DEVELOPMENTS

International Law in the American Courts – The United States Supreme Court Declines to Enforce the I.C.J.'s *Avena* Judgment Relating to a U.S. Obligation under the Convention on Consular Relations

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A. Introduction

The United States is a party to the Vienna Convention on Consular Relations ("the Consular Convention").[1] It requires in Article 36(1)(b) that the competent authorities of each State party inform the consulate of another party if the latter's national is arrested and requests that the consulate be notified. Article 36(1)(b) further requires the authorities to inform the person arrested of the right to communicate with the consulate. Article 36(2) says that the rights in Article 36(1) are to be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso "that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

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[1] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. This Introduction is based in part on ASIL Insight, *The Texas Court of Criminal Appeals Decides Medellín's Consular Convention Case* (Dec. 8, 2006), *available at* http://www.asil.org/insights/2006/12/insights061208.html . *See also* ASIL Insight, *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* (Apr. 8, 2008), *available at* http://www.asil.org/insights/2008/04/insights080418.html.

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The International Court of Justice (I.C.J.) has considered three cases in which applicant States (Paraguay, Germany and Mexico, respectively) asserted that the United States violated the Consular Convention by failing to inform the applicant States' nationals of their rights under Article 36(1)(b).[2] In the cases brought by Germany and Mexico, known respectively as the *LaGrand* and *Avena* cases, the I.C.J. rendered final judgments against the United States. These cases addressed the "procedural default" rule applied by many courts in the United States.

Under that rule, a failure by a defendant in a criminal case to raise an issue at trial that might aid in the defense may preclude him or her from raising it on appeal or in collateral review proceedings for the first time. The I.C.J. in *LaGrand* and *Avena* held that when the violation of Article 36(1) prevented Germany and Mexico from assisting in their nationals' defense in a timely fashion, application of the procedural default rule resulted in a violation of Article 36(2). In essence, the procedural default rule impaired the purposes for which the rights accorded under Article 36(1) are intended.[3]

In 2006, the United States Supreme Court in *Sanchez-Llamas v. Oregon*,[4] a case involving private parties who had not been represented in any of the I.C.J. proceedings, said that the I.C.J. decisions are entitled to "respectful consideration." The Supreme Court nevertheless permitted the state courts involved in that case to apply their procedural default rules when defense counsel had failed to raise the Article 36 issue in the original state court proceedings.

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[2] Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 266 (Order of Prov. Meas., Apr. 9); LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27); Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

[3] LaGrand Case, para. 91; Avena Case, para. 113.

[4] Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006).

In 2004, the I.C.J. in the *Avena* case determined that the United States is obligated "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [52] Mexican nationals" represented by the Mexican government. José Ernesto Medellín was one of those nationals. He had been convicted of murder in a Texas state court and sentenced to death. His lawyer had not raised the Article 36 issue in the original Texas proceedings. After the I.C.J.'s judgment in the *Avena* case was rendered, President George W. Bush issued a memorandum to the U.S. Attorney General, which was then transmitted to all 50 state attorneys generals. He determined that the United States would discharge its obligation under the *Avena* judgment by having state courts give effect to it. Accordingly, the state courts would be obliged to hold hearings in which the Mexican nationals could argue that the failure to inform them of their rights under the Consular Convention prejudiced their ability to mount an effective defense in the original proceedings.

In November 2006, the Texas Court of Criminal Appeals declined to give Medellín the review he sought pursuant to the I.C.J.'s judgment and President Bush's determination. The Texas court concluded that Medellín's application for a writ of habeas corpus should be dismissed because "the ICJ *Avena* decision and the President's memorandum do not constitute binding federal law" that could pre-empt a Texas statute limiting the availability of habeas corpus relief.[5] The United States Supreme Court affirmed the judgment of the Texas Court of Criminal Appeals.[6] Five Justices joined in the majority opinion, which was written by Chief Justice Roberts; Justice Stevens concurred in a separate opinion; and three Justices dissented in an opinion written by Justice Breyer.

[5] *Ex parte* Medellín, 223 S.W.3d 315, 352 (Tex. Crim. App. 2006).

[6] Medellín v. Texas, 128 S.Ct. 1346 (2008).

This Comment will focus on four issues raised by the majority opinion: the doctrine of self-executing treaties in the context of the relevant U.N. Charter and I.C.J. Statute provisions; the role of the President of the United States in "executing" the relevant Charter and Statute provisions; the principle underlying the Charming Betsy canon; and the legally-permissible responses available to Mexico and other States in response to U.S. noncompliance with the *Avena* judgment.

B. The Supreme Court's Discussion of Self-Executing Treaties

The Supreme Court considered whether the relevant provisions of the U.N. Charter and I.C.J. Statute are self-executing under U.S. law. U.N. Charter Article 94 provides:

> 1. 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.
>
> 2. If any party 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.

I.C.J. Statute Article 59 provides:

> The decision of the Court has no binding force except between the parties and in respect of that particular case.

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I.C.J. Statute Article 60 provides in relevant part:

> The judgment is final and without appeal.

Because Medellín was one of the named individuals represented by the government of Mexico in the *Avena* case, these Articles had a direct bearing on whether courts in the United States were obligated to recognize and enforce the I.C.J. judgment. The *Sanchez-Llamas* case was distinguishable because the individual parties to that case had not been named individuals in the I.C.J. proceedings, and thus had no arguable basis for relying on the U.N. Charter and I.C.J. Statute Articles quoted above.

An important question in the *Medellín* case was whether any or all of these provisions are self-executing within the United States in the sense of being incorporated into federal law without having to be "executed" by a federal body with domestic lawmaking powers. Normally, that federal body would be the United States Congress. The Supreme Court majority held that the provisions quoted above are not self-executing within the United States. Consequently, the I.C.J. judgment in *Avena* was not directly binding on the courts of Texas.

As a practical matter, it would have been difficult for the conservative Supreme Court majority to hold otherwise. Had it done so, I.C.J. decisions that normally are entitled only to "respectful consideration" would be binding in domestic law in, and only in, those few cases stemming from I.C.J. proceedings brought on behalf of the very same individuals who are parties before domestic courts in the United States. To the Supreme Court majority, that result might well have seemed anomalous.

For our purposes, the holding that the above-quoted provisions are non-self-executing is less intriguing than is the manner by which the Supreme Court arrived at it. The majority opinion relied heavily on

the language of Article 94(1), emphasizing that it says each U.N. Member "undertakes to comply" with I.C.J. decisions, rather than saying that they "shall" or "must" comply.[7] Justice Breyer's dissent took a much more nuanced approach, stressing case-by-case context and noting (convincingly) that because States around the world take varying positions regarding the domestic effects of treaties – some of them giving domestic law status to all treaties they enter into, others requiring a legislative act before any treaty can become domestic law, and others (such as the United States) giving some but not all treaties immediate domestic effect – one cannot simply look at the agreed-upon text of a broad multilateral treaty and determine whether it is meant to have direct domestic effect in the legal system of any one State party.[8] The Supreme Court majority, however, apparently was uneasy with a nuanced approach that might lead to inconsistent decisions by lower courts in the United States and might result in an expanded domestic lawmaking effect for treaties entered into without the approval of both Houses of Congress.[9]

The majority also relied on Article 94(2), arguing that its reference to the U.N. Security Council as the enforcement mechanism is evidence that I.C.J. judgments were not meant to be enforceable in domestic courts.[10] The majority pointed to statements from the Executive Branch in 1945, including a statement by Charles Fahy, then the State Department Legal Adviser, to the effect that the Security Council was to be "the exclusive means of enforcement," and any attempt to enforce an I.C.J. judgment against the United States would be subject to a U.S. veto.[11] Those statements, however, were directed at the

[7] Medellín, 128 S.Ct. at 1358.

[8] Medellín, 128 S.Ct. at 1381, 1383 (Breyer, J. dissenting).

[9] *See* U.S. CONST. art. II, § 2, cl. 2. (explaining that in the United States, treaties - in the domestic sense of the word - require only the advice and consent of two-thirds of the Senate).

[10] Medellín, 128 S.Ct. at 1359.

[11] *Id.* at 1359-60.

international means of enforcement. What Charles Fahy actually said was that the U.N. Charter contains "no provision for the enforcement of such decisions unless the failure to comply constitutes a threat to the peace or breach of the peace under Article 39 of the Charter."[12] Neither he nor anyone else said anything about whether domestic courts could or should play a role in enforcing I.C.J. judgments against the United States.

Moreover, Fahy's view, which he said was the U.S. government's position, evidently assumed that domestic courts or other means of domestic enforcement would play a role, at least when there is no threat to the peace or breach of the peace.[13] In any event, he certainly would not have subscribed to the majority's seemingly cynical view that "Noncompliance with an I.C.J. judgment through exercise of the Security Council veto [was] always regarded as an option by the Executive and ratifying Senate…."[14] According to the majority, that option would no longer be viable if the I.C.J. judgment were enforced by domestic courts. The majority, in other words, took the position that for the United States and presumably for the other four States with Security Council veto powers (but not for any other United Nations member State), compliance with I.C.J. judgments is optional. That position cannot be reconciled with U.N. Charter Article 94(1).

Returning to its textual exegesis of the Charter and Statute, the majority relied in part on Article 59 on the Statute, which – as noted above – says that an I.C.J. decision "*has no binding force* except

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[12] *Compulsory Jurisdiction, International Court of Justice: Hearing Before a Subcomm. of the Senate Comm. On Foreign Relations*, 79th Cong., 2d Sess. 142 (1946) (statement of Charles Fahy, Legal Adviser to the U.S. Department of State).

[13] The U.S. view on the scope of Article 94(2) was not widely shared by other States at the San Francisco conference that drafted the U.N. Charter. *See* LELAND B. GOODRICH, EDVARD HAMBRO & ANNE PATRICIA SIMONS, CHARTER OF THE UNITED NATIONS 557 (3d ed. 1969); *see also* 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1177 (Bruno Simma ed., 2002).

[14] Medellín, 128 S.Ct. at 1360.

between the parties and in respect of that particular case."[15] According to the majority, this language indicates that an I.C.J. judgment cannot be enforced by an individual, since only States can be parties to I.C.J. proceedings. The majority failed to recognize that Article 59 was inserted into the Statute simply to establish that the common law principle of *stare decisis* does not apply to I.C.J. decisions.[16] Article 59 says nothing about who could seek to enforce an I.C.J. judgment in a domestic court of the respondent State, and in particular, it says nothing about whether a named beneficiary of the judgment could enforce it in a domestic court.

The majority buttressed its conclusion - that the *Avena* judgment does not constitute binding federal law - by pointing out that no other State party to the Consular Convention has treated I.C.J. judgments as binding in its domestic courts. According to the majority, "the lack of any basis for supposing that any other country would treat I.C.J. judgments as directly enforceable as a matter of their domestic law strongly suggests that the treaty should not be so viewed in our courts."[17] This is an ironic dictum from a majority of conservative Justices, including two – Justices Scalia and Thomas – who in other cases have denounced Supreme Court reliance on the laws and practices of other States as aids in interpreting the United States Constitution.[18] The irony is compounded by the fact that there are significant divergences in the ways States around the globe

[15] Medellín, 128 S.Ct. at 1360 (emphasis in the original).

[16] *See* 3 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920–2005, at 1571 (2006).

[17] Medellín, 128 S.Ct. at 1363. A similar approach was taken by the Fifth Circuit Court of Appeals in United States v. Postal, 589 F.2d 862 (5th Cir. 1979) (concerning Article 6 of the Convention on the High Seas). For criticism, see Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 AM. J. INT'L L. 892 (1980). *See also* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h, and Reporters' Note 5 (1987).

[18] *See* Roper v. Simmons, 543 U.S. 551, 622–28 (2005) (Justices Scalia, Thomas and Chief Justice Rehnquist, dissenting); Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Justices Scalia, Thomas and Chief Justice Rehnquist, dissenting).

incorporate treaties into their domestic law. Moreover, there are very few cases one way or the other on the domestic law application of the U.N. Charter and I.C.J. Statute provisions relating to I.C.J. judgments.[19] The absence of cases outside the United States directly enforcing I.C.J. judgments suggests little or nothing about what the law in the United States should be.

The approach taken by the majority of the U.S. Supreme Court may be contrasted with that of the German Federal Constitutional Court. The Constitutional Court held that German courts are constitutionally required to consider competent international courts' interpretation of treaties to which Germany is a party. Consequently the Constitutional Court relied on the *LaGrand* and *Avena* cases in determining that a failure by German criminal courts to consider the legal consequences of a violation of Consular Convention Article 36(1)(b) infringed the defendants' right to a fair trial under German law.[20]

The contrast with the approach taken by the U.S. Supreme Court majority is striking. Even if the relevant U.N. Charter and I.C.J. Statute provisions are non-self-executing in the United States, the Supreme Court could have reached a result similar to that reached by the German Constitutional Court by upholding the President's authority to settle a diplomatic dispute with Mexico, or by applying the principle underlying the Charming Betsy canon. We now turn to those points.

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[19] *See* Medellín, 128 S.Ct. at 1363 n.10 referencing Mackay Radio & Tel. Co. v. Lal-La Fatma Bent si Mohamed el Khadar, [1954] 21 Int'l L. Rep. 136 (Tangier, Ct.App. Int'l Trib.) and Socobel" v. Greek State, [1951] 18 Int'l L. Rep. 3 (Belg., Trib. Civ. de Bruxelles); 1 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005, at 213–20 (2006).

[20] Bundesverfassungsgericht (Federal Constitutional Court of Germany), 2 BvR 2115/01 (Sept. 19, 2006), *available at* http://www.bundesverfassungsgericht.de . The summary in the paragraph above is based on Jana Gogolin, *Avena and Sanchez-Llamas Come to Germany – The German Constitutional Court Upholds Rights under the Consular Convention on Consular Relations*, 8 GERMAN L.J. 261 (2007), and Klaus Ferdinand Gärditz, *Article 36, Vienna Convention on Consular Relations-Treaty Interpretation and Enforcement-International Court of Justice –Fair trial – Suppression of Evidence*, 101 AM. J. INT'L L. 627 (2007).

C. The Role of the President of the United States in "Executing" the Relevant Charter and Statute Provisions

The Supreme Court majority addressed three arguments relating to the President's asserted authority to pre-empt state law within the United States and require the states to comply with the *Avena* judgment: (1) the relevant treaties gave him that authority and Congress has acquiesced in it; (2) the President has an international dispute-resolution power wholly apart from any authority based on the pertinent treaties; and (3) the President in this instance validly exercised his constitutional power to take care that the laws are faithfully executed.[21] The majority rejected all three arguments.

In rejecting the first argument, the majority relied particularly on Justice Jackson's tripartite scheme in the *Youngstown Steel* case.[22] In his concurring opinion, Justice Jackson recognized that when the President acts with the express or implied authorization of Congress, the executive power is at its zenith. If the President acts in the absence of any congressional grant or denial of authority, the executive may rely on its own independent powers or may act in a "twilight zone" in which the separation of powers between President and Congress is uncertain. If the President acts inconsistently with the expressed or implied will of Congress, the executive power is at its lowest ebb. The majority in the *Medellín* case found that the President's asserted authority to enforce a non-self-executing treaty is within the third category because "the implicit understanding of the ratifying Senate" is that a non-self-executing treaty does not have binding effect on domestic courts.[23]

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[21] Medellín, 128 S.Ct. at 1368. The third argument is taken directly from Article II, Section 3 of the Constitution.

[22] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–55 (1952).

[23] Medellín, 128 S.Ct. at 1369.

The majority did not tailor this part of its opinion to U.N. Charter Article 94 and I.C.J. Statute Articles 59 and 60, which of course were the relevant treaty provisions at issue in the *Medellín* case. When the Senate considered the Charter and the Statute after World War II, no apparent attention was given to whether these provisions would or would not be self-executing in the municipal law of the United States.[24] Consequently the Supreme Court majority's argument on this point is a classic case of bootstrapping: the Justices imputed to the Senate a conclusion the Court reached many years later in the case at hand, and the same Justices then relied on it to determine the Senate's original "implicit understanding." Congress, or in this instance the Senate, simply had no expressed or implied will on whether these provisions are or should be self-executing. Consequently the case fell within Justice Jackson's second category, not his third category.

The second argument, having to do with the President's international dispute-resolution power, may not have been made forcefully enough by the parties to the case. The President undeniably is the chief diplomat of the United States.[25] The endemic failure of state officials within the United States to implement Article 36(1)(b) of the Consular Convention created a non-trivial diplomatic issue for the United States in its relations with its neighbor, Mexico, and led directly to Mexico's proceedings against the United States in the *Avena* case. The President, by ordering state courts to comply with the relatively painless requirements imposed on the states of the United States by the I.C.J. in that case, was exercising his diplomatic authority to resolve the matter. He simply wanted to get the problem

[24] Some provisions in a treaty may be self-executing while others are not. *See* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987). The legislative history from 1945 and 1946 that the majority in the *Medellín* case mentioned was concerned entirely with *international* enforcement when a State party to an I.C.J. proceeding failed to comply with the judgment.

[25] United States v. Pink, 315 U.S. 203, 227–30 (1942); United States v. Belmont, 301 U.S. 324, 330–31 (1937); *see* U.S. CONST. art. II, § 3 (illustrating that the Constitution expressly gives the President the authority unilaterally to receive ambassadors and other public ministers).

off the table. He had a strong argument for sole executive authority on the specific facts of the case.[26]

The Supreme Court majority distinguished the cases on which the President relied because they involved the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals.[27] The important point in those cases was not that they involved executive agreements, but rather that the executive agreements reflected foreign policy decisions made by the Executive Branch. The most recent of those cases, *American Ins. Assn. v. Garamendi*, involved executive agreements that the Supreme Court majority regarded as important simply because they "expressed unmistakably" the national position adopted by the President on the settlement of Holocaust-era claims against German companies.[28] It was the President's policy that trumped inconsistent state law in that case.

The majority in *Garamendi* relied in part on the Supreme Court's 1968 decision in *Zschernig v. Miller*.[29] That case involved an Oregon probate law that had the effect of restricting inheritance of property by nonresident nationals of then-Communist countries. The probate law had led to off-the-cuff criticism of those countries by local probate judges. The Supreme Court in *Zschernig* invalidated the Oregon law because it intruded into the field of foreign affairs. The majority in *Garamendi* interpreted the *Zschernig* majority opinion as pre-empting state action that had more than an incidental effect on

[26] This argument has no implications for the President's asserted authority to act unilaterally to combat terrorism as commander-in-chief of the armed forces. In that context, the lines between presidential and congressional authority are much less clear than they are in the purely diplomatic context.

[27] Medellín, 128 S.Ct. at 1371–72. The majority referred to American Ins. Assn. v. Garamendi, 539 U.S. 396 (2003); Dames & Moore v. Regan, 453 U.S. 654 (1981); United States v. Pink, 315 U.S. 203; and United States v. Belmont, 301 U.S. 324 (1937).

[28] Garamendi, 539 U.S. at 421.

[29] Zschernig v. Miller, 389 U.S. 429 (1968).

foreign affairs, "even absent any affirmative federal activity in the subject area of the state law …."[30] It would seem, *a fortiori*, that the affirmative federal activity (the President's directive to state courts) in the *Medellín* case would pre-empt contrary state law. But the majority in *Medellín* did not mention the *Zschernig* case, which may now reside in legal limbo.

The *Medellín* majority rejected the third argument summarily, simply concluding that since the *Avena* judgment is not domestic law, the President could not rely on his "take care" powers.[31] The Constitution, however, says that treaties entered into by the United States are the supreme law of the land. It does not distinguish between self-executing and non-self-executing treaties for this purpose. A non-self-executing treaty is the supreme law of the land, even though a domestic court may not be able to enforce it against the government.[32] Medellín's argument based on the "take care" clause thus deserved considerably more than the majority's back-of-the-hand treatment. Arguably, a non-self-executing treaty (or treaty provision) that is in force for the United States presents a classic case in which the President could (and should) take care that the law is faithfully executed. The President should be able to do what is necessary to execute the supreme law of the land by overriding a state law or procedure that, if carried out, would cause the United States to violate the treaty.

D. The Principle Underlying the *Charming Betsy* Canon

The *Charming Betsy* canon stems from an 1804 U.S. Supreme Court case in which the Court said, "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible

[30] Garamendi, 539 U.S. at 418.

[31] Medellín, 128 S.Ct. at 1372.

[32] *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 203–04 (2d ed. 1996).

construction remains . . . ."[33] By its own terms, the canon was inapplicable in the *Medellín* case because the Supreme Court was not construing an Act of Congress. In fact, the Supreme Court majority virtually invited Congress to enact new legislation implementing the *Avena* decision.[34] The Justices must have known that the invitation would fall on deaf ears – not necessarily because a majority of the members of Congress would be expected to oppose giving Mexican nationals on death row an opportunity to show that they were prejudiced by the acknowledged violations of the Consular Convention, but rather because there is no constituency to which Congress members are accountable that would have a strong interest in urging such a legislative response. Congress has its hands full with constituents who do have strong interests in other legislative initiatives.

The result is that, for all practical purposes, the Supreme Court has placed the United States in violation of international law. That is something it should not do in the absence of a clearly-expressed congressional will to override (for domestic law purposes) a rule of international law. The point reflected in the *Charming Betsy* canon is that in applying and interpreting U.S. law, courts in the United States should choose the path that complies with international law unless Congress has clearly spoken to the contrary. To do otherwise is unnecessarily to place the United States at odds with an international legal regime that relies largely on reciprocity for its effectiveness. As the Supreme Court recognized in the *Charming Betsy* case, the United States has an interest in making that regime work. To be sure, that point would have been more evident to U.S. Supreme Court Justices in 1804, when the United States was not the world power that it is today. Nevertheless, even world powers have an important stake in maintaining an orderly international legal system.

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[33] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

[34] Medellín, 128 S.Ct. at 1365.

As we have seen, Congress has not clearly spoken against compliance with the I.C.J. judgment in situations like that arising from the *Avena* case. If there was doubt about the President's authority to execute the international obligation to comply with the *Avena* decision, the *Charming Betsy* principle should have tipped the scale in his favor.

E. Permissible Countermeasures

In the absence of an Act of Congress remedying the situation, the United States stands in breach of its obligation to comply with the I.C.J. judgment in the *Avena* case, as well as in breach of its obligations to Mexico under Consular Convention Article 36(1)(b). The question arises whether Mexico and possibly other States may apply countermeasures in response to those violations. There are two legal approaches Mexico or other States might pursue. One might rely (unconvincingly) on the Vienna Convention on the Law of Treaties[35] ("the Vienna Convention"); the other looks to customary international law relating to countermeasures.

Vienna Convention Article 60(2)(b) permits "a party specially affected by" a material breach of a multilateral treaty "to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State." Article 60(3)(b) says that "the violation of a provision essential to the accomplishment of the object or purpose of the treaty" is a material breach. According to the International Law Commission's official commentary to the Vienna Convention, a treaty violation could amount to a material breach if the violated provision was considered by the non-violating party to have been essential to the effective execution of the treaty,

[35] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, U.N. Doc. A/CONF.39/27 (1969).

even if the provision does not directly touch the central purposes of the treaty.[36]

Mexico would clearly be a party specially affected by the United States' breaches of both the U.N. Charter's obligation to comply with the *Avena* judgment and the Consular Convention's Article 36(1)(b) obligation to inform an arrested alien of the right to communicate with the consulate. It is far from clear that the U.S. breaches would amount to material breaches of either treaty, even under the International Law Commission's rather relaxed commentary. The Charter and the Consular Convention contain provisions that most or all States would consider far more important than the ones the United States has violated. There is no indication that when Mexico or other States joined the United Nations, they considered the binding character of I.C.J. judgments to be *essential* to the effective execution of the Charter. Consequently we may dismiss the proposition that the United States has committed a material breach (as defined in the Vienna Convention) of either treaty as a result of the Supreme Court's *Medellín* decision.

Customary international law allows a State injured by an internationally wrongful act of another State (such as a breach of a treaty obligation) to take proportional countermeasures against it, even if the wrongful act does not amount to a *material* breach of the treaty.[37] In some instances, even a State other than the injured State

[36] Report of the International Law Commission on the Work of Its Eighteenth Session, U.N. Doc. A/6309/Rev.1 (1966), *reprinted in* [1966] Y.B. INT'L L. COMM'N 172, 255, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

[37] *See* the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, arts. 49 & 51 ("Articles on State Responsibility"), and the Commentary thereto, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, 328-33 & 341-44, U.N. Doc. A/56/10 (2001), *reprinted in* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 281–87 (2002). *See also* Frederic L. Kirgis, *Some Lingering Questions About Article 60 of the Vienna Convention on the Law of Treaties*, 22 CORNELL INT'L L.J. 549, 571–72 (1989).

might take measures in response to the violation.[38] The proportionality standard has been applied rather loosely in at least one significant international arbitral decision, the *Air Services Agreement* case. In that case, the arbitral panel declined to apply a proportionality test that would have simply compared the impact of the countermeasures with the impact of the other party's wrongful act. Instead, it allowed some leeway for "positions of principle" in response to the wrongful act.[39]

Mexico thus might be entitled under the law of countermeasures to decline to execute domestically an I.C.J. judgment against it in a proceeding brought by the United States, at least if doing so would not constitute a threat to the peace (in which case the countermeasure might be considered clearly disproportionate). More importantly, Mexico would have a principled argument for disregarding Consular Convention Article 36(1)(b) when United States nationals are arrested in Mexico. It might have other options as well; the injured state is not limited to countermeasures that mirror the wrongful act of the other state, so long as they meet the proportionality test. Moreover, Mexico is not the only State whose nationals have been denied their Consular Convention rights in the United States and subjected to the procedural default rule. Those other States would also have grounds for disregarding Article 36(1)(b) when U.S. nationals are arrested in their territories.

It may also be argued that any State party to the United Nations Charter or to the Consular Convention – even a State whose nationals

[38] Articles on State Responsibility, art. 54.

[39] Case Concerning the Air Services Agreement of 27 March 1946 (U.S. v. Fr.), 18 R.I.A.A. 417 (1978). The panel upheld countermeasures that "do not appear to be clearly disproportionate" when compared to the wrongful act of the other State. In Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, paras. 85–87 (Sept. 25), the I.C.J. concluded that then-Czechoslovakia's diversion of the Danube River was disproportionate to Hungary's refusal to proceed with work under a treaty to construct and operate a system of locks on the river. The I.C.J. did not offer a test for proportionality.

have not been denied their Article 36(1)(b) rights – could take countermeasures against the United States' failure to comply with the *Avena* judgment. The International Law Commission's Articles on State Responsibility do not preclude countermeasures by a noninjured State when the obligation breached is owed (a) to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) to the international community as a whole.[40] One could argue that the U.N. Charter obligation to comply with a decision of the I.C.J. and the Consular Convention obligations relating to consular assistance are not only owed to the group of States parties to the Charter and the Consular Convention, respectively, but also were established for the protection of their collective interests – in the case of the Charter, their collective interests in the effective functioning of the United Nations' principal judicial organ, and in the case of the Consular Convention, their collective interest in seeing that nationals of all States parties have consular assistance when they get into trouble abroad.

One wonders whether the Supreme Court majority in *Medellín* took the prospect of countermeasures into account. It would have been a practical reason to apply the principle underlying the *Charming Betsy* canon.

F. Conclusion

The United States Supreme Court in the *Medellín* case could have implemented the I.C.J. judgment in *Avena* in a way that would not have encroached on Congress' powers and would not have imposed any substantial burden on the states of the union. The Court could have relied on the President's chief diplomat powers, which should at least be robust enough to permit him to order modest steps to be taken by state courts in order to comply with an I.C.J. judgment against the United States and thereby to resolve a diplomatic issue

[40] Articles on State Responsibility, arts. 48 & 54.

with a neighboring State. To grant that much power to the President would not be tantamount to endowing the Executive Branch with the panoply of powers it has asserted in recent years in other contexts. The precedent, in other words, could have been properly confined.

The result of the Supreme Court's decision in *Medellín* is to reinforce U.S. insularity in a world of norms and institutions that can only function effectively if the United States participates willingly and complies with its international obligations. In recent years it has been the Executive Branch that has marched to its own tune in international affairs. Now the leading arm of the Judicial Branch has quite unnecessarily joined in. The U.S. Supreme Court would have been better advised to take note of the more cosmopolitan approach of the German Federal Constitutional Court.

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