Supranational Courts, Presidential Power, and the Medellín Case

Legal globalization is likely to affect every corner of American law in the coming century, including the law of criminal justice and sentencing. Three developments are particularly important: First, while international law once focused on relations among sovereign states, it is now increasingly concerned with relations between states and individuals. Second, because international law confers rights on large numbers of individuals that implicate the day-to-day functioning of a state’s legal regime, the officials with primary responsibility for compliance with and enforcement of those rights will often be local-level officials, not the centralized foreign policy apparatus accustomed to interpreting and carrying out international obligations. Third, some international agreements conferring rights of this kind provide for enforcement through supranational courts. This additional institutional layer raises many of the same interjurisdictional complications that we see in the domestic interaction between federal and state courts. Unfortunately, the doctrinal and institutional mechanisms needed to mediate the relation between supranational and domestic courts are still very much in their infancy.1

These developments converge in a string of recent cases involving the Vienna Convention on Consular Relations.2 Article 36 of the Convention provides that “if [the accused] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if . . . a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner.” Host country officials must “inform the person concerned without delay of his rights” under the Convention. Unfortunately, compliance by American law enforcement has been spotty at best, leading to extensive litigation in domestic courts and the International Court of Justice (ICJ).3 Most recently, in the Case Concerning Avena and Other Mexican Nationals, the ICJ ordered American courts to provide “review and reconsideration” of the convictions and sentences of over fifty Mexican nationals who have been convicted of capital murder and sentenced to death in various American states, and who had not been notified of their right to speak with the Mexican consulate prior to the initiation of criminal proceedings against them.4

The Avena decision intensified debate about four important issues. The first question, much debated in circuit courts and currently before the U.S. Supreme Court, is whether the Convention is “self-executing” in the sense that it creates rights enforceable by individuals in the domestic courts.5 The second is whether procedural default rules bar a foreign national from asserting his Consular Convention rights on federal habeas review when he failed to assert his rights in the state courts. The Avena court answered yes to the first question and no to the second, thus raising a third issue: To what extent is the ICJ’s interpretation of the Convention binding on domestic courts? Fourth, President George W. Bush responded to the Avena judgment by issuing a memorandum stating that the United States would comply by having the state courts provide the “review and reconsideration” that the ICJ required.6 This order raises important questions of both presidential authority and federalism; after all, Congress has never authorized the Executive to issue any such order, and the national government has never before imposed an exclusive obligation on the state courts to hear a case in violation of their own neutral procedural rules.

As this article goes to press, these questions are all before the Texas Court of Criminal Appeals in the Medellín case. A final issue, however, may prevent that court (and the U.S. Supreme Court on review) from resolving them. Medellín is not entitled to any relief if he was not prejudiced by the denial of his consular notification right;7 there is disagreement, however, both about what the standard for prejudice is and whether it should be governed by domestic or international law.

We argue that the Convention does not prescribe any particular remedy for individual violations, and the federal courts are poorly situated to create one in light of general doubts about their authority to imply private remedies under federal law. We urge Congress to fill this void by specifying a remedy for Consular Convention violations. Any such remedy, however, should be subject to the same rules that govern any federal claim on habeas corpus review—that is, there should be no special exemption from procedural default rules for treaty claims. On the third question, we argue that while the ICJ has the
authority to determine that the United States has violated a treaty on the international plane, it is not hierarchically superior to the domestic courts in the sense that its interpretations of international law are binding. As for the President’s memorandum, we claim that to the extent that the President sought to order the state courts to violate their own procedural rules, that action is unconstitutional on both separation of powers and federalism grounds. Finally, we argue that prejudice in Consular Convention cases should be governed by a domestic standard analogous to that for ineffective assistance of counsel claims. Under that standard, Medellín was plainly not prejudiced—with the result that all of the other fascinating questions in the case should be deferred for another day.

I. The Medellín Case

Jose Ernesto Medellín was convicted in 1994 of the brutal gang rape and double murder of two young girls in Houston, Texas. Although he had spent most of his life in the United States and was educated in American schools, Medellín remained a Mexican national. The Consular Convention thus required law enforcement officers to notify Medellín, upon his arrest, of his right to consult with the Mexican consulate. It is undisputed that the Houston police failed to do so, though Medellín did receive all the rights accorded American citizens including appointed counsel. Before trial, Medellín confessed to participating in the rape and murder; he specifically recounted that he strangled the two girls with one of his shoelaces. A jury ultimately convicted Medellín and sentenced him to death, and the Texas courts affirmed this judgment on direct appeal.

Mexican consular authorities learned of Medellín’s case approximately six weeks after his conviction was affirmed, and they assisted him in filing a state habeas corpus petition. That petition raised, for the first time, the violation of Medellín’s Consular Convention rights as a ground for vacating his conviction and sentence. The state courts rejected that argument. First, they held that the Texas contemporaneous objection rule barred relief because Medellín failed to raise his treaty claim at trial or during the direct appeal. Second, they determined that Medellín did not have an individual right to raise the Article 36 violation. Third, and in the alternative, they found that Medellín could not prove prejudice resulting from the violation.

Medellín then filed a federal habeas petition invoking the ICJ’s prior ruling in the LaGrand case, which found that “the clarity of [the notification] provisions . . . admits of no doubt” that Article 36 did confer an enforceable individual right and that Article 36(2) barred the application of procedural default rules that bar challenges to convictions and sentences because such rules “had the effect of preventing full effect [from being] given to the purposes for which the rights accorded under this article are intended.” The district court rejected Medellín’s arguments on the individual right and procedural default questions. It also accepted the state court’s prejudice reasoning, finding that Medellín had failed to establish “a causal connection between the [Consular Convention] violation and [his] statements.”

The ICJ decided Avena while Medellín’s case was before the U.S. Court of Appeals for the Fifth Circuit. Avena ordered the U.S. to provide “review and reconsideration” for each prisoner, including Medellín. The ICJ also held that the domestic procedural default rules that effectively barred Article 36 claims violated the Convention’s requirement that domestic law “must enable full effect to be given” to consular rights. The Fifth Circuit nonetheless denied Medellín’s claim, following prior Circuit precedent rejecting individually enforceable rights under the Consular Convention. The court of appeals also followed the Supreme Court’s ruling in Breaux v. Greene that Consular Convention claims, like constitutional claims, are subject to the procedural default rules of state criminal courts, despite the ICJ’s ruling to the contrary.

The Supreme Court granted certiorari to resolve two questions: whether a federal court is bound by the ICJ’s decision in Avena to set aside state procedural default rules and whether a federal court, as a matter of uniform treaty interpretation and comity, should give effect to the ICJ’s judgment. Before the Court heard oral arguments, the President issued a memorandum stating that:

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 international 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), 2004 ICJ 128 (Mar. 31), 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.

Based on the President’s Memorandum, as well as the Avena judgment itself, Medellín filed a new application for a writ of habeas corpus in the Texas Court of Criminal Appeals. The Supreme Court dismissed its writ of certiorari as improvidently granted, noting that the Texas court may provide Medellín the review Avena required.

Texas has disputed both the binding effect of Avena and the President’s authority to issue directives to the state courts.

II. Private Enforcement of the Consular Convention

The first point of controversy in cases like Medellín is whether the Consular Convention creates rights enforceable in domestic courts. This is sometimes framed as a debate about whether the treaty is “self-executing,” but that label conflates several distinct issues: for instance, (i) whether local law enforcement officers are legally bound...
by the Convention absent implementing legislation by Congress; (2) whether a foreign national whose Convention rights have been violated would have a private right of action for damages against the responsible officials; and (3) whether a court trying such a foreign national (or reviewing his conviction) may exclude evidence or set aside the conviction on account of the treaty violation. There is general agreement that the Consular Convention is self-executing in the first sense. Few cases so far have raised the second, as the foreign national is generally more interested in overturning his conviction or sentence than in damages. The third issue—whether domestic courts should mandate particular remedies within the context of the criminal prosecution—is currently before the Supreme Court in the Bustillo v. Johnson and Sanchez-Llamas v. Oregon cases.

One cannot answer these questions without noting two basic features of the Consular Convention: First, it confers rights on a vast number of individuals. Roughly 30 million nonimmigrant foreign nationals enter the United States each year. A nontrivial proportion of these are arrested for crimes, giving rise to an extraordinary number of potential Consular Convention claims. Second, the primary responsibility to enforce the Convention falls inevitably on officials who are far removed from the national foreign policy apparatus. In Medellin’s case, that meant the Houston police. Thus, the Convention is not like an arms control agreement to destroy a certain number of nuclear missiles, for instance, a few federal officials who have intimate knowledge of the agreement’s requirements will tightly control compliance.

The inevitable consequence of these two factors is that mistakes will be made—lots of them. That has at least two implications for enforcement: The first is that it makes little sense to hold a nation “in violation” of the Convention simply because the right is not observed in each individual case. The second is that the primary enforcement mechanism for Consular Convention claims must be prepared to deal with many, many claims. That means domestic courts must be the front line of enforcement in consular notification cases. No other mechanism—suits at the ICJ, courts should mandate particular remedies within the context of the criminal prosecution—is currently before the Supreme Court in the Bustillo v. Johnson and Sanchez-Llamas v. Oregon cases.

Our conclusion that domestic courts should be able to hear Consular Convention claims does not resolve the question of whether they are empowered to do so. Any effort to imply a private right of action for foreign nationals whose consular notification rights have been violated would encounter substantial difficulties under the Supreme Court’s recent case law disapproving implied rights under federal statutes. The reasons for judicial reluctance to imply such rights are even more compelling under treaties than statutes. In the former context, the courts risk interference with delicate judgments about foreign affairs, and the Executive branch’s conclusion that the Convention encompasses no such rights is entitled to considerable deference. The same considerations counsel hesitation about other judge-made remedies, such as exclusion of evidence or invalidation of convictions.

Debate continues to rage about the wisdom and effectiveness of exclusionary remedies. And invalidation of a conviction is an extreme measure in a trial that, by hypothesis, has already conformed to all the constitutional requirements of due process. The purpose of either sanction would be to deter violations of the Convention by the police, and the deterrent effect of such sanctions in the domestic context remains highly questionable.

We suggest that courts should hesitate to fashion such remedies on their own—not that there should be no individually enforceable remedies in these cases. Relying on claims espoused by other nations presents a stark institutional choice: Either the U.S. would renew its commitment to adjudication of Consular Convention claims in the ICJ (having withdrawn from ICJ jurisdiction after Avena), or there would be no adjudicatory enforcement mechanism whatsoever. The former would cut American domestic courts out of the loop entirely for purposes of construing the Convention, with the predictable result that emerging interpretations of the Convention’s provisions would display little sensitivity to the institutional complexities of the domestic legal system. The latter would significantly undermine the credibility of the United States as an exponent of international law and, more practically, jeopardize the consular notification rights of Americans abroad.

The remedial questions in Consular Convention cases involve a delicate balancing of disparate interests that is best entrusted to Congress. While the Convention is self-executing in terms of the compliance obligations it imposes on domestic law enforcement, implementing legislation could perform a valuable office by specifying particular remedies. As the contrast between 42 U.S.C. § 1983 and the implied Bivens remedy suggests, statutory remedies may well be more efficacious than ones laboring under the taint of judicial lawmaking. At the same time, legislation could couple individual remedies with structural incentives—such as conditioning federal financial aid to local police departments on demonstrable compliance measures—that courts are not positioned to impose. The bottom line is that action by the political branches seems better able to balance the complex foreign policy and domestic law enforcement interests implicated by these cases.

III. Procedural Default of International Claims

Our position that the domestic courts should be empowered to provide individual remedies in Consular Convention cases has a corollary: International tribunals like the ICJ should respect structural arrangements that ordinarily govern remedies for rights violations in the domestic courts. This view derives from the Legal Process principle of “institutional settlement,” which “expresses the judgment that decisions which are the duly arrived-at
result of duly established procedures . . . ought to be accepted as binding upon the whole society unless and until they are duly changed.” The procedural default doctrine is itself a tool of institutional settlement: It represents a judgment by the federal courts that federal challenges to state court convictions should be resolved, in the first instance, by the state courts. Reasonable people disagree about whether the Rehnquist Court’s version of the doctrine was too harsh, but we submit that some notion of procedural default is essential in any set of parallel judicial systems.

The ICJ appears to have disregarded the procedural default doctrine for two related reasons: First, it believed the international law maxim that the structures of domestic institutions are irrelevant to determining whether a treaty violation occurred; and second, it had an unrealistic view of its own institutional capacity to enforce the treaty. If we instead take a Legal Process perspective on the allocation of remedial authority between the ICJ and the domestic courts, the structure of the domestic legal system becomes highly relevant. In fact, the point of interjurisdictional doctrine in this context is to integrate the domestic legal system with supranational institutions in a workable way. Our immediate task would thus be to evaluate the comparative institutional competences of the ICJ and the domestic courts, assign various aspects of the cases to these institutions, and prescribe appropriate rules of deference when they evaluate one another’s handiwork.

From this perspective, the sheer number of potential consular notification claims requires that primary enforcement authority be vested in the domestic courts. The function of the procedural default doctrine would then be to ensure that such claims are, in fact, presented to the domestic courts in the first instance and to ensure that the efforts of those courts are not wasted by re-adjudicating the entire proceeding at the supranational level.

IV. The Effect of ICJ Judgments

As we have noted, the ICJ’s judgment in Avena addressed both the individual enforcement and procedural default questions arising in Medellín. No one disputes that, under the Optional Protocol whereby the U.S. consented to ICJ jurisdiction over Consular Convention disputes, the Avena judgment is binding on Mexico and the United States as a matter of international law. The question is the effect of that judgment as a matter of domestic law in the domestic courts.

The Optional Protocol operates on an arbitration model, in the sense that the binding effect of an ICJ judgment stems from the agreement of the parties rather than the inherent authority of the tribunal. The ICJ lacks the supreme authority to construe treaties that the U.S. Supreme Court has, for instance, over federal statutes and the Constitution; under the ICJ’s own statute, the court’s prior precedents are merely “evidence” of the content of international law. The question, then, is whether the parties to the Optional Protocol agreed to delegate to the ICJ the authority to issue judgments having direct effect within the domestic legal system. The answer is surely no: The U.S. executive branch has consistently construed the Optional Protocol to lack such effect, and we are aware of no decision by any foreign court treating ICJ pronouncements as binding domestically. If the international community were to sharply increase the ICJ’s power by giving it authority to bind the domestic legal system, that would dramatically increase the salience of any number of institutional difficulties—e.g., the lack of public accountability in the nomination process for ICJ judges, the adequacy of explanation in ICJ opinions, and allegations of national bias in voting patterns—commonly associated with the tribunal.

A better role for the ICJ would distinguish between individual and structural conceptions of remedies. Richard Fallon and Daniel Meltzer have contrasted Marbury v. Madison’s principle of “for every right, a remedy”—a principle that is aspirational in many ways, given hurdles like sovereign immunity and restrictions on jurisdiction—and a structural requirement that the system provide remedies that are generally adequate to keep the government within the bounds of law. The latter is a strong constitutional requirement, but it can accept the failure to provide a remedy in individual cases here and there. On this view, national courts should provide individual remedies: There are many domestic courts, and they are close to the facts of particular cases. The ICJ should confine itself to evaluating whether the overall legal system in place for enforcing the treaty is generally adequate for keeping the government in line with its obligations. The answer to this question in Consular Convention cases might still be no—especially if Congress refuses to create individually enforceable rights. The point is simply that it makes little sense for supranational courts to be reviewing the outcomes in particular cases.

Even if we agreed that the ICJ should confine itself to overall evaluations of a nation’s treaty compliance rather than adjudicating individual cases, two questions would remain: Should ICJ constructions of a treaty be given interpretive supremacy over those of national courts? And should the ICJ have the authority to back up its interpretations with binding orders akin to structural injunctions in domestic law? We have no space to explore those questions here. It will suffice to say that many international regimes operate without an authoritative supranational interpreter of the relevant treaty obligations, and the President’s extraordinary effort to comply with Avena suggests that even unilateralist governments take supranational adjudication seriously even in the absence of coercive enforcement.

V. The President’s Memorandum

Medellín’s lawyers and the Department of Justice have construed President Bush’s Memorandum as an order mandating that the state courts provide each of the Avena prisoners with a new hearing on his consular notification claim, even in the face of state procedural rules...
depriving the state courts of jurisdiction to do so. That construction would raise serious constitutional questions concerning the Executive’s authority to impose new legal obligations without Congressional authorization, as well as the national government’s authority to compel state courts to disregard their own procedural rules. The best reading of the Memorandum, however, is that it does no such thing. The Memorandum is directed to the U.S. Attorney General, not to the state courts; it lacks mandatory language; and it explicitly invokes permissive principles of comity. Nothing in the Memorandum suggests that the Executive means to reverse its prior position in the _Breed_ case, that is, that the federal government can request that States handle Convention cases in a particular way, but that it cannot command the States to do so. Multiple canons of construction, such as avoiding constitutional doubt and requiring a clear statement of intent to intrude on state sovereignty, support this permissive reading.

If the Memorandum is a mandatory order, then it is unconstitutional. The United States’ briefs in the _Medellin_ litigation have defended a mandatory reading of the Memorandum on the basis of an open-ended claim of “independent authority to act” in foreign affairs. But the Constitution contains no general “foreign affairs power”; rather, it carefully allocates a variety of specific foreign affairs powers between the President and Congress. Article II confers no express power over state courts on the President, and the President’s only unilateral power over criminal convictions—the pardon power—is explicitly limited to federal crimes. The Constitution explicitly reserves powers governing judicial jurisdiction in general and habeas corpus in particular to Congress.

Moreover, the Supreme Court has long held that the President’s power is at its “lowest ebb” when he acts in contravention of congressional legislation. Here, any attempt to revive defaulted claims in the state courts would contradict express congressional limits in the Antiterrorism and Effective Death Penalty Act (AEDPA) on federal habeas review. The AEDPA restricts federal interference with state convictions to narrow circumstances; in particular, it bars relief for prisoners who have failed to exhaust their state remedies and bars an evidentiary hearing for prisoners who failed to develop the facts underlying their claim in the state courts. Medellin’s procedural default prevented him from meeting either of these requirements, and the Supreme Court held that the AEDPA foreclosed relief under similar circumstances in _Breed v. Greene_. For the President to nonetheless require the state courts to revisit Medellin’s conviction would fly in the face of Congress’s carefully limited provision for reopening state proceedings. Under these circumstances, “[c]ourts can sustain exclusive Presidential control . . . only by disabling the Congress from acting upon the subject.” The Court has never upheld a presidential action of this kind, and there can be no serious argument that Congress lacks the power to enact a statute governing implementation of the Consular Convention.

A mandatory construction of the Memorandum would also raise a difficult question of federalism. Ordinarily, the national government lacks power to “commandeer” the institutions of state government for purposes of enforcing federal law. This doctrine does not ordinarily mean that state courts may decline to enforce federal law, because courts—unlike legislatures and executive officers—often enforce laws made by other sovereigns as a matter of course. But the Memorandum is highly unusual in that it imposes an obligation to enforce federal law in circumstances where the federal courts would be foreclosed from doing so, and it requires state courts to ignore their own neutral procedural rules. We are unaware of any case in which the state courts have been held obliged to enforce federal law under these circumstances.

VI. Prejudice under the Consular Convention

Even _Avena_ recognized that Medellín can receive a new trial only if he can show that the violation of his consular notification right “caused actual prejudice to [him] in the process of administration of criminal justice.” The Texas Court of Criminal Appeals thus could avoid all of the difficult international and constitutional law issues by deciding this case on the familiar ground that any error, if error there was, did not prejudice the defendant.

The key question for the Court of Criminal Appeals will be whether the prejudice standard applied in the Texas courts on direct appeal is the same standard required under the Consular Convention. The ICJ’s _Avena_ opinion seemed to adopt a causation prejudice test, asking “whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties.” In our view, _Avena_ demands the same type of prejudice inquiry regularly applied in state and federal courts. The Texas trial court arguably satisfied this test by finding that Medellín “failed[ed] to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment.”

Medellín’s lawyers have emphasized, however, that the Mexican government provides substantial resources for its nationals facing capital charges in the United States, and that these additional resources could have made a significant difference at sentencing—perhaps by funding better psychiatric testimony or other, more extensive inquiries into potentially mitigating evidence. The basic question is thus whether prejudice can be shown simply by demonstrating a probability that significantly more resources could have yielded a better outcome or whether prejudice instead presumes a trial that falls below some minimum level of procedural fairness. It is, after all, virtually always true that paying significantly more to defend a case may make some positive difference in the outcome. But that view of prejudice would make consular notification claims virtually unique in the arsenal of federal procedural
defenses, and it would open a wide range of convictions up to question.

The standard of prejudice in consular notification cases is, of course, a federal question. Even if the Texas Court manages to avoid the other issues in the case, the Supreme Court would nonetheless have a basis for direct review. It thus seems unlikely that the Supremes have seen the last of this case.

VII. Conclusion

Whether or not Medellín returns to the Supreme Court, the interaction of domestic and supranational courts is likely to require a great deal more attention in the coming decades than it has received to date. It will be important, in resolving all of these questions, to put aside strong feelings about the merits of the underlying treaty agreements as well as other political and moral questions, such as the legitimacy of the death penalty, that lurk in the background. The domestic legal system is a complex and carefully constructed structure meant to accommodate a wide variety of interests, and grafting a new layer of supranational adjudication on top of that structure is a task of even greater delicacy.

Notes

This essay draws heavily on arguments presented in the Brief of the States of Alabama, Montana, Nevada, and New Mexico as Amici Curiae in Support of Respondent, Ex parte Medellin, No. AP-75,207 (Tex. Crim. App. filed Aug. 31, 2005), available at http://www.debevoise.com/publications/pdfs/CDA%20State%20Amicus.PDF. Professor Young is grateful to his collaborators on that brief, Edward Dawson and Michael Ramsey. To the extent that the present essay goes beyond or diverges from the brief, of course, the views herein should not be attributed to them or to the amici states.

5 The Court heard two cases presenting the self-executing issue this term. See Bustillo v. Oregon, 126 S. Ct. 621 (2005) (mem); Sanchez-Llamas v. Oregon, 126 S. Ct. 620 (2005) (mem). Neither decision has yet issued as this article goes to press. The Seventh Circuit recently found the Vienna Convention on Consular Relations self-executing in Jogi v. Voges, 425 F.3d 367 (7th Cir. 2005).
7 Avena, at paras. 121-22.
8 For a summary of the facts and proceedings, see Medellin v. Dretke, 371 F.3d 270 (5th Cir. 2004).
12 See Medellin v. Dretke, 371 F.3d 270, 280 (5th Cir. 2004) (per curiam) (citing United States v. Jimenez-Nava, 243 F.3d 192, 198 (5th Cir. 2001)).
16 544 U.S. 660, 664 (per curiam).
20 Recently, however, the Seventh Circuit upheld just such a claim. See Jogi v. Voges, 425 F.3d 367 (7th Cir. 2005).
21 One of us has joined an amicus brief by international law and federal courts scholars arguing that the domestic courts should not imply such remedies in Bustillo and Sanchez. See Brief of Professors of International Law, Federal Jurisdiction and the Foreign Relations Law of the United States as Amici Curiae in Support of Respondents in Nos. 04-10566, Sanchez-Llamas v. Oregon, and 05-51, Bustillo v. Johnson, 2006 WL 259988.
24 See Brief of Professors, supra note 21, at 8-11.
25 For this reason, we urge that claimants should have to make a strong showing of prejudice. See infra Section VI.
recent trend toward using such claims to review the correctness of domestic court decisions on domestic law matters. See Young, Institutional Settlement, supra note 1, at 1170-77. See generally States' Brief, supra note 17, at 4-13.


43 Avena, supra note 4, para. 121. See also The Supreme Court, 2004 Term—Leading Cases, 119 Harv. L. Rev. 169, 327 (2005).