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TREATIES IN US DOMESTIC LAW: *MEDELLIN V. TEXAS* IN CONTEXT

Introduction

Your Excellencies, Ladies and Gentlemen, esteemed colleagues, thank you for the honor of addressing you at this inaugural symposium of the Malaysian Chapter of the Asian Society of International Law and the Malaysian Society of International Law. I bring you greetings and best wishes from the officers and members of the American Society of International Law.

It is a privilege – a humbling and terrifying privilege – to follow H.E. Judge Owada, a great international lawyer and jurist and a great friend to and Honorary Member of the American Society. I will do my best under these challenging circumstances.

The focus of your Symposium's topic could not be more relevant to the United States. The recent US Supreme Court judgment in *Medellin v. Texas*², involving the *Avena* judgment of the International Court of Justice (*ICJ*)³, raises the issues addressed by two panels today: the domestic implementation of treaties and the domestic implementation of international judgments. In *Avena*, the ICJ ordered the United States (*US*) to review and reconsider the convictions and sentences of 51 Mexican nationals sentenced to death to determine whether these nationals were prejudiced as a result of US failure to inform them of their rights to assistance from Mexican consular officials under the Vienna Convention on Consular Relations.⁴

In *Medellin v. Texas*, our Supreme Court unanimously agreed with the Bush administration that the United States is obliged to comply with the ICJ judgment as a binding international obligation.⁵ But a majority concluded that both the Court and the President are powerless to comply because the relevant treaties are not self-executing and so, absent an implementing federal statute, are not enforceable by federal courts against the State of Texas.⁶

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² 128 S. Ct. 1346 (2008).

³ *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) (*Avena*).

⁴ *Id.* at 72.

⁵ 128 S. Ct. at 1356.

⁶ *Id.* at 1346.

Based on the Supreme Court decision, and in contravention of the ICJ judgment, the State of Texas yesterday executed one of those individuals, José Ernesto Medellín.⁷ This is a hot and controversial topic. Let me read to you from a recent press report:

*The case highlights a heated debate over the relevance of international legal rulings in the American justice system. It is a flash point in an ongoing rivalry pitting American law against international law, and the controversy is playing out in an emotional case involving race, rape, murder, and capital punishment Texas-style.*⁸

Here is what Texas thinks of international treaty commitments and ICJ rulings:

*"We don't really care where you are from; if you commit a heinous and despicable crime you are going to face the ultimate penalty under our laws," says Allison Castle, a spokeswoman for Texas Gov. Rick Perry (R). "No foreign national is going to receive any additional protection than a Texas citizen would."*⁹

Let us be less sensational and more lawyerly today. The *Medellin* case has put our understanding of the domestic treatment of US treaty law in a state of flux. In sum, treaties are *binding* federal law under our Constitution, equivalent to federal statutes, enforceable by judges. Yet, after *Medellin*, treaties are *not necessarily enforceable federal law*, depending on whether they are self-executing without additional legislation.

These remarks will provide an extremely brief introduction to US law on the treaty-making power and its domestic effect, and then discuss *Medellin* and some of its implications for our evolving understanding of this challenging area of the law. I am speaking in a personal capacity.

First, the treaty-making power

The US Constitution vests the power to make treaties in the Executive, the President.¹⁰ Under Article II of the Constitution, the President, in order to ratify a treaty, must first acquire the "advice and consent" of two-thirds of the Senate.¹¹ Through long-standing practice and judge-made law, the President can also conclude executive agreements, which function as treaties from an international perspective, but do not derive their authority from the Constitution Article II process of Senate advice and consent. The President has the authority to conclude executive agreements with foreign States in three circumstances:

⁷ James C. McKinley, *Texas Executes Mexican Despite Objections*, New York Times, August 6, 2008, at A19, available at <http://www.nytimes.com/2008/08/06/us/06execute.html?scp=5&sq=medellin&st=cse>.

⁸ Warren Richey, *Showdown Over a Texas Execution*, The Christian Science Monitor, July 31, 2008, available at <http://www.csmonitor.com/2008/0731/p03s05-usju.html>.

⁹ *Id.*

¹⁰ U.S. CONST. Art. II, § 2.

¹¹ *Id.*

1. Where a duly executed treaty contemplates follow-on agreements, the President may conclude a *treaty-based executive agreement*;
2. Where the President's power derives from some other Constitutional source, the President may conclude a *sole-executive agreement*;
3. Where the President has obtained majority approval from both the Senate and the House of Representatives, the President may conclude a *congressional-executive agreement*.¹²

I bring your attention to executive agreements because they are, in practice, far more prevalent than Constitution Article II treaties. By some estimates, executive agreements make up 95% of the international agreements concluded by the United States.¹³ Although references to "treaties" throughout this talk are meant to encompass both Constitution Article II treaties and executive agreements, it is important to disaggregate them when considering the implications of the domestic effect of such agreements.

Now, what is the domestic effect of treaties in the US?

The United States' foundational principle regarding the domestic effect of treaty law is found in Article VI, Section 2, of the US Constitution – the "Supremacy Clause." It states:

*This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or 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, anything in the Constitution or laws of any state to the contrary notwithstanding.*¹⁴

This sounds elegantly simple, right? It appears that treaties are supreme federal law, equivalent to federal statutes, binding on state court judges. It is not so simple.

In addition to our Constitutional Supremacy Clause, the other significant source of US treaty law is judge-made law. Under our common law system, US judicial decisions create binding precedents for other US courts. Early treaty law court cases have both confirmed and complicated the Supremacy Clause's simple formulation.

The Supremacy Clause itself has at least two implications for treaty law. First, treaties are equivalent in their domestic effect to the Constitution and federal statutes. Second, the Supremacy Clause explicitly directs the state judiciary to regard treaties as superseding state law. This second point is – or should be – of particular significance under the US system of government, because the 50 states, under the 10th Amendment to the Constitution, have all

¹² See THOMAS BUERGENTHAL, PUBLIC INTERNATIONAL LAW IN A NUTSHELL §7-3 (2002). The US Constitution indirectly recognizes at least the existence of non-treaty based international agreements by way of reference to "alliances," "confederations" and "compacts." See U.S. CONST. Art., § 10.

¹³ Thomas Buergenthal, *supra* note 12.

¹⁴ U.S. CONST. Art. VI, § 2.

residual legislative power not explicitly delegated to the Federal government,¹⁵ and states remain sovereign in many domains.

The Supreme Court has used strong rhetoric to support the commands in the Supremacy Clause, with respect to treaties. In *U.S. v. Belmont*, the 1937 Supreme Court found that the President was capable of overcoming state law and forcing a New York bank to release assets sought by the Soviet Union based on a diplomatic (executive) agreement between the two countries.¹⁶ In so doing, the Court stated, "In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes, the State of New York does not exist."¹⁷ The power of the federal government – and in particular the President – to bind the states under treaty obligations was reaffirmed and refined under the "*Belmont* line" of cases that followed.¹⁸

A much earlier Supreme Court case, however, complicated the matter – and brought us the "self-execution" concept. In *Foster v. Neilson*, the Supreme Court in 1829 clarified that a treaty should generally be treated like federal legislation under the Supremacy Clause, and be regarded as "self-executing" – meaning in effect domestically in the US without follow-on special legislative action.¹⁹ There are, however, situations where a treaty can be regarded as "non-self-executing": in the language of *Foster*, such a treaty "addresses itself to the political, not the judicial department."²⁰ Such treaties require action by the political branch before the judiciary can apply the treaty as domestic law (what the *Foster* Court meant by a treaty "addressing" itself to one branch of government or another is precisely what becomes at issue in *Medellin*.)

It is best to admit this: *Foster* is in tension with the Supremacy Clause. *Foster* says non-self-executing treaties may not be supreme. For this reason, many commentators have argued – quite persuasively – that *Foster* should be read narrowly, meaning that there should be a strong presumption in favor of self-execution of treaties.²¹ Judicial practice since *Foster* – until *Medellin* – has been broadly consistent with this view.²²

¹⁵ U.S. CONST. Am. X.

¹⁶ *United States v. Belmont*. 301 U.S. 324, 330-31 (1937).

¹⁷ *Id.*

¹⁸ *Belmont's* sweeping language was narrowed and clarified in *United States v. Pink*. 315 U.S. 203, 230-31 (1942) ("[T]reaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy... [however] state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement."). See also, *Dames & Moore v. Regan*, 453 U.S. 654, 655 (1981); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003) ("There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the national government's policy...").

¹⁹ *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

²⁰ *Id.*

²¹ See, e.g., Carlos Manuel Vazquez, *Treaties as Law of the Land: The Supremacy Clause and the Presumption of Self-Execution*, 121 HARV. L. REV. (forthcoming 2008); Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L. L. (forthcoming July 2008); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §111 (1987). LOUIS

Powers pursuant to treaties

It is essential to review the powers granted to the President in our system to understand the domestic effects of treaties. The President's power in respect of treaty law is the greatest. The powers of the President – including the power to give domestic effect to treaty law – was illuminated by the Supreme Court in another famous case, *Youngstown v. Sawyer*, in 1952.²³ The Supreme Court prevented President Truman from commandeering US steel mills to support the Korean War effort, which he had attempted on the basis of his authority as civilian commander of the armed forces. In *Youngstown*, Justice Jackson provided a three-category framework for understanding US Presidential power:

1. In Category I, where the President acts with express or implied authority from Congress, Presidential power is at its "zenith," its highest point;
2. In Category II, where Congress is silent, Presidential power is in a gray "zone of twilight"; and
3. In Category III, where the President acts in defiance of express or implied Congressional orders, Presidential power is at its "lowest ebb."²⁴

We continue to use these categories today, as is evident from a reading of *Medellin*.

In the treaty law context, the President has historically been given significant latitude to act unilaterally under the *Youngstown* framework. Speaking broadly, this is because the Constitution affords the executive branch great power in foreign relations. The President may therefore wield significant powers even when in *Youngstown* Category III – acting in defiance of Congress – because the Constitution affords him authority to act independently of the legislative process. This conception of Presidential power is particularly important because it has been essential to the effectiveness of international executive agreements, which gain their currency from the President's broad foreign policy power as affirmed by the *Belmont* line of cases. In *Dames & Moore v. Regan*, for example, the Supreme Court upheld President Reagan's authority to nullify certain US companies' US court claims against the Islamic Republic of Iran in order to

HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 201 (2d ed. 1996); *see also*, Martin S. Flaherty, *History Right? Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999) (arguing that the Framers of the US Constitution understood treaties to be self-executing); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988) (same); *but see*, John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (December 1999).

²² *See* 128 S. Ct. 1391-92 (Appendix A to J. Breyer's opinion) (listing the broad range of treaty obligations found to be self-executing). In the successor case to *Foster*, *United States v. Percheman*, the Supreme Court clarified that a non-self-executing treaty is one that "*insist[s]* on the interposition of government" and "*stipulate[es]* for some future legislative act." *United States v. Percheman*, 32 U.S. 51, 7 Pet., 88-89 (1833). While not unequivocal, the language in *Percheman* seems to envision non-self-execution to require explicit commitment in the treaty language, and thus presume self-execution.

²³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579.

²⁴ *Id.* at 635 (Jackson, concurring).

implement the Algiers Accords – not Constitution Article II treaties – freeing US hostages in Iran and establishing the Iran-US Claims Tribunal.²⁵

Congress' power with respect to treaty law is limited but substantive. The Senate has the role of advising and consenting to treaties as a check on Presidential ratification. Once treaties are concluded, as established in the famous 1920 Supreme Court case of *Missouri v. Holland*, Congress also has the ability to legislate to effectuate treaty obligations.²⁶ This power remains even where such federal legislation impinges on domains traditionally reserved for the states.²⁷ Congress may legislate not only to effectuate treaties, but may also act in opposition to treaties. While the Constitution provides no explicit guide in such circumstances, judge-made law clarifies this relationship through the "later in time rule": where a federal statute and a treaty conflict, the one passed later in time prevails, regardless of the international legal implications.²⁸

Finally, the federal judiciary's powers with respect to treaty law is clear under Article III of the Constitution: federal judicial power explicitly extends to cases concerning treaties.²⁹

Medellin v. Texas

With this legal framework in mind, it is time we turn to the fate of José Ernesto Medellin and the latest chapter of the domestic effect of treaties in the United States.

The facts of the case are not pleasant. In our system, we say "bad facts make bad law." Medellin was convicted and sentenced to death under the criminal law of the State of Texas, for the gang rape and murder of two teenage girls.³⁰ He lived in the US from preschool.³¹ He was a member of a violent gang.³² He gave a detailed written confession within hours of his arrest.³³ He was given Miranda Warnings, but not informed of his Vienna Convention right to notify the Mexican Consulate.³⁴ He did not raise his Vienna Convention claim until after he was convicted

²⁵ 453 U.S. at 655.

²⁶ *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

²⁷ *Id.* In general, federal power is limited to those powers granted in the Constitution, and actions "necessary and proper" to the execution thereof: not so with international affairs. *United States v. Belmont* 301 U.S. 324, 330 (1937) ("The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.").

²⁸ See *The Head Money Cases*, 112 U.S. 581, 581 (1884) (later statute rules) ("[S]o far as a treaty made by the United States with any foreign nation...it is subject to such acts as Congress may pass for its enforcement, modification, or repeal."); *Cook v. United States*, 288 U.S. 102, 119-120 (1933) (later treaty rules).

²⁹ U.S. CONST. Art. III, § 2.

³⁰ 128 S. Ct. at 1354

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

and sentenced to death, and his appeal had failed.³⁵ The Texas trial court held that the treaty claim was procedurally defaulted.³⁶ The trial court also rejected the treaty claim on the merits, on the grounds that Medellín failed to show that non-notification impacted the validity of his conviction or sentence. (The Supreme Court noted that the Vienna Convention requirement of notification "without delay" is satisfied, according to the ICJ, if notice is provided within three working days; Medellín confessed within three hours.³⁷) Medellín's first *habeas corpus* petition was denied.³⁸

After his conviction, the ICJ issued its judgment in the *Case Concerning Avena and other Mexican Nationals (Avena)*, finding the United States in abrogation of its obligations under the Vienna Convention on Consular Relations (*VCCR*) for failure to inform 51 Mexican nationals sentenced to the death penalty, including Medellín, of their treaty rights to be put in contact with Mexican consular officials.³⁹ The ICJ ordered the United States by means of its own choice to "review and reconsider the convictions and sentences of the Mexican nationals to determine whether prejudice resulted from the violations, without regard to procedural bans."⁴⁰ Medellín filed a second *habeas corpus* petition in Texas for review of his detention on the basis of *Avena* despite the Texas procedural rule precluding successive *habeas corpus* petitions. His petition was again denied. Medellín's case was accepted by the Supreme Court.⁴¹ Before oral argument in 2005, President Bush issued a memorandum to the US Attorney general "determin[ing]... to discharge [the United States'] international obligations under [*Avena*] by having state courts give effect to the decision..."⁴² In other words, the President decided to use his powers unilaterally to execute the ICJ judgment. Based upon this memorandum, Medellín re-filed his *habeas corpus* petition in Texas. It was again denied. The matter reached the Supreme Court again in *Medellin v. Texas*.

What was the central question at issue in *Medellin*? What is the US domestic legal effect of the ICJ's *Avena* judgment on the Texas procedural rule denying Medellín successive *habeas corpus* review? Or, in short, is *Avena* controlling law in US state courts?

What was the answer? The Supreme Court decided that the ICJ's *Avena* judgment – although a binding international obligation – has *no* US domestic legal effect.⁴³ It bears emphasis that the Court was divided, with five Justices forming the majority (Chief Justice Roberts and Justices Alito, Kennedy, Scalia and Thomas); Justice Stevens concurring; and three dissenting (Justices Breyer, Ginsburg and Souter).

³⁵ 128 S. Ct. at 1354.

³⁶ *Id.* at 1354-55.

³⁷ *Id.* at 1346, note 1.

³⁸ *Id.* at 1355.

³⁹ 2008 I.C.J. at 72; Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, Article 36 (VCCR).

⁴⁰ 2008 I.C.J. at 72.

⁴¹ *Medellin v. Dretke*, 544 U.S. 660, 661 (2005) (per curiam).

⁴² George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005). Available at <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>.

⁴³ *Id.* at 1346.

The majority focused its analysis on determining whether the jurisdiction provision of the Vienna Convention's Optional Protocol (establishing ICJ jurisdiction) and the ICJ compliance provision of the United Nations Charter are self-executing, thus making the ICJ judgment enforceable US domestic law.⁴⁴ To determine whether these agreements were self-executing, the Court asked whether the texts of each treaty "reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect."⁴⁵ If not, the Court also considered whether the President had the power to effectuate the *Avena* judgment through his memorandum.⁴⁶

First, the Supreme Court looked at the Optional Protocol to the Vienna Convention, under which the United States agreed to submit Convention disputes to the ICJ.⁴⁷ The Optional Protocol reads: "Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie with the compulsory jurisdiction of the International Court of Justice." The Court summarily concluded that this provision is a "bare grant of jurisdiction" on the basis that "submitting to jurisdiction and agreeing to be bound are two different things."⁴⁸

Second, at the heart of its analysis, the Supreme Court looked at UN Charter Article 94(1) as the compliance provision related to ICJ judgments.⁴⁹ You will recall that Article 94(1) reads: "Each Member of the United Nations undertakes to comply with the judgment of the International Court of Justice in any case to which it is a party." The majority's opinion hinged on whether Article 94(1) is self-executing or non-self-executing. The majority read the phrase "undertakes to comply" as unequivocally prospective, and therefore not a "directive to domestic courts...[but] a commitment...to take further action through their political branches to comply."⁵⁰ In other words, as in the treaty in the early *Foster* case, Article 94(1) is not self-executing.

⁴⁴ Explicitly not at issue was whether the VCCR Article 36 obligations of consular notification are self-executing. *Id.* at FN 4. In the earlier VCCR death penalty case of *Breard v. Greene*, the Supreme Court, by way of its acknowledgement that the VCCR's provisions are the "supreme law of the land," implied that the VCCR is self-executing. *See*, 523 U.S. 371, 376 (1998) (per curiam). The Court backtracked in *Sanchez-Llamas v. Oregon* by "assuming but not deciding that the Convention creates judicially enforceable rights." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 331 (2006). That the VCCR is self-executing is in keeping with the Executive's and Senate's understandings at the time of ratification. *See* S. EXEC. REP. No. 91-9, app. at 2, 5 (1969) (statement of J. Edward Lyerly, Deputy Legal Adviser to the Department of State).

Also not at issue was whether the United States has an international legal obligation to comply with the judgment: the Supreme Court, and all parties to the case, agreed that it did. 128 S. Ct. at 1356 ("No one disputes that the *Avena* decision... constitutes an *international* law obligation on the part of the United States.").

⁴⁵ 128 S. Ct. at 1366.

⁴⁶ *Id.* at 1367-72.

⁴⁷ Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, Apr. 24, 1963, [1970] 21 U.S.T. 325, T. I. A. S. No. 6820 (Optional Protocol).

⁴⁸ *Id.*

⁴⁹ U.N. Charter art. 92(1), 59 Stat. 1051, T.S. No. 993 (1945).

⁵⁰ *Id.* 1358 (citing Brief for United States as *Amicus Curiae* in *Medellin I*, O.T. 2004, No. 04-5928, p. 34).

The majority supported its reading of Article 94(1) by noting that the Executive agreed in its *Amicus* brief that it is not self-executing.⁵¹

The majority found it somewhat more difficult, however, to divine the Senate's views, the view of the legislative branch. In order to do so, the Court used a combination of textual interpretation and ratifying history. Time prevents us from going into any detailed discussion of this, but given the topic of the third panel today, the Court's discussion of UN Charter Article 94(2) deserves mention. As you know, under Article 94(2), one party's failure to perform its obligation pursuant to an ICJ judgment entitles the other party to seek redress through Security Council action.⁵²

The majority found circumstantial evidence in Article 94(2) that the Senate intended Article 94(1) to be non-self-executing. The majority comes to the dubious conclusion that Article 94(2) is the "sole" enforcement mechanism for ICJ judgments,⁵³ and that the Senate and President understood this to be the case at the time of ratification and relied on the US veto to avoid compliance.⁵⁴

The majority then moved beyond its stated methodology of a purely textual-focused interpretation to review the *travaux préparatoires* and the "'post-ratification understandings' of signature nations".⁵⁵ The majority found no explicit indication that Article 94(1) was intended to be self-executing in these materials and considered this further evidence that the provision is non-self-executing.

Having determined that the UN Charter's Article 94(1) is non-self-executing, the Supreme Court turned to the question of whether the President had authority to execute the UN Charter through his memorandum. In other words, was the memorandum an effective "undertaking to comply" under Article 94(1)? As this question entered the realm of Presidential powers, the Court applied the *Youngstown* framework: it found the President to be in Category III.⁵⁶ The Court reasoned that, because the UN Charter language that Congress ratified (Article

⁵¹ *Id.* at 1350 ("Finally, the United States' interpretation of a treaty 'is entitled to great weight' and the Executive Branch has unfailingly adhered to its view that the relevant treaties do not create domestically enforceable federal law." (internal citations omitted)).

⁵² U.N. Charter art. 92(2), 59 Stat. 1051, T.S. No. 993 (1945).

⁵³ *Id.* at 1359. Nothing in the text indicates that Article 94(2) is the only avenue for enforcement or redress: indeed, both further ICJ action under provisional measures and diplomatic redress would be available to an aggrieved party. Further, the issue at hand in *Medellin* is not what happens when a State does not comply with an ICJ judgment (the subject of Article 94(2)), but what happens when a State is deciding *whether* it has a domestic law obligation to comply with an ICJ judgment regarding such State's abrogation of another treaty.

⁵⁴ *Id.* at 1359-60. The ratification history cited by the *Medellin* majority demonstrates that the Senate rightfully understood Article 94(2) not to provide the only enforcement mechanism of ICJ judgments, but as the ultimate recourse, along with diplomacy, once (and only after) a state has refused to abide by an obligation to execute an ICJ judgment.

⁵⁵ 128 S. Ct. at 1363 (internal citations omitted).

⁵⁶ *Id.* at 1368.

94(1)) is non-self-executing, Congress implicitly reserved its right to execute that treaty via legislation in the future and thereby impliedly denied the President power to execute it unilaterally.⁵⁷ The Court considered the phrase "undertakes to comply" in Article 94(1) to be a Congressional limitation on Presidential power, so the Court regarded this power to be at its "lowest ebb, in Category III of *Youngstown*."⁵⁸

The Supreme Court hurriedly dismissed other arguments in favor of giving effect to the President's memorandum. These included the White House's argument that unilateral execution of the *Avena* judgment fell under the President's foreign policy power to settle international disputes. The Supreme Court concluded that the power to settle such disputes does not enable the President to order state courts to supersede state law by reviewing and reconsidering the conviction and sentences in question.⁵⁹ Given the *Belmont* line of cases discussed earlier, you will not be surprised that many commentators – and, indeed, the dissenting Justices – disagree with this conclusion.

Finally, the majority rejected the argument that the President has the authority to execute the agreement under the Executive's constitutional authority under Article II, Clause 3 to "take care that the laws be faithfully executed."⁶⁰ Having concluded that the UN Charter Article 94(1) is non-self-executing, the Court further appeared to conclude that the judgment is not domestic law at all,⁶¹ and thus that the President cannot "take care" that it – as domestic law – is faithfully executed.⁶²

A brief review of the dissenting opinion is in order, if only to demonstrate that the majority's view on domestic implementation of US treaty law is far from the evident or only conclusion. Among other things, the dissenting Justices found:

- (a) First, the proper analysis is governed by the Supremacy Clause⁶³, with *Foster v. Neilson* providing a narrow but necessary exception where treaties explicitly stipulate for future legislative acts or otherwise precludes judicial enforcement.⁶⁴

⁵⁷ *Id.* at 1369.

⁵⁸ *Id.*

⁵⁹ The Court distinguished the President's ability to foreclose domestic courts to litigants in the *Belmont* line of cases, including *Dames & Moore* and *Garamendi*, as limited to the "narrow set of circumstances [of the] making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals." 128 U.S. at 1371 (citing *United States v. Belmont*, 301 U.S. 324, 327 (1937)). A Presidential directive to state courts is, according to the Court (citing the White House's *Amicus* brief), unprecedented. *Id.* at 1372.

⁶⁰ U.S. CONST. Art. II, § 3.

⁶¹ *See infra*, p. 9.

⁶² 128 S. Ct. at 1372.

⁶³ *Id.* at 1377 (Breyer, dissenting).

⁶⁴ *Id.* at 1379.

- (b) Second, the texts of treaties generally reveal little regarding whether a treaty is self-executing or not, because execution is a question of domestic law.⁶⁵ The Court has therefore historically relied on "practical, context-specific criteria" to determine whether a treaty is self-executing.⁶⁶ While interpretation begins with the text, it should not be in pursuit of explicit language addressing self-execution or not, but instead use the text to determine whether the subject is appropriate for the judiciary to address (self-executing), or is so "politically charged" that it is best viewed as being addressed to the political branch for implementation (non-self-executing).⁶⁷
- (c) Third, the Optional Protocol to the Vienna Convention is self-executing, based on both a natural reading and as a matter of logic, and it requires compliance with ICJ decisions.⁶⁸
- (d) Fourth, UN Charter Article 94(1) is also self-executing. The phrase "undertakes to comply" evidences an intention to be presently bound.⁶⁹
- (e) Fifth, several factors weigh in favor of judicial enforcement of the *Avena* judgment, including that:
 - (i) "review and consideration" of convictions and sentences is particularly "well suited to direct judicial enforcement";
 - (ii) judicial enforcement does not threaten constitutional imbalance of powers between the branches of the federal government; and
 - (iii) it is supported by the President himself (and Congress is silent).⁷⁰
- (f) Sixth, because the President's memorandum seeks to implement treaty provisions in which the United States agrees that the ICJ judgment is binding with respect to the *Avena* parties, the President's action falls in *Youngstown* Category II (the "zone of twilight"). Consequently, foreign policy exigencies weigh heavily in favor of the President's unilateral ability to effectuate the relevant obligations.⁷¹

Underscoring the wide range of views and, frankly, the general confusion, Justice Stevens's concurrence is sympathetic to the dissent's views, but joins the majority's conclusion. Stevens is ultimately persuaded that "undertakes," albeit ambiguous, is best read as language "that

⁶⁵ *Id.* at 1380. Breyer provides an Appendix of cases where treaties were found to be self-executing, and notes: "The many treaty provisions that this Court has found self-executing contain no textual language on the point... Few, if any, of these provision are clear." *Id.*

⁶⁶ *Id.* at 1382.

⁶⁷ *Id.* at 1382-83.

⁶⁸ *Id.* at 1376, 1386.

⁶⁹ *Id.* at 1381-82.

⁷⁰ *Id.* at 1388.

⁷¹ 128 S. Ct. at 1390-91 (Breyer, dissenting).

contemplates future action by the political branches."⁷² Optimistically, he encourages Texas to help the United States by choosing to comply with international law.⁷³ This, we now know, did not happen.

Medellin's implications for the domestic enforcement of treaties

So where are we? What are the implications of *Medellin v. Texas* for US domestic implementation of treaties? The case raises more questions than it answers, both with respect to the analytical framework it applies, and the conclusions the Court draws in applying that framework. The US's dichotomy between self-executing and non-self-executing treaties has been called a "morass" and it is more so now. The final third of these remarks is thus necessarily more in the form of questions than conclusions. For those who are interested, there is already much commentary to read about *Medellin* and there will be much more to come. You can find an Insight exchange on the American Society website and the next issue of the American Journal of International Law will include an Agora of articles setting forth different views.

Questioning Medellin's analytical framework

As an initial matter, the very different analytical approaches of the majority and dissent require consideration, especially since both opinions look to *Foster* for guidance as to how to differentiate self- and non-self-executing treaties. *Foster* distinguishes between those treaties addressing themselves to the political branch, and those addressing themselves to the judiciary. The majority and dissent, however, understand this principle differently. The majority understands "address" in a very literal sense: it turns *Foster's* formulation into an exercise of close textual analysis and treaty interpretation. This is in keeping with the plain language of *Foster*. The dissent, on the other hand, reads *Foster* in light of the Supremacy Clause, suggesting that treaties are "addressed" to the legislature when the court has no standard by which to apply treaty law pursuant to the Supremacy Clause's command. Under the dissent's view, *Foster* is justified in varying from the Constitutional command of the Supremacy Clause because the judiciary has no choice, in some cases, but to wait for the legislature to act.⁷⁴ This is in keeping with the view that self-execution is essentially left to domestic law, and is only partially a question of treaty interpretation. The majority's and dissent's differences can largely be explained by this differing understanding of *Foster*.

Although scholars are already debating it, the *Medellin* majority's analytical approach appears to shift the background presumption from one favoring self-execution of treaties to one favoring non-self-execution. On the one hand, the Court stated it does not "require that a treaty provide for self-execution in so many talismanic words."⁷⁵ On the other hand, the Court also encouraged the other branches to ensure self-execution "by ensuring that [a treaty] contains language plainly providing for domestic enforceability." It is hard to reconcile the Court's

⁷² *Id.* at 1374 (Stevens, concurring).

⁷³ *Id.* at 1374-75.

⁷⁴ Under the alternative understanding of *Foster*, which presumes self-execution, the *Avena* decision would be binding. The UN Charter has instructed the US to "undertake to comply" and the ICJ has instructed it to "review and consider" the relevant convictions and sentences in light of the VCCR violations: these are precisely the types of standards the judiciary is capable of applying.

⁷⁵ *Id.* at 1366.

preference for such plain self-execution language with anything other than a presumption that treaties are non-self-executing. The scope of this presumption is, however, entirely open to question.

Indeed, the scope of the Court's textualism is also open to question, perhaps necessarily so because treaties so rarely address the mechanics of execution. Justice Breyer, in the dissent, noted that the majority cited *not one* case with the plain language it wanted to see.⁷⁶ Certainly not *Foster v. Neilson* – the only other Supreme Court case finding a treaty non-self-executing. There, the Court flagged language indicating non-self-execution, a stipulation for future legislation. Even there, however, the Supreme Court concluded that the same treaty text was self-executing only four years later in *Percheman*.⁷⁷

Moving beyond the text itself, the *Medellin* Court began to answer, but ultimately left open, what materials are relevant to aid the judiciary in its textual analysis of treaties. The Court stated that finding the intent of the President and Senate were animating forces for its textualism – but one could still ask *which* Senate's intent and *which* President's intent? Is, for example, the intent of the ratifying President dispositive, or the intent of the sitting one?⁷⁸ Is the first President's intent to execute an international obligation relevant to determining whether the treaty is self-executing, or only the current President's interpretation that it is not itself self-executing?⁷⁹

⁷⁶ See 128 S. Ct. at 1381 (Breyer, dissenting) ("[T]he majority does not point to a single ratified United States treaty that contains the kind of 'clea[r]' or 'plai[n]' textual indication for which the majority searches...few of them actually *do* speak clearly on the matter.") (internal citations omitted).

⁷⁷ 32 U.S. at 87. By considering *Foster* but neglecting *Percheman*, the *Medellin* court also leaves in question the relevance of differences in equally authoritative treaty texts. The *Medellin* majority cites to *Foster* to support its textualist approach, yet the *Percheman* Court used the equally authoritative Spanish text to conclude that the treaty in *Foster* was, in fact, self-executing. The *Medellin* majority fails to consider any of the five equally authoritative foreign language texts of the UN Charter 94(1). The *Medellin* dissent observes that the Spanish text of the UN Charter reads "'compromete a complir' indicat[ing] a present obligation to execute, without any of the tentativeness of the sort the majority finds in the English word 'undertakes.'" 128 S. Ct. at 1384. It is unclear, given that so much of the *Medellin* Court's analysis rests on the meaning of "undertakes," why this broader analysis is not undertaken.

⁷⁸ One might presume that the ratifying President's intent is the more relevant one, because it avoids courts having to take into account *post hoc* interpretations that are at odds with the undertaking of international responsibilities at the time of ratification. The Court places "great weight" on the sitting President's interpretation without discussion of the issue. *Id.* at 1350 (internal citations omitted).

The fact that Justice Scalia was in the *Medellin* majority is interesting in light of his former hostility to the practice of examining the Senate's ratifying history as relevant: as a consequence of his historical dissent on the issue, the Senate's ratifying history had not been cited by the Supreme Court as a means of treaty interpretation since the 1989 case *US v. Stuart*. See, David J. Bederman, *Medellin's New Paradigm for Treaty Interpretation*, 102 AM. J. INT'L L. (forthcoming July 2008).

⁷⁹ See Steve Charnovitz, *Revitalizing the US Compliance Power*, 102 AM. J. INT'L L. (forthcoming July 2008) (arguing that the President's attempt to ensure the treaty was executed via his memorandum should itself provide evidence that the relevant treaty provisions are self-executing).

The majority also stated that the pre- and post-ratification views of the signatories are relevant to treaty interpretation, but left the nature of that relevance unexplored. Skipping any analysis of the pre-ratification *travaux*,⁸⁰ the Court really only looked to post-ratification practices as indicative of the parties' interpretations, noting that there is little, if any, evidence that other signatory countries regard Article 94(1) as self-executing.⁸¹

As much as the Supreme Court's consideration of foreign law and practice is generally a win for the strengthening of international law, it is not appropriate here. Going back to *Foster*, the United States has recognized that its system of self-execution is at odds with that of other jurisdictions.⁸² It is therefore of little relevance to US interpretation of its own treaty law whether, for example, the British system requires all treaties to be executed by its legislature, or the Dutch system does the opposite. One may take the view, as the *Medellin* dissent did, that treaties are generally silent with respect to execution precisely because of the diversity of national systems. In this light, the formulation in UN Charter Article 94(1) of "undertakes to comply" may be an elegant way of acknowledging that domestic regimes necessarily differ in how they execute and comply with treaties. Such open-ended language would not, however, mean Article 94(1) is not self-executing in the peculiar US system.⁸³

Questioning Medellin's conclusions

Having raised a few questions arising from the Supreme Court's analytical approach in *Medellin*, it is necessary to do the same for the Court's conclusions.

From the perspective of a US international lawyer, a presumption against self-execution of treaties is troubling in several respects. Treaties, setting out the agreement of States with different legal systems, realistically will not have language tailored to the United States' (not simple) system of treaty execution. As the dissent in *Medellin* notes, few jurisdictions have a Constitutional provision making treaties self-executing, and many in fact require legislation for *any* treaty to be enforceable.⁸⁴ It is at least cause for concern that the Supreme Court is placing a burden on US negotiators to ensure that treaties explicitly address self-execution, i.e. say "this is self-executing." It is not troubling that treaties are non-self-executing in any given regime; this is common enough throughout the world. US international lawyers, however, including those

⁸⁰ Despite the statement that the *travaux preparatoires* are relevant, the Court neither cited to them nor indicated why they are absent from its analysis. This question is particularly salient in light of the Supreme Court's frequent use of *travaux* and the VCLT's designation of the *travaux* as a secondary source for treaty interpretation. For further treatment of this issue, see Bederman, *supra* note 78.

⁸¹ 128 S. Ct. at 1362.

⁸² 27 U.S. at 314 ("A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is intra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument...In the United States a different principle is established. Our constitution declares a treaty to be the law of the land.").

⁸³ The absence of *travaux* analysis in the majority and dissenting opinion may reflect a general absence of discussion of self-execution or non-self-execution in the *travaux*, consistent with the diversity of domestic practices in this regard.

⁸⁴ 128 S. Ct. at 1388 (Breyer, dissenting).

negotiating treaties, have operated under a different set of presumptions with respect to our home laws. We may now have to revise our views on treaties past, present and future.

It is also difficult to take the majority's conclusion that the President may not unilaterally implement the Vienna Convention Optional Protocol and Article 94(1) and reconcile it with the broad powers granted by the Constitution to the Executive in respect of international affairs. Essential to this conclusion is the majority's opinion that Article 94(1) is unambiguously non-self-executing. If the provision were ambiguous and Congress could be regarded as silent on the issue, then Presidential power would derive from *Youngstown's* Category II. In this "zone of twilight," to quote Justice Jackson, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables." This would require the Supreme Court to balance US foreign policy imperatives against the Texas procedural *habeas corpus* rules.⁸⁵ This would not be a simple exercise. As Justice Stevens's concurrence points out, the Court's analysis of Article 94(1), for all its importance, is fairly superficial.⁸⁶

Also essential to the majority's analysis is the understanding that the Senate's "statement" in consenting to the treaty language "undertakes" is analogous to Congress (the Senate plus the House) having legislated to directly prohibit the President from acting, as was the case in *Youngstown*. Further, Congress's "statement" must be closer in kind to *Youngstown* than to, say, Congress's silence in *Dames & Moore*. Based on these far from obvious premises, the Court concluded that the President did not have the authority to "undertake to comply" with the decision alone, but that the proper power to "undertake to comply" lay with Congress.

Even if one assumes the President must draw on independent Constitutional authority to act in the face of implicit Congressional disapproval, the *Belmont* line of cases suggests that the Constitution authorizes execution of treaty obligations as contemplated in the President's memorandum. While the lower courts grappled with this question,⁸⁷ the Supreme Court rather quickly concluded that, because the President's issuance of the memorandum was not long-standing executive practice, it fell outside of this line of cases. While the President's *Medellin* memorandum was novel, one may question whether the national policy issues at stake in *Belmont* and its progeny were any less sensitive.

As a US lawyer, it is most difficult to reconcile a presumption against self-execution with the Supremacy Clause. Such a presumption would appear to make many treaties – with language equally or less executory than the Optional Protocol and Article 94(1) – something less than "the supreme law of the land" binding on the US states and their judiciaries.⁸⁸ Again, by way of reminder, the US Constitution states:

⁸⁵ 343 U.S. at 635.

⁸⁶ 128 S. Ct. at 1373.

⁸⁷ See, e.g., *Ex parte Medellin*, 223 S.W.3d 315, 334-35 (2006)

⁸⁸ It also seems at odds with *Percheman*, which envisions *non*-self-execution to require explicit commitment in the treaty language, and thus implies a presumption in favor of self-execution. See *supra* footnote 22.

*This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or 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, anything in the Constitution or laws of any state to the contrary notwithstanding.*⁸⁹

Most troubling, *Medellin* leaves unclear whether non-self-executing treaties are "merely" judicially unenforceable, or not US domestic law at all. The Supreme Court seems to imply strongly that such treaties are not US domestic law at all.⁹⁰ It is extremely difficult to reconcile this view with the Supremacy Clause – *all* treaties are the supreme law of the land. If non-self-executing treaties are not US domestic law and there is a presumption against self-execution, *few* treaties indeed will be the supreme law of the land.

This issue is not purely academic. If a non-self-executing treaty is not law at all, it must somehow fall outside the Supremacy Clause. If this were the case, it may not be incumbent upon US states to comply with treaty obligations (as per Justice Stevens's pleas in his concurrence in *Medellin*). Further, sometimes legislation provides for the enforcement of "treaties" generally, as is the case with the US federal *habeas* statutes:⁹¹ if a "treaty" internationally is not a "treaty" domestically (under the Supremacy Clause), then such legislation may be ineffectual with respect to non-self-executing treaties.⁹²

Equally significantly, it is unclear whether the Executive branch is *obligated* to act in accordance with a non-self-executing treaty if it is not domestically enforceable law.⁹³ It is, in fact, unclear *what* avenues are available to the Executive to comply with its international obligations when a treaty is non-self-executing. The majority opinion in *Medellin* stresses that the President could comply with the treaty obligations in question "by some other means, so long as they are consistent with the Constitution."⁹⁴ It is hard to imagine what those other means would be. The majority's statement is particularly curious given that the Court concluded that where the judiciary has determined a treaty to be non-self-executing, it has by implication also determined that Congress intended to foreclose unilateral Presidential execution of that treaty.

⁸⁹ U.S. CONST. Art. VI, § 2.

⁹⁰ *See, e.g.*, 128 S. Ct. at 1356 (non-self-executing treaties "do not by themselves function as binding federal law."). *See also id.* at 1372 (concluding that the President's Constitutional authority to "take care that the law be faithfully executed" does not apply because the non-self-executing treaties in question are not domestic law).

⁹¹ *See* 28 U.S. § 2241(c)(3) ("The writ of *habeas corpus* shall not extend to a prisoner unless... He is in custody in violation of the Constitution or laws or treaties of the United States...").

⁹² Posting of Steve Vladeck to Opinio Juris. Available at <http://opiniojuris.org/2008/03/25/medellin-non-self-executing-treaties-and-the-supremacy-clause/> (March 25, 2008, 1:52 PM EDT).

⁹³ The 1949 Geneva Convention on the Treatment of Prisoners of War, for example, may have requirements that are clearly in the President's power to execute, but if those requirements are non-self-executing under *Medellin*, is the President have to execute them? *Pers. comm.* David Golove, July 31, 2008.

⁹⁴ 27 U.S. at 1731.

The Court's analysis essentially precludes the possibility that a treaty could be non-self-executing according to the judiciary, but ambiguous with respect to Congressional intent and thus potentially executable by the President. Thus the President's domestic avenues of enforcement are all but entirely foreclosed. The President, of course, has no viable international options to ensure the unexecuted ICJ decision is enforced domestically: I doubt that the Supreme Court was envisioning the President taking an ICJ judgment to the Security Council for enforcement against the United States (which, according to the Court, is the only avenue for ICJ judgment enforcement under international law).

The Court may simply be saying that, as a general matter, the President may act in accordance with international obligations subject to the limitations of the Constitution. On the other hand, the court's implication that treaties are not domestic law at all suggests that such Executive compliance would be discretionary.

As foreshadowed at the outset of these remarks, the application becomes even more complicated when applying *Medellin* to the executive agreements that make up most of the United States' international obligations:

- Where the President relies on his independent Constitutional powers to conclude a non-self-executing executive agreement, is he more or less capable of unilaterally executing it than a Constitution Article II treaty?
- Where an international agreement is concluded *after* legislation has been enacted that empowers the President to conclude the agreement (as is often the case with executive agreements), does such enabling legislation itself favor a presumption of self-execution where relevant treaty language is vague, ambiguous or altogether absent?

Finally, lest I create the impression that the above discussion is comprehensive, it is worth noting a few of the many other substantive issues that *Medellin* raises:

- Do self-executing treaties themselves create privately enforceable rights? If not, is this an additional hurdle, distinct from execution, that litigants must face in seeking redress pursuant to a treaty obligation?
- Should ICJ provisional measures, such as the one subsequently issued by the ICJ in connection with *Avena*,⁹⁵ be treated differently from ICJ judgments?
- Are there limits on each of the 50 states' authority to act in accordance with non-self-executing treaties?

Conclusion

Despite the above confusion, we can conclude with four positive points.

First, despite the myriad questions *Medellin* raises about the domestic effects of US treaty obligations, this is unlikely to prove a Constitutional or international law crisis. The Supreme Court likely will limit the applicability of the decision, if only to give itself latitude with respect

⁹⁵ 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. 139.

to future decisions. Remember what was – and is – ultimately at issue in *Avena* and *Medellin*: the death penalty in the US. The sensitivity of this issue should also limit the impact of the decision on general treaty law.

Second, from the perspective of an international arbitration lawyer and that of private international law more generally, the Supreme Court in *Medellin* indicated that the decision should not be viewed as disrupting the functioning of international dispute resolution in the context of commerce and trade.⁹⁶ Whether or not the Court was successful in making a *reasoned* distinction between the criminal law issue at hand in *Medellin* and commercial matters, we can perhaps find comfort in the fact the Supreme Court intends to treat the vast area of international commercial matters differently.

Third, every challenge is an opportunity. The American Society of International Law and the American Bar Association International Law Section have created a joint task force to review existing US treaty obligations to ascertain whether they should be considered self-executing or non-self-executing in light of *Medellin*, and to determine whether and how the US treaty-making process should be altered going forward in light of *Medellin*. Results will be published.

Fourth, regardless of one's views on the reasoning or advisability of the *Medellin* decision, one thing is clear: the Supreme Court has handed Congress the ultimate responsibility to ensure that the United States complies with the Vienna Convention Optional Protocol and UN Charter Article 94(1) as to the 51 Mexican nationals in *Avena*. As acknowledged by the President, failure to bring the US into compliance with the Vienna Convention would set a dangerous precedent, undermining the reciprocal consular rights that US citizens are entitled to enjoy while traveling, living or working abroad. For that reason, I and all living past presidents of the American Society have sent letters to Congress in our personal capacities urging quick passage of implementing legislation. The House of Representatives is considering legislation that would direct federal courts to hold the review and reconsideration hearings in the *Avena* cases. While any such legislation will be too late for José Medellin, it would certainly be important to the other Mexican nationals, to Mexico and to those of us who would like to see the United States recognized for compliance with its international obligations.

Thank you for your kind attention to these remarks on a complicated subject. Let us hope that today's presentations demonstrate that these issues are clearer in your legal systems.

If the new Malaysian Societies will honor the American Society of International Law by accepting our gift, we would like to donate to the new library a copy of our centennial history – the *American Society's First Century*. When you publish your centennial history, we would be grateful if it noted the support enthusiastically given by the American Society at your inaugural conference.

⁹⁶ See 128 S. Ct. at 1365.