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DOES MEDELLÍN MATTER?

Janet Koven Levit*

INTRODUCTION

This Term's *Medellín v. Texas*¹ decision sent a shockwave through the international legal community. Practitioners lament the decision's impact on the United States' posture in treaty negotiations.² International legal scholars fear a *Medellín*-driven presumption against automatic enforceability of treaty obligations.³ Others conceive of *Medellín* as a blow to judicial transnationalism.⁴ Undoubtedly, *Medellín* creates a high, exacting bar for judicial enforcement of treaty obligations.⁵

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

2. Nina Totenberg, *All Things Considered: States Not Subject to All Treaties*, *High Court Rules* (NPR radio broadcast Mar. 25, 2008) ("Many U.S. diplomats were dismayed. Yale Law School Dean Harold Koh, who served as a State Department official in the Clinton administration, said the decision would create havoc in diplomatic circles for some time to come. 'If our international allies have no assurance that we're actually going to keep our word, then they have much less incentive to keep their word when they're being obliged to do something.' . . . Temple law professor Duncan Hollis, an expert on international law, said that nonetheless, Tuesday's ruling will have practical consequences. Because enforcement of some existing treaties may now be in doubt, negotiations over future treaties could be more difficult . . .").

3. See, e.g., Posting of Oona Hathaway to *Opinio Juris*, <http://opiniojuris.org/2008/03/26/medellin-v-texas-and-treaties-end/> (Mar. 26, 2008, 12:15 EDT); Posting of Paul Stephan to *Opinio Juris*, <http://opiniojuris.org/2008/03/25/medellin-v-texas-modest-and-fairly-careful/> (Mar. 25, 2008, 14:43 EDT); Posting of Ernie Young to *Opinio Juris*, <http://opiniojuris.org/2008/03/25/medellin-v-texas-another-set-of-early-thoughts/> (Mar. 25, 2008, 16:36 EDT); see also Margaret 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*, *ASIL INSIGHTS*, Apr. 17, 2008: Vol. 12 Issue 6, <http://www.asil.org/insights080418.cfm>.

4. See, e.g., Margaret E. McGuinness, *Three Narratives of Medellín v. Texas*, 31 *SUFFOLK TRANSNAT'L L. REV.* 227 (2008); Nina Totenberg, *High Court Rejects Bush Assertion on U.S. Treaties* (NPR radio broadcast Mar. 26, 2008) (noting that the decision is one about the status and enforceability of treaties in U.S. courts and that the decision could have been one about executive power but instead focused on the standing (or lack thereof) of international law); Posting of Eric Posner to *Convictions* blog,

Yet, does *Medellín* really matter? Of course, for Jose Medellín and his family, the answer is undoubtedly yes. On August 5, 2008, the U.S. Supreme Court denied Mr. Medellín's request for a stay of execution,⁶ and the State of Texas executed Medellín that evening.

Yet, from the narrow perspective of enforcement of Vienna Convention obligations, does the *Medellín* decision matter? This essay suggests that the answer is no, at least not as much as the immediate scholarly hysteria foreshadowed. Assuming that a goal of *Medellín*, and the litigation that preceded it, was timely implementation of consular notification rights,⁷ a cursory survey of on-the-ground activity at the local, state, and administrative levels suggests that the *Medellín* litigation indeed achieved its ends in spite of the Supreme Court's rather cautiously chilly decision.

Medellín punctuates more than a decade of Vienna-Convention-based litigation. During this time, critical touchpoints with detained foreign nationals became increasingly conscious and observant of consular notification rights. Thus, on the eve of *Medellín*, the United States, via a web of local officials and private actors, was already quite compliant with its Vienna Convention obligations. And the Court's decision in *Medellín* will not reverse or undermine such compliance.

I. A TOP-DOWN VIEW: A DECADE OF VIENNA CONVENTION LITIGATION

The international law stories that scholars often tell are of a "top-down" genre—they center on state elites who enact and interpret rules through formal legal mechanisms.⁸ Thus, a top-down story of *Medellín* rests on the diplomats who negotiated the Vienna Convention and the judges, at the state, federal and international level, who interpreted obligations under the treaty. From a mile-high view, *Medellín* culminates over a decade of

<http://www.slate.com/blogs/blogs/convictions/archive/2008/03/25/medellin-and-america-s-ability-to-comply-with-international-law.aspx> (Mar. 25, 2008, 12:40 EST).

5. In determining whether a treaty is "self-executing" and thus directly enforceable in U.S. courts, the U.S. Supreme Court resorts "to the text" of the treaty, thereby jettisoning the multifactor, case-by-case contextual analysis that has, until *Medellín*, separated self-executing from non-self-executing treaties. *Medellín v. Texas*, 128 S. Ct. 1346, 1362–63 (2008).

6. *Medellín v. Texas*, Nos. 06-984, 08-5573, 08-5574, 2008 WL 3821478 (U.S. Aug. 5, 2008) (per curiam) (denying stay of execution); see James C. McKinley, *Texas Executes Mexican Despite Objections from Bush and International Court*, N.Y. TIMES, Aug. 6, 2008, at A19.

7. While few would contest this assumption—that one of the goals of the *Medellín* litigation is enforcement of consular notification rights—some argue that other goals were dominant. See, e.g., Posting of Peggy McGuinness to *Opinio Juris* blog, <http://www.opiniojuris.org/posts/2008/03/25/medellin-its-about-the-death-penalty> (Mar. 25, 2008, 13:09 EDT).

8. See generally Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125 (2005); Janet Koven Levit, *Bottom-Up Lawmaking Through a Pluralist Lens: The ICC Banking Commission and the Transnational Regulation of Letters of Credit*, 57 EMORY L. REV. 1147 (2008).

foreign-government-prompted litigation to bring the United States into compliance with Vienna Convention obligations.⁹

Article 36 of the Vienna Convention provides that detaining officials must inform a foreign national “without delay”¹⁰ of his right to request that his consulate be informed of the detention;¹¹ and foreign consulates must be free to communicate with, visit, and/or arrange legal representation for foreign nationals.¹² State parties to the Convention are obligated to give “full effect”¹³ to the aforementioned rights. Vienna Convention rights are reciprocal, offering precious comfort to U.S. citizens when traveling abroad, often to countries with criminal justice systems that offer less procedural protections than our own.¹⁴ Significantly for purposes of the *Medellin* litigation, the Optional Protocol on Disputes, which the United States ratified in 1969, anoints the International Court of Justice (ICJ) as the venue to consider all “[d]isputes arising out of the interpretation or application” of the Convention.¹⁵

The gravamen of the *Medellin* litigation stems from a gap between treaty text and on-the-ground practice, exacerbated by a deeply entrenched federalist system. In the United States, detaining officials are typically members of state and local law enforcement agencies, and, historically, these officials have not regularly informed foreign national detainees of their Vienna Convention rights, primarily because international treaty obligations are foreign to their day-to-day practice. By the time a foreign national raises the Vienna Convention transgression, the criminal prosecution often has progressed to a point where state procedural bar rules (sometimes known as procedural default rules) impede a court’s ability to entertain Vienna Convention-related claims. Thus, in the United States, courts often do not have the opportunity to contemplate Vienna Convention violations and any concomitant prejudice to the foreign national.

Foreign states have become particularly angered when their foreign nationals receive death sentences without being informed of their Vienna Convention rights in a timely fashion, thereby spurring a flurry of Vienna Convention-related litigation in the ICJ pursuant to the Optional Protocol. On behalf of foreign nationals facing imminent death sentences, Paraguay and Germany filed separate claims against the United States in the ICJ, arguing prejudice on account of the United States’ failure to notify

9. *But see supra* note 7 and accompanying text.

10. Vienna Convention on Consular Relations and Optional Protocol on Disputes art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention and Optional Protocol].

11. *Id.*

12. *Id.* arts. 36(1)(a), (c).

13. *Id.* art. 36(2).

14. *See* Editorial, *A Travel Advisory*, N.Y. TIMES, Mar. 14, 2005, at A20.

15. Vienna Convention and Optional Protocol, *supra* note 10, art. I. U.S. Secretary of State Condoleezza Rice informed the Secretary General of the United Nations that the United States would withdraw from the Optional Protocol on March 7, 2005. *See* Charles Lane, *U.S. Quits Pact Used in Capital Cases: Foes of Death Penalty Cite Access to Envoys*, WASH. POST, Mar. 10, 2005, at A1.

respective defendants of their rights to contact their consulates.¹⁶ In each case, the ICJ concluded that the U.S. had not complied with Article 36;¹⁷ yet, in each case the Supreme Court denied ultimate habeas relief to the death row foreign nationals and thus did not give effect to the ICJ orders.¹⁸

Again, in 2003, on behalf of approximately fifty defendants on death row in various U.S. states, Mexico initiated the most recent challenge to the U.S. Vienna Convention practices.¹⁹ In the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, the ICJ concluded that the United States, in its arrest, detention, trial, and sentencing of the Mexican nationals, had violated its obligations under the Vienna Convention, most egregiously in its failure to notify these foreign nationals of their right to contact the Mexican Consulate.²⁰ While Mexico argued that the conviction and sentences in all of the cases should be annulled,²¹ the ICJ determined that the United States need only afford “review and reconsideration” to determine the extent to which each particular defendant had been prejudiced

16. In 1993, the State of Virginia convicted Angel Francisco Breard, a Paraguayan national, of attempted rape and capital murder and soon thereafter sentenced him to death. *Breard v. Commonwealth*, 445 S.E.2d 670, 673 (Va. 1994). Breard had been procedurally barred from raising the Vienna Convention issues at his habeas corpus proceedings. *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998). Paraguay argued in its April 3, 1998, International Court of Justice (ICJ) petition that the United States violated the Vienna Convention on account of the Virginia authorities’ failure to notify Breard of his right to contact the Paraguayan consulate; and consequently, Virginia should, among other things, stay the scheduled April 14, 1998, execution pending an ICJ decision on the merits of Paraguay’s case. *Vienna Convention on Consular Relations* (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9). Walter and Karl LaGrand were German nationals convicted in Arizona of first degree murder, attempted armed robbery, and kidnapping. *LaGrand Case (Ger. v. U.S.)*, 2001 I.C.J. 466, 475 (June 27). When the LaGrands raised their Vienna Convention rights in their habeas corpus proceedings, the federal courts concluded that the LaGrands were procedurally barred from doing so. *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir. 1998), *cert. denied*, 525 U.S. 971 (1998). Karl LaGrand was executed on February 24, 1999, prompting Germany to file its ICJ petition on March 2, 1999. *LaGrand Case (F.R.G. v. U.S.)*, 1999 I.C.J. 9, 12 (Mar. 3).

17. On April 9, 1998, just five days before Breard’s scheduled execution, the ICJ issued a provisional order, asking the United States to stay the execution pending an ICJ decision on the substantive Vienna Convention claims. *Vienna Convention on Consular Relations*, 1998 I.C.J. at 258. In the *LaGrand Case (Germany v. United States)*, the ICJ concluded that Arizona’s procedural default rules violated the Vienna Convention because their application precluded defendants from challenging their sentences even though the state officers had not informed them of their consular protections. 2001 I.C.J. at 492, 497–98.

18. Following the ICJ’s *Breard* provisional decision, the Supreme Court concluded that while the Vienna Convention “arguably confers on an individual the right to consular assistance following arrest,” the ICJ’s *provisional order* requesting a stay would not trump either state or federal procedural default rules. *Breard v. Greene*, 523 U.S. 371, 376 (1998); *see also* *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999); McGuinness, *supra* note 4.

19. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31). For an excellent summary of the *Avena* decision, see Dinah L. Shelton, *ICJ Jurisdiction—Vienna Convention on Consular Relations—Diplomatic Protection—Reparations, in International Decisions*, 98 AM. J. INT’L L. 559 (David D. Caron ed., 2004).

20. *Avena and Other Mexican Nationals*, 2004 I.C.J. at 42–43, 46.

21. *Id.* at 23.

by the respective Vienna Convention violations.²² The ICJ further concluded that procedural default rules violate the Vienna Convention to the extent that they preclude such review and reconsideration.²³

Medellín is one of the Mexican nationals named in *Avena*. In 1994, despite the fact that no official informed Medellín of his Vienna Convention-based right to contact the Mexican consul,²⁴ a Texas state court convicted Medellín of two counts of rape and murder and sentenced him to death.²⁵ Several years later, upon filing his state habeas petition, Medellín argued for the first time that his death sentence and conviction should be vacated on account of Texas state officials violating his Vienna Convention rights.²⁶ The state trial court, and later the Texas Court of Criminal Appeals, denied relief, concluding that Texas's contemporaneous objection rule barred Medellín's Vienna Convention claim and further concluding that the Vienna Convention did not grant individuals the right to raise Vienna Convention claims to attack their sentences.²⁷

Medellín filed a federal habeas petition in November 2001 (amended in 2002), again raising Texas's failure to inform him of his right to contact the Mexican Consulate as grounds for relief.²⁸ On June 26, 2003, the U.S. District Court for the Southern District of Texas rejected Medellín's Vienna Convention-based arguments;²⁹ it also, *sua sponte*, denied Medellín a

22. *Id.* at 65 (“[W]hat is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.”).

23. *Id.* Specifically, the ICJ stated that procedural default rules “may continue to prevent courts from attaching legal significance to the fact, *inter alia*, that the violation of the rights set forth in Article 36, paragraph 1, prevented Mexico, in a timely fashion, from retaining private counsel for certain nationals and otherwise assisting in their defence.” *Id.* at 57.

24. Jose Medellín informed the Texas officials that he was born in Laredo, Mexico, at the time of his arrest. *Medellín v. Dretke*, 544 U.S. 660, 675 (2005). Justice Sandra Day O'Connor pointed out in her dissent, “Medellín was arrested, detained, tried, convicted, and sentenced to death without ever being informed that he could contact the Mexican consul.” *Id.* at 675 (O'Connor, J., dissenting). The Mexican consulate discovered Medellín only because he wrote a letter from death row six weeks after his conviction was affirmed in the state court system. *Id.*

25. *Id.* at 662.

26. *See id.*; Application for Writ of Habeas Corpus at 25–31, 45, *Medellín v. State*, No. 675430-A (Tex. Dist. Ct. Mar. 26, 1998).

27. Brief for Petitioner at 7, *Medellín*, 544 U.S. 660 (No. 04-5928). The dissent stated that Medellín was “procedurally barred” from raising the Vienna Convention claims and, in the alternative, that Medellín “lack[ed] standing to enforce” the Vienna Convention. *Medellín*, 544 U.S. at 675 (O'Connor, J., dissenting) (citing the Texas District Court's conclusions of law).

28. Medellín argued that that the *LaGrand Case*, decided a few months prior to filing his habeas petition, “controls the interpretation of the Vienna Convention,” Brief for Petitioner, *supra* note 27, at 8 (internal quotation marks omitted), and that the federal courts are bound by its conclusions: (1) that individuals may bring challenges under the Vienna Convention; and (2) that procedural bar rules may not preclude such challenges, *id.* at 7–8.

29. *Medellín v. Dretke*, 371 F.3d 270, 274 (5th Cir. 2004); Brief for Petitioner, *supra* note 27, at 8.

Certificate of Appealability (COA), a prerequisite to pursuing further federal appeals under the Antiterrorism and Effective Death Penalty Act (AEDPA).³⁰ In October 2003, Medellín appealed the district court's denial of a COA on several grounds, including the Vienna Convention claim.³¹ The U.S. Court of Appeals for the Fifth Circuit denied Medellín relief, concluding that Medellín was procedurally barred from raising the Vienna Convention claim, in spite of the ICJ's intervening *Avena* decision.³² Thus, the Fifth Circuit's decision denied Medellín the review and reconsideration that *Avena* explicitly demanded.

As Court-watchers anticipated, on December 10, 2004 the Supreme Court granted Medellín's petition for a writ of certiorari to address the *Avena* decision's legal status within the federal court system.³³ *Medellin* did follow the rhythm of most Supreme Court cases—brief writing, oral argument, decision. On February 28, 2005, President George W. Bush ordered state courts to “give effect to” the *Avena* decision “in accordance with general principles of comity.”³⁴ On the basis of this memorandum,

30. *Medellin*, 371 F.3d at 274 (citing 28 U.S.C. § 2254 (2000)).

31. Brief for Petitioner, *supra* note 27, at 13.

32. *Medellin*, 371 F.3d at 280 (interpreting *Breard* as holding that “ordinary procedural default rules can bar Vienna Convention claims”).

33. *Medellin v. Dretke*, 544 U.S. 660, 661–62 (2005).

34. Memorandum from George W. Bush, President, U.S., to Attorney Gen., U.S., on Compliance with the Decision of the International Court of Justice in *Avena*, U.S. (Feb. 28, 2005), available at <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>. The memorandum states,

The United States is a party to the Vienna Convention on Consular Relations (the “Convention”) and the Convention’s Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (ICJ) jurisdiction to decide disputes concerning the “interpretation and application” of the Convention.

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its inter-national obligations under the decision of the International Court of Justice in the Case Concerning *Avena* and Other Mexican Nationals (Mexico v. United States of America) (*Avena*) by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

Id. (citation omitted). This memorandum surfaced as an attachment to the United States amicus brief in the *Medellin* case (note that the Court granted certiorari even though it had not reviewed the U.S. position in this case). Brief for U.S. as Amicus Curiae Supporting Respondents, *Medellin*, 544 U.S. 660 (No. 04-5928). The brief stated, “[T]he President has determined that the foreign policy interests of the United States in meeting its international obligations and protecting Americans abroad require the ICJ’s decision to be enforced without regard to the merits of the ICJ’s interpretation of the Vienna Convention.” *Id.* at *48. It went on to state,

[I]n light of the decision of the ICJ in *Avena*, the 51 named individuals may file a petition in state court seeking such review and reconsideration, and the state courts are to recognize the *Avena* decision. In other words, when such an individual applies for relief to a state court with jurisdiction over his case, the *Avena* decision should be given effect by the state court in accordance with the President’s determination that the decision should be enforced under general principles of comity. . . . The authority of the President to determine the means by which the United States will implement its international legal obligations is especially

Medellín filed a fresh habeas petition in the Texas Court of Criminal Appeals.³⁵ At this juncture, the Court chose not to decide *Medellín*, issuing a per curiam decision to dismiss the writ as improvidently granted.³⁶

While the Texas courts contemplated Medellín's fresh habeas petition, the Supreme Court ostensibly resolved one issue that it left pending in *Medellín*. In *Sanchez-Llamas v. Oregon*, a Vienna Convention case with defendants who were neither in the *Avena* class nor on death row, the Court concluded that Vienna Convention claims do not trump state procedural bar rules.³⁷ With this "ammunition," the Texas Court of Criminal Appeals denied Medellín's pending writ of habeas corpus on the basis of the President's memorandum.³⁸

The Court again granted certiorari in *Medellín*, poised to answer the two looming questions that the course of the litigation raised: (1) the legal effect of the *Avena* ruling in state courts; and (2) the legal effect of the President's memorandum requiring state courts to "give effect" to the *Avena* decision.³⁹ In this Term's decision, the Court ultimately concluded that neither state courts nor federal courts are bound by the ICJ's decision in *Avena* because the treaties which undergird the decision—the Optional Protocol⁴⁰ and Article 94 of the UN Charter⁴¹—are "non-self-executing" and thus do not constitute "directly enforceable federal law" that preempt "state restrictions on the filing of successive habeas petitions."⁴² These treaties are "non-self-executing" because Congress has not enacted any "implementing legislation" and because the treaties under scrutiny are not explicitly (by the terms of their text and/or ratification) self-executing.⁴³ The Court also concluded that the President does not have the independent authority to order state courts to "discharge" the United States' obligations under *Avena*.⁴⁴

important in the context of a treaty, like the Vienna Convention, that not only protects foreign nationals in this country, but also protects Americans overseas.

Id. at *42.

35. *Medellín*, 544 U.S. at 662.

36. The Court initially reasoned that "new developments," presumably the President's memorandum and the pending Texas state court habeas petition on the basis of *Avena* and the memorandum, "may provide Medellín with the review and reconsideration of his Vienna Convention claim that the ICJ required." *Id.* at 664.

37. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 337, 346–52 (2006). See generally Janet Koven Levit, *Medellín v. Dretke: Another Chapter in the Vienna Convention Narrative*, 41 TULSA L. REV. 193 (2005).

38. *Ex parte Medellín*, 223 S.W.3d 315 (Tex. Crim. App. 2006).

39. Petition for Writ of Certiorari, *Medellín v. Texas*, 128 S. Ct. 1346 (2008) (No. 06-984).

40. See Vienna Convention and Optional Protocol, *supra* note 10.

41. U.N. Charter art. 94.

42. *Medellín*, 128 S. Ct. at 1353, 1367 & n.13.

43. *Id.* at 1357.

44. *Id.* at 1367–72.

While the *Medellin* litigation persists in its ninth life,⁴⁵ the Supreme Court ostensibly resolved the legal issues at its core in a way that privileges domestic procedural rules vis-à-vis international treaty obligations. Thus *Medellin* and Vienna Convention obligations lose; state courts win. Viewing *Medellin* from the top down, U.S. courts now offer scant remedies for aggrieved foreign nationals, and the Vienna Convention's consular notification provisions retain little, if any, bite within the United States.

II. CONSULAR NOTIFICATION: A VIEW FROM THE GROUND UP

In this top-down account, *Medellin* reifies national/state rules in the face of "trespassing" treaty obligations. *Medellin* is thus a "knock out" to the ICJ's institutional standing and a reaffirmation of American dualism, disentangling the domestic legal system from the international.⁴⁶ From this vantage point, as Article 36 has no direct domestic effect and Vienna Convention "rights" are "hollow," plagued by a problem endemic to international law—lack of a "real" enforcement mechanism—foreign national detainees should not expect routine consular notification.

Paradoxically, the opposite appears to be true in local practice. In Tulsa, Oklahoma, for instance, foreign national detainees in federal custody routinely receive consular notification prior to their first appearance, which occurs within twenty-four hours of detention.⁴⁷ For those detained in the state system, the sheriff's office notifies the detainee upon booking at the local jail.⁴⁸ So, at the very moment that the Supreme Court concluded that Article 36 has no "automatic *domestic* legal effect," the effects are quite palpable, in fact transcendent.⁴⁹

Why the disconnect? The answer lies in the poverty of top-down accounts of international lawmaking, as these accounts ignore the not-so-glamorous underbrush and thus discount all that transpires on-the-ground, in-the-trenches. Instead, I offer a bottom-up story, centering on nonjudicial actors, particularly at the state and local level, who, for a variety of reasons—some completely unrelated to Vienna Convention litigation—progressively institutionalize consular notification practices. While a comprehensive review of on-the-ground consular notification practices is

45. Unofficial Press Release, Int'l Court of Justice, Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena and Other Mexican Nationals* (Mexico v. United States of America): Conclusion of the Public Hearings on Mexico's Request for the Indication of Provisional Measures (June 20, 2008), available at <http://www.icj-cij.org/docket/files/139/14598.pdf?PHPSESSID=03600872d3f9abcd0a09670d22963981>.

46. See generally Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007).

47. Telephone interview with Joseph Wilson, Assistant U.S. Attorney, U.S. Attorney's Office for the N. Dist. of Okla., in Tulsa, Okla. (June 6, 2008).

48. Interview with Honorable William Kellough, Judge, Tulsa County Court, in Tulsa, Okla. (June 12, 2008); Interview with Sue Snider, Deputy, Tulsa County Sheriff's Office, in Tulsa, Okla. (June 12, 2008).

49. *Medellin*, 128 S. Ct. at 1356.

beyond the scope of this essay, I offer an initial glimpse, based on a series of interviews in Tulsa County, Oklahoma,⁵⁰ as well as publicly available sources. So, as the heady constitutional issues at the heart of *Medellín* worked their way through the system, what was happening in places like Tulsa Oklahoma?

A. Federal Administrative Agencies

First, local law enforcement officials receive periodic visits from the U.S. Department of State. The State Department, with a diplomatic corps spread throughout the globe, understands that its employees (diplomats) are a primary beneficiary of Vienna Convention rights when abroad; thus, the State Department has a strong stake in the integrity of the Vienna Convention. James Lawrence—a young Vienna Convention missionary who is the Public Affairs Director of the State Department’s Consular Notification and Outreach Division—routinely visits local police departments, sheriff departments, and state attorney general offices, as well as a myriad of law enforcement trade associations,⁵¹ to offer intensive Vienna Convention education.⁵² This Outreach Division has distributed over one million pieces of consular notification instructional material,⁵³ including: flow charts that essentially map the Vienna Convention requirements; model procedures and protocols that local law enforcement agencies can adopt; a Consular Notification and Access Reference Card that

50. Interview with Mark Cagel, Assistant Pub. Defender, Tulsa County Pub. Defenders Office, in Tulsa, Okla. (June 11, 2008); Interview with Barry Derryberry, U.S. Fed. Defenders Office, N. Dist. Okla., in Tulsa, Okla. (June 25, 2008); Interview with Honorable Sam Joyner, Magistrate Judge, U.S. Dist. Court for the N. Dist. of Okla., in Tulsa, Okla. (June 6, 2008); Interview with Honorable William Kellough, *supra* note 48; Interview with Bill Mussman, Assistant Dist. Attorney, Tulsa County Dist. Attorney’s Office, in Tulsa, Okla. (June 12, 2008); Interview with Honorable Millie Otey, Judge, Tulsa County Court, in Tulsa, Okla. (June 10, 2008); Interview with Honorable Robert Perugino, Judge, Tulsa County Court, in Tulsa, Okla. (June 3, 2008); Interview with Sue Snider, *supra* note 48; Interview with David Sobel, private practice, in Tulsa, Okla. (June 11, 2008); Interview with Van Stevens, Immigration & Customs Enforcement Officer, Tulsa County Sheriff’s Office, in Tulsa, Okla. (June 12, 2008).

51. Such trade associations include: American Correctional Association, <http://www.aca.org> (last visited Oct. 9, 2008); American Jail Association, <http://www.aja.org> (last visited Oct. 9, 2008); American Probation and Parole Association, <http://www.appa-net.org> (last visited Oct. 9, 2008); International Association of Chiefs of Police, <http://www.theiacp.org> (last visited Oct. 9, 2008); National Organization of Black Enforcement Executives, <http://www.noblenatl.org> (last visited Oct. 9, 2008); National Sheriffs’ Association, <http://www.sheriffs.org> (last visited Oct. 9, 2008).

52. James Lawrence, a public affairs specialist, is charged with traveling the United States to train and educate more than 700,000 local law enforcement officials in 19,000 jurisdictions on consular notification matters. Interview with James A. Lawrence, Pub. Affairs Specialist, Consular Notification & Outreach Div., U.S. Dep’t of State, in Wash., D.C. (Jan. 5, 2006).

53. U.S. Dep’t of State, Working to Advance CNA Awareness & Compliance, State Department Activities to Advance Consular Notification and Access Awareness and Compliance, <http://www.travel.state.gov/law/consular/consular2244.html> (last visited Oct. 9, 2008).

provides a *Miranda*-esque script that law enforcement officials can use upon detaining a foreign national; translation of a consular notification script into thirteen languages; phone numbers and addresses for consulates throughout the U.S.; and training videos.⁵⁴ In Tulsa, Oklahoma, local law enforcement agencies have incorporated some of these State Department roadmaps into policy and practice.⁵⁵

Second, attendant to federal efforts to heightened enforcement of immigration laws, the U.S. Department of Homeland Security now prompts local law enforcement agencies to institutionalize “booking” processes that identify a detainee’s immigration status, which includes clarifying place of birth.⁵⁶ In the past, local law enforcement officials were hesitant to inquire about immigration status or place of birth because of legal ambiguities surrounding racial profiling. Thus, a consequence, perhaps unintended, of Homeland Security initiatives is a regularization, through immigration-related paperwork (i.e., questions regarding place of birth), of practices that facilitate notification of consular rights. Furthermore, Immigration and Customs Enforcement (ICE) officials have assumed a greater presence in local jails, and ICE officials are armed with a form known as the I-826, “Notice of Rights and Request for Disposition,” which is a type of consular notification.⁵⁷

B. Subnational Governments: States and Municipalities

State and local governments play a critical, but often overlooked, role in the making and implementing of international law.⁵⁸ Indeed, parallel to Vienna Convention litigation, some state legislatures incorporated Article

54. See generally U.S. Department of State, Consular Notification and Access, http://travel.state.gov/law/consular/consular_753.html (last visited Oct. 9, 2008); Consular Notification & Access (U.S. Department of State CD-ROM, Sept. 2005) (on file with author); U.S. Department of State, Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them, http://travel.state.gov/consul_notify.html (last visited Oct. 9, 2008); U.S. Dep’t of State, Arresting a Non-U.S. Citizen: Consular Notification Process, available at <http://travel.state.gov/pdf/CNAFlowcolor.pdf>.

55. See *infra* apps. 1 & 2 (documents are a verbatim replica of State Department materials). Beyond Tulsa, Oklahoma, State Department materials have a formative impact on local practices. See, e.g., CAL. PENAL CODE § 834c(a)(2) (West 2006) (“The law enforcement official who receives the notification request pursuant to paragraph (1) shall be guided by his or her agency’s procedures in conjunction with the Department of State Guidelines Regarding Foreign Nationals Arrested or Detained in the United States . . .”); OFFICE OF THE ATTORNEY GEN. OF TEX., MAGISTRATE’S GUIDE TO THE VIENNA CONVENTION ON CONSULAR NOTIFICATIONS (2006), available at http://www.oag.state.tx.us/AG_Publications/pdfs/vienna_guidebook.pdf.

56. See Interview with Van Stevens, *supra* note 50.

57. See Dep’t of Homeland Sec., Record of Deportable/Inadmissible Alien, Form I-213 (on file with author); Dep’t of Homeland Sec., Immigration and Customs Enforcement, Notice of Rights and Request for Disposition, Form I-826 (on file with author).

58. See, e.g., Hari M. Osofsky & Janet Koven Levit, *The Scale of Networks?: Local Climate Change Coalitions*, 8 CHI. J. INT’L L. 409 (2008); see also, e.g., Gerald E. Frug & David J. Barron, *International Local Government Law*, 38 URB. LAW. 1 (2006).

36 into penal codes, although Oklahoma's legislature has not yet done so. California, for instance, requires "every peace officer, upon arrest and booking . . . for more than two hours of a known or suspected foreign national" to "advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country."⁵⁹

In other states, administrative agencies, rather than legislatures, have taken the lead. Offices of State Attorneys General heighten law enforcement community awareness of their Vienna Convention obligations. Most notably the Texas Attorney General's office (Medellín's state) widely disseminates a guide to consular notification,⁶⁰ and many states borrow heavily from this guide.⁶¹ The Oklahoma Law Enforcement, Education, and Training Council, a quasi-public entity, offers live and online continuing education to law enforcement officers; one training video is dedicated to consular notification.⁶²

Additionally, due to stricter enforcement of immigration laws, as well as the growth of the foster care system in many states, minor foreign nationals often fall into the custody of human services and/or child welfare agencies. These agencies regularly enter into Memorandums of Understanding (MOUs) with the government of Mexico that provide, in part, that such agencies will afford minors Vienna Convention protections and contact the respective consulate when a minor falls into their custody.⁶³ These MOUs

59. CAL. PENAL CODE § 834c(a)(1).

60. See MAGISTRATE'S GUIDE TO THE VIENNA CONVENTION ON CONSULAR NOTIFICATIONS, *supra* note 55.

61. IND. SUPREME COURT, IMMIGRATION ISSUES ARISING IN INDIANA CRIMINAL COURTS, *available at* <http://www.in.gov/judiciary/center/education/library/criminal/immigration/issues.pdf> (citing the Magistrate's Guide prominently in developing discussion of Vienna Convention).

62. See Oklahoma Council on Law Enforcement Education and Training (CLEET), Continuing Education: Consular Notification, http://www.ok.gov/cleet/Continuing_Education/Continuing_Education_-_User_Login_-_CE_Courses/index.html (last visited Oct. 9, 2008).

63. See Memorandum of Understanding Between the Government of the State of Iowa of the United States of America and the Ministry of Foreign Affairs of the United Mexican States Regarding Consular Notification and Access in Cases Involving Minors, Iowa Department of Human Services, May 4, 2007, *available at* http://www.dhs.state.ia.us/policy/analysis/PolicyManualPages/Manual_Documents/Master/17-C3%20T12.pdf. Nebraska signed a similar memorandum a few months prior to Iowa. Memorandum from Todd Reckling, Protection & Safety Admin'r, Office of Protection & Safety, Neb. Health & Human Servs. Sys., to Holders of Title 390 (Feb. 6, 2006); *see also* Memorandum of Understanding Between the State of Illinois, Department of Children and Family Services and the Consulate General of México in Chicago Regarding Consular Notification and Access in Cases Involving Minors, Nov. 8, 2007, *available at* <http://www.f2f.ca.gov/res/pdf/IllinoisMOUMexicanConsulate.pdf>. County governments, in lieu of the state, have also entered into these memoranda of understanding. *See, e.g.*, Memorandum of Understanding Between the County of Sacramento on Behalf of the Department of Health and Human Services, Child Protective Services Division and the Mexican Consulate, Sacramento, California, July 1, 2005, *available at* <http://www.f2f.ca.gov/res/pdf/SacramentoMOUMexicanConsulate.pdf>; Memorandum of Understanding Between the Consulate General of Mexico in San Diego, California and the County of San Diego Health and Human Services Agency, State of California of the United

consider the treatment of minor foreign nationals in state custody, often creating detailed processes for identifying foreign nationals and standardizing notification processes.⁶⁴ Consular notification processes that gel to protect children in state custody inevitably impact workflow, paper trails, and general consciousness in a broader sphere.

C. Public Servants: U.S. Attorneys, Public Defenders, and Private Lawyers

The criminal defense bar has become increasingly sensitized to Vienna Convention missteps, and thus the anecdotal rate of procedural default appears to be decreasing. Treatise materials implore all federal public defenders to raise Vienna Convention transgressions at trial.⁶⁵ And public defenders acknowledge that they are “on the lookout” for consular notification (or the failure thereof).⁶⁶

In federal cases, the Assistant U.S. Attorney (AUSA) actually serves as the backstop for consular notification.⁶⁷ If detaining officials—sheriffs, police, detectives—overlook notification, the AUSA notifies the foreign national of his or her rights and sends a standard fax to respective consulates when detainees make such requests.⁶⁸

The American Bar Association’s Guidelines for Defense Counsel in Death Penalty Cases deploy appointed private counsel to protect Vienna Convention rights, calling upon counsel to: (1) “make appropriate efforts” to determine whether the client is indeed a foreign national; (2) “advise the client of his or her right to communicate with the relevant consular office”; and (3) “obtain the consent” to contact the consulate and, upon receiving such consent, “immediately contact the client’s consular office.”⁶⁹

States of America Regarding Consular Assistance in Cases of Custody Involving Mexican Minors, Apr. 30, 2008, available at <http://www.f2f.ca.gov/res/pdf/SanDiegoMOUMexicanConsulate.pdf>; Memorandum of Understanding Between the Monterey County Department of Social and Employment Services, Family and Children Services and the Consulate General of Mexico in San José, California Regarding Consular Involvement in Cases Involving Minors, 2007, available at <http://www.f2f.ca.gov/res/pdf/MontereyMOUMexicanconsulate.pdf>; Memorandum of Understanding on Consular Protection of Mexican Nationals Between the County of Riverside Department of Public Social Services, California, and the Consulate of Mexico in San Bernardino, California, available at <http://www.f2f.ca.gov/res/pdf/RiversideMOUMexicanConsulate.pdf>.

64. See ILL. DEP’T OF CHILDREN & FAMILY SERVS., POLICY GUIDE 2004.02: MEXICAN CONSULATE NOTIFICATION OF MEXICAN OR MEXICAN AMERICAN MINORS IN THE CUSTODY OF THE DEPARTMENT (2004) (on file with author).

65. FED. DEFENDERS OF E. WASH. & IDAHO, PRACTICE GUIDE FOR DEFENDING A FEDERAL CRIMINAL CASE 285 (2001).

66. See Interview with Barry Derryberry, *supra* note 50.

67. See Interview with Honorable Sam Joyner, *supra* note 50.

68. *Id.*

69. AM. BAR ASS’N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, 1012–14 (2003), available at <http://www.abanet.org/deathpenalty/resources/docs/2003Guidelines.pdf>.

D. Nongovernmental Actors: Think Tanks and Trade Associations

In addition to serving as a conduit for efficient dissemination of Vienna Convention educational materials, trade associations illuminate best practices and set minimum standards for their membership.⁷⁰ For instance, the Commission on Accreditation for Law Enforcement Agencies has recently added a “consular notification and access standard” to their accreditation standards for local law enforcement.⁷¹

The Pegasus Research Foundation answered Congress’s post-9/11 charge to enhance security and preparedness by creating a local-to-local data communications network which will enable local law enforcement officials to “talk to each other.”⁷² In creating such a system, the Pegasus Research Foundation has developed electronic consular notification functionality as an “add on,” thereby giving local law enforcement agencies who subscribe to the electronic database capability to fulfill Vienna Convention obligations.⁷³

E. Foreign Governments

Beyond litigating *Avena*, the government of Mexico is waging a concerted political, diplomatic and economic campaign on behalf of its nationals. As noted above,⁷⁴ while the courts contemplated the Vienna Convention, Mexico signed MOUs with myriad state and local governmental agencies reinforcing its protections. Consistent language from MOU to MOU suggests that the constant party—Mexico—choreographed this MOU strategy. Additionally, at various stages of the litigation, Mexico allegedly threatened targeted economic protests, aimed particularly at those states whose courts (and then governors) ignore *Avena*.⁷⁵

70. See, e.g., *supra* note 51 and accompanying text.

71. Working to Advance CNA Awareness & Compliance, http://www.travel.state.gov/law/consular/consular_2244.html (last visited Oct. 9, 2008) (noting that the Commission on Accreditation for Law Enforcement Agencies recently published a “consular notification and access standard in their 5th Edition of the ‘Standards for Law Enforcement Agencies,’” which requires all agencies to “draft a written directive governing procedures for ensuring compliance with the Vienna Convention on Consular Relations”); see also Commission on Accreditation for Law Enforcement Agencies, <http://www.calea.org> (last visited Oct. 9, 2008).

72. LEE COLWELL, PEGASUS RESEARCH FOUND., 2005 ANNUAL REPORT TO CONGRESS ON THE LOCAL-TO-LOCAL (L2L) INFORMATION EXCHANGE NEEDS & REQUIREMENTS OF THE NATION’S LOCAL LAW ENFORCEMENT AGENCIES (2005), available at http://www.pegasusresearch.org/2005_Annual_Report_to_Congress.pdf.

73. U.S. Dep’t. of State, Working to Advance CNA Awareness & Compliance, State Department Activities to Advance Consular Notification and Access Awareness and Compliance, http://www.travel.state.gov/law/consular/consular_2244.html (last visited Oct. 9, 2008).

74. See *supra* notes 63–64 and accompanying text.

75. Cf. Paul English, *Death-Penalty Foes Plead with Henry to Spare Mexican’s Life*, TULSA WORLD, May 13, 2004, at A17. My personal involvement in the matters described herein have led me to believe that these threats were made.

F. *Bottom-Up Lawmaking: Transnational Legal Progress*

Local law enforcement practices stand at the confluence of these foreign, federal, state, local, and private initiatives, and the ensuing empirical evidence belies the pessimism that *Medellin* spawned. Local law enforcement operating procedures now routinely incorporate Vienna Convention obligations, often creating roadmaps and consular notification forms that functionally translate treaty requirements, stated in diplomatic legalese, into on-the-ground practice.⁷⁶ In Tulsa County, early “touchpoints” in a foreign national’s detention—sheriffs, detectives, and magistrates—follow protocols and checklists that include Vienna Convention-related questions.⁷⁷

Why the disjuncture between the Court’s palpable hostility toward the Vienna Convention in *Medellin* and the accommodating attitudes on the ground by those who grapple with consular notification day in and day out? In my view, the Court’s pronouncement happened too far into the consular notification tale to have significant consequence. The top-down story of Supreme Court and ICJ decisions, a story that international legal scholars are often quick to tell, is unidimensional and woefully inadequate to capture the complex dynamics that Vienna Convention litigation sparked. The decade-plus volley within the judicial echelon—the volley that is at the heart of top-down accounts—unleashed irrepressible forces, triggering transnational dialogue and energizing multiple state, local, and private actors. A bottom-up account thus reveals that, by the time the Court issued *Medellin*, a core goal of Vienna Convention litigation, compliance, had been met. The complex, intertwined, and self-reinforcing nature of the web that undergirds such compliance suggests that the decision will not spark a reversal.

CONCLUSION

While *Medellin* may have limited consequence, its backdrop nonetheless reveals much about international law and lawmaking. International law is not a snapshot; it is an interactive process. This simple, almost self-evident conclusion has been at the fulcrum of international scholarship for

76. See, e.g., ROBERT C. WHITE, STANDARD OPERATING PROCEDURES FOR THE LOUISVILLE METRO POLICE DEPARTMENT, No. 10.4.5 (2005) (“Upon knowingly arresting a foreign national, officers shall . . . [i]mmediately advise the foreign national of his right to consular notification.”); see also Michael Ramage, Emerging Immigration Issues for Local Law Enforcement: A Presentation to the International Association of Chiefs of Police Legal Officers Section (Sept. 25, 2005), available at [http://www.fdle.state.fl.us/OGC/Seminar%5FInfo%5F%20et%5F%20al/IACP2005%20\(2\).doc](http://www.fdle.state.fl.us/OGC/Seminar%5FInfo%5F%20et%5F%20al/IACP2005%20(2).doc) (“Make sure your troops know of the obligation to notify foreign consul whenever ANY foreign national is detained or arrested. Have a policy in place and assure your agency follows it.”).

77. See, e.g., Interview with Sue Snider, *supra* note 48; see also *infra* app. 1 (including a checklist of documents that must be included in files for those who are booked at the Tulsa County Jail).

decades.⁷⁸ Yet, scholars and practitioners tend to celebrate the role of traditional elites—diplomats, judges, presidents. What this essay emphasizes is the role of a myriad of actors who do not adorn headlines—instead, they are those who roll up their sleeves and grapple with the nitty-gritty mechanics of detaining, booking, and notifying foreign nationals of their Vienna Convention rights. Thus, international law emerges as a multidimensional, multidirectional process, emanating not only from the top down but also from the bottom up. To focus on “top-down” Vienna Convention litigation, on the Court’s ultimate decision in *Medellín*, without also contemplating all that is transpiring on the ground level, is to paint a woefully incomplete picture and to skew scholarly and advocacy endeavors.

Medellín indisputably closed the courthouse doors to many Vienna Convention claims. Yet, while Vienna Convention litigation made its way through various international, national, and state courts, public awareness of reciprocal Vienna Convention obligations grew, and nonjudicial actors began institutionalizing processes that effectively cured Vienna Convention transgressions. *Medellín* will not reverse all that has solidified in the underbrush—from police department checklists to consular notification functionality in law enforcement databases. For the most part, officials now notify foreign nationals of consular rights. Thus, consular notification happens whether the Supreme Court demands it or not. And, while scholars will undoubtedly parse and debate *Medellín*, from the perspective of Vienna Convention compliance, it is a decision that may simply not matter.

78. This “international law as process” approach has deep theoretical roots, beginning with Harold D. Lasswell and Myres S. McDougal’s New Haven School of International Law and a number of groundbreaking works by McDougal and W. Michael Reisman. MYRES S. MCDUGAL, *INTERNATIONAL LAW, POWER, AND POLICY: A CONTEMPORARY CONCEPTION* (1953); Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in World Constitutive Process: How International Law Is Made*, 6 YALE STUD. IN WORLD PUB. ORD. 249 (1980); Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1967); W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC’Y OF INT’L L. PROCS. 101, 107 (1981). It evolved into Dean Harold Koh’s more contemporary Transnational Legal Process School. See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183–84 (1996); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2626 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995)).

APPENDIX 1

WORK FOLDER

These forms and procedures are required to complete a Work Folder, check off once each step has been done.

** USE ONLY BLUE INK ON ALL IMMIGRATION FORMS AND DOCUMENTS.

- ___ IMACS One Screen
- ___ Scratch I-213
- ___ Notice of Rights (I-826)
- ___ Statement to be provided to detained Foreign National
- ___ IAFIS and IDENT search responses (All aliens are to rolled.) IAFIS IDENT
- ___ CIS response
- ___ NCIC response
- ___ Legal Service Providers (I-618) To be signed by Alien
- ___ Detainer (I-247)
- ___ Consular Notification (If needed)
- ___ Copy of the A&B
- ___ Any ID's they come to DLMCJC with to include immigration documents.

ENFORCE EVENT # _____

ENFORCE TRANS # (search only) () _____

Supervisory Review By: _____ Date: _____

Comments or additional information:

APPENDIX 2

STATEMENT TO BE PROVIDED TO ARRESTED OR DETAINED FOREIGN NATIONAL

ENGLISH

You are entitled to have us notify your country's consular representatives here in the United States. A consular official from your country may be able to help you obtain legal counsel and may contact your family and visit you in detention, among other things. If you want us to notify your country's consular officials, you can request this notification now, or at any time in the future. After your consular officials are notified, they may call or visit you.

Do you want us to notify your country's consular officials?

YES _____

NO _____

Usted tiene derecho a pedirnos que notifiemos sobre su detencion a los representantes consulares de su pais aqui en Los Estados Unidos, si lo desea. Ademas de otras cosas, un funcionario de su pais puede ayudarle a obtener representacion legal, ponerse en contacto con su familia, y visitarlo en la carcel. Si usted desea que notifiemos al consulado de su pais, ellos podran llamarle o visitarlo.

Desea que notifiemos al consulado de su pais?

SI _____

NO _____

Name / Nombre _____

Signature / Firma _____

File Number _____

DOB: _____ POB: _____

I.C.E. Officer _____ Title _____

DATE: _____

Notes & Observations