 I.C.J. at 515.

80. (*F.R.G. v. U.S.*), 2001 I.C.J. 466 (June 27).

81. See, e.g., *Avena*, 2004 I.C.J. at 65-66 (holding that review and reconsideration of the foreign nationals' convictions and sentences should not be barred by state procedural default rules); see also *LaGrand*, 2001 I.C.J. at 516 (stating that while the United States can review the convictions and sentences by means of its own choosing, the review shall not be affected by procedural default rules).

82. *Breard v. Commonwealth*, 445 S.E.2d 670, 673, 682 (Va. 1994) (affirming the Circuit Court for Arlington County in finding Breard guilty of rape and capital murder and sentencing him to death).

83. *Breard v. Netherland*, 949 F. Supp. 1255, 1260 (E.D. Va. 1996).

84. *Id.* at 1263.

85. *Vienna Convention on Consular Relations (Para. v. U.S.)*, 1998 I.C.J. 248, 249 (Provisional Measures Order of Apr. 9).

86. *Id.* at 248-49.

States, as the detaining State, failed to advise the Paraguayan consular officers of Breard's detention, thus preventing the Paraguayan officials from rendering assistance.⁸⁷

Drawing on the Court's power to order provisional measures, the ICJ unanimously held that the United States shall take all necessary measures to ensure that Breard would not be executed pending final decision of the ICJ proceedings.⁸⁸ Breard subsequently filed a petition for original writ of habeas corpus with the United States Supreme Court, asking the court to enforce the ICJ order.⁸⁹ The Supreme Court, by a vote of six to three, denied the petition.⁹⁰ The Court stated that while the ICJ's interpretation of international treaties deserved due consideration, absent an express indication to the contrary, the procedural rules of the forum State must govern the treaty's implementation in that State.⁹¹ The Court held that the language of Article 36(2) of the Vienna Convention clearly allowed a signatory State to exercise the rights expressed in the Convention in conformity with its own laws and regulations, provided such laws and regulations gave full effect to the purposes for which the rights were intended.⁹² The Court concluded that denial of Breard's petition was proper because Breard's failure to raise the Vienna Convention claim in state court first rendered the claim procedurally defaulted, in violation of the laws of the United States and the Commonwealth of Virginia.⁹³ The ICJ expanded on its holding in *Breard* a year later when Germany initiated proceedings against the United States, alleging the United States had violated its obligations under the Vienna Convention.⁹⁴

2. *Germany Initiates Proceedings Against the United States Before the ICJ*

On January 7, 1982, Arizona law enforcement officers arrested Karl and Walter LaGrand, German nationals, for their alleged involvement in an attempted armed bank robbery in Marana, Arizona.⁹⁵ The law enforcement officers suspected that Karl and Walter LaGrand murdered the bank manger and seriously injured another bank employee during the course of the al-

87. *Id.* at 249.

88. *Id.* at 258.

89. *Breard v. Greene*, 523 U.S. 371, 374 (1998) (per curiam).

90. *Id.* at 378-81.

91. *Id.* at 375.

92. *Id.* (citing Vienna Convention, *supra* note 19, art. 36(2), at 101).

93. *Id.* at 375-76.

94. See discussion *infra* Part II.B.2 (discussing the proceedings initiated by Germany against the United States before the ICJ).

95. *LaGrand*, (F.R.G. v. U.S.), 2001 I.C.J. 466, 475 (June 27).

leged robbery.⁹⁶ In 1984, the Superior Court of Pima County, Arizona, convicted both Karl and Walter LaGrand of murder in the first degree and sentenced each to death.⁹⁷ After a series of unsuccessful appeals, the LaGrands filed applications for writs of habeas corpus in the United States District Court for the District of Arizona, for the first time asserting violations of their Vienna Convention rights.⁹⁸ The district court dismissed the claim as procedurally defaulted, given the Petitioners' failure to raise the claim at trial or on direct appeal.⁹⁹ The Ninth Circuit Court of Appeals affirmed the judgment and in 1999, the United States Supreme Court denied further review.¹⁰⁰ The execution of Karl LaGrand took place on February 24, 1999.¹⁰¹

On March 2, 1999, the day before the scheduled date of execution for Walter LaGrand, Germany initiated proceedings before the ICJ.¹⁰² Germany alleged that in arresting, detaining, and failing to inform Karl and Walter LaGrand of their Article 36 rights, the United States violated the Vienna Convention on Consular Relations and deprived Germany of providing consular assistance to its detained nationals.¹⁰³ On March 3, 1999, the ICJ issued an order indicating provisional measures and requested that the United States ensure the stay of execution of Walter LaGrand pending final decision of the ICJ.¹⁰⁴ On the same day, Germany initiated proceedings in the United States Supreme Court, seeking compliance with the ICJ order of provisional measures.¹⁰⁵ The Supreme Court refused to exercise its original jurisdiction in the action brought by Germany against the United States and dismissed the case.¹⁰⁶ In relation to these proceedings, the

96. *Id.*

97. *State v. LaGrand*, 734 P.2d 563, 565 (Ariz. 1987). In addition to the conviction of murder in the first degree, the Superior Court of Pima, Arizona, convicted the defendants of attempted murder in the first degree, attempted armed robbery, and two counts of kidnapping. *Id.* The Superior Court sentenced the LaGrands to death for the first-degree murder and to concurrent sentences of imprisonment for the other charges. *Id.*

98. *LaGrand v. Stewart*, 133 F.3d 1253, 1261-63 (9th Cir. 1998).

99. *Id.* at 1259.

100. *LaGrand v. Stewart*, 170 F.3d 1158, 1161 (9th Cir. 1999), *cert. denied*, 526 U.S. 1061 (1999).

101. *LaGrand*, 2001 I.C.J. at 478.

102. *Id.*

103. *Id.* at 473-74.

104. *Id.* at 479.

105. *Federal Republic of Germany v. United States*, 526 U.S. 111, 111-12 (1999) (*per curiam*).

106. *Id.* at 112. The Court stated that Germany did not have the right, under the Vienna Convention, to assert a claim against the State of Arizona for imposing a death sentence upon a German national. *Id.* The Court viewed such an assertion as contrary to the principles of the Eleventh Amendment, which addresses a state's ability to be sued. *Id.* Moreover, because Arizona imposed

United States Solicitor General, as council of record, took the position that the ICJ order was not binding and did not provide a basis for judicial relief.¹⁰⁷ The State of Arizona executed Walter LaGrand on March 3, 1999, the same day the United States Supreme Court dismissed Germany's motion for stay of execution.¹⁰⁸

Although both Karl and Walter LaGrand were executed, Germany did not withdraw its case from the ICJ.¹⁰⁹ In reviewing the merits of Germany's case, the ICJ, by a fourteen-to-one vote, held that the United States breached its obligations to Germany, by failing to inform Karl and Walter LaGrand of their rights under Article 36(1)(b) of the Vienna Convention and thereby depriving Germany from rendering timely consular assistance to its detained nationals.¹¹⁰ The ICJ found that Article 36(1)(b) of the Vienna Convention conferred upon foreign nationals individual rights, which could be invoked on their behalf by their nation in proceedings before the ICJ.¹¹¹ Furthermore, the ICJ asserted that the United States breached its obligation under the Convention by failing to comply with the ICJ order on provisional measures because such an order bound the United States.¹¹² The ICJ concluded that, in the future, should German nationals be detained, convicted, and sentenced to severe penalties irrespective of their rights under Article 36(1)(b), the United States would be obligated to provide, by means of its own choosing, review and reconsideration of the convictions and sentences.¹¹³ In doing so, the United States must take into account the possible prejudice caused by such violations.¹¹⁴ Moreover, the ICJ held that the review and reconsideration should not be barred by state procedural default rules, as such a bar would offend the purposes for which the rights were intended and would necessarily constitute a violation of Article 36(2) of the Vienna Convention.¹¹⁵ The ICJ reached the same conclusion in *Case Concerning Avena and Other Mexican Nationals*.¹¹⁶

the sentence in 1984 and Germany learned about it in 1992, the claim was tardy, thus preventing the Court from exercising jurisdiction. *Id.*

107. *LaGrand*, 2001 I.C.J. at 479; see also *Federal Republic of Germany v. United States*, 526 U.S. at 113 (Breyer, J., dissenting) (quoting the letter by the Solicitor General for the United States, in which the Solicitor General admitted he did not have the "time to read the materials thoroughly or to digest the contents" of the order issued by the ICJ).

108. *LaGrand*, 2001 I.C.J. at 479-80.

109. *Id.* at 480.

110. *Id.* at 515.

111. *Id.*

112. *Id.* at 516.

113. *Id.*

114. *Id.*

115. *Id.*

116. See discussion *infra* Part II.B.3 (analyzing the ICJ decision in *Avena*).

3. *Mexico Initiates Proceedings Against the United States Before the ICJ*

On January 9, 2003, Mexico instituted proceedings before the ICJ against the United States, alleging violations of Article 36 of the Vienna Convention on Consular Relations with respect to fifty-two Mexican nationals, including Medellín.¹¹⁷ Mexico argued that in fifty of the fifty-two cases, authorities in the United States failed to inform the Mexican nationals of their right to consular notification under Article 36(1)(b) of the Vienna Convention.¹¹⁸ On February 5, 2003, the ICJ issued a provisional measures order regarding three of the named Mexican nationals, who at that time had exhausted all judicial remedies in the United States and were facing executions in the upcoming months or even weeks.¹¹⁹ The ICJ ordered the United States to take all actions available at its disposal to ensure these individuals would not be executed pending final judgment of the ICJ.¹²⁰

The ICJ rendered its decision on the merits of Mexico's claim on March 31, 2004.¹²¹ It held, by a fourteen-to-one vote, that by failing to inform the fifty-one detained Mexican nationals of their rights under Article 36(1)(b) of the Vienna Convention, the United States breached its obligations under the Convention.¹²² The United States further breached its obligations under the Vienna Convention by failing to notify the Mexican consular post of the detention of forty-eight of the fifty-one named Mexican nationals and thus depriving Mexico of the opportunity to provide consular assistance to these individuals.¹²³ According to the ICJ, the appropriate reparation would be for the United States to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the named Mexican nationals.¹²⁴ In doing so, however, the United States

117. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 17, 54 (Mar. 31). At the time Mexico filed its application with the ICJ, all fifty-two individuals were on death row. *Id.* at 27. In addition, of the fifty-two cases involved in the proceedings brought by Mexico before the ICJ, forty-nine were at different stages in state or federal courts in the United States. *Id.*

118. *Id.* at 26. In the remaining two cases, Mexico asserted the detained individuals were informed of their Vienna Convention rights but not without delay, as required by the Convention. *Id.*

119. *Id.* at 27. The three individuals were Mr. Fierro, Mr. Moreno, and Mr. Torres. *Id.* At the time of judgment, none of them had been executed, although an execution date of May 18, 2004 was set for Mr. Torres by the Oklahoma Court of Criminal Appeals. *Id.* at 28.

120. *Id.* at 17.

121. *Id.* at 12.

122. *Id.* at 71. The number of Mexican nationals was reduced because in the case of Mr. Salcido (case No. 22), the ICJ found that Mexico failed to prove that the United States' authorities were aware Mr. Salcido was a foreign national. *Id.* at 46.

123. *Id.* at 54.

124. *Id.* at 72.

was obligated to take into account the violations of the rights expressed in the Vienna Convention and more specifically, the legal consequences of such violations on the individual criminal proceedings.¹²⁵ Lastly, as in *LaGrand*, the ICJ concluded that the process of review and reconsideration was best suited for the judicial process and should therefore occur within the judicial proceedings concerning the individual defendants.¹²⁶ State procedural default rules should not bar the process of review.¹²⁷ The United States Supreme Court first responded to the ICJ judgments in *LaGrand* and *Avena* in *Sanchez-Llamas v. Oregon*,¹²⁸ issued after the ICJ rendered its decision in *Avena*, but involving individuals not named in *Avena*.¹²⁹

C. U.S. SUPREME COURT RESPONSE: ARTICLE 36 CLAIMS ARE SUBJECT TO PROCEDURAL DEFAULT RULES

In *Sanchez-Llamas v. Oregon*, the United States Supreme Court confronted the question of whether a defendant's failure to raise an Article 36 claim at trial or on direct appeal rendered the claim procedurally defaulted in a post conviction proceeding.¹³⁰ Answering this question in the affirmative, the Supreme Court held that post-conviction arguments asserting violations of the Vienna Convention were subject to the same state procedural default rules as any other federal law claim.¹³¹ The case involved Mario Bustillo, a Honduran national, whose jury conviction of first-degree murder resulted in a thirty-year prison sentence.¹³² Following the conviction, Bustillo filed a petition for writ of habeas corpus in state court where, for the first time, he raised the violation of his Vienna Convention right to consular notification.¹³³ The court dismissed the claim as procedurally barred because Bustillo had failed to raise it at trial or on direct appeal.¹³⁴ The Vir-

125. *Id.* at 62.

126. *Id.* at 65-66 (citing *LaGrand* (F.R.G. v. U.S.), 2001 I.C.J. 466, 516 (June 27)).

127. *Id.*

128. 548 U.S. 331 (2006).

129. See discussion *infra* Part II.C (analyzing the response of the United States Supreme Court to the ICJ judgment in *Avena*, which found that claims arising out of violations of the Vienna Convention are not subject to state procedural default rules).

130. *Sanchez-Llamas*, 548 U.S. at 337. Chief Justice Roberts delivered the opinion of the Court, in which Justices Scalia, Kennedy, Thomas, and Alito joined. *Id.* Justice Ginsburg filed an opinion concurring in the judgment. *Id.* at 360. Justice Breyer filed a dissenting opinion, in which Justices Stevens and Souter joined, and in which Justice Ginsburg joined as to Part II. *Id.* at 365.

131. *Id.* at 356.

132. *Id.* at 341.

133. *Id.*

134. *Id.* at 342.

ginia Supreme Court found no reversible error, and the United States Supreme Court granted certiorari on the Vienna Convention issue.¹³⁵

Relying on the ICJ decisions in *LaGrand* and *Avena*, Bustillo urged the Court to interpret the Vienna Convention as precluding the application of procedural default rules to his claim, arguing such application would prevent the United States from giving full effect to the purposes for which the rights were intended.¹³⁶ The Court, in rejecting Bustillo's argument, held that while ICJ interpretations of international treaties should be given due consideration, such interpretations are not binding on the courts of the United States.¹³⁷ ICJ judgments, the Court noted, are binding only on the parties involved in a particular case.¹³⁸ Furthermore, the Court pointed out that ICJ judgments were not to be awarded significant weight because, following *Avena*, the United States withdrew from the Optional Protocol and ceased to recognize ICJ jurisdiction in disputes arising out of the Vienna Convention.¹³⁹ The Court concluded *LaGrand* and *Avena* did not control the outcome of *Sanchez-Llamas v. Oregon*.¹⁴⁰

In addition, the Court found that the language of Article 36 allowed procedural default rules to apply to Vienna Convention claims.¹⁴¹ The Court thus rejected the ICJ conclusion in *LaGrand* and *Avena* that application of procedural rules failed to give full effect to the purposes for which the rights were intended.¹⁴² The Court stated that the ICJ failed to distinguish between the importance of procedural default rules in an adversarial system, such as the United States legal system, and an inquisitorial legal system, common in the majority of Vienna Convention signatory nations.¹⁴³

135. *Id.*

136. *Id.* at 352-53 (citing *LaGrand* (F.R.G. v. U.S.), 2001 I.C.J. 466, 497 (June 27) and *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12, 66 (Mar. 31)).

137. *Id.* at 354.

138. *Id.* The Court interpreted Article 59 of the Statute of the International Court of Justice to mean that ICJ judgments did not bind other courts, including the ICJ itself, because any decision rendered by the ICJ had "no binding force except between the parties and in respect of that particular case." *Id.* at 354-55 (quoting *ICJ Statute* at art. 59, 1062).

139. *Id.* at 355.

140. *Id.*

141. *Id.* at 356.

142. *Id.* Article 36(2) provides that the right expressed in Article 36(1) "shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended." Vienna Convention, *supra* note 19, art. 36(2), at 101.

143. *Sanchez-Llamas*, 548 U.S. at 356-57. The Court noted that an adversary system relies primarily on the *parties* to raise important issues before the courts and that procedural default rules are designed to encourage parties to do so at the proper time for adjudication. *Id.* (emphasis in original). On the contrary, in a magistrate-directed, inquisitorial legal system, the responsibility to raise a legal issue does not rest primarily with the parties themselves, and failure to raise a legal error can therefore be partly attributed to the magistrate or the state itself. *Id.* at 357. Thus, be-

Given the lack of express or implied language in the Vienna Convention to the contrary, the Court held that claims under Article 36 of the Convention were subject to state procedural default rules.¹⁴⁴

Writing for the minority, Justice Breyer stated that pursuant to the ICJ decisions in *LaGrand* and *Avena*, the Vienna Convention obligated member States to inform detained foreign nationals of the right to contact their nation's consulate and seek assistance.¹⁴⁵ The dissent did not construe the ICJ judgments as requiring American courts to ignore procedural default rules.¹⁴⁶ Instead, the dissent noted that all that was required of a state court with regard to Article 36 violations was to excuse a procedural default rule where the defendant's failure to bring the claim sooner was the result of the underlying violation or where the State was unwilling to provide some other effective remedy.¹⁴⁷

The decision in *Sanchez-Llamas* reaffirmed the Court's position that treaty implementation is subject to the procedural default rules of the forum state, absent a clear and express statement to the contrary.¹⁴⁸ Moreover, the Court held that ICJ judgments are not controlling on the courts of the United States and are binding only as to the parties of a particular case.¹⁴⁹ Thus, while *LaGrand* and *Avena* were entitled to respectful consideration, the Court in *Sanchez-Llamas* refused to require states to hear Vienna Convention claims, notwithstanding state procedural default rules.¹⁵⁰ In *Medellín v. Texas*, the United States Supreme Court expanded on the issue of implementation of ICJ judgments by examining not only the power of the Court, but also the power of the Executive to preempt state procedural default rules and give binding domestic legal effect to the decisions of the ICJ.¹⁵¹

III. ANALYSIS

In *Medellín*, Chief Justice Roberts delivered the opinion of the Court, in which Justices Scalia, Kennedy, Thomas, and Alito joined.¹⁵² The

cause parties to a dispute in an adversary system have the primary responsibility of raising their claims promptly, the ICJ interpretation of Article 36 is inconsistent with the basic characteristics of an adversary system. *Id.*

144. *Id.* at 360.

145. *Id.* at 370 (Breyer, J., dissenting).

146. *Id.* at 387.

147. *Id.* at 388.

148. *Id.* at 351 (citing *Breard v. Green*, 523 U.S. 371, 375 (1998)).

149. *Id.* at 354.

150. *Id.* at 360.

151. See discussion *infra* Part III.A (analyzing the majority opinion in *Medellín v. Texas*).

152. *Medellín v. Texas*, 128 S. Ct. 1346, 1352 (2008).

majority held that neither the ICJ judgment in *Avena* nor the President's Memorandum constituted directly enforceable federal law that preempted state procedural default rules.¹⁵³ Justice Stevens concurred with the judgment.¹⁵⁴ Justice Breyer filed a dissenting opinion, in which Justices Souter and Ginsburg joined.¹⁵⁵

A. THE MAJORITY OPINION

The Court granted certiorari in *Medellin v. Texas* to decide two questions.¹⁵⁶ First, the Court addressed whether the ICJ judgment in *Avena* was directly enforceable as domestic law in a state court in the United States.¹⁵⁷ Second, the Court examined whether the President's Memorandum could bind state courts in the United States to give effect to the ICJ judgment in *Avena*, without regard to state procedural default rules.¹⁵⁸ In *Avena*, the ICJ found the United States violated the rights of fifty-one named Mexican nationals, including Medellín, to consular notification under the Vienna Convention.¹⁵⁹ The ICJ further held that the United States was obligated to provide, by means of its own choosing, review and reconsideration of the sentences and convictions of the named Mexican nationals, notwithstanding state procedural default rules.¹⁶⁰ The majority found that while the *Avena* judgment created an international obligation on the part of the United States, in the absence of implementing legislation, the *Avena* judgment did not constitute binding federal law that preempted state procedural default rules.¹⁶¹ The Court further held that the President did not have the authority to unilaterally execute an international judgment by giving it binding domestic effect.¹⁶²

1. *The ICJ Judgment in Avena is Not Automatically Binding Domestic Law*

Medellín argued that the Supremacy Clause of the Constitution rendered *Avena* a binding obligation on state and federal courts in the United

153. *Id.* at 1353.

154. *Id.* at 1372 (Stevens, J., concurring).

155. *Id.* at 1375 (Breyer, J., dissenting).

156. *Id.* at 1353.

157. *Id.*

158. *Id.*

159. *Id.* at 1352 (citing Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 71 (Mar. 31)).

160. *Id.* (citing *Avena*, 2004 I.C.J. at 72).

161. *Id.* at 1367.

162. *Id.* at 1369.

States.¹⁶³ Medellín asserted that the treaties requiring compliance with *Avena* were already the “law of the land,” and therefore the ICJ judgment was binding federal law that preempted state procedural default rules.¹⁶⁴ In rejecting Medellín’s argument, the Court distinguished between treaties that have automatic domestic legal effect and treaties that might constitute an international obligation on the part of the United States, but cannot by themselves become binding federal law.¹⁶⁵ A treaty with automatic effect as domestic law is a self-executing treaty, operating of itself and not requiring further legislative action.¹⁶⁶ In contrast, the Court found that non-self-executing treaties could become binding federal law only through an act of Congress.¹⁶⁷ Thus, the Court concluded that while some treaties might impose an international obligation on the part of the United States, international treaties can become domestic law only if they are self-executing or if Congress has enacted legislation to carry them into effect.¹⁶⁸ To determine whether *Avena* was automatically binding domestic law, the Court analyzed the treaties underlying the ICJ judgment.¹⁶⁹

The Court held that treaty interpretation must begin with the text of the treaty, followed by due consideration of the treaty’s negotiations and drafting history.¹⁷⁰ The majority used this interpretive approach in determining whether, in the absence of implementing legislation, the treaties underlying the ICJ judgments in *Avena* created binding federal law that preempted state procedural default rules.¹⁷¹ The Court noted that as a signatory to the Optional Protocol, the United States agreed to submit itself to the compulsory jurisdiction of the ICJ with respect to disputes arising out of the application and interpretation of the Vienna Convention.¹⁷² In doing so, however, the majority pointed out that the United States did not necessarily agree to be bound by ICJ decisions.¹⁷³ Finding that nothing in the language of the Optional Protocol required parties to comply with ICJ judgments or provided

163. *Id.* at 1356.

164. *Id.*; see also U.S. CONST., art. VI, cl. 2.

165. *Id.*

166. *Id.* (citing *Foster v. Neilson*, 27 U.S. 253, 314 (1829)).

167. *Id.* (citing *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)).

168. *Id.* (citing *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005)).

169. *Id.* at 1357.

170. *Id.* (citing *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996); *Air France v. Saks*, 470 U.S. 392, 396-97 (1985)).

171. *Id.* at 1357-67.

172. *Id.* at 1358.

173. *Id.* The Court stated that a party’s decision to submit to compulsory non-binding arbitration, for example, did not automatically require the party to treat the arbitral tribunal’s decision as binding. See, e.g., *North American Free Trade Agreement, U.S.-Can.-Mex.*, art. 2018(1), Dec. 17, 1992 32 I.L.M. 697 (1993) (stating that parties’ agreement on a resolution should normally conform with the tribunal’s determination).

for enforcement mechanisms of such judgments, the Court concluded the Optional Protocol was simply a grant of jurisdiction and nothing more.¹⁷⁴

The Court then considered the text of Article 94 of the U.N. Charter and the obligation it imposed on signatory nations to comply with judgments of the ICJ.¹⁷⁵ The Court acknowledged that under the U.N. Charter, the United States undertook to comply with those decisions of the ICJ, to which the United States was a party.¹⁷⁶ However, the Court interpreted that the language “undertakes to comply” to constitute a commitment on the part of the United States to take future action through the political branches to ensure compliance with ICJ decisions.¹⁷⁷

Moreover, the enforcement provision of Article 94 provided that the remedy for non-compliance with ICJ judgments was a referral to the Security Council by the aggrieved party—a remedy that was clearly diplomatic and not judicial in nature.¹⁷⁸ The Court reasoned the remedy provided in Article 94 was a clear indication the U.N. Charter did not contemplate automatic enforceability of ICJ judgments in domestic courts; otherwise, neither Mexico nor the ICJ would need to proceed to the Security Council to enforce the judgment in *Avena*.¹⁷⁹ Thus, the Court concluded that the enforcement mechanism set out in the U.N. Charter fatally undermined Medellín’s position that the U.N. Charter rendered ICJ decisions automatically enforceable in domestic courts.¹⁸⁰ To hold otherwise, the Court stated, would be to eliminate the option of non-compliance contemplated by Article 94 of the U.N. Charter.¹⁸¹

Lastly, the Court examined the text of the ICJ Statute and incorporated the U.N. Charter, which allowed the ICJ to hear disputes among member-states.¹⁸² The Court noted that while proceedings before the ICJ are often the result of disputes among persons or entities, the ICJ Statute clearly stated that only member-states, and not individuals, could be parties before

174. *Medellin*, 128 S. Ct. at 1358.

175. *Id.* (citing U.N. Charter, *supra* note 43, art. 94, at 1051).

176. *Id.* (citing U.N. Charter, *supra* note 43, art. 94(1), at 1051).

177. *Id.*

178. *Id.* at 1359. The Court further noted that the remedy provided in Article 94(2) was not absolute because it required the Security Council to first deem necessary the issuance of a recommendation, which then could still be vetoed by the United States as a member of the Security Council. *Id.* The Court explained that both the Executive branch and the Senate were aware of this procedure when the President agreed to submit the United States to the compulsory jurisdiction of the ICJ. *Id.*

179. *Id.* at 1359-60 (citing *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 347 (2006)).

180. *Id.* at 1360.

181. *Id.*

182. *Id.* (citing U.N. Charter, *supra* note 43, art. 34(1), at 1059).

is the ICJ.¹⁸³ Article 59 of the ICJ Statute further provided that ICJ judgments had binding force only as to those member-states that were parties to a particular case.¹⁸⁴ Given the language of the ICJ Statute, the Court found that Medellín, as an individual, could not be a party to an ICJ proceeding.¹⁸⁵

Taking into consideration the relevant treaties underlying the ICJ judgment in *Avena* and finding no textual support to the contrary, the Court concluded that the relevant treaties were non-self-executing and, in the absence of implementing legislation, did not afford binding domestic legal effect to judgments of the ICJ.¹⁸⁶ The Court held that while *Avena* created an international obligation on the part of the United States, the ICJ judgment did not, by itself, constitute binding federal law that would preempt state procedural default rules.¹⁸⁷ Neither the text nor the negotiating and drafting history of the treaties supported a finding that the President or Senate intended for ICJ judgments to be automatically enforceable in domestic courts without the aid of implementing legislation.¹⁸⁸ Having found *Avena* did not automatically bind state courts in the United States, the majority next considered whether the President had the authority to establish binding rules of decision that preempt contrary state laws.¹⁸⁹

2. *The ICJ Judgment is Not Binding by Virtue of the President's Memorandum*

The President's Memorandum stated that the United States would discharge its international obligations under *Avena* by having state courts provide the required review and reconsideration to the fifty-one Mexican nationals named in *Avena*.¹⁹⁰ The government argued that the President's ac-

183. *Id.* (citing U.N. Charter, *supra* note 43, art. 34, at 1059).

184. *Id.* (citing U.N. Charter, *supra* note 43, art. 59, at 1062).

185. *Id.*

186. *Id.* at 1364. The Court found it unnecessary to resolve the question of whether the Vienna Convention itself was self-executing or whether it conferred individually enforceable rights. *Id.* at 1357 n.4. Thus, the Court assumed, without deciding, Article 36 of the Vienna Convention granted foreign nationals the right to be informed by the authorities of the detaining state of their Convention-given individual right to consular notification. *Id.* (citing *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 342-43 (2006)).

187. *Id.* at 1367. The Court noted that while the judgments of an international tribunal might not have automatic domestic legal effect, such a holding did not render the underlying treaty useless. *Id.* at 1365. The judgment would still constitute international obligations on the part of the United States, but such obligations would be best suited for political and diplomatic negotiations. *Id.* (citing *Head Money Cases*, 112 U.S. 580, 598 (1884)). The majority held that Congress was free to give the treaties domestic effect and could do so through implementing legislation. *Id.*

188. *Id.* (citing *Sanchez-Llamas*, 548 U.S. at 360).

189. *Id.* at 1367.

190. *Id.* at 1355.

tions in issuing the Memorandum stemmed from both his constitutional power to settle international disputes and his power to implement treaty obligations on the part of the United States.¹⁹¹ Therefore, the government contended, the President's actions were consistent with the first category of Justice Jackson's famous tripartite scheme in *Youngstown*, where the President's power was at its maximum.¹⁹² The Court rejected the government's contention, holding that while the President might have authority to enforce international obligations on the part of the United States, the President lacked the authority to unilaterally convert a non-self-executing treaty into one that was self-executing.¹⁹³ Congress, not the President, possessed such authority.¹⁹⁴ The Court stated that a non-self-executing treaty could become domestically binding only upon a congressional act, because the Constitution vested Congress with the power to make the necessary laws and the President with the power to execute the laws.¹⁹⁵ The Court concluded that in the absence of implementing legislation, the non-self-executing treaties underlying *Avena* did not vest the President, expressly or impliedly, with the power to make *Avena* binding on state courts in the United States.¹⁹⁶ The President's Memorandum did not, therefore, fall in the first category of Justice Jackson's tripartite framework established in *Youngstown*.¹⁹⁷

The Court further held that because the Senate ratified the treaties as non-self-executing, the President was clearly prohibited from creating domestic law making the treaties binding on state courts in the United States.¹⁹⁸ The Court concluded the President's assertion of authority in relation to the relevant non-self-executing treaties must therefore fall in the third category of the *Youngstown* framework, where the President's power was at the lowest end of the spectrum.¹⁹⁹ Thus, the government's argument that the President's Memorandum was a valid exercise of power in the context of Congress' acquiescence had to necessarily fail, because congressional acquiescence applied only when the President's act fell in the second,

191. *Id.* at 1368.

192. *Id.* at 1368 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

193. *Id.* at 1368 (citing *Whitney v. Robertson*, 124 U.S. 190, 194 (1888), *Foster v. Neilson*, 27 U.S. 253, 315 (1829), and *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc)).

194. *Id.* (citing *Whitney*, 124 U.S. at 194).

195. *Id.* at 1369 (citing *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006)).

196. *Id.*

197. *Id.* (citing *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)).

198. *Id.*

199. *Id.* (citing *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring)).

and not the third category, of Justice Jackson's *Youngstown* framework.²⁰⁰ Given that the President's Memorandum implementing *Avena* was not an act in the absence of either a congressional grant or denial of authority, the Memorandum could not be given effect as domestic law.²⁰¹

The government next argued that the President's authority to implement *Avena* stemmed from his statutory responsibilities and his role in litigating foreign policy concerns.²⁰² The Court rejected this argument stating that while Congress authorized the President to represent the United States before the United Nations, the ICJ, and the Security Council, such authority was pertinent only to the President's international responsibilities and did not accord him the power to unilaterally create domestic law.²⁰³ Thus, the congressional authority given to the President was confined to the international realm and did not apply to the issue presented in this case.²⁰⁴ While the President could comply with the treaty's obligations through different means, given they were consistent with the Constitution, he or she could not rely upon a non-self-executing treaty to establish binding rules of decision that preempt contrary state law.²⁰⁵

Lastly, the Court noted that the President's authority to make executive agreements settling civil claims between American citizens and foreign governments or nationals had been upheld by the Court in the past.²⁰⁶ According to the majority, the President's Memorandum in *Medellin* represented an unprecedented action by the Executive and was not supported by a longstanding tradition of congressional acquiescence.²⁰⁷ The Court stated that neither the United States government nor *Medellin* could identify other instances in which a presidential directive had been issued to state courts.²⁰⁸ Moreover, by compelling state courts to set aside applicable procedural default rules, the President's Memorandum interfered with the states' police power.²⁰⁹ Thus, the Court concluded that the limited authority

200. *Id.* at 1370. The government's argument that the President's asserted authority was based on congressional acquiescence was based on Congress' failure to act in prior presidential resolutions of ICJ controversies. *Id.* The Court rejected the government's arguments stating that none of the prior controversies involved the transformation of an international obligation into domestic law. *Id.* Given the lack of resemblance between the President's Memorandum in this case and the prior resolutions of ICJ controversies, the government's claim was not supported. *Id.*

201. *Id.*

202. *Id.* at 1371.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* (citing *Dames & Moore v. Regan*, 453 U.S. 654, 679-80 (1981)).

207. *Id.* at 1372.

208. *Id.*

209. *Id.*

of the President to settle disputes with foreign governments or nationals pursuant to an executive agreement could not be extended to the President's Memorandum regarding the ICJ's *Avena* judgment.²¹⁰

B. JUSTICE STEVENS'S CONCURRENCE

Justice Stevens concurred in the judgment, stating that *Avena* was not binding on courts in the United States and that the relevant treaties did not authorize the President to direct state courts to implement the judgment, contrary to state procedural default rules.²¹¹ In support of the majority's non-self-execution argument, Justice Stevens added that unlike other treaties, the language of the U.N. Charter did not necessarily incorporate international judgments into domestic law.²¹² He further noted that while Congress had passed implementing legislation ensuring the enforcement of certain other international judgments, none existed in the case of *Avena*.²¹³ However, the majority's opinion failed to persuade Justice Stevens that the language of Article 94(1) completely foreclosed the possibility the treaty was self-executing.²¹⁴ According to Justice Stevens, the obligation on the part of the United States to undertake to comply with ICJ judgments was more consistent with self-execution than the majority allowed.²¹⁵

In conclusion, Justice Stevens stated that while *Avena* was not the "Supreme Law of the Land," the judgment nevertheless constituted an international obligation on the part of the United States.²¹⁶ Justice Stevens pointed out that the United States was not absolved from its promise to take future action necessary to comply with the ICJ judgment.²¹⁷ The concurrence asserted that the State of Texas needed to act to protect the honor and integrity of the nation, because by failing to comply with the Vienna Convention, Texas involved the United States in the current dispute in the first place.²¹⁸

210. *Id.*

211. *Id.* at 1372-73 (Stevens, J., concurring).

212. *Id.* at 1373; *see also* United Nations Convention on the Law of the Sea Annex VI, art. 39, Dec. 10, 1982, S. Treaty Doc. No. 103039, 1833 U.N.T.S. 570 ("[D]ecisions of the [Seabed Disputes] chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought.").

213. *Medellin*, 128 S. Ct. at 1373; *see also* Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), art. 54(1), Mar. 18, 1965, [1966] 17 U.S.T. 1291 ("Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce [it] . . . within its territories as if it were a final judgment of a court in that State.").

214. *Id.*

215. *Id.*

216. *Id.* at 1374.

217. *Id.*

218. *Id.*

Justice Stevens stated that the cost to Texas for complying with the *Avena* judgment would be minimal.²¹⁹ On the contrary, the consequences of refusing to comply with the judgment would be significant and would jeopardize the rights of American citizens abroad, as well as the United States' commitment to the authority of international law.²²⁰ Given the minimal cost of compliance with *Avena*, Justice Stevens urged the State of Texas to recognize that the issue presented by Medellín was bigger than whether, in the absence of implementing legislation, the ICJ and the President could trump Texas' procedural rules.²²¹ Thus, concurring with the majority, Justice Stevens noted the Court's opinion did not foreclose further appropriate action by the State of Texas.²²²

C. JUSTICE BREYER'S DISSENT, JOINED BY JUSTICE SOUTER AND JUSTICE GINSBURG

The dissent focused on the Supremacy Clause, which provides that "all Treaties . . . which shall be made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby."²²³ The dissent asserted that whenever a treaty operates of itself, that is, without the aid of any legislative provision, the treaty must be viewed as equivalent to an act of the legislature.²²⁴ In the *Avena* case, the United States voluntarily submitted itself to the compulsory jurisdiction of the ICJ for the purpose of compulsory judgments.²²⁵ In addition, because the President determined that domestic courts should comply with the ICJ judgment in *Avena*, and because Congress did nothing to sug-

219. *Id.* at 1375. Justice Stevens stated that *Avena* merely asked the United States "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals." *Id.* at 1374. The ICJ asked the United States to consider whether the violations of the Vienna Convention caused actual prejudice to the Mexican nationals. *Id.* Finding the likelihood of such prejudice very remote, Justice Stevens concluded the cost to Texas for complying with *Avena* would be minimal. *Id.* at 1375. In further support of his argument, Justice Stevens referred to Oklahoma's response to *Avena*. *Id.* The Governor of Oklahoma commuted the death sentence of another Mexican national named in *Avena* to life without the possibility of parole. *Id.* at n.4. The Governor based his decision on the following factors: (1) the United States was a signatory to the Vienna Convention; (2) the treaty provided protection for the rights of American citizens abroad; (3) the ICJ decision found that the rights of the Mexican nationals have been violated; and (4) the Governor was responding to the United States Department of State's plea to carefully consider the Nation's treaty obligations. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* (quoting U.S. CONST. art. VI, cl. 2).

224. *Id.* (citing *Foster v. Neilson*, 27 U.S. 253, 314 (1829)).

225. *Id.* at 1376.

gest otherwise, *Avena* was binding on state courts in the same manner as an act of the legislature.²²⁶

1. *The ICJ Judgment is Enforceable as a Matter of Domestic Law Without Further Legislation*

In answering the question of whether the ICJ judgment was automatically binding on state courts, the dissent relied on the Court's treaty-related cases interpreting the Supremacy Clause and focused in large part on the Framers' intent in drafting the Clause.²²⁷ The dissent stated the Supremacy Clause was designed to allow binding international treaties to have domestic legal effect without the need for implementing legislation.²²⁸ The cases, following the ratification of the Constitution, provided further insight into the Framers' intent by holding that a treaty was the law of the land unless it specifically contemplated further legislative action and thus addressed itself to the political and not the judicial department.²²⁹

The dissent noted that while there was no "magic answer" as to what provisions were self-executing, the Court's precedents clearly indicated that the majority's approach of requiring self-execution language in the treaty's text was misplaced.²³⁰ The provisions found by the Court to be self-executing in the past lacked the textual clarity required by the majority.²³¹ The dissent reasoned the lack of clarity in treaty language was most likely the result of the drafters' awareness of national differences in determining the necessary requirements for a treaty to become domestic law.²³² Therefore, the dissent concluded the absence or presence of textual clarity

226. *Id.* (citing *Foster*, 27 U.S. 253, 314 (1829)).

227. *Id.* at 1377.

228. *Id.* The dissent relied primarily on the views expressed by Justice Iredell, a member of the North Carolina Ratifying Convention, which were later used by Justice Story to explain the Framers' intent behind the Supremacy Clause. *Id.* at 1378 (citing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 696-97 (1833)).

229. *Id.* at 1379 (quoting *Foster*, 27 U.S. at 314). In *Foster*, the Court found a treaty to be non-self-executing because of the specific language of the treaty, "shall be ratified." *Id.* (citing *Foster*, 27 U.S. at 315). Such language, the Court held, demonstrated that the provision contemplated further legislative action. *Id.* (citing *Foster*, 27 U.S. at 315). However, the Court changed its holding four years later due to the less legislative Spanish-language version of the treaty at issue. *Id.*

230. *Id.* at 1380.

231. *Id.* at 1380-81.

232. *Id.* at 1381. To clarify these national differences, the dissent used Britain's approach to treaty implementation, which almost always required parliamentary legislation before a treaty could be domestically enforced. *Id.* On the contrary, the practice in the Netherlands was to directly incorporate treaties concluded by the Executive without explicit parliamentary approval of the treaty. *Id.*

in a treaty's language as to self-execution was irrelevant to the question of whether a treaty was in fact self-executing.²³³

The dissent further stated that examining the text and history of a treaty, together with its subject matter and related characteristics, is the correct approach to determine whether the treaty provision addresses itself to the political branches, contemplating further action, or to the judicial branch, contemplating direct enforcement.²³⁴ Applying the practical, context-specific approach mentioned above, the dissent determined the relevant treaty provisions in *Medellín* to be self-executing as applied to the ICJ judgment in *Avena*.²³⁵ The dissent noted that the language of the relevant treaties supported a finding of direct judicial enforceability.²³⁶ In addition, the Optional Protocol applied to disputes arising out of the Vienna Convention, which was itself self-executing and judicially enforceable.²³⁷ The dissent further stated that the treaty provision providing for binding and final judgments for treaty-based settlement disputes was logically self-executing, because the judgment's underlying treaty provision was itself self-executing.²³⁸ Finally, according to the dissent, the majority's approach had serious negative practical implications for the United States, which submitted itself to the compulsory jurisdiction of the ICJ in more than seventy treaties.²³⁹ Thus, if in *Medellín* the Optional Protocol, the U.N. Charter, and the ICJ Statute, were insufficient to warrant enforcement of the ICJ judgment, it would be difficult to see how a different result could be reached as to those other treaties.²⁴⁰

Moreover, the dissent stated that the majority could not look to Congress for a "quick fix."²⁴¹ The dissent noted that Congress was unlikely to authorize the automatic enforcement of all ICJ judgments, given the possibility that some of these judgments might contain sensitive political issues

233. *Id.*

234. *Id.* at 1382 (citing *Foster*, 27 U.S. at 314).

235. *Id.* at 1382-83.

236. *Id.* at 1382. The dissent noted that the language of Article 94(1) of the U.N. Charter providing that each member "undertakes to comply with the decision" of the ICJ, together with the ICJ Statute's provision stating that such a decision had binding force between parties who have submitted themselves to the compulsory jurisdiction of the ICJ, clearly indicated the necessity for judicial activity. *Id.*

237. *Id.* at 1385. The dissent stated that because the provision involved an individual's right to be informed of his or her separate right to contact his or her nation's consul and because such a right was intertwined with the rules of criminal procedure, the provision contained judicially enforceable standards. *Id.*

238. *Id.* at 1386.

239. *Id.* at 1387.

240. *Id.* at 1387-88.

241. *Id.* at 1388.

better suited for the other branches.²⁴² *Avena* called for the review and reconsideration of the possible prejudice caused to the fifty-one Mexican nationals as a result of the Vienna Convention violation.²⁴³ Such a call required an understanding of criminal law and procedure.²⁴⁴ Therefore, it was the judiciary, not the legislature, that was best-suited for the task.²⁴⁵ The dissent emphasized that a finding that the United States' treaty obligation was self-executing and *Avena* enforceable would not create a constitutional conflict with the other branches.²⁴⁶ The fact that neither the President nor Congress have expressed any concern about the direct judicial enforcement of the ICJ judgment in *Avena* supported such a statement.²⁴⁷ The dissent concluded that the ICJ judgment in *Avena* was judicially enforceable in domestic courts without the need for implementing legislative action.²⁴⁸

Finding the *Avena* judgment binding, the dissent next turned to the question of what would constitute a proper review and reconsideration of the state convictions and sentences of the fifty-one Mexican nationals.²⁴⁹ The dissent stated that the proper course of action for the Supreme Court in *Medellín* would be to remand the case, making Texas' state courts the proper forum for review and reconsideration.²⁵⁰ The dissent further noted that state review was proper because both the crime and the prosecution at issue took place in Texas.²⁵¹ Therefore, the ICJ judgment in *Avena* required Texas to consider whether the failure to inform Medellín of his Vienna Convention rights caused Medellín actual prejudice, notwithstanding state procedural default rules barring such consideration.²⁵² Finally, because Texas law authorizes a criminal defendant to seek post-judgment review where the law provides a legal basis that was previously unavailable, the dissent stated the case should have been remanded for reconsideration to the Texas state courts, directing them to apply *Avena* as binding law.²⁵³ Having reached the conclusion *Avena* constituted binding domestic law, the dissent did not focus on whether the President had the constitutional authority to

242. *Id.* The dissent noted military hostility, naval activity, and the handling of nuclear weapons as likely politically sensitive judgments. *Id.*

243. *Id.* (citing Case Concerning *Avena* and Other Mexican Nationals (Mex. V. U.S.), 2004 I.C.J. 12, 65 (Mar. 31)).

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 1389.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 1390.

enforce *Avena*.²⁵⁴ In the last part of its opinion, however, the dissent addressed the majority's holding that the President may not rely upon a non-self-executing treaty to establish binding rules of decision that preempt contrary state law.²⁵⁵

2. *The President's Memorandum*

The dissent noted that the President's Memorandum was an attempt on the part of the Executive to implement treaty provisions, in which the United States agreed the ICJ judgment was binding with respect to *Avena*.²⁵⁶ According to the dissent, the President acted pursuant to his constitutional authority in the area of foreign affairs in issuing the memorandum.²⁵⁷ Therefore, his acts fell within the second category of Justice Jackson's *Youngstown* framework, in which the President acts where Congress has neither explicitly authorized nor prohibited the act in question.²⁵⁸

The dissent noted that if the President had the constitutional authority in the area of foreign affairs to act with respect to *Avena*, then the issuance of the Memorandum would require setting aside state procedural law.²⁵⁹ The dissent stated that past Court decisions have upheld the President's authority to make and implement executive agreements with respect to international obligations and to assert principles of foreign sovereign immunity, even where such authority could require state law to be set aside.²⁶⁰ However, the dissent did not reach a conclusion on the constitutional balance among state and federal or executive and legislative power in the area of foreign affairs.²⁶¹ The dissent noted it lacked the judicial expertise in determining the scope of presidential authority to implement treaty provisions contrary to state law.²⁶² Such determination, the dissent stated, was best left in "the constitutional shade from which it has emerged."²⁶³

254. *Id.*

255. See discussion *infra* Part III.A.2 (stating that in the absence of implementing legislation, a non-self-executing treaty does not give the President the authority to create binding rules of decision that preempt contrary state law).

256. *Medellin*, 128 S. Ct. at 1390.

257. *Id.*

258. *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

259. *Id.*

260. *Id.* at 1390-91 (citing *Ex parte Peru*, 318 U.S. 578, 588 (1943) and *United States v. Pink*, 315 U.S. 203, 233 (1942)).

261. *Id.* at 1391.

262. *Id.*

263. *Id.*

IV. IMPACT

The Supreme Court's decision in *Medellín v. Texas* drew a great deal of domestic and international attention.²⁶⁴ Supporters of the decision commended the ruling,²⁶⁵ while opponents urged Congress to act immediately and implement the *Avena* judgment.²⁶⁶ The United States Supreme Court, however, reaffirmed the holding of *Medellín* only a few months after the initial opinion by denying Medellín's petition for writ of certiorari and motion for stay of execution.²⁶⁷ At the same time, Congress reacted to *Medellín* by attempting to provide the requisite legislative approval for implementing *Avena*.²⁶⁸ Throughout these judicial and legislative developments, legal scholars continued to debate the impact of *Medellín*, the effect of the decision on the interpretation and implementation of international treaty obligations, and the questions the Supreme Court left unanswered in *Medellín v. Texas*.²⁶⁹

A. SUBSEQUENT HISTORY

Following the Supreme Court's decision in *Medellín v. Texas*, Medellín filed a subsequent application for writ of habeas corpus and a motion for

264. See Robert Greffenius, *Selling Medellín: The Entourage of Litigation Surrounding The Vienna Convention on Consular Relations and the Weight of International Court of Justice Opinions in the Domestic Sphere*, 23 AM. U. INT'L L. REV. 943, 946 (2008) (arguing the Supreme Court in *Medellín* failed to establish a test for analyzing binding decisions of international tribunals such as the ICJ); but see Noah Feldman, *When Judges Make Foreign Policy*, N.Y. TIMES MAGAZINE, Sept. 28, 2008, at 50 (stating the case generated little public attention, although in its own way it was instrumental in defining the United States' constitutional era). As of November 2009, only two opinions had cited to the Supreme Court decision in *Medellín v. Texas*. See e.g., *In re Martinez*, 209 P.3d 908 (Cal. 2009). Legal scholars, however, continued to write about the significance of the case and the future of treaty obligations following the *Medellín* decision. See, e.g., Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762 (2009).

265. James C. McKinley Jr., *Texas Executes Mexican Despite Objections*, N.Y. TIMES, Aug. 6, 2008, available at <http://www.nytimes.com> (search title, then click title hyperlink).

266. See Frederic L. Kirgis, *International Law in the American Courts—the United States Supreme Court Declines to Enforce the I.C.J.'s Avena Judgment Relating to a U.S. Obligation Under the Convention on Consular Relations*, 9 GERMAN L.J. 619, 634-35 (2008) (explaining the possible steps Mexico might take in response to the United States' refusal to provide review and reconsideration for Medellín's conviction and sentence); see also The StandDown Texas Project, *Today's Medellín Coverage*, <http://www.standdown.typepad.com/weblog/2008/08/todays-medellin.html> (last visited on Nov. 21, 2009) (statement of Sandra Babcock, counsel for Medellín) (stating that if Texas proceeds with the execution, the United States will find itself in breach of its international obligations).

267. See discussion *infra* Part IV.A (analyzing the Supreme Court's denial of Medellín's petition for writ of certiorari and motion for stay of execution).

268. See discussion *infra* Part IV.B (discussing Congress' proposed legislation regarding the ICJ judgment in *Avena*).

269. See discussion *infra* Parts IV.C, IV.D (examining the effect of *Medellín* on United States-Mexico relations and addressing some of the questions raised by the decision).

stay of execution.²⁷⁰ After the Texas Court of Criminal Appeals dismissed the application, Medellín filed a petition for writ of certiorari with the United States Supreme Court.²⁷¹ In denying Medellín's motion for stay of execution, the Supreme Court held that the possibility of either Congress or the state legislature determining Medellín's sentence should be vacated because of *Avena* was too remote to warrant stay of execution.²⁷² The Court reiterated its position that when treaties are non-self-executing, treaty obligations undertaken by the United States can become binding domestic law only through implementing legislation.²⁷³

In his dissenting opinion, Justice Stevens stated that the stay of execution should have been granted because the harm of refusing to respect the ICJ judgment outweighed a short delay in imposing the sentence.²⁷⁴ Justice Souter, in a separate dissent, noted that he would grant the petition to allow for the views of the Solicitor General to be considered and for any congressional action that might affect the disposition of the case to be taken.²⁷⁵ In his dissenting opinion, Justice Breyer determined that the issue before the Court was whether the United States would carry out its international legal obligations to enforce the ICJ judgment in *Avena*.²⁷⁶ Granting the stay of execution, Justice Breyer asserted, would prevent the Court from placing the nation in violation of international law.²⁷⁷ However, on August 6, 2008, shortly after the Supreme Court denied Medellín's motion, Medellín was executed by lethal injection.²⁷⁸ The Governor of Texas, Mr. Rick Perry, rejected requests from Mexico, the State Department, and the White House to delay the execution, stating that the nature of Medellín's crimes were just cause for the death penalty.²⁷⁹

B. LEGISLATIVE CHANGES

On July 14, 2008, members of the United States House of Representatives introduced the "Avena Case Implementation Act of 2008," seeking to provide the legislative approval necessary to implement the ICJ judgment in

270. Medellín v. Texas, 129 S. Ct. 360, 361 (2008) (per curium).

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 362 (Stevens, J., dissenting).

275. *Id.* (Souter, J., dissenting). Justice Ginsburg filed a separate dissent inviting, similarly to Justice Souter, the views of the Solicitor General on the current matter. *Id.* at 363 (Ginsburg, J., dissenting).

276. *Id.* at 363 (Breyer, J., dissenting).

277. *Id.* at 364.

278. McKinley, *supra* note 265, at 1.

279. *Id.*

Avena.²⁸⁰ The introduction of the bill was partly the result of requests made by United States Attorney General Michael Mukasey, Secretary of State Condoleezza Rice, and past and present presidents of the American Society of International Law.²⁸¹ All urged Congress to take legislative action and resolve the treaty dispute between Mexico and the United States over the convictions and sentences of the Mexican nationals named in *Avena*, including Medellín.²⁸² The legislation, as proposed, would empower federal courts to hear the Vienna Convention claims of foreign nationals who were not advised of their right to consular notification.²⁸³ Furthermore, the United States' government informed the International Court of Justice that it would take further steps to give effect to the convictions and sentences of the Mexican nationals named in the *Avena* judgment.²⁸⁴ The legislation was referred to the House Judiciary Committee for consideration, but no further developments have been reported.²⁸⁵ Thus, in the absence of clear congressional response to *Avena*, some international commentators suggested other possible ways in which Mexico could seek remedies.²⁸⁶

C. IMPLICATIONS FOR UNITED STATES-MEXICO RELATIONS

Mexico has two primary options for remedies.²⁸⁷ First, Mexico could invoke Article 60(2)(b) of the Vienna Convention.²⁸⁸ Article 60(2)(b) provides that as a party affected by a material breach of a multilateral treaty, Mexico could suspend the operation of the treaty, in whole or in part, in its

280. *Medellín*, 129 S. Ct. at 361 (Breyer, J., dissenting). See also Diane Jennings, *Federal Officials Try to Block Texas Execution to Allow World Court Review of Case*, DALLAS MORNING NEWS, July 28, 2008, available at <http://www.dallasnews.com/> (last visited Nov. 10, 2009) (stating that Representatives Howard Bernan and Zoe Lofgren of California introduced a bill in Congress to require the state to comply with the *Avena* judgment of the ICJ).

281. See The StandDown Texas Project, *supra* note 266 (discussing the proposed legislation regarding *Avena*); see also Marcia Coyle, *Attorneys Urge Congressional Leaders to Address Issue of Mexican Nationals on Death Row*, NAT'L L.J., July 24, 2008, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202423200889&slreturn=1&hblogin=1> (discussing the importance of congressional action and the importance of such action for ensuring the protection of American citizens abroad).

282. See Coyle, *supra* note 281 (stating that attorneys are asking Congress to take action regarding Medellín's sentence).

283. See The StandDown Texas Project, *Medellín & Congressional Legislation*, http://standdown.typepad.com/weblog/federal_legislation/ (July 30, 2008) (discussing the language of the *Avena* Case Implementation Act of 2008).

284. *Medellín*, 129 S. Ct. at 362 (Souter, J., dissenting) (citing Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2008 I.C.J. ¶ 37 (Order of July 16)).

285. *Id.* at 361.

286. Kirgis, *supra* note 266, at 633.

287. *Id.*

288. *Id.* at 633 (citing Vienna Convention on the Law of Treaties, art. 60(2)(b), May 23, 1969, 1155 U.N.T.S. 331).

relations to the United States.²⁸⁹ Mexico most likely would be unsuccessful in pursuing this course of action, however, because Mexico would be unable to show that the Supreme Court's decision in *Medellín* rose to the level of material breach required by the Vienna Convention.²⁹⁰ Second, customary international law provides that a State injured by an intentionally wrongful act of another State, such as breach of treaty obligations, may take proportional countermeasures against that State.²⁹¹ Thus, Mexico might choose to disregard Article 36(1)(b) of the Vienna Convention on Consular Relations when United States nationals are arrested and detained by Mexican authorities.²⁹² Moreover, customary international law permits States, other than the injured State, to take countermeasures in response to violations of international treaties.²⁹³ Non-injured States may take countermeasures where the violation amounts to a breach of duty owed to a group of States or the international community as a whole.²⁹⁴ Thus, similarly to Mexico, other States may choose to deny the right to consular notification to United States nationals arrested and detained on their territories.²⁹⁵ The effect of *Medellín* on the relationship between the United States and Mexico remains unclear and represents only one of many questions the United States Supreme Court failed to address in *Medellín*.²⁹⁶

D. THE UNANSWERED QUESTIONS

Medellín v. Texas left commentators wondering about the future of international treaty obligations.²⁹⁷ The decision has raised new doubts about whether other United States treaty obligations are binding as domestic law.²⁹⁸ Some commentators have suggested that one possible way of

289. *Id.*

290. *Id.* at 634. The International Law Commission's comments to the Vienna Convention state that when the non-violating party (here, Mexico) considers the violated treaty provision essential to the execution of the treaty, the violation constitutes a material breach. *Id.* at 633. Kirgis argues that because neither Mexico nor the United States considered the binding nature of the ICJ judgments to be essential to the execution of the Vienna Convention, Mexico would not be able to show the United States committed a material breach. *Id.* at 634.

291. *Id.*

292. *Id.* at 635; see also Allen Turner, *Medellín Executed for Rape, Murder of Houston Teens*, HOUSTON CHRONICLE, Aug. 6, 2008, available at http://www.blogrunner.com/snapshot/D/0/3/medellin_executed_for_rape_murder_of_houston_teens/ (last visited Nov. 21, 2009) (stating the Supreme Court's decision in *Medellín* could affect American citizens living abroad with regard to their Vienna Convention rights).

293. Krigis, *supra* note 266, at 634-35.

294. *Id.* at 636.

295. *Id.*

296. See discussion *infra* Part IV.D.

297. E.g., Greffenius, *supra* note 264, at 944.

298. See Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1321 (2008) (stating that while the impact of

eliminating the doubt created by *Medellin* would be to enact international agreements as congressional-executive agreements.²⁹⁹ Others argue that the Constitution presumes treaties to be self-executing and suggest that a default rule of self-execution be established.³⁰⁰ Such a rule, commentators assert, will be consistent with both the text of the Constitution and the structure and precedent of the Supreme Court.³⁰¹ Furthermore, a default rule of self-execution will enable treaty-makers to control the domestic consequences of treaties.³⁰²

In addition, the question of how United States courts should consider ICJ judgments in the future, when these judgments are rendered in accordance with self-executing or congressionally implemented treaties, remains undecided.³⁰³ The standard for determining whether a treaty is self-executing or whether congressional action is necessary for its implementation is unclear as well.³⁰⁴ Finally, the Supreme Court failed to address the subject of federalism within the context of international treaty obligations and left unanswered the question of whether the federal government may mandate states to comply with the government's international obligations.³⁰⁵ Thus, while legal scholars responded quickly to some of the issues raised by *Medellin* in the months following the decision, commentators are likely to continue the debate on the significance of *Medellin v. Texas* and its future effect on the interpretation and implementation of the United States' treaty obligations.³⁰⁶

Medellin remains unclear, the decision has raised questions about international treaty obligations for the United States).

299. *Id.*; see also Milena Sterio, *The Evolution of International Law*, 31 B.C. INT'L & COMP. L. REV. 213, 250 n.217 (2008) (stating that following *Medellin*, "congressional action must be taken in order to ratify international law and implement it domestically").

300. See Vázquez, *supra* note 32, at 602 (suggesting that treaties should be construed to be self-executing under the Constitution).

301. *Id.*

302. *Id.*

303. See Greffenius, *supra* note 264, at 946-47 (proposing the implementation of an international *Erie* doctrine as a way of reconciling the United States Supreme Court decision in *Sanchez-Llamas v. Oregon* with the ICJ judgment in *Avena*).

304. See John F. Murphy, *Medellin v. Texas: Implications of the Supreme Court's Decision for the United States and the Rule of Law in International Affairs*, 31 SUFFOLK TRANSNAT'L L. REV. 247, 248 (2008) (arguing that the lack of certainty in determining whether international treaties are domestically binding undermines the United States' respect for the rule of law in international treaty obligations).

305. See Craig Jackson, *The Anti-Commandeering Doctrine and Foreign Policy Federalism—the Missing Issue in Medellin v. Texas*, 31 SUFFOLK TRANSNAT'L L. REV. 335, 335-36 (2008) (addressing the possible federalism implications of *Medellin v. Texas*).

306. See generally Greffenius, *supra* note 264, at 944 (discussing the response to *Medellin* by legal commentators).

V. CONCLUSION

In *Medellin v. Texas*, the Supreme Court ruled on the judgment of the ICJ in *Case Concerning Avena and Other Mexican Nationals* and the President's Memorandum attempting to implement that decision as domestic law.³⁰⁷ The Court found that while *Avena* created an international obligation on the part of the United States, the treaties underlying the judgment were non-self-executing and, in the absence of implementing legislation, did not constitute binding federal law that preempted state procedural default rules.³⁰⁸ The Court further held that because the Executive did not have the authority to unilaterally execute an international judgment, the President's Memorandum did not make the ICJ *Avena* judgment binding on state courts.³⁰⁹

*Denitsa Mavrova Heinrich**

307. *Medellin v. Texas*, 128 S. Ct. 1346, 1353 (2008).

308. *Id.* at 1366-67.

309. *Id.* at 1368-69.

*J.D. candidate at the University of North Dakota School of Law. Winner of the 2009 North Dakota State Bar Foundation Outstanding Note/Case Comment Award. A special thank you to my loving husband, Andrew Heinrich, for his endless support and quiet reminders to stop and take a breath when I needed it most.