from the newsletter

Vol. 24, Issue 3
July/September 2008

Society Resources Brought to Bear on *Medellín*

Notes from the President

I never cease to be amazed by how much the Society has going on at any one time. To mention only a few recent routine and not-so-routine activities: the first steps of our MacArthur Foundation-funded Task Force on the International Criminal Court, chaired by Judge **Patricia Wald** and former Legal Adviser **Will Taft**; the June meeting on Accountability in Peacekeeping Missions and 1325 Implementation, co-sponsored by the Center for Strategic and International Studies, the Finnish Embassy, and the Society, at which we were again graced with the frank views of our 2008 Grotius Lecturer, **Prince Zeid Ra'ad Al-Hussein**, Ambassador of Jordan; the dispersing of the twelve 2008 Helton Fellows to tackle their human rights projects around the world; the editing of the 2008 Annual Meeting Proceedings; and, starting the cycle again, the first official meeting of the Program Committee for the 2009 Annual Meeting.

My duties have take me from Pittsburgh to celebrate Judge **Ted Meron**'s receipt of the prestigious Charles Homer Haskins Prize from the American Council of Learned Societies for his lifetime of learning; to Kuala Lumpur for Asian Society of International Law proceedings; and to Chautauqua, NY for the Second International Humanitarian Law Dialogs among international criminal prosecutors.

I hasten to add that it is not the number of activities or the number of air miles that is impressive, but the quality of what the Society undertakes and achieves with modest financial resources. The key to our success is, as I emphasized at the 2008 Annual Meeting, the extraordinary breadth and depth of our Tillar House staff and our member resources.

Nowhere is this better illustrated than by the roles the Society and Society members have played in the recent U.S. Supreme Court case of *Medellín v. Texas* and the reactions to the Court's decision. *Medellín* involves many international law issues, among them compliance with the Vienna Convention on Consular Relations, compliance with ICJ judgments, and international treaty law in the U.S. system. Our members are active (visibly and otherwise) on all aspects and at all levels.

Medellín, of course, is the decision in which the Supreme Court unanimously agreed with the Bush administration — and ASIL Vice President **Donald Donovan**, counsel for José Medellín — that the International Court of Justice judgment in *Avena* creates a binding international obligation on the United States to "review and reconsider" the convictions and death sentences of 51 Mexican defendants to determine whether prejudice resulted from the failure of U.S. law enforcement officials to inform them of their Vienna Convention rights to contact Mexican consular officials upon detention. So far so good. But this is also the decision in which a majority of the Court proceeded to hold that the ICJ judgment is not binding federal law because the relevant treaties – Article 94(1) of the UN Charter and the Optional Protocol to the Vienna Convention – are not self-executing and so, absent implementing legislation from Congress, are not enforceable by federal courts against Texas.

With Medellín facing execution in Texas on August 5 and a provisional measures case underway in The Hague, I and all the living former Presidents of the Society — **José Alvarez, Charles Brower, Jim Carter, Tom Franck, Lou Henkin, Art Rovine, Anne-Marie Slaughter, Peter Trooboff** and **Edie Brown Weiss** — wrote to the Senate and the House on July 17 requesting urgent implementation of legislation to implement *Avena*. We wrote our letter, posted on the ASIL website (www.asil.org/presidentsltr), in our personal capacities. Notwithstanding our differing views about the merits of the *Avena* and *Medellín* decisions, one thing at least was clear: Congress could ensure U.S. compliance with the binding international law obligation in the ICJ judgment, as recognized by both the Supreme Court and the Bush Administration. Hence, we emphasized in our letter that the United States' violation of the Vienna Convention and the ICJ judgment would threaten the reciprocal "rights that American citizens are entitled to enjoy while traveling, living, or working abroad" and "damage the reputation of the United States as a nation that respects international legal obligations and holds others to the same high standard." Thanks to ASIL Director of Communications and Member Relations **Sheila Ward**'s contemporaneous press release and persistence, José and I and four other members were interviewed by several print and broadcast journalists. Overall, we went a long way towards educating Congress and the public that *Medellín* was not primarily about the Texas death penalty (for an admittedly horrendous crime) but about U.S. responsibilities and rights under international treaties.

The Presidents have been far from the only ASIL members speaking out on and analyzing *Medellín*. **Peggy McGuinness**

wrote an *ASIL Insight* on April 17 on the Supreme Court decision and, by my count, there are some 10 other *ASIL Insights* by member experts explaining the international law issues and implications of the case. Donald Donovan did an ASIL Webinar. The Society sponsored a panel with the DC Bar. We have set up with the ABA International Law Section a Task Force on Treaties in U.S. Law, chaired by **Ron Bettauer**, to review existing treaties and the treaty making process against the *Medellín* standards. The July volume of AJIL will contain an Agora on *Medellín*, and many ASIL members are writing on *Medellín* and the underlying treaty law issues in other leading journals. We have long included the importance of Vienna Convention consular warnings in our judicial training and other outreach.

"Notwithstanding our differing views about the merits of the *Avena* and *Medellín* decisions, one thing at least was clear: Congress could ensure U.S. compliance with the binding international law obligation in the ICJ judgment . . ."

I leave the in-depth analysis of the treaty law issues to ASIL scholars and the sorting of the practical implications for treaty making to ASIL treaty lawyers, groups that heavily intersect – another element of the Society's breadth and depth. But I do offer two observations, one on the international law of treaties and one on the Vienna Convention itself.

The first does trespass somewhat on the scholars. To prepare to speak about the implementation of treaties in U.S. law and *Medellín* at the inaugural meeting of the Malaysian Society of International Law and Malaysian Chapter of the Asian Society of International Law in Kuala Lumpur in August (on the invitation of our Honorary Member, ICJ Judge **Hisashi Owada**), I re-taught myself the basics of U.S. treaty law and studied the *Avena* and *Medellín* records in detail. With only some 30 minutes to speak, I had to cut to the quick. Which, in my view, inescapably is this: In the 1829 Supreme Court case creating the self-execution concept, *Foster v. Neilson* (27 U.S. 253), the Court found the relevant land treaty to be – exceptionally – non-self-executing because it contained specific language anticipating future legislative action. Four years later, in *United States v. Percheman* (32 U.S. 51), the Supreme Court found the same treaty to be self-executing, based on the Spanish version. In the next Supreme Court case scrutinizing self-execution – *Medellín*, 175 years later – the Court found the relevant treaties to be non-self-executing because they lack specific language indicating that they are intended to be self-executing. This despite the fact – a fact I know well as a former negotiator of international agreements – that self-execution is a U.S. national law concept rarely, if ever, appropriately included in treaties. Whether one perceives presumptions of self-execution versus non-self-execution in play or not, and whether one predicts *Medellín*'s impact to be limited to criminal cases or not (and I welcome the debates underway among ASIL members on these and other issues – see the upcoming AJIL Agora), U.S. law on the self-execution of treaties is more confounding than ever. I agree with José Alvarez that determining whether a treaty is self-executing based on its "plain language" – apparently now to include the "plain absence" of the elusive words "self-executing" – is a hazardous exercise. I, for one, look forward to the results of the ASIL-ABA Task Force on Treaties in U.S. Law.

Second, I turn to my observation on Vienna Convention consular rights. I, and the living former ASIL Presidents and doubtless most other ASIL members, deeply regret that the United States did violate its international law obligations when Texas executed Medellín on August 5. But it bears emphasis that, as a result of *Avena* and the related Vienna Convention death penalty cases, law enforcement officials in the United States now read detainees their "consular warnings" far, far more reliably than they did in the past. And it bears emphasis, whether or not one agrees with Texas that Medellín received an adequate substitute for the ICJ-ordered "review and reconsideration" (which I do not), that Texas "acknowledge[d] the international sensitivities presented by the *Avena* ruling" in its Brief in Opposition to *Medellín*'s stay of execution application in the Supreme Court, 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."

To conclude, we are witnessing advances in compliance with international law in important respects. This is due in some immeasurable but significant part to the roles played by ASIL members – as counsel for Medellín and others, as counsel for the U.S. Government, as judges, as commentators, as critics, as activists, as Task Force members, as teachers. I have by no means mentioned everybody by name. That they have all brought the breadth and depth of their skills to bear on a critical international law issue serves us all well.

Lucy F. Reed