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US Supreme Court, *Medellín* v. *Texas*: More than an Assiduous Building Inspector?

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Abstract

The US Supreme Court case of *José Ernesto Medellín, Petitioner* v. *Texas*, decided on 25 March 2008, has generally been seen as a US refusal to follow unambiguous treaty provisions. There has not been such a strong reaction to US behaviour relative to specific treaty obligations since the 1992 *Alvarez-Machain* case. The Supreme Court majority (six votes to three) held that 'neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law'. The uncomfortable – and to many illogical – conclusion reached by the Court was that even though *Avena* is an 'international law obligation on the part of the United States', it is not binding law within the United States even in the light of an explicit presidential order. While the result may be disappointing, the case should be understood in the context of a legal system that (i) makes treaties part of 'the supreme Law of the Land'; (ii) has developed a complicated concept of self-executing treaties; and (iii) can be hesitant to direct states (sub-national units) to follow presidential directives even on matters of foreign policy.

Key words

Alvarez-Machain; *Avena*; common law; *Medellín* v. *Texas*; self-executing treaties; *stare decisis*; Supremacy Clause; US Supreme Court; Vienna Convention on Consular Relations

1. Introduction

The focus of this article, the ruling in the US Supreme Court case of *José Ernesto Medellín, Petitioner* v. *Texas*, handed down on 25 March 2008,[1] has attracted considerable attention in academic, diplomatic, and government communities.[2] The decision has intrinsic significance but must also be understood in context. The minutiae of individual decisions can obscure their broader importance. This is especially true for the United States, where in 2008 one finds a unique confluence of the following:

1. a precedent-driven, judge-centred common law legal system;

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1 *José Ernesto Medellín, Petitioner v. Texas*, 552 US ___ (Sup.Ct. 25 March 2008). The slip opinion includes a syllabus, the Opinion of the Court (majority) delivered by Chief Justice J. G. Roberts, a concurring opinion written by Justice J. P. Stevens, and a dissenting opinion written by Justice S. G. Breyer and joined by Justices R. B. Ginsburg and D. H. Souter. Each part of the slip opinion has its own pagination and is cited separately hereafter. The slip opinion is available at www.supremecourtus.gov/opinions/07pdf/06–984.pdf.

2 See notes 131, 134, 135, 144, 146, and 147 and accompanying text, *infra*.

2. a federal system with frequent disagreement about where the locus of legal power should reside;
3. a presidential system with conflict as to executive and legislative authority;
4. a unipolar world with more military power concentrated in one state than at any time since the First World War;
5. a widely held perception that the United States is inadequately supportive of international law and international institutions and is often hypocritical, openly spurning international law as a guide for its own behaviour while admonishing other states to toe the legal line; and
6. polarized views about the death penalty held by those involved with the case.

These six factors in combination create a maelstrom of complexity, making the decision and the shadow it will cast difficult to understand and subject to differing interpretations. In the following section, we describe the general contours of the decision – this can be done concisely but not briefly. In the final section we place the case in a broader context and speculate whether *Medellín* might change the legal–political environment in the United States, producing a less hostile climate for international law. Time and space preclude a thorough examination of all six of the above factors. However, providing a brief overview of the context within which the US Supreme Court has dealt with international law is desirable.

In the broadest sense, the US Supreme Court's posture towards international law and how the Court approaches US municipal law is shaped by the US Constitution. Even though that document and the way it is understood have evolved significantly since 1787[3] it still, as it were, sets the stage on which the Supreme Court operates. The Constitution falls in the dualist camp. In fact, strong advocacy of monism and Professor Kelsen's *Grundnorm*[4] might create an immediate need to fill several vacancies on the Court. Dualism in the case of the United States means that international law cannot override the Constitution, should the two come into direct conflict.[5] There is less to the preceding assertion than one might infer because the Constitution was constructed anticipating the need to deal with international law, of course within a *stare decisis* common law framework.[6] Historically, the United States has been disposed to follow international law. This inclination was stated – probably overstated – in the *Charming Betsy* doctrine from an 1804 Supreme Court case.[7] This doctrine, developed in response to the issue of the rights of neutrals in time of war,

3 US Constitution, adopted 17 September 1787.
4 See H. Kelsen, *Principles of International Law* (1966).
5 See J. H. Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis', (1992) 86 AJIL 310, at 314 and 318. 'In a dualist state, international treaties are part of a separate legal system from that of domestic law (hence a "dual" system). Therefore, a treaty is not part of the domestic law, at least not directly.' '[C]onstitutions generally are deemed superior to treaties.'
6 'Stare decisis states that judicial decisionmaking should adhere to precedent. Precedent provides a source external to the judges' individual opinions that legitimizes their reasoning, supplying ready evidence that judicial decisions are based on more than individual whim.' P. H. Dunn, 'How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis', (2003) 113 *Yale Law Journal* 493, at 493.
7 *Murray v. Schooner Charming Betsy*, 6 US (2 Cranch) 64 (Sup.Ct. 1804).

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has been widely cited: 'An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains'.[8]

The Constitution, especially for a document written in the eighteenth century, deals extensively with international law. Those with even minimal familiarity with US constitutional law understand that the Supremacy Clause stipulates that 'all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land'.[9] Almost as well known is the presidential power to make treaties 'provided two thirds of the Senators present concur'.[10] Of course, the United States as a modern state with global reach and thousands of treaty obligations has had to accommodate the infeasibility of submitting all treaties to the senate for 'Advice and Consent'.[11] The result is that most US treaties are executive agreements that do not require Senate action. Less well known but very important from an international law vantage is the provision in Article I that explicitly grants Congress the power 'to *define* and *punish* Piracies and Felonies committed on the High Seas, and Offenses against the *Law of Nations*'.[12] This provision both acknowledges the importance of international law and asserts US prerogatives in specifying the contours of that law.

As expected in a broad-brush common law constitution, the US Constitution left considerable room for interpretation. For international law, one of the first important issues to arise was self-executing treaties. Chief Justice Marshall, in one of the most significant cases in US constitutional history, *Foster & Elam* v. *Neilson*,[13] examined the issue of what, given the Supremacy Clause, was necessary for treaty provisions to become part of US municipal law. In doing so, Marshall created the theory of self-executing treaties without explicitly using the term. Marshall wrote,

> Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract – when either of the parties engages to perform a particular act – the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court.[14]

The shadow of Justice Marshall's opinion is long, certainly extending to the case that is the subject of this piece. The issue of whether a treaty or certain parts of it are self-executing can be highly contentious. Sometimes the intent that a treaty be transported into US municipal law is manifestly clear. In other instances, for example when the domain of Congress is involved or individual rights are asserted, self-execution can be highly problematic. Self-execution of treaties is a factor in many US Supreme Court cases (including the case at issue here).

8 Ibid., at 118.
9 US Constitution, Art. VI, Clause 2. See text at note 150, *infra*.
10 Ibid., Art. II, Sec. 2, Clause 2.
11 Ibid.
12 Ibid., Art. I, Sec. 8, Clause 10 (emphases added).
13 *Foster & Elam v. Neilson*, 27 US 253 (Sup.Ct. 1829).
14 Ibid., at 254.

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An opportunity to clarify this matter arose in *United States* v. *Pink*,[15] decided by the Supreme Court in 1942. The trigger was a Russian insurance company that in 1907 established a branch in the state of New York. The insurance company was nationalized after the Russian Revolution of 1917. After President F. D. Roosevelt took office in March 1933, US policy changed and negotiations began to normalize relations with the Soviet Union. The process, commonly called the Litvinov Assignment,[16] resulted in US recognition of the USSR. The process of normalization of relations – as we would call it today – involved who had the right to assets of the Russian insurance company held in the United States. The decision of the Court in *Pink* shows international law being applied as US law in the face of objection from the state of New York and the rights of individuals to claim assets.

The Court held that 'by the nationalization decree, the property in question became vested in the Russian Government; the right of the Russian Government passed to the United States under the Litvinov Assignment, and the United States is entitled to the property as against the corporation and its foreign creditors'.[17] The decision had to confront rights guaranteed by the Fifth Amendment to the US Constitution, most pertinently the provision that assures that the people will not 'be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation'.[18] One plausible reading of *Pink* is that, in this instance, a broader national interest overrode the usually available protections of the Fifth Amendment:

> [T]he Fifth Amendment does not stand in the way of giving full force and effect to the Litvinov Assignment. To be sure, aliens as well as citizens are entitled to the protection of the Fifth Amendment . . . The Federal Government is not barred by the Fifth Amendment from securing for itself and our nationals priority against such creditors.[19]

Finally, *Pink* asserts that '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.'[20] This sweeping statement illustrates how far self-execution can be taken and how the axiom that international law cannot override the US Constitution is an important general rule, not an absolute prohibition that can be implemented easily and simply.[21]

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15 *United States v. Pink*, 315 US 203 (Sup.Ct. 1942).

16 See 'Exchange of Communications between the President of the United States and the President of the all Union Central Executive Committee' and 'Exchange of Communications between the President of the United States and Maxim M. Litvinov People's Commissar for Foreign Affairs of the Union of Soviet Socialist Republics', (1934) 28 AJIL 1, beginning at 1.

17 *United States v. Pink*, *supra* note 15, at 234.

18 US Constitution, Fifth Amendment.

19 *United States v. Pink*, *supra* note 15, at 228.

20 Ibid., at 230.

21 *Pink* was decided five to two. The dissent, written by Chief Justice Stone and joined by Justice Roberts, stated the following: 'Treaties, to say nothing of executive agreements and assignments which are mere transfers of rights, have hitherto been construed not to override state law or policy unless it is reasonably evident from their language that such was the intention.' Ibid., at 255.

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At this point, mention should be made of the famous 1992 Supreme Court ruling, *United States* v. *Alvarez-Machain*.[22] It has been so much commented upon that it requires only brief mention. Alvarez-Machain, a physician and Mexican national, was accused of aiding in the torture and murder of an agent of the US Drug Enforcement Administration (DEA). US government agents forcibly abducted Alvarez-Machain from Mexico without the knowledge or consent of the Mexican government.[23] There was an extradition treaty between the United States and Mexico. Two intertwined issues were involved:

1. Did the illegal method used to acquire Alvarez-Machain affect whether he could be tried in the United States? The Court used the *Ker-Frisbie* doctrine stemming from an 1886 case and held that jurisdiction was not dependent on methods used to obtain him.[24]
2. Did the extradition treaty implicitly prohibit abduction?

The majority opinion found:

> By contrast, to imply from the terms of this Treaty that it prohibits obtaining the presence of an individual by means outside of the procedures the Treaty establishes requires a much larger inferential leap, with only the most general of international law principles to support it. The general principles cited by respondent simply fail to persuade us that we should imply in the United States–Mexico Extradition Treaty a term prohibiting international abductions. Respondent and his *amici* may be correct that respondent's abduction was 'shocking,' Tr. of Oral Arg. 40, and that it may be in violation of general international law principles. Mexico has protested the abduction of respondent through diplomatic notes, App. 33–38, and the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch.[25]

Given the long, contentious history between the United States and Mexico, the notion that an extradition treaty must explicitly prohibit forcible abduction is very hard to accept.

It is in conjunction with these precedents that the case *José Ernesto Medellín, Petitioner* v. *Texas*, decided by the US Supreme Court on 25 March 2008, must be read.[26] Medellín, a Mexican national, was arrested in 1993 for the gang rape and murder of two teenagers.[27] Within a few hours of his arrest, he signed a waiver and provided a written confession.[28] He 'was convicted of capital murder and sentenced

22 *United States v. Alvarez-Machain*, 504 US 655 (Sup.Ct. 15 June 1992).
23 Ibid., at 657.
24 The *Ker-Frisbie* doctrine refers to two cases: *Ker v. Illinois*, 199 US 436 (Sup.Ct. 1886), and *Frisbie v. Collins*, 342 US 519 (Sup.Ct. 1952). In *Alvarez-Machain* (at 661), the Court quoted *Ker* (at 444): 'such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court.'
25 *United States v. Alvarez-Machain*, *supra* note 22, at 669.
26 See note 1, *supra*.
27 J. G. Roberts, CJ, 'Opinion of the Court', *José Ernesto Medellín, Petitioner v. Texas*, 552 US ___ (Sup.Ct. 25 March 2008), 4–5. Medellín had lived in the United States since pre-school and was a member of the Black and Whites gang, the gang responsible for the gang rape and murder of the two Houston teenagers.
28 Ibid., at 5.

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to death'[29] in the state of Texas; his punishment was affirmed on appeal.[30] At no point was Medellín informed of his right to contact the Mexican consulate as per the Vienna Convention on Consular Relations (VCCR).[31]

Both Mexico and the United States are party[32] to the VCCR, Article 36(1)(b) of which stipulates rights that must be afforded to foreign nationals upon arrest or detention:

> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested . . . shall 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.[33]

Following his conviction, Medellín's first application for relief was based on the non-observance of the above rights, a claim denied on procedure and 'on the merits'.[34] The Texas Court of Criminal Appeals[35] affirmed the decision, which later was upheld by a Federal District Court when Medellín filed a habeas corpus petition.[36]

An Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes (opened for signature the same day as the VCCR itself, hereinafter Optional Protocol)[37] provides that 'Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice'.[38] The United States ratified the VCCR and its Optional Protocol.[39] In 2003 Mexico, believing that the United States was not fulfilling its obligations under the VCCR,[40] acceded to the Optional Protocol and made application to the International Court of Justice (ICJ).[41] The resulting ICJ *Case Concerning Avena and Other Mexican Nationals* (*Avena*) dealt with 52 Mexican nationals, including Medellín, who are or were on death row in the United

29 Ibid.
30 Ibid., referring to *Medellín v. State*, Texas Court of Criminal Appeals (16 May 1997).
31 1963 Vienna Convention on Consular Relations, 596 UNTS 261.
32 See 'Chapter III: Privileges and Immunities, Diplomatic and Consular Relations, etc.', number 6, in *Status of Multilateral Treaties Deposited with the Secretary-General*, available at http://untreaty.un.org/ ENGLISH/bible/englishinternetbible/partI/chapterIII/chapterIII.asp. The United States ratified the VCCR on 24 November 1969; Mexico ratified it on 16 June 1965.
33 VCCR, *supra* note 31, Art. 36(1)(b).
34 Roberts, *supra* note 27 at 5; referring to *Medellín v. State*, Texas Court of Criminal Appeals (16 May 1997). The Texas trial court found the claim procedurally defaulted because it was not raised at trial or on direct review. The court also rejected in on the merits because Medellín failed to prove that his punishment was impacted by not being able to contact the Mexican consulate. In addition, he confessed within three hours, before the authorities could have violated his rights; the phrase 'without delay' in Article 36 (1)(b) of the VCCR as defined by the ICJ means within three working days.
35 Ibid., at 5–6; referring to *Medellín v. State*, Texas Court of Criminal Appeals (16 May 1997).
36 Ibid., at 6; referring to *Medellín v. Cockrell*, Southern District Court of Texas (26 June 2003).
37 1963 Optional Protocol Concerning the Compulsory Settlement of Disputes, 596 UNTS 487.
38 Ibid., Art. 1.
39 Roberts, *supra* note 27, at 2.
40 VCCR, *supra* note 31, Art. 36(1)(b).
41 M. E. McGuinness, '*Medellín v. Texas*: Supreme Court Holds ICJ Decisions under the Consular Convention Not Binding Federal Law, Rejects Presidential Enforcement of ICJ Judgments over State Proceedings', (2008) 12 *American Society of International Law Insights*, available at www.asil.org/insights080418.cfm, para. 3.

States and were not provided with rights guaranteed under Article 36 of the VCCR.[42] While Medellín applied for a certificate of appealability, the *Avena* decision was handed down, instructing the United States 'to provide, by means of its own choosing, review and reconsideration'[43] of the cases. The Fifth Circuit[44] denied Medellín's certificate, disregarding the *Avena* decision.[45] The US Supreme Court (Court) granted certiorari[46] but later dismissed his petition because, in 2005, President George W. Bush had issued a Memorandum instructing state courts, for example Texas courts, to uphold international obligations by giving effect to the *Avena* judgment.[47] Subsequently, the United States withdrew from the Optional Protocol.[48]

Medellín's second application for habeas relief in Texas was dismissed because the *Avena* decision and the President's Memorandum were not binding federal law.[49] The Court again granted certiorari[50] to address two questions:

> *First*, is the ICJ's judgment in *Avena* directly enforceable as domestic law in a state court in the United States? *Second*, does the President's Memorandum independently require the States to provide review and reconsideration of the claims of the 51 Mexican nationals named in *Avena* without regard to state procedural default rules?[51]

The Court decided (by six votes to three) that 'neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions'.[52] In the following section we examine the three distinct opinions that often occur when the Court addresses controversial issues and unanimity is impossible.

2. Majority, concurring, and dissenting opinions[53]

2.1. Majority opinion

In order to answer the Court's first question, Justice Roberts examined two issues raised by Medellín: (i) the binding obligation of ICJ judgments; and (ii) the self-execution of treaties to which the United States is bound. Medellín argued

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42 *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, Judgment of 31 March 2004, ICJ No. 128. There is considerable inconsistency among sources as to the number of individual cases in *Avena*. *Avena* originally dealt with 54 individual cases. Mexico made adjustments and only 52 individuals were involved at the time of judgment. The ICJ found that the United States failed to provide consular notification for 51 of the 52 individuals. See ICJ Press Release 2004/16, 31 March 2004, available at www.icj-cij.org/docket/index.php?pr=605&code=mus&p1=3&p2=3&p3=6&case=128&k=18, paras.11 and 14.

43 Ibid., para. 153(9).

44 The US Court of Appeals for the Fifth Circuit has appellate jurisdiction over certain district courts; one is the Southern District Court of Texas. See www.ca5.uscourts.gov/.

45 Roberts, *supra* note 27, at 6; referring to *Medellín v. Dretke*, United States Court of Appeals for the Fifth Circuit (2004).

46 Ibid., at 7; referring to *Medellín v. Dretke*, 544 US 660 (Sup.Ct. 2005).

47 US President G. W. Bush, 'Memorandum of the President' (28 February 2005), available at www.whitehouse.gov/news/releases/2005/02/20050228–18.html.

48 Letter from Condoleezza Rice, US Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (7 March 2005), in which the United States gave its notice of withdrawal from the Optional Protocol, available at http://untreaty.un.org/English/CNs/2005/101_200/186E.doc.

49 Roberts, *supra* note 27, at 7; referring to *Ex parte Medellín*, Texas Court of Criminal Appeals (2006).

50 Ibid.

51 Ibid., at 2.

52 Ibid.

53 See note 1, *supra*.

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that the *Avena* judgment is a binding obligation in US state and federal courts and that treaty commitments questioned in *Avena* are 'already the "Law of the Land"'.[54] Roberts acknowledged that the *Avena* decision 'constitutes an international law obligation on the part of the United States. But not all international law obligations automatically constitute binding federal law enforceable in United States courts'.[55]

In addition to arguing that *Avena* is domestically binding, Medellín maintained that he and the 50 other Mexican nationals named in *Avena* should be considered parties to the case.[56] Roberts noted that only states can be parties in ICJ cases.[57] Roberts also relied on the questionable assertion that no state, as yet, 'treats ICJ judgments as binding in domestic courts',[58] and in *Avena*, the ICJ only suggested that the 'judicial process' is the best method for 'review and reconsideration'.[59] These are the bases for Roberts's conclusion that ICJ decisions themselves are not directly enforceable domestically.[60]

Next Roberts divided treaties into two broad groups, self-executing and non-self-executing. A self-executing treaty 'has automatic domestic effect as federal law upon ratification',[61] while a non-self-executing treaty 'does not by itself give rise to domestically enforceable federal law'[62] and its 'domestic effect depends upon implementing legislation passed by Congress'.[63] The Court held that whether a treaty is self-executing depends on the specific provisions of the treaty.[64] After drawing these distinctions, Roberts narrowed the issue to 'whether the *Avena* judgment has binding effect in domestic courts under the Optional Protocol, ICJ Statute, and UN Charter'.[65]

The Optional Protocol stipulates that disputes about the VCCR are subject to ICJ jurisdiction, but provides no explicit guidance regarding compliance with or enforcement of any ICJ judgment.[66] Direction about compliance with ICJ decisions can come from Article 94 of the UN Charter, which stipulates that each UN member 'undertakes to comply' with ICJ decisions.[67] Roberts referred to a statement made by the executive branch to the effect that an ICJ decision does not have 'immediate

54 Ibid., at 8; quoting US Constitution, Art. VI, Clause 2. See text at note 150, *infra*.
55 Ibid.
56 Ibid., at 16.
57 1945 Statute of the International Court of Justice, 9 Hudson 510, Art. 34. Art. 34(1) states, 'Only states may be parties in cases before the Court.' Hudson refers to M. O. Hudson, *International Legislation: A Collection of the Texts of Multipartite International Instruments of General Interest Beginning with the Covenant of the League of Nations*, 9 vols. (1931–50).
58 Roberts, *supra* note 27, at 20. Roberts notes that Medellín was unable to identify 'a single nation that treats ICJ judgments as binding in domestic courts.' The best argument made was that 'local Moroccan courts have referred to ICJ judgments as "dispositive"'.
59 *Avena*, *supra* note 42, para. 153(9).
60 Roberts, *supra* note 27, at 17.
61 Ibid., at 9.
62 Ibid.
63 Ibid.
64 Ibid., at 24.
65 Ibid., at 10.
66 Ibid., at 1. See 1963 Optional Protocol, *supra* note 37, Art. 1
67 1945 United Nations Charter, 9 Hudson 327, at Ch. XIV Art. 94(1). Art. 94(1) states, 'Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.'

legal effect in the courts of UN members'[68] but is a 'commitment on the part of UN members to take future action through their political branches to comply'.[69] Article 94 also provides for an 'express diplomatic – that is nonjudicial'[70] route, referral to the Security Council,[71] which, Roberts argued, is 'evidence that ICJ judgments were not meant to be enforceable in domestic courts'.[72] In other words, Roberts believed that, although the VCCR is self-executing,[73] the Optional Protocol, the ICJ Statute, and the UN Charter are not.[74] Therefore they are not 'the Law of the Land' and the *Avena* judgment does not have binding effect in domestic courts.[75]

Regarding the President's Memorandum (second question), Medellín argued that the *Avena* judgment is the 'Law of the Land', regardless of whether the judgment is domestically enforceable on its own,[76] and is within the president's 'take Care' powers.[77] The Solicitor General maintained that the 'relevant treaties give the President the authority to implement the *Avena* judgment, that Congress has acquiesced in the exercise of such authority',[78] and that the president has 'independent international dispute-resolution power wholly apart from the asserted authority based on the pertinent treaties'.[79]

Roberts rejected these arguments because the president's actions can derive only from acts of Congress or the Constitution,[80] and the President's action 'seeks to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting the relations with foreign governments, and demonstrating commitment to the rule of international law'.[81] Roberts used the tripartite scheme developed by Justice Jackson in a 1952 case[82] to assess Medellín's and the Solicitor General's arguments about the president's use of authority. The three-level analysis first defines the president's maximum power (highest level) when acting 'pursuant to an express or implied authorization of Congress'.[83] The second level occurs when the president can use independent powers only 'in absence of either a congressional grant or denial of authority'.[84] Third, when the president acts against the will of Congress, expressed or implied, 'his power is at its lowest ebb'.[85]

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68 Roberts, *supra* note 27, at 12.
69 Ibid.
70 Ibid., at 13.
71 1945 UN Charter, *supra* note 67, Ch. XIV, Art. 94(2). Art. 94(2) states, 'If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.'
72 Roberts, *supra* note 27, at 13.
73 Ibid., at 10. Roberts also notes that it 'grants Medellín individually enforceable rights'.
74 Ibid., at 17.
75 Ibid., at 10.
76 Ibid., at 27.
77 US Constitution, Art. II, Sec. 3, where it states that the president 'shall take Care that the Laws be faithfully executed'.
78 Roberts, *supra* note 27, at 29.
79 Ibid.
80 Ibid., at 28.
81 Ibid.
82 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579 (Sup.Ct. 1952).
83 Ibid., at 635.
84 Ibid., at 637.
85 Ibid., at 637–8.

According to Justice Roberts, President Bush's action fails to meet the standard of the first and second levels because the relevant non-self-executing treaties do not give the president even implicit authority.[86] Roberts noted that 'unilaterally converting a non-self-executing treaty into a self-executing one'[87] is a power vested solely in Congress.[88] He stated, 'given the absence of congressional legislation, ... the non-self-executing treaties at issue here did not "express[ly] or implied[ly]" vest the President with the unilateral authority to make them self-executing'.[89] Roberts concluded that the President's action, creating domestic law to enforce a non-self-executing treaty, was 'in conflict with the implicit understanding of the ratifying Senate',[90] an action falling at the third level (above).[91]

Congressional acquiescence falls under level two, a standard that, according to Roberts, the President's action did not meet.[92] Roberts further explained that past resolutions issued by the president regarding ICJ judgments where Congress did not act to deny acquiescence 'for none of them remotely involved transforming an international law obligation into domestic law and thereby displacing state law'.[93] Roberts examined past claims-settlement cases where the Court validated executive agreements.[94] However, he found that, unlike the President's Memorandum, executive agreements for claims settlement have a 'history of congressional acquiescence'.[95]

2.2. Concurring opinion

Although Justice Stevens found 'a great deal of wisdom'[96] in the dissent, he concluded that the relevant treaties do not provide adequate basis for the Court to enforce the *Avena* judgment.[97] He explained that the phrase 'undertakes to comply' found in Article 94 of the UN Charter is not a 'model of either a self-executing or a non-self-executing commitment'[98] for complying with ICJ judgments, but instead 'contemplates future action by the political branches'.[99] Stevens agreed with the majority of the Court that the President's Memorandum is not binding law but notes that it was a 'commendable attempt to induce the States to discharge the Nation's obligation'.[100]

Stevens expressed concern about the obligation of the United States to comply with the ICJ's *Avena* judgment and suggested a role for states (sub-national units)

86 Roberts, *supra* note 27, at 30.
87 Ibid.
88 Ibid.
89 Ibid., at 31.
90 Ibid.
91 Ibid., at 32.
92 Ibid., at 32–3.
93 Ibid., at 33.
94 Ibid., at 35.
95 Ibid.
96 J. P. Stevens, 'Concurring in Judgment', *José Ernesto Medellín, Petitioner v. Texas*, 552 U.S. ___ (Sup.Ct. 25 March 2008), at 1.
97 Ibid.
98 Ibid.
99 Ibid., at 2.
100 Ibid., at 4.

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in compliance: '[s]ometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation.'[101] While the costs of respecting the *Avena* decision are 'minimal',[102] the costs of non-compliance are 'significant'.[103] Stevens believed that Texas should appreciate the costs of non-compliance instead of focusing on the relatively minor issue of whether the *Avena* judgment and the Memorandum overrode state procedural rules. The majority opinion certainly does not prevent Texas from complying with *Avena*.[104]

2.3. Dissenting opinion

Because President Bush determined that *Avena* should be enforced and 'Congress has done nothing to suggest the contrary',[105] Justice Breyer stated,

> Under these circumstances, I believe the treaty obligations, and hence the judgment, resting as it does upon the consent of the United States to the ICJ's jurisdiction, bind the courts no less than would 'an act of the [federal] legislature'.[106]

This opinion is rooted in the belief that the relevant treaties are self-executing.

Breyer examined the Court's past decisions dealing with the Supremacy Clause and treaties to assess self-executing treaty provisions.[107] He explained that past practices of the Court show that 'self-executing treaty provisions are not uncommon or peculiar creatures of our domestic law'.[108] Additionally, the Court has found that treaty provisions, even absent an explicit statement to the effect, can be self-executing.[109] Breyer accepted the majority's contention that the relevant treaties lack language about self-execution but argued that because these treaties are multilateral, how could language about self-execution be practical?[110] States have vastly different traditions and standards about self-execution.[111] Therefore, 'the absence or presence of language in a treaty about a provision's self-execution proves nothing at all'.[112] He examined a wide range of past cases to determine whether the judiciary or other branches of government took further action[113] rather than requiring explicit provisions about self-execution.

Breyer provided seven reasons for finding the relevant treaty provisions to be self-executing.

1. The treaty language 'supports direct judicial enforceability'.[114] Emphasized are the phrases 'compulsory settlement' found in the title of the Optional Protocol

101 Ibid.
102 Ibid., at 5.
103 Ibid., at 6.
104 Ibid.
105 S. G. Breyer, J., 'Dissenting', *José Ernesto Medellín, Petitioner v. Texas*, 552 U.S. ___ (Sup. Ct. 25 March 2008), at 2.
106 Ibid., quoting Chief Justice Marshall's majority opinion of *Foster v. Neilson*, 27 US 253 (1829), at 314.
107 Ibid., at 4–5.
108 Ibid., at 9–10.
109 Ibid., at 10.
110 Ibid., at 12.
111 Ibid.
112 Ibid.
113 Ibid., at 13.
114 Ibid., at 15.

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and 'binding force' in Article 59 of the ICJ Statute referring to the ICJ's jurisdiction in its cases.[115] The phrase 'undertakes to comply' in Article 94 of the UN Charter does not fall short of meaning 'shall comply'[116] and is not ambiguous as suggested by the concurrence.[117]

2. The dispute is about a treaty provision that is self-executing and addresses an individual's rights.[118]
3. When a dispute is about a self-executing treaty provision and binding dispute settlement has been agreed to, how can a claim be made that the judgment of the binding dispute settlement is non-self-executing?[119]
4. The majority's approach does not encourage enforcement and fulfilment of US obligations; to rely on Congress to act for similar non-self-executing ICJ judgments is unrealistic. Congress does not have the time to examine cases individually, nor would it legislate that every ICJ judgment automatically becomes judicially enforceable.[120]
5. The judicial branch, rather than Congress, is better suited to provide the 'review and reconsideration' demanded by the ICJ. 'Criminal procedure' and 'related prejudice' are technical dealings common to courts.[121]
6. No constitutional conflicts with other governmental branches arise when self-execution is applied.[122]
7. 'Neither the President nor Congress has expressed concern about direct judicial enforcement of the ICJ decision.'[123] In fact, the President's Memorandum does call for such enforcement.

Breyer found that President Bush's action was within his power, albeit 'middle range'[124] where Congress has not provided explicit guidance.[125] Finding it impractical for the president to override state law by using Article II powers,[126] the dissent warned against 'concluding that the Constitution implicitly sets forth broad prohibitions (or permissions)'.[127] Breyer broadened the scope of his analysis, citing the 'Court's comparative lack of expertise in foreign affairs'.[128] 'In a world where commerce, trade, and travel have become ever more international that is a step in the wrong direction'.[129] On balance, Breyer concluded that the majority decision did not

115 Ibid.
116 Ibid., at 17.
117 Ibid., at 18.
118 Ibid., at 19–20.
119 Ibid., at 21.
120 Ibid., at 24.
121 Ibid., at 25.
122 Ibid.
123 Ibid., at 26.
124 Ibid., at 28.
125 Ibid.
126 US Constitution, Art. II.
127 Breyer, *supra* note 105, at 30.
128 Ibid.
129 Ibid., at 26.

accurately or adequately examine precedent, probably resulting in a breach of the VCCR.[130]

3. Context and prognosis

Reaction to the decision from the legal and academic communities has been generally negative. We could find few academic sources, as distinct from the mass media, that supported the legal reasoning or conclusion of the decision.[131] One of the few is Professor Curtis Bradley:

> My first argument is that the United States legal system should not give direct effect to the ICJ's decision in *Avena* – or, indeed, to any ICJ decision. That an international tribunal's decision is binding on the United States does not reveal anything about the domestic legal status of the decision . . . The ICJ itself has stated in its Vienna Convention decisions, including *Avena*, that the United States could implement the decisions 'by means of its own choosing.' . . . The Supremacy Clause of the US Constitution, however, states that there are only three types of supreme federal law: federal statutes, treaties, and the Constitution itself. Thus international judicial decisions are not themselves supreme federal law under our Constitution.[132]

Most scholars do not accept this narrow interpretation.

The Supreme Court's action, more conspicuously in international-law-related cases, might be compared to an august building inspector carefully checking whether myriad, sometimes contradictory, rules and regulations have been followed. Most scholars and practitioners would accept – sometimes grudgingly – that the Court must navigate a labyrinth of building codes, on multiple levels, all within the complicated context of a common law, federal system. In addition to written building codes, this inspector is required to compare the building with other buildings whose soundness has been assessed. The choice of comparison buildings can be quite subjective. There are many points at which the building might be deemed unacceptable even if the overall structure is sound, even robust. The predominant view seems to be that in *Medellín* the Court may have exceeded this assiduous building inspector threshold and, instead, was determined to find a way to reject the building, becoming a capricious inspector. It is as if the majority opinion found that the building had passed a rigorous inspection but must remain vacant.

Professor Frederic Kirgis's analysis of the case provides one example of this impossible-to-satisfy building inspector standard. The majority opinion suggested that enforcement via the UN Security Council provides an alternative to direct enforcement of ICJ judgment in US courts.[133] Kirgis contends that this reference to the Security Council is a fundamental misunderstanding of how the UN Charter was

130 Ibid., at 32.

131 An example of a source supporting the decision is an anonymous editorial from the *Wall Street Journal*. 'International Law, and Domestic Order', *Wall Street Journal*, 26 March 2008.

132 C. A. Bradley, 'Enforcing the *Avena* Decision in US Courts', 30 *Harvard Journal of Law & Public Policy* 119, at 120–1.

133 Roberts, *supra* note 27, at 13–14.

intended to operate.[134] Professor Jordan Paust found the majority decision clearly and unequivocally flawed – that is, beyond our assiduous building inspector threshold.

In this case, the President had a constitutionally-based duty to assure that there would be compliance with the judgment of the ICJ in the *Avena Case*, since, under the United Nations Charter, the United States has a treaty-based duty to comply and, under the Constitution, the President had a duty faithfully to execute the treaty-based duty.[135]

Is there a silver lining to the dark legal cloud that many see in *Medellín*? Justice Stevens's concurring opinion held that 'no one disputes that it [the *Avena* decision] constitutes an international law obligation on the part of the United States'.[136] However, legal obligations seem vacuous if their implementation is made impossibly difficult. *Medellín* seems to many to follow this pattern of the building inspector hell-bent on finding a flaw, especially when one considers that there are far more plausible interpretations. Professor Paust explained it this way:

> [T]he judgment, as an admitted treaty obligation of the United States that has 'final' and 'binding force', is given domestic legal effect by the United States Constitution when it expressly and unavoidably mandates that the treaty-based obligation (as obligations under *all* treaties of the United States) is supreme law of the land binding on the states and its courts.[137]

There has been considerable activity on the part of Mexico to try to prevent the executions. On 5 June 2008 Mexico requested an interpretation of the *Avena* judgment and an indication of provisional measures.[138] Mexico also requested that the United States ensure that the executions would not occur unless review and reconsideration were provided. Mexico also asked that the United States inform the ICJ of measures taken to prevent the executions.[139] The United States believed that the ICJ did not have jurisdiction to issue an interpretation or an indication of provisional measures, and requested that the ICJ dismiss the proceedings.[140]

The ICJ issued provisional measures on 16 July 2008. On 22 July 2008, the ICJ gave the United States until 29 August 2008 to file written observations regarding Mexico's request for interpretation.[141] Despite attempts to prevent Medellín's execution, Texas went forward as scheduled.[142] The decision to execute was primarily in the hands of the Supreme Court and the governor of Texas, Rick Perry; the Supreme Court denied a reprieve.[143] The execution has not gone unnoticed. On 11 August 2008, the

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134 F. L. Kirgis, 'International Law in the American Courts – The United States Supreme Court Declines to Enforce the ICJ's *Avena* Judgment Relating to a U.S. Obligation under the Convention on Consular Relations', (2008) 9 *German Law Journal* 619, at 624–5.

135 J. J. Paust, '*Medellín, Avena*, the Supremacy of Treaties, and Relevant Executive Authority', (2008) 31 *Suffolk Transnational Law Review* 299, at 312.

136 Stevens, *supra* note 96, at 4.

137 Paust, *supra* note 135, at 301; referring to US Constitution, Art. VI, Clause 2. See text at note 150, *infra*.

138 ICJ Press Release Summary 2008/3, 16 July 2008, available at www.icj-cij.org/docket/files/139/14647.pdf, at 1.

139 Ibid., at 2.

140 Ibid., at 3.

141 ICJ Press Release of 22 July 2008, No. 2008/21, available at www.icj-cij.org/docket/files/139/14649.pdf.

142 B. Mears, 'Mexican Executed after Appeal Denied in Texas,' CNN.com, available at www.cnn.com/2008/CRIME/08/05/scotus.execution/index.html, para. 1.

143 Ibid., paras. 3 and 9. See also www.supremecourtus.gov/opinions/07pdf/06–984a.pdf.

EU issued a presidency declaration expressing disapproval and requesting that the United States carry out its international obligations.[144] ICJ Judges Owada, Tomka, and Keith dissented on the measures but noted that execution of any individuals named in *Avena* without proper remedy would place the United States in breach of its international obligations.[145]

In spite of the fact that the ICJ decision and indication of provisional measures swayed neither the Supreme Court nor the state of Texas, the pieces may be in place for a resolution of the basic principles undergirding *Medellín*. On 17 July 2008, the current and most living past presidents of the American Society of International Law wrote to the leadership in the Senate and House of Representatives urging action in response to the *Medellín* decision. Salient portions of the letter are as follows.

> In light of the Supreme Court's recent decision in *Medellín* v. *Texas*, we urge congressional action to ensure that the United States lives up to its binding international legal obligations under the Vienna Convention on Consular Affairs [*sic*] and the United Nations Charter . . . we are concerned about the possible US breach of these obligations and the impact such breach could have on our own nationals abroad and on our reputation as a trusted counterparty in international legal relations . . . The Supreme Court concluded, however, that both it and the President were powerless to order such 'review and reconsideration' and that, absent voluntary action by state executives or legislatures, compliance with this international obligation requires congressional action. With the execution of the first of the Mexican nationals scheduled to take place in Texas on August 5, 2008, the United States is poised irreparably to violate the Vienna Convention and a judgment of the ICJ. Such violations of international law would set a dangerous precedent, undermining the reciprocal Vienna Convention rights that American citizens are entitled to enjoy while traveling, living, or working abroad . . . Both the President and the Supreme Court have concluded that the United States is obliged to comply with the ICJ *Avena* judgment. The President has recognized the importance of such compliance to US international relations. Now it falls to Congress to legislate compliance. If you fail to do so, Americans who are detained abroad may well lose the critical protection of ensured access to United States consular officers. We urge that you act, and act quickly. We thank you for your attention to this important matter.[146]

This plea from the American Society will not have an immediate effect, especially during a heated presidential election season. However, prospects for congressional action in 2009 are better. Convincing conservative constituencies is relatively easier because of reciprocity. On the crassest level, the argument is that if the United States does not provide VCCR rights to Mexican nationals in US jails, then US nationals in Mexican jails will be in jeopardy.

Even absent congressional action, a piecemeal solution to *Medellín* may be developing. The US Department of State has undertaken a campaign to educate all fifty

144 Presidency Declaration on Behalf of the European Union on the Execution of Mr José Medellín in the United States (Texas), Council of the European Union, 11 August 2008, available at www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/cfsp/102231.pdf.

145 ICJ Press Release, *supra* note 138, at Summary of dissent of Judges Owada, Tomka, and Keith.

146 L. Reed (current president) and past presidents J. Alvarez, C. N. Brower, J. H. Carter, T. Franck, L. Henkin, A. Rovine, A. Slaughter, P. D. Trooboff, and E. B. Weiss, 'Letter to Leadership in US Senate and House of Representatives' (17 July 2008), available at www.asil.org/pdfs/presidentsletter.pdf.

state judiciaries.[147] This is a tall order and certainly will experience some resistance, but most state legal systems, if they are aware of the VCCR requirement, would wish to comply. In the information age one should not underestimate the possibility of global media focusing attention on a judicial proceeding in small-town America. Furthermore, President Bush's order that triggered *Medellín* certainly raised awareness at the sub-national level, which is where the vast majority of VCCR issues occur.

Ending the story here with an unfortunate Supreme Court decision with reasonably good prospects for remediation would ignore the broader context of the decision. Sometimes overshadowed by indignation over the decision is the fact that this should have been an easy matter to resolve. Kirgis called it a 'relatively painless requirement'.[148] Justice Stevens's concurring opinion indicated that voluntary observance would not be difficult.[149]

This matter should have been resolved routinely as part of a domestic legal system aware of, and comfortable with, the realities of the globalizing twenty-first-century world. There is more than a little irony in the fact the legal system created in 1787 is fully capable of dealing with the twenty-first century, including *Medellín*. The Supremacy Clause of the US Constitution reads:

> 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, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[150]

Case closed, or, more accurately, the case never should have arisen or at least should have evolved differently.

Medellín is best appreciated when viewed in the context of the long-term relationship between the United States and the corpus of international law. Since the late eighteenth century the United States has had a complicated, sometimes strained, relationship with international law. The early years of the republic were not without problems. Professor (and Dean) Harold Koh quotes Thomas Jefferson's words from the Declaration of Independence saying that US courts should 'pay a decent respect to the opinions of mankind'.[151] Even as revered a figure as Jefferson had an inconsistent record on international law and he operated in an unglobalizing world. Jefferson developed sophisticated views of international law in areas such as extradition and the recognition of states.[152] However, in other areas, he did not shine so bright, justifying claims to new territory in this way:

> If we claim that country at all, it must be on Astor's settlement near the mouth of the Columbia, and the principle of the *jus gentium* of America, that when a civilized nation

147 J. F. Murphy, '*Medellín v. Texas*: Implications of the Supreme Court's Decision for the United States and the Rule of Law in International Affairs', (2008) 31 *Suffolk Transnational Law Review* 247, at 264.
148 Kirgis, *supra* note 134, at 629.
149 Stevens, *supra* note 96, at 5–6.
150 US Constitution, Art. VI, Clause 2.
151 Declaration of Independence, para. 1, cited in H. Koh, 'International Law as Part of Our Law', (2004) 98 AJIL 43.
152 C. M. Wiltse, 'Thomas Jefferson and the Law of Nations', (1935) 29 AJIL 66, at 72–3.

> takes possession of the mouth of a river in a new country, that possession is considered as including all its waters.[153]

The United States showed strong isolationist behaviour immediately before the First and Second World Wars. Much more recently, the Reagan administration (1981–9) is often cited as a low point in respect for international law, with the most conspicuous violations occurring with the ICJ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (1984) and the US invasion of Grenada in October 1983.[154] One of us (Gamble) wrote that the 'Reagan years were characterized by a systematic self righteousness, an attitude that seems to say we know we are right, just and peace loving, so don't complicate matters with reference to the minutiae of international law'.[155]

The *Medellín* case and reactions to it illustrate that the US posture towards international law during the regime of President George W. Bush leaves much to be desired. Most legal scholars would point to many elements of the invasion of Iraq as evidence of far too little sensitivity to international law as a major element of foreign policy development. As Professor Kirgis and others have pointed out, it is not just the executive branch but also the judiciary that 'has marched to its own tune' when it comes to international law.[156] A relatively new phenomenon is the propensity for Supreme Court justices to speak out against the Court's use of foreign and international law; Justices Scalia and Thomas are the most extreme examples.[157] There are those who speak in favour of foreign sources, Chief Justice Rehnquist (surprisingly) and Justice O'Connor more recently. Chief Justice Rehnquist, as cited in Koh, stated,

> For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.[158]

Justice O'Connor's views expressed a similar sentiment:

> I suspect that with time, we will rely increasingly on international and foreign law in resolving what now appear to be domestic issues, as we both appreciate more fully the ways in which domestic issues have international dimensions, and recognize the rich resources available to us in the decisions of foreign courts.[159]

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153 Ibid., at 69.
154 For a detailed discussion see J. Gamble, 'International Law in the Reagan Years: How Much of an Outlier?', (1990) 23 *Akron Law Review* 351.
155 Ibid., at 370.
156 Kirgis, *supra* note 134, at 637.
157 Ibid., at 626.
158 W. H. Rehnquist, 'Constitutional Courts – Comparative Remarks' (1989), repr. in P. Kirchhof and D. P. Kommers (eds.), *Germany and Its Basic Law: Past Present and Future – A German–American Symposium* (1993), 411, 412, cited in Koh, *supra* note 151.
159 S. D. O'Connor, Remarks at the Southern Center for International Studies (28 October 2003), cited in J. Setear, 'A Forest with No Trees: The Supreme Court and International Law in the 2003 Term', (2005) 91 *Virginia Law Review* 579, at 582.

The issue of the use of foreign sources is not uni-dimensional, as it is sometimes portrayed. There have been strong reactions against Justice Scalia, the most vocal opponent of 'foreign sources'. Professor Harold Koh criticized Scalia along many dimensions including inconsistency in 'insisting upon the irrelevance of foreign and international law'[160] and ignoring early US appeals for the use of foreign sources.[161] Koh believes that we need a 'decent respect for international and foreign comparative law' because there exist 'parallel rules, empirical evidence, or community standards found in other mature legal systems'.[162] Certain assumptions of Justice Breyer, Professor Koh, and others are questioned by Professor Roger Alford; his most salient point is that 'international sources are proposed for comparison only if they are viewed as rights enhancing'.[163] Alford believes that US courts seldom look systematically at foreign sources: 'If international and foreign sources are arrows in the quiver of constitutional interpretation, those arrows should pierce our constitutional jurisprudence to produce results that we celebrate and that we abhor.'[164] Alford's point is well taken, but his own warning would caution against any a-priori assumptions about the quality and quantity of those arrows.

What does this suggest for an overall resolution of *Medellín*? We see two possible scenarios, both of which are more accurately described as points along a continuum. One possibility would be 'fixing' the immediate issues surrounding *Medellín* – for example, through congressional legislation – but this might create the illusion of broader progress, obscuring the fact that *Medellín* is not a stern test. Exacerbating matters further, 'fixing' *Medellín* might reduce pressure for more far-reaching reform. Ironically, a narrow solution to *Medellín* might impede systemic progress.

A far more desirable result would find a resolution to *Medellín* providing an important first step towards a broader and deeper reconciliation between the United States and international law, including genuine communication among scholars such as Alford, Koh, Scalia, and Thomas. Such a positive result would develop more easily with more enlightened and better-informed legislators, governors, presidents, secretaries of state, and, yes, Supreme Court appointments, all buttressed by enlightened public opinion. The United States does not need to sacrifice its national interests on the altar of the Peace Palace. There are times when emergency situations arise, such as genocide or military invasion, when precipitous, even extra-legal, action might be necessary. Such situations are extremely rare and certainly do not include *Medellín*.

The international system will produce more prosperity and more justice if – to paraphrase Professor Louis Henkin – the only remaining superpower obeys almost all the rules of international law, almost all the time.[165] A positive trajectory will be more difficult to achieve if the US Supreme Court acts – and is widely perceived to

160 Koh, *supra* note 151, at 47.
161 Ibid.
162 Ibid., at 56.
163 R. P. Alford, 'Misusing International Sources to Interpret the Constitution', (2004) 98 AJIL 57, at 67.
164 Ibid., at 69.
165 L. Henkin, *How Nations Behave: Law and Foreign Policy* (1979), 47. Henkin's exact words were 'It is probably the case that *almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time*' (emphasis in original).

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act – as at most an assiduous building inspector, not as a capricious ideologue determined to obstruct and delay the construction of the international legal infrastructure so necessary for US participation in a globalizing world. However, critics should understand the complex milieu within which US courts must operate, including the uncertain status of ICJ judgments; enduring constitutional law questions; a constantly shifting balance between federal and state law; and the highly contentious issue of self-executing treaties.

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