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A DECENT RESPECT TO THE OPINIONS OF MANKIND SOMETIMES REQUIRES A SECOND LOOK

*Chief Judge Robert Henry**

It is futile to think, as extreme nationalists do, that we can have an international law that is always working on our side. And it is futile to think that we can have international courts that will always render the decisions we want to promote our interests. We cannot successfully cooperate with the rest of the world in establishing a reign of law unless we are prepared to have that law sometimes operate against what would be our national advantage. In our internal affairs we have come to rely upon the judicial process to settle individual controversies and grievances and even those between states of the Union, not because courts always render right judgments, but because the consequences of wrong or unwise decisions are not nearly so evil as the anarchy which results from having no way to obtain any decision of such questions; in which case each will take the law into his own hands. And in a somewhat similar sporting spirit we must look upon any international tribunal, not as one whose decision always will be welcome or always right or wise. But the worst settlement of international disputes by adjudication or arbitration is likely to be less disastrous to the loser and certainly less destructive to the world than no way of settlement except war. And we will not suffer the worst of decision but will benefit from the judicial process at its best if we insist upon the independence and intellectual integrity of any international tribunal which purports to arbitrate or adjudicate controversies between states.¹

— Justice Robert H. Jackson, April 13, 1945.

* Judge Henry wishes to thank Chris Borgen, Janet Levit, Margaret McGuinness, Sean Murphy, and Joseph Thai for their comments on earlier drafts.

1. Justice Robert H. Jackson, U.S. Supreme Court, Address at the Thirty-Ninth Annual Meeting of the American Society of International Law (Apr. 13, 1945), in *A DECENT RESPECT TO THE OPINIONS OF MANKIND: SELECTED SPEECHES BY JUSTICES OF THE U.S. SUPREME COURT ON FOREIGN AND INTERNATIONAL LAW* 27, 40 (Christopher J. Borgen ed., 2007). The rest of the quotation, which ends his speech, is also of interest:

I always have found a great measure of professional pride and inspiration in the story I have heard and often repeated about Lord Alverstone. In the Alaskan Boundary dispute between the United States and Great Britain, an arbitration commission was set up, consisting of an equal number of nationals of each. Of course no decision could be reached unless at least one arbitrator voted against the interests of his own country. It so happened that Lord Alverstone, named to the commission by Great Britain, joined in an award in favor of the United States. The storm of criticism among his countrymen was fierce. The answer attributed to Alverstone embodied in few words about all that I have taken a half hour to say. It was an attitude fol-

I am very honored indeed to be at a lecture memorializing a singularly important and legendary lawyer and jurist, the late Judge Irving L. Goldberg. A founder of one of our nation's premier law firms—now Akin Gump Strauss Hauer & Feld—he was, in the words of the *New York Times*, “one of the Federal judiciary's strongest links to the civil rights era.”² In twenty-nine years on the bench, he ruled on cases ranging from school desegregation to his important decision in *Rodriguez v. San Antonio Independent School District*, in which he advanced the position—okay, he *held*—that education was a fundamental right.³ As Drew Days, III, noted in his 2001 Goldberg Lecture, the Supreme Court reversed Judge Goldberg by a 5-4 vote, but constitutional scholars and policy makers still debate the issue strenuously.⁴ I did not have the opportunity to know Judge Goldberg, but two great judges that I admire have taught me about him. My good friend Judge Diane Wood, one of our more highly regarded appellate jurists in this country, told me last week of her glorious experiences working for the Judge. She commented on his raconteurship, specifically referencing his stories of trying “bug in the bottle cases”—a phenomenon that plagued the Lone Star State for some time when exceptionally high numbers of various small arthropods seemed to find their way into bottled beverages. Diane also told me that perhaps the greatest experience she garnered from Judge Goldberg was that being a judge is first and foremost about the people whose cases you are adjudicating.

In the inaugural Goldberg lecture, Judge Frank M. Johnson, Jr. also returned to the theme of justice when he referenced Aristotle's definition of a judge to talk about Judge Goldberg.⁵ To Aristotle, a judge was supposed to “do” justice.⁶ But we modern judges indeed are in the law busi-

lowed by Mr. Justice Van Devanter, who joined in deciding a later arbitration against the United States. It is, I think, the shortest explanation of the success with which this country and Great Britain for well over a century have been able to settle their differences by peaceful means. Alverstone's reply to criticism was simply, “If when any kind of arbitration is set up they don't want a decision based on the law and the evidence, they must not put a British judge on the commission.” That is the spirit in which disputes between states or between individuals must be decided, and the spirit in which decisions must be accepted, if the world is ever truly to be ruled by law instead of by the wills of men in power.

Id. at 41.

2. Richard Perez Pena, *I.L. Goldberg*, 88, *U.S. Judge*, N.Y. TIMES, Feb. 13, 1995, at B7.

3. *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 282 (W.D. Tex. 1971).

4. See Drew S. Days, III, *In Search of Educational E/Quality Forty-Six Years After Brown v. Board of Education*, 54 SMU L. REV. 2089, 2089 (2001).

5. See Frank M. Johnson, *Civilization, Integrity, and Justice: Some Observations on the Function of the Judiciary*, 43 Sw. L.J. 645, 651 (1989).

6. See ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, ch. 4, at 115 (D. Ross trans., 1966) (“[T]o go to the judge is to go to justice; for the nature of the judge is to be a sort of animate justice”), quoted in Johnson, *supra* note 5, at 651 n.24; cf. ROBERT ALTER, *THE FIVE BOOKS OF MOSES* 89 (2004) (“Will not the Judge of all the earth do justice?” (trans-

ness, not the justice business, and we are bound to follow the law and justify our decisions under its rule. Sometimes, justice is not implicated in a decision—it is a choice between two positions, neither more or less just than the other. But when the pathways of law and justice diverged, Judge Goldberg was the kind of judge who made certain that the law truly compelled his direction.

Of course, Judge Goldberg was also known for his sense of humor. Illustrating that, he cited a variety of sources, even using a little “foreign” law, as one of my favorite Goldbergisms demonstrates:

Counsel for Golden Panagia informed this court at oral argument that Newell is now, in any event, dead. A Higher Court thus has jurisdiction over Henry Newell, and we are confident that any sins he may have committed will be dealt with appropriately there. *See* Matthew 25:41-46 (explaining Final Judgment procedures).⁷

Judge Goldberg made some tough and controversial decisions in his remarkable career. This lecture series was created in his honor, signifying the widespread agreement that his was a principled jurisprudence. The path I advocate today is not nearly so difficult to determine. I am here at a school noted for its interest and accomplishments in things foreign, international, and transnational. Not surprisingly, I should like to talk a bit about such things. At the outset, let me note that I am not speaking about pending cases, nor should positions I take in the academic environment be deemed to necessarily express my opinion should similar matters come before me as a judge, nor do today’s somewhat metaphysical maneuverings represent positions of any committees, councils, or panels of judges upon which I serve.

I will discuss three things today. In doing so, I want to offer for thought what I consider a rather modest point: when we have international obligations and a manifestation by our President and the Department of State (or, as is often the case, several Presidents and several Departments of State) to abide by them, we ought to find a way to uphold those obligations, regardless of whether we are compelled to do so by law, judges, politics, or morals. (Although usually one or more of these are implicated.)

First, I will discuss a bit of our historical love–hate relationship with international cooperation, including that relationship’s current seemingly fussy tone, and why it was not always like that. Also, implicit in my talk are some reasons why it may be good for us to band together with one message in foreign relations contexts, even if it comes from several

lating *Genesis* 18:25)); MUHAMMAD ASAD, *THE MESSAGE OF THE QURĀN* 133 (2003) (“[A]nd whenever you judge between people, . . . judge with justice.” (translating *Sūrah* 4:58)); *id.* at 133 n.75 (“I.e., in the judicial sense, as well as in the sense of judging other people’s motives, attitudes and behaviour.” (explaining *Sūrah* 4:58)).

7. *Golden Panagia S.S., Inc. v. Panama Canal Comm’n*, 791 F.2d 1191, 1200 (5th Cir. 1986).

voices.⁸ We should have coherent policy in international relations because it is in our national interest, it shows respect for our own promises, and it shows some respect for the international community.

Second, I will primarily discuss the Supreme Court opinion of *Medellín v. Texas*⁹ but also touch on some other cases involving the Vienna Convention on Consular Relations (VCCR). *Medellín* and *Torres v. Mullins*, another VCCR case, demonstrate two ways that states have resolved the problem of how we might handle international obligations that do not have clear legal remedies.¹⁰

Third and finally, I will discuss where we are after these cases, and how the picture may be brighter than it once appeared—that is, although we do not have binding international law in the matter I will discuss, we are at least moving in the direction of keeping our promises. In discussing these matters, some will be disappointed that I avoid two controversial topics, which I do not need to discuss to make my point. The two areas that I choose to avoid are: first, the international debates on the death penalty (the presence of which clearly played a role in foreign states' decade-plus efforts to litigate the VCCR cases); and, second, the debate about whether the VCCR and other relevant documents are self-executing, and what the changes in the way we now examine that issue will mean for the future (this is primarily the debate between Justice Breyer and the Chief Justice in *Medellín*).¹¹ These are interesting topics, to be sure, but they await another day and a more competent speaker.

I. AMERICAN DUALISM, EXCEPTIONALISM, OR NATIONALISM?

Oddly, given reality, American politics of late seem to have an aversion to international cooperation and coordination, especially if human rights law is involved. I say reality because there has never been a time when internationalism is more necessary. Examples abound where international cooperation is absolutely necessary: terrorism, nuclear proliferation, and the global economic crisis, which Dennis C. Blair, the Director of National Intelligence and four-star admiral, recently advised Congress was our most urgent national security threat.¹²

8. By several voices, I primarily mean that states, and even localities, may properly and legally play a role in foreign policy as long as it is not preempted or contrary to the properly formulated national position. See Julian G. Ku, *The Crucial Role of the States and Private International Law Treaties: A Model for Accommodating Globalization*, 73 Mo. L. REV. 1063, 1063 (2008); see also *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 397 (2003) (holding that Presidential agreements with Germany and other countries preempted California law regarding restitution for bad acts by Nazi insurance companies).

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

10. *Torres v. Mullin*, 540 U.S. 1035 (2003).

11. *Medellín*, 128 S. Ct. at 1391.

12. The *New York Times* earlier described Admiral Blair as “[a] brainy retired four-star admiral” who had commanded the U.S. Pacific Command and served on the National Security Council, as well as “an Asia expert” fluent in Russian. Mark Mazzetti, *The New Team: Dennis C. Blair*, N.Y. TIMES, Nov. 22, 2008, <http://www.nytimes.com/2008/11/22/us/politics/22web-blair.html>. He stressed that global economic turmoil and the instability it

One area where I am particularly happy to have international cooperation is in global disease surveillance and response programs—programs like the Global Polio Eradication Initiative, which “has made a significant impact on the prevalence of polio throughout the world.”¹³ But, of course, there are other beasts (van Leeuwenhoek’s word)¹⁴ of more immediate concern than polio, which require strict international protocols: SARS (Sudden Acute Respiratory Syndrome), Ebola viral hemorrhagic fever (this is a really good one to avoid getting), West Nile virus, and intentional anthrax among them.¹⁵ No one would doubt continued need for international cooperation in these areas.¹⁶

Nonetheless, there does seem to be something at work in America that is anti-international these days¹⁷—a widespread near-antipathy towards

could ignite had outpaced terrorism as the most urgent threat facing the United States. It was not terrorism, it was not nuclear proliferation (although these problems also require international cooperation don’t they), but rather the economic downturn was “the primary near-term security concern, and he warned that if it continued to spread and deepen, it would contribute to unrest and imperil *some governments*.” Mark Mazzetti, *Global Economic Crisis Poses Top Threat to U.S., Spy Chief Warns*, N.Y. TIMES, Feb. 12, 2009, at A14 (emphasis added); see Walter Pinrus & Joby Warrick, *Financial Crisis Called Top Security Threat to U.S.*, WASH. POST, Feb. 13, 2009, at A14.

13. Penny Hitchcock et al., *Challenges to Global Surveillance and Response to Infectious Disease Outbreaks of International Importance*, 5 BIOSECURITY AND BIOTERRORISM: BIODEFENSE STRATEGY, PRACTICE, AND SCIENCE, 206, 220 (2007) (describing how outbreaks of Sudden Acute Respiratory Syndrome (SARS), multidrug-resistant tuberculosis, Ebola viral hemorrhagic fever, West Nile viral encephalitis, intentional anthrax, and H1N1 viral infections led to updates in the International Health Regulations). The article also lists global surveillance and response organizations, noting achievements and areas requiring more improvement. *Id.* at 210-20.

14. Jonathan H. Esensten, *Put Down That Toothbrush*, HARV. CRIMSON, Sept. 26, 2002, <http://www.thecrimson.com/article.aspx?ref=254216>.

15. HITCHCOCK, *supra* note 8, at 206. Since the presentation of this lecture and before its publication, swine flu has made the list; the World Health Organization declared this form of flu a pandemic. See Press Release, Margaret Chan, Dir.-Gen., World Health Org., World Now at the Start of the 2009 Influenza Pandemic (June 11, 2009), available at http://www.who.int/mediacentre/news/statements/2009/h1n1_pandemic_phase5_2009061/en/in-dex.html.

16. A reporting of the Modernizing Foreign Assistance Network stated:

We face challenges today that are beyond the capacity of any one nation (even the United States) to solve: terrorism, infectious disease, climate change, global economic imbalances. Working in cooperation with other countries, international institutions and civil societies multiplies our strength, expands our options, shares the costs and risks, and leverages our common successes. We live in an interdependent world and thus need the respect and support of others to safeguard our security, to work together on common challenges and to show that our values and priorities have merit.

MODERNIZING FOREIGN ASSISTANCE NETWORK, *NEW DAY NEW WAY: U.S. FOREIGN ASSISTANCE FOR THE 21ST CENTURY* 5-6 (2008).

17. In response to a question that “Chancellor Schroeder says international law must apply in [the case of Iraq reconstruction contracts]. What’s your understanding of the law?” President Bush replied, “International law? I better call my lawyer. He didn’t bring that up to me.” Remarks Following a Cabinet Meeting and an Exchange with Reporters, 39 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 1765, 1782-83 (2003), available at <http://fdsys.gpo.gov/fdsys/pkg/WCPD-2003-12-15/html/WCPD-2003-12-15-Pg1782-2.htm>. I do not mean to take some presidential humor out of context, but I think the President was reflecting a view held in some circles that international law is less worthy of respect because it is not relevant in domestic politics.

international cooperation, especially in the field of human rights, the modern genesis of which our nation created in the Declaration of Independence,¹⁸ and later fostered in the United Nations Charter¹⁹ and the Universal Declaration of Human Rights (drafted by a panel led by Eleanor Roosevelt).²⁰ This hostility or tension may be a by-product of our virulent “dualism” in international law, a carryover from English common law, modified by our unique federalism. Dualism is the idea that international law and domestic law are separate and distinct, operating on different levels, and that international law can only be enforced in national law if it is incorporated (and perhaps now, incorporated *very* specifically—but I said I would not get into that) into our domestic law.

Perhaps, and more likely, it is, as Professor Margaret E. McGuinness has persuasively described it, “American exceptionalism.”²¹ This idea, first offered by Alexis de Toqueville (until recently, the last French intellectual to say something nice about us) is that:

[T]he United States, in its form of government and its institutions of civil society, is unique and different from the rest of the world. Tocqueville cited the role of the judiciary in resolving political questions as evidence of American exceptionalism in the 19th Century, famously observing that there “is virtually no political question in the United States that does not sooner or later resolve itself into a judicial question.” In its current incarnation, American exceptionalism describes the ways in which the United States has set itself apart from the rules governing much of the international system. The wisdom of this current type of exceptionalism—going it alone, ignoring prior international commitments and working around multilateral institutions—has itself become a political question.²²

Now, like so many other things, there is good exceptionalism and bad exceptionalism²³ (and good natural law and bad natural law), and a lengthy discussion is beyond today’s scope and my ability. (Suffice for present purposes that I favor good exceptionalism!) But some have raised the following as examples of what they might call “iffy” exceptionalism: a reluctance to discuss international law; perhaps relatedly, a fear of citing foreign law as merely persuasive or informational in opinions; a concern by certain judicial elites about other “cosmopolitan” judicial

18. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

19. See U.N. Charter pmbl.

20. See Universal Declaration of Human Rights, G.A. Res. 217A, pmbl., at 71-72, U.N. GAOR, 3d Sess., 1st Plan. Mtg., U.N. Doc. A/810 (Dec. 12, 1948).

21. Her important article is: Margaret E. McGuinness, Sanchez-Llamas, *American Human Rights Exceptionalism and the VCCR Norm Portal*, 11 LEWIS & CLARK L. REV. 47 (2007).

22. *Id.* at 47 (citations omitted).

23. See generally Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003).

elites;²⁴ and a worrisome revival of protectionism.²⁵ Though America is certainly the good kind of exceptional in many ways, we see some evocation of American exceptionalism as hostility or reluctance to look at foreign law, and I think some of that may, intentionally or otherwise, rub off on international law. But this fear of things foreign or international was not always with us, as the epigram at the beginning of this paper quoting Justice Robert Jackson indicates.²⁶ Justice Jackson is one of our heroic figures in American law, and a figure whose name was positively evoked in the confirmation hearings of two recent justices—the Chief Justice’s²⁷ and Justice Alito’s.²⁸ The views of our country’s Nuremberg trial prosecutor reflect not only his wide reading but his experiences, and they are worthy of thoughtful consideration. I reference in the title of my lecture another demonstration of earlier respect for world opinion (and an attempt to cultivate world opinion in our favor), the preamble to the Declaration of Independence.²⁹

24. RICHARD A. POSNER, *HOW JUDGES THINK* 347 (2008).

25. DAVID M. MARCHICK & MATTHEW J. SLAUGHTER, *GLOBAL FBI POLICY: CORRECTING A PROTECTIONIST DRIFT* 3 (2008), available at <http://www.cfr.org/publication/16503/>. The summation is useful:

Foreign investment, though, is not immune to the sort of resistance that we are seeing with respect to the movement of goods and services. Indeed, just as with trade, calls to restrict investment are growing louder in many countries, with potentially significant adverse political and economic consequences. In this Council Special Report, David M. Marchick and Matthew J. Slaughter track the rise of investment protectionism. They examine trends in a number of countries, documenting moves toward restricting investment through both legislation and regulation. They also analyze the reasons behind these trends, such as increased concern over investment from “nontraditional” sources, both private and sovereign wealth funds.

The report ends with recommendations for policymakers. Acknowledging governments’ legitimate national security interests, it lays out clear principles for host countries to follow in regulating foreign investment. The authors also recommend actions to be taken by international organizations to help foster sound policies in these host countries. The result is a compelling analysis and a strong case for governments everywhere to take steps to maintain openness to investment.

Overview: Foreign Investment Has Been a Principle Engine of Global Economic Growth in Recent Years, <http://www.cfr.org/publication/16503> (last visited Oct. 5, 2009).

26. BORGAN, *supra* note 1, at 40. Professor Borgen’s collection, along with his introduction and commentary, is an excellent means of seeing how distinguished Supreme Court Justices, from Chief Justice Hughes, to Justices Robert Jackson, Sandra Day O’Connor, Antonin Scalia, Ruth Bader Ginsburg, and Stephen Breyer, have viewed international law.

27. *Confirmation Hearing of John Roberts: Hearing before the S. Judiciary Comm.*, 109th Cong. (2005) (statement of John Roberts).

28. *Confirmation Hearing of Samuel Alito: Hearing before the S. Jud. Comm.*, 109th Cong. (2006) (statement of Sen. Kennedy, Member, S. Jud. Comm.).

29. According to the Declaration:

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, A DECENT RESPECT TO THE OPINIONS OF MANKIND requires that they should declare the causes which impel them to the separation.

THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (emphasis added). In trying to establish our right to be here, and perhaps to be Englishmen, Mr. Jefferson’s charter is

Even if we might disagree as to whether we can learn from foreign voices, we should agree that we ought to respect them. While international cooperation does not require respect, it works a lot better with it. Joining with other nations, we can enter into mutually beneficial trade agreements to open markets and improve our economy, or to develop protocols that protect us from deadly diseases. We can deal with global environmental crises, and global warming, if that's what's happening. And, of course, we can protect our own citizens when they are abroad by reciprocally protecting citizens of other nations when they visit us. Ideally, we can be the good kind of exceptional *while* respecting foreign voices and upholding our obligations. As we shall see, it is not always as simple as that in practice.

I am going to talk about two cases: one is the *Medellín* case,³⁰ which many of you are probably familiar with, and the other that I will talk about briefly is the *Torres* case.³¹

II. MEDELLÍN

There are many different ways to look at *Medellín*.³² Ilya Shapiro of the Cato Institute called it “the Ultimate Law School Exam.”³³ Janet Koven Levit, a scholar in the field and Dean of the University of Tulsa Law School, noted that *Medellín* “sent a shockwave through the international legal community.”³⁴ A group of international and constitutional scholars termed it, with admirable terseness, “ODD.”

I will begin with a bit of background, specifically the ratification of the Vienna Convention on Consular Relations (VCCR).³⁵ In 1969, the Senate consented to and the President ratified the Convention.³⁶ In Article 36, the Convention reciprocally gave nationals traveling abroad the right to ask for assistance from their consulates when they are detained by foreign authorities.³⁷ As part of that right, Americans, and subjects of other parties to the treaties, received the right to be notified of their right to

really a brief dedicated to world opinion. I see it as a demonstration of respect for world opinion, although some appear to disagree. See, e.g., Eugene Kontorovich, *The Opinion of Mankind*, N.Y. SUN, July 1, 2005, at 9 (“[The Declaration does not say that] we learn from others. Rather the Declaration seeks to teach other nations.”). It seems to me that the Declaration’s intent was primarily to state its case for both Americans and the world to see. Along with other missives, it sought to encourage other countries to help us and did not do this by “teaching” them.

30. See *Medellín v. Texas*, 128 S. Ct. 1346 (2008).

31. See *Torres v. Mullin*, 540 U.S. 1035 (2003).

32. See, e.g., Margaret E. McGuinness, *Three Narratives of Medellín v. Texas*, 31 SUFFOLK TRANSNAT’L L. REV. 227, 227 (2008) (“Every once in a while, a Supreme Court case comes along that holds a mirror up to the changing face of the American polity.”).

33. Ilya Shapiro, *Medellín v. Texas and the Ultimate Law School Exam*, 2008 CATO SUP. CT. REV. 63, 85.

34. Janet Koven Levit, *Does Medellín Matter?*, 77 FORDHAM L. REV. 617, 617 (2008).

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

36. *Id.*

37. See *id.*

confer with their consulates “without delay.”³⁸

Additionally, in an Optional Protocol, the United States agreed to submit “[d]isputes arising out of the interpretation or application’ of the Convention”³⁹ to the International Court of Justice or the ICJ.⁴⁰ Established in 1945 in the U.N. Charter, the International Court of Justice is “the principal judicial organ of the United Nations”;⁴¹ it is a sort of global court with general jurisdiction over disputes among adhering nations.⁴²

In the U.N. Charter, each member of the U.N. “undertakes to comply with the decision of the [ICJ] in any case to which it is a party.”⁴³ Only nations can be parties to disputes before the ICJ.⁴⁴ Importantly, the United States invoked the Optional Protocol in 1979, suing Iran for taking fifty-two United States hostages in Tehran.⁴⁵

The VCCR Article 36 is simple to comply with in theory. When we arrest people from foreign countries, we have to tell them, without delay, that they have the right to ask for their consulate to be notified of their arrest and the right to confer with that consulate.⁴⁶ And at least some

38. Article 36, entitled “Communication and contact with nationals of the sending [foreign] State,” says in part:

With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

. . . [If the detainee] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

. . . The rights referred to in [the above paragraphs] of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Id. art. 36.

39. Levit, *supra* note 34, at 619.

40. Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 [hereinafter *Optional Protocol* or *Protocol*].

41. U.N. Charter art. 92.

42. *See id.* art. 36.

43. *Id.* art. 94(1). Binding jurisdiction is by consent, either general or specific. The United States withdrew from general jurisdiction in 1985, but remained subject to specific jurisdiction with regard to the VCCR based on the optional protocol.

44. *See id.* art. 34.

45. *See* Curtis Bradley & Lori Fisler Damrosch, *Medellín v. Dretke: Federalism and International Law*, 43 COLUM. J. TRANSNAT’L L. 667, 677 (2005) (“When the Vienna convention was being negotiated in the late 1960s, it was the United States that insisted that there should be a compulsory dispute settlement system, and the U.S. took the lead role in negotiating these dispute settlement provisions. The U.S. resisted the proposals of others to water it down. The United States was the first state party to invoke the optional protocol under the Vienna Convention This was in the *Tehran Hostages Case* brought in 1979.”).

46. VCCR, *supra* note 35, art. 36. For United States citizens abroad, this means getting to meet with an American consular officer who informs the citizens’ loved ones in the

people think it can make a difference. Some consulates provide resources for indigent defendants, including attorneys. These attorneys can be better qualified and more sensitive to the needs of a defendant who cannot speak English than an attorney provided through a state's indigent defense system.⁴⁷

This works well, except for when it doesn't. The problem comes when the nation or its subdivision forgets to tell a defendant about his right to consular notification. Especially what, if anything, should the defendant's later remedy be, and when should he have to raise this issue, if it can be individually raised at all.⁴⁸ This is a special problem in America, as much of our criminal law is state and not federal law and we have strict rules in our state courts about when certain arguments must be made. Under state laws, defendants can procedurally default their rights if they do not raise them in time. For example, if a state prosecutor withheld mitigating evidence in a state trial, the defendant would have to raise that issue at trial or risk forfeiting the right unless he could show good reasons—such as ineffective assistance of counsel or the fact that the violation was concealed from him—for not promptly raising the claim.

Medellin and many of the VCCR cases deal with just this problem: What happens when the defendants do not raise their rights in time because the state did not tell them about their rights, as it is the state's obligation to do? (In effect, what happens when the state says, "Sorry I didn't tell you about your rights; unfortunately you were supposed to complain about that shortly after the time I didn't tell you about them.")

The Supreme Court took a look at this question and decided there was no remedy.⁴⁹ Based on its reading of the VCCR, the defendant has no recourse when an independent and adequate state procedural bar is in effect.⁵⁰ Therefore, if the defendant does not raise his right in time, he is barred from raising it.⁵¹

The ICJ looked at the same question and disagreed with the Supreme Court's reading of the VCCR. In the ICJ's view, failure to abide by the terms of the VCCR entitled the defendant to judicial "review and reconsideration" in order to determine whether the failure to notify the defendant of a right to contact his consulate prejudiced his case, even when his

United States, provides guidance about the local legal system and information about attorneys, and performs periodic visits during incarceration or later imprisonment to ensure that citizens are not subjected to mistreatment. *Id.*

47. See *Choiniere v. United States*, Nos. 3:07-CV-27 RM, 3:05-CR-56, 2009 WL 112585, at *7 (N.D. Ind. Jul. 14, 2009) ("The consulate can offer many services to the detainee, including providing critical resources for legal representation and case investigation, conducting investigations, filing amicus briefs, locating witnesses and evidence from the home country, and even intervening directly in a proceeding if necessary." (citing *Osagiede v. United States*, 543 F.3d 399, 403 (7th Cir. 2008))).

48. Of course, as an individual, he has no recourse to the ICJ. See U.N. Charter art. 34.

49. See *Sanches-Llamas v. Oregon*, 547 U.S. 331, 331 (2006).

50. *Id.*

51. See, e.g., *id.*; *Breard v. Greene*, 523 U.S. 371 (1998); *Levit*, *supra* note 34, at 617.

rights are otherwise defaulted.⁵² This remedy of “review and reconsideration” is not as drastic as it might be;⁵³ for example, the ICJ did not require the United States to apply the exclusionary rule, to overturn convictions, or even to necessarily alter sentences—it just called for judicial review and reconsideration.⁵⁴

The ICJ’s decision involved about fifty Mexican nationals (including Mr. Medellín) who were convicted in a number of states throughout the country.⁵⁵ Because only nations may bring cases in front of the ICJ, Mexico had to bring the case against the United States. It is referred to as *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*.⁵⁶ At that time, remember, the United States had agreed to the jurisdiction of the ICJ in the Optional Protocol, and the United States government admitted that it had been in breach of the notification provision.⁵⁷ Further, the United States, as a member of the United Nations, had agreed to “undertake[] to comply” with ICJ decisions.⁵⁸ (Reflecting perhaps our exceptionalism, the United States withdrew from the Optional Protocol on March 7, 2005, in a letter Condoleezza Rice sent to the U.N. Secretary General.)⁵⁹ What was at issue was the appropriate remedy for the breach.⁶⁰

In *Avena*, the ICJ found that the United States had violated the treaty in forty-nine of the fifty-two cases.⁶¹ It reiterated⁶² that the proper remedy for a VCCR violation was “review and reconsideration” of the person’s conviction and sentence conducted by the judicial system of the country.⁶³ The United States had argued that executive clemency procedures provided sufficient review and reconsideration, but the ICJ disagreed, saying it was a job for the judicial branch in this case.⁶⁴

52. *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 12, 65-66 (Mar. 31).

53. *See id.* at 23 (describing Mexico’s demand that the United States “annul[] or otherwise depriv[e] of full force or effect the convictions and sentences”).

54. *Id.* at 59-61.

55. *Id.* at 24-26.

56. *Id.* at 12.

57. VCCR, *supra* note 35, art. 1.

58. U.N. Charter art. 94.

59. *See* Frederic L. Kirgis, *Addendum to ASK Insight, President Bush’s Determination Regarding Mexican Nationals and Consumer Convention Rights*, ASIL INSIGHTS, Mar. 2005, <http://www.asil.org/insights/2005/03/insights050309a.html>.

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

61. *Id.* at 71-72.

62. In the *LaGrand Case*, Germany initiated action in the ICJ against the United States to prevent the execution of Walter LaGrand, a German national who botched a bank robbery in Arizona. *LaGrand Case (Germany v. United States)*, 2001 I.C.J. 466, 475, 467-79 (June 27). Germany also instituted a suit in the United States Supreme Court. In *Federal Republic of Germany v. United States*, 526 U.S. 111, 111-12 (1999), the Supreme Court declined to exercise original jurisdiction over Germany’s claim, noting the tardiness of the pleas. In 2001, after LaGrand was executed in an Arizona gas chamber, the ICJ held that the Court’s finding that LaGrand procedurally defaulted his VCCR rights violated the VCCR. *LaGrand*, 2001 I.C.J. at 514-17.

63. *Avena*, 2004 I.C.J. at 59-70.

64. *Id.* at 65-66.

I want to focus on two of the individuals involved in the *Avena* decision. I hope that in discussing these cases and talking about the rights of these individuals, you do not misunderstand me as minimizing the odiousness of the crimes the two individuals committed, or the magnitude of the state's interests in running its court systems.

José Ernesto Medellín, an eighteen-year-old at the time of his crimes in 1993, was convicted in Texas of rape and murder based on his participation in a horrible, drunken gang-initiation in which a fourteen-year-old and sixteen-year-old girl were raped and killed.⁶⁵ Medellín personally strangled one of the girls with her own shoelaces.⁶⁶ After his conviction, and partly through his appeals, his lawyers realized that Texas had not told Medellín about his right to consular notification.⁶⁷ Texas courts found that state rules procedurally barred Medellín's complaint about this failure and that, in any case, the VCCR did not grant individuals the right to raise VCCR claims to attack their sentences.⁶⁸ After Medellín filed a federal habeas writ, the Fifth Circuit also denied Medellín a certificate of appealability,⁶⁹ in disagreement with provisional measures from ICJ in the *Avena* case suggesting that courts should grant relief.⁷⁰ Based in part on the applicable ICJ ruling in *Avena*, the Supreme Court granted certiorari in Medellín's case.⁷¹

Now here let me pause to make an important point. The United States clearly has one of the world's best criminal justice systems. Our courts provide rights that other courts do not, and in reality, one would often be hard-pressed to claim that a failure to grant consular consultation would be likely to affect the actual result in a major crime. But there is a wrinkle: the United States is one of the few economically developed countries in the world that has a death penalty. This ratchets up the concerns of foreign states—one of their citizens may be executed. And we are also one of the relatively few such countries that has a federalism system that makes these decisions, by and large, state decisions and not national ones.⁷² This can be tough for governments in countries without the death penalty to understand or explain to their citizens.⁷³ Finally, American

65. *Medellín v. Cockrell*, No. Civ.A.H-01-4078, 2003 WL 25321243, at *1 (S.D. Tex. June 25, 2003).

66. *Id.*

67. *Medellín v. Dretke*, 371 F.3d 270, 274, 279 (5th Cir. 2004).

68. *Id.* at 279-80.

69. *Id.* at 281.

70. *Case Concerning Avena and other Mexican Nationals (Mexico v. United States)*, Provisional Measures, 42 I.L.M. 309 (Feb. 5, 2003), available at <http://www.icj-cij.org/docket/index.php?pl=3&p2=3&k=18&case=128&code=mvs&p3=3>.

71. *See Medellín v. Dretke*, 544 U.S. 660, 661-62 (2005).

72. Imagine if the Mexican State of Chihuahua refused to abide by an agreement that the United States made with Mexico regarding the punishment of United States citizens.

73. Michael R. Steinmark, *The Case Concerning Avena and Other Mexican Nationals (Mexico v. United States): A Mexican Perspective on the Fight for Consular Rights*, 10 L. & BUS. REV. AM. 417, 421 (2004) ("The Mexican public views the denial of consular rights not as a diplomatic or political issue, but rather as a human rights issue and source of outrage. Their response has been compared to the American public's reaction to the 1994 caning of American teenager Michael Peter Fay in Singapore.").

death penalty statutes allow evidence to be presented in mitigation of the death penalty after the fact-finder, usually a jury, has determined guilt.⁷⁴ The mitigation phase has sparked much controversy in our own country; scores of cases show that inexperienced lawyers do this very poorly. Thus, despite our generally excellent legal system in America, capital cases spark intense feelings and demand careful counsel in both the guilt and sentencing phases of the trial.

Now, returning to my story, we were at the point where the Supreme Court had granted a writ of certiorari to review the Fifth Circuit.

Shortly after the Court granted the writ, a portion of the sea changed. On February 28, 2005, President George W. Bush, whose administration had consistently evinced opposition to VCCR claims,⁷⁵ issued a memorandum to Attorney General Alberto Gonzales, directing state courts to “give effect to” the *Avena* decision without regard to state procedural default rules, “in accordance with general principles of comity.”⁷⁶

Medellín filed another petition for habeas in Texas state court, relying on the presidential memo. Based on this filing, the United States Supreme Court dismissed the first writ of certiorari as improvidently granted to allow Texas to act in response to the presidential directive.⁷⁷ Based in part on *Sanchez-Llamas v. Oregon* and *Breard v. Greene*, Supreme Court cases holding that the state procedural bars trumped VCCR rights, the Texas courts again denied habeas relief to Medellín.⁷⁸ Medellín again appealed to the Supreme Court, which granted certiorari.⁷⁹ Based on the earlier rulings, Medellín could not strictly rely on the VCCR; he had to rely on his status as a named party in the *Avena* decision under the protocol ceding VCCR jurisdiction to that court and the President’s memorandum stating the policy to give effect to the ruling.⁸⁰

Thus, in *Medellín v. Texas*, the Supreme Court had to determine (1) if the *Avena* decision bound Texas (and any other state), allowing Medellín to enforce directly the ICJ’s decision, and (2) what legal effect, if any, the President’s memorandum had in Texas, or anywhere else.⁸¹

In the Supreme Court, Texas won big. With respect to the question of whether the ICJ had jurisdiction to enter its decision, binding American courts to grant VCCR rights and review and reconsider cases, the Court ruled that, though the VCCR and the *Avena* judgment created an international obligation, it was not directly enforceable as domestic law in state court, reinforcing the wall between our international commitments and

74. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 2008).

75. Brief for the United States as Amicus Curiae Supporting Respondents, *Bustillo v. Johnson*, 548 U.S. 331 (2006) (No. 5-51), 2006 WL 271823, at *11-30 (arguing, among other things, that Article 36 does not confer individually enforceable rights).

76. See Levit, *supra* note 34, at 622.

77. *Medellín v. Dretke*, 544 U.S. 660, 661-62 (2005).

78. *Ex parte Medellín*, 223 S.W.3d 315, 330-32, 352 (Tex. Crim. App. 2006).

79. *Medellín v. Texas*, 128 S. Ct. 1346, 1354-56 (2008).

80. *Id.* at 1356-57, 1367.

81. *Id.* at 1353.

our domestic law.⁸² The ICJ's decision was not enforceable because the Optional Protocol, which granted the ICJ jurisdiction, was not "self-executing," that is, the treaty required an implementing act by Congress before a remedy in American courts would be provided (probably under our habeas corpus statute).⁸³ Congress had passed no implementing legislation for either the VCCR or the Optional Protocol.⁸⁴ Therefore, although the VCCR created obligations and in the Optional Protocol we agreed to submit to the jurisdiction of the ICJ regarding those obligations, the *Avena* decision did not provide Medellín with a means to enforce the ICJ ruling in domestic courts.⁸⁵

With respect to the question about the effect of President Bush's memorandum, the Court held that without congressional acquiescence, the President's memorandum had no effect.⁸⁶ The President's foreign affairs authority does not stretch so far as to allow him to compel state courts to re-open final criminal judgments and set aside neutrally applicable state laws in this case.⁸⁷

Appeals not to proceed with the execution poured into Texas. Attorney General Michael Mukasey and Secretary of State Condoleezza Rice wrote to Governor Rick Perry pleading with him to abide by the *Avena* decision.⁸⁸ The local paper, the *Dallas Morning News*, encouraged the Governor to take action demonstrating respect for the *Avena* decision, saying:

The international court's ruling can't be enforced, and the Supreme Court has upheld the state's authority to proceed. But that doesn't mean Mr. Perry is *required* to proceed. For the good of the country, we join Attorney General Michael Mukasey and Secretary of State Condoleezza Rice in urging him to grant a stay of execution.

. . .

Yes, Mr. Perry can flex the state's judicial muscle and show the world that Texans don't bow to the whims of some distant, obscure international court. But it would send an unequivocal message to all foreign governments—especially Mexico—that this country doesn't stand by its promises. They can justifiably point to Mr. Perry's example if they decide not to be bound by this or other important treaties in the

82. *Id.* at 1356-67.

83. *Id.*

84. *Id.* at 1369-70.

85. The court held that ICJ decisions are neither binding nor enforceable. *Id.* at 1360. This reiterated the holding in *Breard v. Greene*, "which held that Vienna Convention claims are subject to procedural default rules, rather than by the ICJ's contrary decision in *Avena*." *Id.* at 1355. *Breard* also discussed how the Antiterrorism and effective Death Penalty Act (AEDPA) may affect these claims as subsequent acts of Congress determined to be in conflict with a treaty will control. See *Breard v. Green*, 523 U.S. 371, 376-77 (1998).

86. *Medellín*, 128 S. Ct. at 1367-72.

87. *Id.* at 1371-72.

88. John R. Crook, *Mexico Again Sues United States in ICJ; ICJ Directs United States to Block Medellín Execution; U.S. Supreme Court Again Denies Relief; Texas Executes Medellín*, 102 AM J. INT'L L. 860, 862 (2008).

future.⁸⁹

Despite these pleas, Governor Perry made clear Texas's position shortly before Medellín's execution. He vowed Texas would continue with the execution without reviewing or reconsidering Medellín's case:

The world court has no standing in Texas and Texas is not bound by a ruling or edict from a foreign court. . . . It is easy to get caught up in discussions of international law and justice and treaties. It's very important to remember that these individuals are on death row for killing our citizens.⁹⁰

Mr. Medellín was executed by lethal injection on August 5, 2008. Appeals to delay in order to give Congress time to consider or enact legislation failed. In any case, it seems unlikely that Congress would have enacted implementing legislation, as it has not done so since.⁹¹

On January 19, 2009, the ICJ held that "the United States did not discharge its obligation under the Court's Order of 16 July 2008, in the case of Mr. José Ernesto Medellín Rojas."⁹²

III. TORRES

Osbaldo Torres, who is also named in *Avena*, was convicted in Oklahoma for the 1993 murders of Francisco Morales and Maria Yanez.⁹³ Torres's co-defendant, George Ochoa, was identified by an eyewitness as the actual gunman.⁹⁴ Thus, his case had less egregious facts than Medellín's, though egregious nonetheless. Resolution of Torres's case predated Medellín.

Torres was convicted in state court and lost his direct appeal.⁹⁵ In 1999, Torres filed for habeas relief in federal court, for the first time raising Oklahoma's violation of his VCCR rights.⁹⁶ The Tenth Circuit refused to grant him a certificate of appealability.⁹⁷ Torres appealed to the Supreme

89. Editorial, *Gov. Perry Should Halt This Execution*, DALLAS MORNING NEWS, July 29, 2008, http://www.dallasnews.com/sharedcontent/dws/dn/opinion/editorials/stories/DN-death_29edi.ART.state.Edition1.4d5d131.html.

90. Allan Turner & Rosanna Ruiz, *Texas to World Court: Executions Are Still On / Gov. Perry's Office Rebuffs Call to Let Medellín's Case be Reviewed*, HOUSTON CHRON., July 17, 2008, at A1.

91. See Scott W. Lyons, *Breach Without Remedy in the International Forum and the Need for Self-Help: The Conundrum Resulting from the Medellín Case*, 13 LEWIS & CLARK L. REV. 73, 79-80 & n.31 (citing H.R. 6481, 110th Cong. § 1 (2008), which was not passed in the 110th Congress).

92. Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), para. 53 (order of Jan. 19, 2009), available at <http://www.icj-cij.org/doCKET/files/139/14939.pdf>.

93. Torres v. State, 962 P.2d 3, 7-8 (Okla. Crim. App. 1998).

94. *Id.* at 8.

95. See Torres v. State, 58 P.3d 214 (Okla. Crim. App. 2002); Torres, 962 P.2d at 3; Torres v. State, No. PC-98-213 (Okla. Crim. App. Aug. 4, 1998) (unpublished order).

96. Torres v. Gibson, No. CIV-99-155-R (W.D. Okla. Aug. 23, 2000).

97. Torres v. Gibson, No. 00-6334 (10th Cir. Apr. 26, 2001) (unpublished order); Torres v. Mullin, 317 F.3d 1145, 1148 n.1 (10th Cir. 2003). I must reveal that I sat on this case and dissented from our opinion, but not on the grounds of the VCCR. *Gibson*, No.

Court, which denied certiorari.⁹⁸ Justice Breyer filed an opinion saying he would defer consideration of the petition because *Avena* was in progress and “given the international implications of the issues raised.”⁹⁹

Torres’s execution was set for May 18, 2004. In *Avena*, the ICJ expressed “great concern” about the execution date.¹⁰⁰ In response to *Avena*, (remember this is before *Medellín*) the Oklahoma Court of Criminal Appeals (OCCA) stayed the execution, allowing an evidentiary hearing on whether Torres was prejudiced by the lack of consular notification.¹⁰¹ The same day the OCCA stayed Torres’s execution. Oklahoma Governor Brad Henry, commuted Torres’s death sentence to life without the possibility of parole. In doing so, (as Justice Stevens noted) Governor Henry reasoned “(1) the United States signed the Vienna Convention, (2) that treaty is ‘important in protecting the rights of American citizens abroad,’ (3) the ICJ ruled that Torres’ rights had been violated, and (4) the U.S. State Department urged his office to give careful consideration to the United States’ treaty obligations.”¹⁰²

The U.S. State Department, through a letter from the Legal Adviser to the Secretary of State, William Howard Taft IV, had encouraged Governor Henry to take a close look at this matter.¹⁰³ Also, the Ambassador of Mexico, the former United States Ambassador to Mexico, officials from the European Union, and Ivy League law professors, among others, had urged Oklahoma (either by addressing the Governor or signing amici briefs to the Oklahoma Court of Criminal Appeals) to respect the ICJ ruling.¹⁰⁴

In his *Medellín* concurrence, Justice Stevens encouraged Texas to consider Oklahoma’s response: “The cost to Texas of complying with *Avena* would be minimal, particularly given the remote likelihood that the violation of the Vienna Convention actually prejudiced José Ernesto Medellín. It is a cost that the State of Oklahoma unhesitatingly assumed.”¹⁰⁵

00-6334 (unpublished order denying COA); *Mullin*, 317 F.3d at 1162-68 (Henry, J., dissenting).

98. *Torres v. Mullin*, 540 U.S. 1035 (2003).

99. *Id.* at 1041.

100. *Medellín v. Texas*, 128 S. Ct. 1346, 1375 n.4 (2008) (Stevens, J., concurring).

101. *See Torres v. State*, No. PCD-04-442, 2004 WL 3711623, at *1 (Okla. Crim. App. May 13, 2004).

102. *See Medellín*, 128 S. Ct. at 1375 n.4; *see also* Press Release, Office of Gov. Brad Henry, Gov. Henry Grants Clemency to Death Row Inmate Torres (May 13, 2004), available at http://www.ok.governor/display-article.php?article_id=301&article_type=1.

103. *See* Heather L. Finstuen, *From the World Court to Oklahoma Court: The Significance of Torres v. State for International Court of Justice Authority, Individual Rights, and the Availability of Remedy in Vienna Convention Disputes*, 58 OKLA. L. REV. 255, 271 (2005).

104. *See* Janet Koven Levit, *A Tale of International Law in the Heartland: Torres and the Role of State Courts in Transnational Legal Conversation*, 12 TULSA J. COMP. & INT’L L. 163, 181 (2004).

105. *Medellín*, 128 S. Ct. at 1375 (Stevens, J., concurring).

IV. SO, WHERE DID THIS LEAVE US?

The Supreme Court said we have an international obligation, but certain officials in Texas did not seem to care, even when the message came (admittedly in a legally unenforceable form) from a former Texas Governor through a former Texas Supreme Court Justice. Merely agreeing to take a second look, in any of several ways, as Oklahoma did and other states have done, most likely would have still resulted in Mr. Medellín's execution, but at a considerably cheaper cost in terms of world opinion, not to mention litigation expenses. Where are we? Several places—but let us take the easy one first.

The Supreme Court ruled that the President was out of line in his unilateral attempt to direct state court systems to comply with a treaty obligation—an obligation that his Administration had never considered a self-executing one.¹⁰⁶ Given the Court's conclusion that the protocol was not self-executing (a decision which still engenders considerable debate), this decision was clearly correct. The President was without authority to act in this way, as even John Yoo, who is not a shrinking violet when it comes to presidential power, agreed.¹⁰⁷ Just about everyone agrees here.

But then things start to go South (or is it West?). The Cato Institute heralds the case as a great victory in “resisting the tide of transnational global governance.”¹⁰⁸ This is a somewhat curious conclusion in an otherwise fine (if a bit cynical) article about the case. It is curious because the United States ratified the VCCR, largely to protect its own citizens, and the State Department itself concluded even before the 1969 ICJ protocol that the Convention was “considered entirely self-executive and does not require any implementing or complementing legislation.”¹⁰⁹ It is hardly a matter of a one-world government to voluntarily ratify such a treaty that makes so much sense (as we shall see more evidence of in a moment).

Cato's conclusion is curious from another perspective, too. The Institute favors some globalization, just not human rights globalization: “While economic globalization brings opportunity and freedom to different parts of the world, what could be called ‘political globalization’ seeks to substitute the views of elite cosmopolitan technocrats for the consent of each nations governed.”¹¹⁰

It strikes me as odd that the cosmopolitan technocrats who brought us NAFTA and the WTO bring opportunity and freedom—along with the domestic tax changes that have become necessary to implement these

106. *Id.* at 1367-72.

107. See Amicus Curiae Brief of Constitutional and International Law Scholars in Support of Respondent State of Texas, *Medellín v. Texas*, 128 S. Ct. 1346 (2008) (No. 06-984), 2007 WL 4983975, at *7-11 (filed by John Yoo and Erwin Chemerinsky, among others).

108. Shapiro, *supra* note 33, at 102.

109. *Id.* at 83 n.109 (citing S. Exec. Rep. No. 91-9, at 5 (1969)).

110. *Id.* at 102.

paradigms¹¹¹—but the cosmopolitan technocrats in our Department of State who want to receive, and hence must give, consular notification, are for transnational global governance.¹¹²

Professor McGuinness noted the joy of some exceptionalist scholars at the Supreme Court's strong expression of the doctrine in *Sanchez-Llamas*, a *Medellín* precursor:

Sovereignist observers of the Court initially hailed *Sanchez-Llamas* as a defeat for internationalism in American jurisprudence and thus a triumph for exceptionalism. What could be a more significant rejection of international regulation of individual rights in the United States than an explicit rejection of the International Court of Justice's (ICJ) interpretation of judicial enforceability of an individual right arising from a treaty to which the U.S. is a party and with which the U.S. has expressly and consistently agreed to comply?¹¹³

But she goes on to conclude that “such celebrations . . . may be misplaced and may misunderstand the dimensions of American exceptionalism at issue in the VCCR cases.”¹¹⁴ Her conclusion could apply equally to those heralding the *Medellín* decision.

Indeed, other voices, both “liberal” and “conservative,” seem to agree that the VCCR cases open up new opportunities for the states to have a role in foreign policy decisions not preempted by the federal government.¹¹⁵ One such scholar argues that the decision reached by Oklahoma's Governor may have revealed the most practical and feasible way to accommodate the internationalizing pressure of globalization with a continuing federal system of dual sovereignties.¹¹⁶ Agreeing that the consequences of Texas's actions in these cases might affect all Americans and that this is a “legitimate concern,” he argues that it may not be necessary to speak with one voice on all decisions, that internationalism does not necessarily mean nationalism, and that there may be more than one way to skin a cat.¹¹⁷ It is laudable to protect American citizens. Oklahoma and Texas citizens—indeed citizens in all states and United States entities—are largely indistinguishable when they travel abroad.

111. In 2004, President Bush and Congress scrapped a law that allowed certain international corporations to get special tax rates, based on EU complaints to the WTO. However, President Bush replaced these “tax increases” with fresh tax breaks worth \$140 billion. See *Bush Shakes Up US Corporate Taxes*, BBC NEWS, Oct. 22, 2004, <http://news.bbc.co.uk/2/hi/business/3946183.stm>.

112. In an article lamenting the United States's decision to keep lumber duties in the face of an adverse NAFTA ruling, Daniel Ikenson, an analyst at the Cato Institute stated that: “America's growing disdain for its international trade commitments is a troubling development. It will now be that much easier for U.S. trade partners to break the rules and disregard their own commitments.” Daniel Ikenson, *Felling NAFTA*, CATO INST. COMMENT., Oct. 24, 2005, <http://www.freetrade.org/pubs/articles/as-ikenson.pdf>. It seems this argument would apply equally to other issues like consular notification.

113. Margaret E. McGuinness, *Sanchez-Llamas, American Human Rights Exceptionalism and the VCCR Norm Portal*, 11 LEWIS & CLARK L. REV. 47, 50 (2007).

114. *Id.*

115. Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380, 2398-99 (2006).

116. *Id.* at 2414-15.

117. *Id.* at 2413-14.

The diphthongs give some things away. State governors should be able to figure out enforcement mechanisms and procedures that meet international obligations on their own.¹¹⁸

Further, to the extent that the goal might be that we should keep our word, Dean Levit notes in a “from the ground up” view that the interactive process that is international law has resulted in massive support for and compliance with the VCCR.¹¹⁹ The State Department knows that its embassy employees are primary beneficiaries of the similar Vienna Convention on Diplomatic Relations (VCDR), that our citizens are the primary beneficiaries of the VCCR, and that together these treaties provide important protections for our citizens and representatives abroad. Its outreach to state and local law enforcement has snowballed, delivering over one million pieces of consular notification instructional material, including a Consular Notification and Access Reference Card that mirrors the famed *Miranda* cards I used to use in my office when I was Attorney General. States like California have passed laws requiring peace officers to comply; state officials, including, notably, the Attorney General of Texas, have disseminated guides to consular notification (indeed, the Texan guide seems to be a model for other states).¹²⁰ Dean Levit concludes: “For the most part, officials now notify foreign nationals of consular rights.”¹²¹ And that is a good thing for domestic law enforcement, too. Even though individuals cannot directly enforce this international obligation when it is procedurally barred, failure to comply with the VCCR might affect the voluntariness of an interrogation or waiver, as Justice Ginsburg has suggested; it also might contribute to an ineffective assistance of counsel claim, as the Seventh Circuit has recently ruled.¹²²

118. *Id.* at 2413. Professor McGuinness is downright optimistic about the future:

As federal states in the United States continue to expand the ways in which they carry out foreign policies, we can expect them to increasingly take the lead in internalizing external human rights norms. That is not to suggest that it will be a smooth, linear progression from American political and judicial exceptionalism to adoption of international standards. The persistence of the death penalty and the current U.S. [Bush] administration’s attitude toward the Geneva conventions and customary international law governing detainee treatment demonstrate that significant backsliding from higher international standards can occur.

McGuinness, *supra* note 113, at 64.

119. Janet Koven Levit, *A Tale of International Law in the Heartland: Torres and the Role of State Courts in Transnational Legal Conversation*, 12 *TULSA J. COMP. & INT’L L.* 163, 178-87 (2004).

120. Victoria M. Lee, *Giving State and Local Law Enforcement the Benefit of the Doubt: How to Ensure VCCR Compliance Without Judicial Remedies*, 17 *J.L. & POL’Y* 609, 638-43 (2009).

121. Janet Koven Levit, *The Legitimacy of Delegating Lawmaking to International Institutions: The International Court of Justice and Foreign Nationals on Death Row in the U.S.: Does Medellín Matter?*, 77 *FORDHAM L. REV.* 617, 631 (2008).

122. *Osagiede v. United States*, 543 F.3d 399, 407-12 (7th Cir. 2008) (“Indeed, Justice Ginsburg stated that it was ‘critical’ for her that the defendant did not raise an ineffective assistance of counsel claim along with his direct Vienna Convention claim.” (citing *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 363-64 & n.3 (2006) (Ginsburg, J., concurring))).

We are in a globalized world, where it will continue to be important to work with other nations and to enter international treaties, conventions, and accords. If our nation gives its word, should states seek avenues to go along when state interests can still be met in the process?

Interestingly, and encouragingly—and I saved this for the end—Texas itself softened its position in its Brief in Opposition to Medellín’s stay of execution in the Supreme Court. As Lucy Reed, President of the American Society of Internal Law, an organization to which every American Secretary of State since its founding has belonged, noted, referring to Texas’s brief in *Medellín*: “Texas ‘acknowledge[d] the international sensitivities presented by the *Avena* ruling’ . . . and stated that it would ‘as an act of comity’ take steps to provide other *Avena* defendants with ‘review and reconsideration’ of their claims of prejudice under the Vienna Convention on the merits.”¹²³

Specifically, Texas said that in the future it would “join with the defense in asking the reviewing court to address the claim of prejudice on the merits.”¹²⁴ Thus, although Texas would not—and did not have to—comply with the President’s directive based on comity in *Medellín*, it certainly noticed the national and international outcry. Even though it had argued that its system had complied with the ICJ’s regimen (a conclusion hotly disputed, to be sure), in the aftermath of this troubling case, Texas seems to have taken the lead, not for transnational governance, but for complying with our valid international obligations—on the basis of comity.

Medellín was truly a difficult case, coming at a convergence of national values: the value of keeping international obligations with a state’s value of running its criminal courts as it sees fit under our constitutional umbrella. The fact that it was a death penalty case probably sharpened the swords on both sides. A new way to read treaties developed, a President was reigned in, but in the end, the strange winner was comity after all. Again, Professor McGuinness noted: “[T]he United States gains more than it loses from participation in the international human rights system, and . . . disengagement from the rest of the world is not a viable option.”¹²⁵ We are a “melting pot” of immigrants; we travel back to our ancestral homelands in record numbers; we are a nation of travelers. The VCCR teaches other nations that they cannot take an American and throw him or her into a cell and not tell us. These rights disproportionately help us since Americans travel all over the world.

I said the winner—if states abide by the VCCR—was comity, but of course, there is another. For some years ago, the great Hugo Black noted in an Indian treaty case that “Great nations, like great men, should keep

123. Lucy F. Reed, *Society Resources Brought to Bear on Medellín*, ASIL NEWSLETTER (Am. Soc’y of Int’l L., Wash. D.C.), July/Sept. 2008, at 15, available at <http://www.asil.org/files/pres080922.pdf>.

124. Brief of Respondent in Opposition at 17-18, *Medellín v. Texas*, 129 S. Ct. 290 (2008) (No. 08-5573, 08A98).

125. McGuinness, *supra* note 113, at 64.

their word.”¹²⁶ When our federal government makes an international commitment, there is something to be said for states trying to honor the agreement.

126. *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

Comments

