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EVERYONE KNOWS MEDELLIN; HAS ANYONE HEARD OF O'BRIEN? RECONCILING THE UNITED STATES AND THE INTERNATIONAL COMMUNITY BY AMENDING THE VCCR

STEVEN M. NOVAK*

I. A TALE OF TWO APPEALS

On August 5, 2008, Jose Ernesto Medellin ("Medellin"), a citizen of Mexico living in the United States since he was in preschool,¹ was executed for the rape and murder of two young girls, Jennifer Ertman and Elizabeth Pena.² The international implications of Medellin's citizenship caused his lengthy appellate process to involve a series of appeals in state and federal courts,³ the acclaimed International Court of Justice's decision in *Avena and Other Mexican Nationals*,⁴ a Presidential Memorandum,⁵ and finally, a much criticized decision in the United States Supreme Court.⁶ This appellate process was based on Medellin's citizenship and Texas law enforcement's violations of the Vienna Convention on Consular Relations Treaty (VCCR).⁷

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1. *Medellin v. Texas*, 552 U.S. 491, 500-01 (2008).

2. Allan Turner and Rosanna Ruiz, *Medellin Executed for Rape, Murder of Houston Teens*, HOUS. CHRON., Aug. 6, 2008, at A2.

3. *Medellin*, 552 U.S. at 498.

4. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 53-57 (Mar. 31).

5. See Brief for the United States as Amici Curiae Supporting Respondents at app. 2, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928), 2005 WL 504490 [hereinafter President's Memorandum].

6. See *Medellin*, 552 U.S. at 491 (outlining the complicated procedural history of Medellin's case); see John F. Murphy, *Medellin v. Texas: Implications of the Supreme Court's Decision for the United States and the Rule of Law in International Affairs*, 31 SUFFOLK TRANSNAT'L L. REV. 247, 272-75 (2008) (arguing that the Supreme Court's decision in *Medellin* will have strong, adverse effects on the international affairs of the United States and its citizens traveling abroad).

7. *Medellin*, 552 U.S. at 498-500; Vienna Convention on Consular Relations art. 36, Dec. 14, 1969, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter

In contrast, Derrick Sean O'Brien ("O'Brien"), an American citizen, convicted of participating in the same crime had no such treaty to fall back on.⁸ O'Brien was executed almost a full two years before Medellín,⁹ and after a less than noteworthy appellate process.

This contrast highlights a disconnect between the interests of international and domestic law that will be explored in this Comment. While Medellín and O'Brien both grew up in the United States, were members of the same Texas gang, and participated in a horrendous crime,¹⁰ Medellín's case raised international hairs while O'Brien's did not.

Part II of this Comment will outline the debate between international and domestic law as framed by the VCCR and its historical application in the United States. This debate appropriately sets the context, because the two sides have always been the interests of state domestic law in effectively prosecuting violent offenders against the interests of the rule of international law for foreign nationals arrested in the United States. Part III will contrast the appeals of Medellín and O'Brien in order to explain how the VCCR seems particularly inapplicable—and perhaps not worth enforcing by the states—when the suspect has lived in the foreign country for a long period of time and would know just as much about its judicial system as the average native. Finally, in Part IV, this Comment will propose an amendment to the VCCR that may make the treaty more applicable to both the interests of domestic law in the United States and at the same time preserve the deserved rights of foreigners—and American citizens abroad—arrested and scared in a strange land.

II. CONFLICTS OF INTEREST

A. *Texas Criminal Procedure*

1. *General Texas Criminal and Appellate Procedure*

In Texas, it is a capital offense for a person to—as Medellín was convicted of doing—murder more than one person during the

VCCR].

8. See *Ex parte O'Brien*, 190 S.W.3d 677, 677 (Tex. Crim. App. 2006) (limiting the appeal to a discussion of whether or not lethal injection was a cruel and unusual punishment under the Federal Constitution).

9. Allan Turner and Rosanna Ruiz, *O'Brien Executed for Rape-Murders*, HOUS. CHON., July 12, 2006, at A1.

10. See T.J. Milling, *Six Teens Held in Two Girls' Rape-Murders/"Vicious" Youths Reportedly were Bragging in their Cells*, HOUS. CHRON., Jun. 30, 1993, at A1 (reporting on the arrest of both O'Brien and Medellín and suggesting the two were both participating in a possible gang initiation rite and lived in close proximity to each other).

same “criminal transaction.”¹¹ In a capital case where the prosecution is seeking the death penalty, after the guilt-phase of the trial there is a sentencing phase whereupon the jury decides whether or not to impose the death penalty or merely life imprisonment.¹² Pursuant to the Texas Code of Criminal Procedure, all judgments of conviction and sentence of death are subject to automatic review by the Texas Court of Criminal Appeals.¹³ Medellín’s conviction and sentence was affirmed by this appellate court without Medellín raising the issue that his right to consular notification had been violated.¹⁴

2. The Procedural Default Rule

The concept of the procedural default rule, at action in Medellín’s appeal, is that if an issue is not raised at the trial level, then it is waived on appeal.¹⁵ In Texas, in order to preserve an

11. TEX. PENAL CODE ANN. § 19.03(7)(A) (Vernon 2005). To be part of the same criminal transaction, the murders must occur in a continuous and uninterrupted process over a short period of time. *Id.* See *Rios v. State*, 846 S.W.2d 310, 314 (Tex. Crim. App. 1992) (holding that the circumstantial evidence that the two victims were shot in the same manner, with the same weapon, and deposited in the same location was sufficient to support a jury finding that the two murders were part of the same criminal transaction).

12. TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(a)(1) (Vernon 2005). If the defendant is found guilty, the sentencing proceeding is conducted before the jury as soon as practicable. *Id.* art. 37.071(2)(a)(1). In this proceeding, evidence is presented by both the state and the defendant as to any matter that may be relevant to sentence including evidence of the defendant’s background or character or other mitigating circumstances. *Id.* art. 37.071(2)(a)(1). Upon conclusion of the proceeding, the judge submits two issues to the jury: (1) whether there is a probability that the defendant would commit criminal acts of violence in the future; and (2) whether the defendant actually caused or intended to cause the death of the victim. *Id.* art. 37.071(2)(b). If the jury answers in the affirmative the above issues, while taking into account the background of the defendant, then the judge will sentence the defendant to death. *Id.* art. 37.071(2)(e), (g).

13. TEX. CODE CRIM. PROC. ANN. art. 37.071(h).

14. See *Medellin*, 552 U.S. at 501 (noting that Medellín only raised his VCCR claim in his first habeas application in state court, after direct review of his conviction by the state appellate court). Medellín’s subsequent VCCR claims in both state and federal court were in habeas applications and subsequent appeals from those applications. *Id.* at 501-02. Although Medellín did not appeal his direct conviction to the United States Supreme Court, a defendant convicted in state court and whose conviction was affirmed in the highest state appellate court can appeal to the United States Supreme Court which can review, among other things, state statutes as being “repugnant to the Constitution, treaties, or laws of the United States”. 28 U.S.C. § 1257 (2006); see *Burgett v. Texas*, 389 U.S. 109, 113-14 (1967) (asserting that the Supreme Court does not sit as a court of criminal appeals to review state cases and thus the states are free to provide criminal procedures as long as they don’t violate the Constitution).

15. See *Ex parte Medellin*, 223 S.W.3d 315, 322 (Tex. Crim. App. 2006) (noting that Medellín did not raise the issue of alleged VCCR violations at

issue for subsequent appellate review a party must give the trial court notice of the issue through a timely request, objection, or motion with sufficient specificity to make the issue clear.¹⁶ The only exceptions to this procedural default rule are rights which are so absolute that they cannot be waived.¹⁷

This rule also applies to appeals for post-conviction relief in writs of habeas corpus filed in federal court.¹⁸ This federal procedural default rule takes into account the effect of state procedural rules and applies them to federal habeas cases.¹⁹ In order to have this effect, the state rule must be firmly established and the petitioner must not have complied with the rule.²⁰ The procedural default rule operated in this way in Medellin's federal habeas application with Texas' waiver rule as the underlying state rule.²¹ This procedural default rule plays a major part in the debate on how the VCCR should be interpreted.

B. *The Debate between International and Domestic Law*

Over time, both the United States Supreme Court and the International Court of Justice (ICJ) developed different interpretations of the VCCR and the application of procedural default rules.²² Medellin himself was a named party in the *Avena* case, which held that his conviction should be reviewed despite any procedural default rules.²³ The ICJ decision of *Avena* would become the basis of Medellin's appeal to the United States Supreme Court.²⁴ Medellin's appeal would further decide which interpretation would be binding on courts in the United States.²⁵

trial, so that issue had been waived).

16. TEX. RULES. APP. PROC. Rule 33.1(a); *Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278, 280 (Tex. 1999).

17. See *Marbut v. State*, 76 S.W.3d 742, 749-50 (Tex. Crim. App. 2002) (citing *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993)) (describing briefly the categories of rights which are "absolute" and holding that a defendant's right to be tried by a qualified prosecutor is not so absolute as to be unwaivable).

18. *Keith v. Mitchell*, 455 F.3d 662, 674 (6th Cir. 2006). Congress has expressly granted the federal courts habeas jurisdiction. 42 U.S.C. § 2241 (2006). The writ of habeas corpus does not extend to a prisoner unless they are being held in violation "of the Constitution or laws or treaties of the United States." *Id.* § 2241(c)(3).

19. *Keith*, 455 F.3d at 674.

20. *Id.* at 673.

21. *Medellin*, 552 U.S. at 502.

22. Compare *Sanchez-Llamas v. Oregon*, 548 U.S. 321, 356 (2006) (holding that the VCCR did not preclude the application of state default rules), with *Avena*, 2004 I.C.J. at 53-57 (holding that domestic procedural default rules should not apply to VCCR violations).

23. *Avena*, 2004 I.C.J. at 53-57.

24. *Medellin*, 552 U.S. at 498.

25. *Id.* at 498-99.

1. *The VCCR*

In 1969, the United States ratified the VCCR.²⁶ The purpose of the VCCR as stated in its preamble is to “contribute to the development of friendly relations among nations.”²⁷ The particular relations at issue are the consular functions in Article 36 of the VCCR. Article 36 was included “with a view to facilitating the exercise of consular functions relating to nationals of the sending State.”²⁸ Article 36 essentially provides that foreign nationals arrested in a signing state be informed of their rights to confer with consular officers of their native state.²⁹ The foreign nationals are then able to meet with those consular officers and involve them in their legal defense.³⁰ In addition to the United States, this treaty governs the consular functions of approximately 165 other countries.³¹

According to the VCCR on its face, the authorities who arrested and interrogated Medellín violated his right to consular notification as described in its text.³² However, this is precisely

26. VCCR, *supra* note 7, at 77.

27. *Id.* at 79.

28. *Id.*

29. *Id.*

30. *Id.* Stated in full, Article 36(1) provides:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

Id. art. 36(a)(1)-(3). See also *infra* note 127 (describing some of the benefits consular involvement in a case can have in obtaining mitigating evidence from the native country).

31. Anthony N. Bishop, *The Unenforceable Rights to Consular Notification and Access in the United States: What's Changed Since the LaGrand Case?*, 25 HOU. J. INT'L L. 1, 10 (2002).

32. See *Medellin*, 552 U.S. at 501 (acknowledging that although Medellín was given Miranda warnings, the law enforcement officers did not inform

where the debate between international and domestic law enters the picture.

At both the state post-conviction and federal level, Medellín's claims that his consular rights had been violated were dismissed because Medellín waived the issue by not arguing it at the trial level or on direct review of his conviction.³³ Despite this harsh result, the Supreme Court has held that such an application of procedural default rules is appropriate.³⁴ In other words, although the VCCR technically applies, the procedural default rule also applies and can prevent a foreign national from raising the VCCR on appeal for the first time.³⁵ The application of the procedural default rule to the VCCR has been unsatisfactory to many nations and has led to suits in the ICJ being filed against the United States.³⁶

2. *The International Court of Justice and Early Decisions Regarding the VCCR*

The ICJ has been an important institution in deciding the course of international law since 1945 and is the "principal judicial organ of the United Nations."³⁷ The ICJ had twice discussed the

Medellin of his Vienna Convention right to notify his consulate of his arrest).

33. See *Medellin v. Tex.*, 552 U.S. at 501 (citing *Medellin v. State*, No. 71-997, slip op. at 64-65 (Tex. Crim. App. May 16, 1997) (explaining that Medellín's consular issue argument was dismissed on appeal to the Texas Court of Criminal Appeals because it was procedurally defaulted as he had failed to raise it at trial or direct review); *Medellin v. Cockrell*, Civ. Action No. H-01-4078, 2003 WL 25321243, at *11 (S.D. Tex. June 26, 2003) (holding of the Federal District Court that Medellín had similarly waived this issue).

34. See *Breard v. Greene*, 523 U.S. 371, 375 (1998) (holding that "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State"); *Sanchez-Llamas*, 548 U.S. at 356. (noting that the procedural default rule serves an important purpose in the adversarial system as the focus is on the parties to present critical issues to the court in a timely manner). Furthermore, Article 36(2) of the VCCR indicates that the laws and regulations of the particular ratifying state should be used in its application. See VCCR, *supra* note 7, art. 36(2) (stating that "the rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State").

35. See *Medellin*, 552 U.S. at 501-02.

36. See *infra* notes 38-39 (discussing cases filed against the United States in the ICJ based on the application of the procedural default rule to VCCR violations).

37. U.N. Charter art. 92. The ICJ was established pursuant to the United Nations Charter in 1945. *Id.* The organization of the ICJ and its various procedures are laid out in the Statute of the International Court of Justice (ICJ Statute), which was annexed to the U.N. Charter's Article 92. Statute of the International Court of Justice, Oct. 24, 1945, 59 Stat. 1051, T.S. No. 993 (1945), available at 1945 WL 26967.

According to the ICJ Statute, the ICJ is composed of a court of fifteen international members. *Id.* art. 3. Members of the court are elected by the General Assembly and by the Security Council from a list of nominations. *Id.*

issue of the VCCR and its alleged violations by the United States before the *Avena* decision: first in the *Breard* case³⁸ and then in the *LaGrand* case.³⁹

In *Breard*, although the ICJ issued a provisional measure ordering the United States to stay the execution of Angel Breard, the state of Virginia still carried out Breard's execution before the ICJ could decide the case fully on the merits.⁴⁰ After the

art. 4. The nominations are largely provided by the "national groups" in the Permanent Court of Arbitration. *Id.* No two members of the court are allowed to be from the same country and the basic requirements for nomination are "high moral character" and "qualifications required in their respective countries for appointment to the highest judicial offices, or are juris consults of recognized competence in international law." *Id.* art. 2. ICJ judges are elected for a period of nine years and can be re-elected if they choose to "run" again. *Id.* art. 13. It also provides that no member of the ICJ can hold any political or administrative position or maintain any other professional occupation. *Id.* art. 16.

Procedurally, only states can be parties in cases before the ICJ. *Id.* art. 34. Parties appeal to the ICJ by a written application addressed to the Registrar of the Court outlining the subject of the dispute and the parties that are implicated. *Id.* Hearings consist of both written and oral segments with presentations of documents, evidence, and expert testimony. *Id.* art. 43. Any judgment is final and cannot be appealed. *Id.* art. 60.

In deciding cases, The ICJ Statute generally provides that the court should apply "international conventions," "international customs", and "the general principles of law recognized by civilized nations." *Id.* art. 38.

Importantly, as will become apparent later in this Comment, the U.N. Charter addresses the effect of ICJ decisions. U.N. Charter, art. 94, ¶ 1 (stating that "each Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party").

38. See generally Memorial of the Republic of Paraguay, Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. Pleadings 99 (Oct. 9, 1998) (arguing that the United States should do everything in its power to stop the execution of Angel Breard due to the violations of his rights under the VCCR by Virginian law enforcement). Breard had been convicted of capital murder and sentenced to death. *Breard*, 523 U.S. at 373. The Republic of Paraguay's appeal to the ICJ was merely the last step in a long series of unsuccessful attempts to persuade the United States to reconsider Breard's case. See *id.* at 373-74 (summarizing the attempts of Paraguay to intervene on Breard's behalf, including a civil suit brought in federal district court against certain Virginia officials).

39. See generally *LaGrand Case* (Ger. v. U.S.), 2001 I.C.J. 466 (June 27) (holding that the United States should disregard the procedural default rule when deciding Article 36 VCCR violations). Walter and Karl LaGrand, two German brothers, were tried and convicted in Arizona for murder of a bank employee during an armed robbery. See *State v. LaGrand*, 734 P.2d 563, 566 (Ariz. 1987) (summarizing in detail the facts of the LaGrand brothers' crime and convictions). Much like Paraguay in regards to the *Breard* case, the German government initiated a similar civil suit in United States federal district court on behalf of the LaGrand brothers. See *LaGrand v. Lewis*, 883 F. Supp. 451, 468 (D. Ariz. 1995) (denying all of the LaGrand brothers' petitions with prejudice).

40. See Mani Sheik, *From Breard to Medellin: Supreme Court Inaction or ICJ Activism in the Field of International Law?*, 94 CAL. L. REV. 531, 540

execution, the United States apologized to Paraguay and Paraguay subsequently removed their ICJ petition.⁴¹ Similarly, in *LaGrand*, the LaGrand brothers were executed before the ICJ could decide the case on the merits.⁴² However, Germany, unlike Paraguay, did not withdraw its request for a decision.⁴³

In *LaGrand*, not only did the ICJ rule that its orders were binding, it also held that if notice of consular rights were not given in a timely fashion, the United States would be required to review and reconsider the conviction.⁴⁴ More importantly, the ICJ held that the procedural default rule was an insufficient excuse to prevent a foreign national from asserting their consular rights under the VCCR.⁴⁵

3. *Avena and Medellin: Are the Judgments of the ICJ Binding in a Court in the United States?*

Now that both the United States Supreme Court and the ICJ had different interpretations of the VCCR, the Supreme Court next had to decide which interpretation would be enforceable domestic law.⁴⁶ Medellin's case would serve as the context for the Supreme Court's decision that the ICJ's interpretation of the VCCR was not binding on domestic courts.⁴⁷

In light of the ICJ's *Breard* and *LaGrand* decisions, Mexico obtained a decision from the ICJ in *Avena* which held that the United States had violated Article 36(1)(b) of the VCCR and reiterated that state procedural default rules should be disregarded.⁴⁸ Medellin argued that the *Avena* decision constituted

(2006) (explaining that *Breard* was executed after the ICJ's provisional measure was recognized yet while the actual case was still pending before the ICJ).

41. See *id.* (characterizing the statement issued to Paraguay as an apology with promises that the United States would improve compliance with VCCR requirements through better education of officials and acknowledging the importance of reciprocity between nations of VCCR obligations).

42. Robert Greffenius, *Selling Medellin: The Entourage of Litigation Surrounding the Vienna Convention on Consular Relations and the Weight of International Court of Justice Opinions in the Domestic Sphere*, 23 AM. U. INT'L L. REV. 943, 952-53 (2008).

43. *Id.* at 953.

44. Daniel A. McFaul, Jr., *Germany v. United States of America*, 15 N.Y. INT'L L. REV. 119, 123-25 (2002). However, the ICJ did not specify how the required review and reconsideration would be carried out and left that specific decision up to the United States. *Id.* at 125.

45. See *LaGrand*, 2001 I.C.J. at 497-98 (justifying their holding on the basis that the procedural default rule had the effect of preventing "full effect from being given to the purposes for which the rights accorded under this article are intended" and thus violated Article 36(2) of the VCCR).

46. *Medellin*, 552 U.S. at 504.

47. *Id.*

48. *Avena*, 2004 I.C.J. at 53-57. Mexico named fifty-one individual Mexican nationals in *Avena*, including Medellin. *Id.* at 13. Another point reiterated in

a “binding” obligation on the state and federal courts of the United States and that his case should be reconsidered.⁴⁹ The major question had changed from how the VCCR should be interpreted to whether the *Avena* ruling was automatically binding federal law.⁵⁰

In *Medellin*, the Supreme Court answered that question by holding that ICJ decisions were not binding on domestic courts in the United States.⁵¹ *Medellin* cited three treaties which could have created the necessary obligation: (1) the jurisdictional mechanism of the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention (“Optional Protocol”); (2) the U.N. Charter; or (3) the ICJ Statute.⁵² Pursuant to the Supremacy Clause of the United States Constitution, it would seem that the cited treaties are binding on the states.⁵³ However, it is not that

Avena was that the United States was obligated to review and reconsider, again in a manner of its own choosing, the convictions of the named Mexican nationals. *Id.* at 72. Although Mexico had been pressing for a stronger, more decisive remedy to such VCCR violations, the ICJ instead “balked” at doing so. Greffenius, *supra* note 42, at 954. Furthermore, the ICJ found that the clemency process was also an insufficient method of review and reconsideration. *Id.*

49. *Medellin*, 552 U.S. at 504.

50. *Id.* at 498.

51. *Id.* at 506.

52. *Id.* at 499. The Optional Protocol is part of the same treaty as the VCCR and deals with the ICJ’s jurisdiction in disputes arising from the VCCR. See Optional Protocol Concerning the Compulsory Settlement of Disputes, Dec. 14, 1969, 21 U.S.T. 77, T.I.A.S. No. 6820 [hereinafter Optional Protocol] (stating in Article I that “disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a party to the present protocol.”).

The Optional Protocol, along with the UN Charter itself and the ICJ Statute, became the focus of the *Medellin* decision because only those treaties could possibly give rise to an interpretation that decisions of the ICJ were binding on courts in the United States. See *Medellin*, 552 U.S. at 506 (acknowledging that only the Optional Protocol, United Nations Charter, and the ICJ statute could supply the “relevant obligation” to give ICJ decisions a binding effect); *id.* at 506 n.4 (noting that even *Medellin* had disclaimed reliance on the VCCR).

Interestingly, because the VCCR itself had no jurisdictional component and was thus temporarily set aside, the United States Supreme Court assumed that Article 36 of the VCCR grants foreign nationals “an individually enforceable right to request that their consular officers be notified of their detention, and accompanying right to be informed by authorities.” *Id.* (quoting *Sanchez-Llamas*, 523 U.S. at 342-43). This assumption did not help decide the contested question of whether the VCCR bestowed rights to individuals. See generally Bishop, *supra* note 31, at 43-58 (arguing, before *Medellin* was decided, that there is “no” individual right to consular assistance in the United States).

53. See U.S. CONST. art. VI, cl. 2 (stating that: “[t]his Constitution, and the laws of the United States . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the

simple. The Supreme Court has long held that there is a distinction between treaties that are automatically domestic law as soon as they are ratified, and treaties that do not function as binding federal law without a separate act of Congress.⁵⁴ Treaties that do act without a subsequent legislative act are “self-executing.”⁵⁵

In *Medellin*, the Supreme Court held that neither the Optional Protocol,⁵⁶ Article 94 of the U.N. Charter,⁵⁷ nor the ICJ

Land.”); see also *Mo. v. Holland*, 252 U.S. 426, 432 (1920) (upholding a treaty between the United States and Great Britain which protected migratory birds that traveled between the United States and Canada from Tenth Amendment challenge as the treaty was the supreme law of the land).

54. *Medellin*, 552 U.S. at 504-05 (citing *Foster v. Neilson*, 27 U.S. 253, 315 (1829), *rev'd on other grounds* *United States v. Percheman*, 32 U.S. 51 (1833)). In *Foster*, Chief Justice Marshall established this distinction by separating treaties into different groups based on whether or not the treaty “operates, of itself, without the aid of any legislative provision.” *Foster*, 27 U.S. at 256. When a treaty did not “of itself” operate without a Congressional act, and in absence of such an act, the treaty then only created a political obligation, rather than a judicial one. *Id.* at 254; see also *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (explaining that treaty provisions which are not self-executing can only be enforced pursuant to Congressional legislation that give them effect).

55. See *Medellin*, 552 U.S. at 505 n.2 (stating: “[w]hat we mean by ‘self-executing’ is that the treaty has automatic domestic effect as federal law upon ratification”).

56. Although acknowledging that the United States agreed to submit disputes arising out of the Vienna Convention to the ICJ under the Optional Protocol, the Supreme Court found a distinction between “submitting to jurisdiction and agreeing to be bound.” *Id.* at 507. The Court saw the Optional Protocol as a simple granting of jurisdiction akin to compulsory nonbinding arbitration that would require a party to show up, but not treat the tribunal’s decision as final. *Id.* The Court also found dispositive the fact that the Optional Protocol contained no provisions about the effect of an ICJ decision and specifically no provisions committing the signatory nations to treat ICJ judgments as binding. *Id.*

57. Article 94(1) of the Charter provides that “each Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party.” U.N. Charter, art 94(1). The *Medellin* Court interpreted the phrase “undertakes to comply with the decision of the [ICJ]” as meaning “a commitment on the part of the U.N. Members to take future action through their political branches to comply with an ICJ decision.” *Medellin*, 552 U.S. at 492 (quoting Brief for United States as Amicus Curiae supporting Respondents at 34, *Medellin v. Texas*, 552 U.S. 491 (2008) (No. 04-5928) (emphasis in original)).

The Court also found dispositive the fact that the sole remedy for noncompliance in Article 94 was referral to the United Nations Security Council. *Medellin*, 552 U.S. at 509 (citing U.N. Charter, art. 94(2)). The U.N. Charter’s express diplomatic remedy was evidence that ICJ judgments were not meant to be enforceable in domestic courts. *Id.* If Article 94 was truly meant to deem ICJ judgments as binding, then Mexico, the ICJ, or any other party would have no reason to proceed to the Security Council to help enforce the judgment. *Id.* at 511-12.

As evidence that neither the Executive Branch nor the Senate intended

Statute,⁵⁸ were self-executing in bestowing binding domestic effect upon ICJ judgments. The Supreme Court based its decision largely on the explicit text of the treaties⁵⁹ and also the broader policy implications of holding that ICJ decisions are binding.⁶⁰ As a result, ICJ judgments were not given binding effect within the United States and instead became political and diplomatic issues.⁶¹

Medellin has since been harshly criticized as a near mortal blow to the United States' adherence to the international rule of law.⁶²

for ICJ judgments to be binding on United States domestic courts, the Court cited statements from the Congressional records indicating that such binding effect was not contemplated. *See id.* at 510 (quoting *A Resolution Proposing Acceptance of Compulsory Jurisdiction of International Court of Justice: Hearings on S. Res. 196 before the Subcomm. of the S. Comm. On Foreign Relations*, 79th Cong. 142 (1946) (statement of Charles Fahy, State Dept. Legal Adviser)) (stating that "while parties that accept ICJ jurisdiction have 'a moral obligation' to comply with ICJ decisions, Article 94(2) provides the exclusive means of enforcement.").

58. *See id.* at 510-13 (analyzing the ICJ statute and determining that, under its text, ICJ judgments can only be binding on the parties to the case, and those parties must always be states and cannot be individuals).

59. *See supra* notes 53-58 and accompanying text (discussing in detail the Court's textual approach to interpreting each treaty); *Medellin*, 552 U.S. at 510-15 (defending the majority's textual approach while criticizing the multifactor, "context specific" approach of the dissent).

60. *See Medellin*, 552 U.S. at 517-18 (arguing that if an ICJ judgment had binding effect, then neither a state nor the Supreme Court could look beyond the judgment and disagree with its reasoning or result). ICJ judgments that would override otherwise binding state law would also possibly override contrary federal law as well. *Id.* (citing *Cook v. United States*, 288 U.S. 102, 119 (1933)) (holding that a later-in-time self-executing treaty supersedes a federal statute if there is a conflict between the two).

The majority pointed out that *Medellin* did not identify a single nation that does, in fact, treat ICJ judgments as binding domestic law. *Id.* at 516. Almost comically, the best example that *Medellin's amici curiae* could produce is that local Moroccan courts have inconsistently referred to ICJ judgments as "dispositive". *Id.* at 517 n.10.

Furthermore, even the dissent takes the view that not all ICJ judgments should be considered binding because some judgments might be politically sensitive and thus better suited to the other branches. *Id.* at 560 (Breyer, J., dissenting). The majority, on the other hand, insists that it is not the job of the judicial branch to determine which judgments are politically sensitive and which are not. *Id.* at 518.

61. *See id.* at 519-20 (arguing that even in light of the ruling that ICJ decisions are not binding on domestic courts, the underlying treaties are not useless as such judgments would still constitute international obligations which would be better handled by political and diplomatic negotiations).

62. *See, e.g.,* Greffenius, *supra* note 42, at 970-74 (proposing, instead of *Medellin's* blanket rule, an adaptation of the *Erie* Doctrine to better determine in which cases domestic or international law applies); Jordan J. Paust, *Medellin, Avena, The Supremacy of Treaties, and Relevant Executive Authority*, 31 SUFFOLK TRANSNAT'L L. REV. 301, 328-29 (2008) (contesting that

III. THE DIFFERENCE TECHNICAL CITIZENSHIP CAN MAKE

A. Focusing on Medellín

Medellin came to the United States when he was three-years-old and, despite being a citizen of Mexico, could read and write fluently in English.⁶³ By the time Medellín was eighteen-years-old, he had already joined a violent Texas gang known as the Black and Whites,⁶⁴ which was led by Peter Cantu and O'Brien.⁶⁵ The Black and Whites gang had a reputation for violence and members of the gang besides Medellín and O'Brien had committed violent acts before the Ertman and Pena murders.⁶⁶

Medellin's official criminal background, before his arrest for the Ertman and Pena murders, contained only a juvenile weapons possession charge.⁶⁷ However, certain incidents that also took place before the Ertman and Pena murders relating to his involvement with the gang became documented due to testimony during Medellín's trial.⁶⁸ Witnesses at the sentencing phase of Medellín's trial testified that in the wake of a gang-related

the Supreme Court's tests for determining self-execution of the relevant treaties was improper and that there is a presumption in favor of self-execution instead of one against it); Frederic L. Kirgis, *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*, 9 GERMAN L. J. 619, 636-37 (2008) (characterizing the Supreme Court's decision in *Medellin* as reinforcing U.S. insularity and accusing the Supreme Court of joining the Executive Branch in "march[ing] to its own tune in international affairs").

63. *Ex parte Medellín*, 223 S.W.3d at 358 (Hervey, J., concurring). Medellín had been living in Houston, Texas until his conviction and subsequent execution. Milling, *supra* note 10, at A1.

64. *Medellin*, 552 U.S. at 500-01. The gang members involved with the Pena and Ertman murders either as participants or witnesses consisted of Medellín himself, Medellín's younger brother, Venancio, Peter Cantu, Derrick O'Brien, Efrain Perez, Raul Villarreal, Roman Sandoval and Frank Sandoval. See *Chilling Testimony in Trials/Three Face Death in Rape-Murders of Teenage Girls*, HOUS. CHRON., Sept. 13, 1994, at A13 (naming the gang members who either participated in the Pena and Ertman murders or later served as witnesses). All of the members were either eighteen or nineteen years old except for Venancio Medellín who was only a minor at the time. *Id.*

65. Jennifer Liebrum, *Gang Members Sent to Death Row/Pair Raped and Killed Two Teen Girls*, HOUS. CHRON., Sept. 22, 1994, at A23.

66. See Jennifer Liebrum, *Prosecutors to Seek Death for Young Rapist-Murderers*, HOUS. CHRON., Sept. 20, 1994, at A20 (describing an incident testified to by a shooting victim of Efrain Perez). At the sentencing portion of Perez's trial, the victim testified that in 1992, Perez confronted him and threatened to rape his mother if he did not give him his L.A. Raiders jacket. *Id.* The witness further testified that when he attempted to run away, Perez shot him through the chest and shoulder. *Id.*

67. Texas Execution Information Center, Jose Medellín, <http://www.txexecutions.org/reports/410.asp> (last visited Aug. 21, 2010).

68. Liebrum, *supra* note 66, at A20.

shooting, Medellin, along with Efrain Perez, “showed contempt for authority.”⁶⁹ Blood samples taken from Medellin after he was arrested linked him to the murder of Patricia Lopez, which took place five months before the Ertman and Pena murders.⁷⁰

On June 24, 1993, Jennifer Ertman and Elizabeth Pena were walking home at night when they came across Medellin, O’Brien, and other Black and Whites members drinking and participating in a gang initiation.⁷¹ Roman Sandoval, another gang member, testified at Medellin’s trial that before he left the scene, he saw Medellin knock Pena down as she tried to get away.⁷² Christina Cantu, the sister-in-law of Peter Cantu and husband of Joe Cantu, testified that the group, with the exception of O’Brien, gradually revealed that they had raped and murdered the two girls.⁷³ Medellin was not a bystander and played an active role in at least one of the girls’ deaths by strangling her with a shoelace.⁷⁴ Joe Cantu called the authorities and reported the crime.⁷⁵ Medellin was arrested on June 29, 1993, and after the police read him his *Miranda* warnings, Medellin signed a waiver and gave a written confession.⁷⁶

In September 1994, jurors returned with a guilty verdict in fifteen minutes.⁷⁷ The next week, jurors sentenced Medellin to the

69. *Id.* Witnesses testified that in the wake of an unrelated “gang related shooting” Medellin and Perez said “they could take care of it themselves” rather than let police handle the shooting incident. *Id.*

70. Jennifer Liebrum, *DNA Test Links Murder Suspect to Another Killing*, HOUS. CHRON., May 3, 1994, at A17. Although blood samples were taken from Medellin, O’Brien, and Cantu, only Medellin’s positively matched the DNA evidence on the body. *Id.* A beer can with O’Brien’s fingerprint on it was found beneath the body. *Id.* The authorities confronted O’Brien about the evidence linking him and Medellin to the murder before his trial, and he subsequently gave a statement containing the details of the attack. *Id.* Medellin, Cantu, and O’Brien were never charged separately for the Lopez murder given their convictions in the murders of Ertman and Pena. *See id.* (speculating that if Medellin was found guilty the information would most likely be used in the punishment phase of his trial—similar to what happened in O’Brien’s case).

71. Jennifer Liebrum, *Heated Debate/Murder Victim’s Kin, Protestors Clash/Emotions High After Teenager Convicted*, HOUS. CHRON., Sept. 17, 1994, at A29; *see also supra* note 64, at A13 (listing the gang members involved with the attacks). Each of the gang members took turns fighting Villarreal, the new initiate. Liebrum, *supra* note 66, at A20.

72. Liebrum, *supra* note 64, at A13.

73. *Id.*; *see also* Texas Execution Information Center, *supra* note 67 (summarizing in detail the facts of the murders).

74. *Medellin*, 552 U.S. at 501.

75. Liebrum, *supra* note 64, at A13.

76. *Medellin*, 552 U.S. at 501.

77. Liebrum, *supra* note 71, at A29. It should be noted that in all of Medellin’s appeals for post conviction relief, he has not argued actual innocence. *See generally* Brief of Petitioner, *Medellin v. Texas*, 552 U.S. 491 (2008) (No. 06-984) (arguing Medellin’s case should be reviewed due to the ICJ’s decision in *Avena* and the President’s Memorandum); *see also Ex parte*

death penalty after four hours of deliberation.⁷⁸ Medellín's conviction and sentence were affirmed on direct appeal.⁷⁹

Medellin then made his first application for state post-conviction relief based on the violation of the VCCR.⁸⁰ Although law enforcement officers gave Medellín *Miranda* warnings, they did not notify Medellín of his VCCR right to notify the Mexican consulate of his detention.⁸¹ The trial court held that the claim was procedurally defaulted because Medellín failed to raise it at trial or even on direct review.⁸² With his habeas petition denied, Medellín's next step would be to take his VCCR issue, and its looming place in the international law controversy, into federal court.⁸³

B. Medellín Goes International

Medellin's subsequent appeals in federal court would eventually lead to the ICJ, the United States Supreme Court, and the international spotlight.⁸⁴ After his state habeas petition was denied, Medellín proceeded with his VCCR claim by filing another habeas petition in federal court.⁸⁵ The Southern District of Texas,

Medellin, 223 S.W.3d at 357 (Hervey, J., concurring) (noting that Medellín made no claim that he did not commit the crime he was convicted of).

78. Liebrum, *supra* note 65, at A23; *see also supra* note 66 and accompanying text (discussing some of the evidence of prior violence-related acts introduced during the sentencing phase of Medellín's trial). In addition to Medellín and O'Brien, Peter Cantu, Raul Villareal, and Efrain Perez were sentenced to death for their participation in the Ertman and Pena murders. Texas Execution Information Center, *supra* note 67. In June 2005, the sentences of Raul Villareal and Efrain Perez were commuted to life imprisonment because they were seventeen years old at the time of the crime. *Id.* Vernancio Medellín, who was fourteen years old at the time of the murders, was convicted of aggravated sexual assault and was sentenced to forty years in prison. *Id.* Peter Cantu remains on death row. *Id.*

79. *See generally* Medellín v. State, No. AP-71,997, slip op. (Tex. Crim. App. Mar. 19, 1997) (affirming Medellín's conviction and sentence on direct appeal).

80. Medellín v. State, No. 71-997, slip op. at 64-65 (Tex. Crim. App., May 16, 1997).

81. *Medellin*, 552 U.S. at 501.

82. *Medellin*, No. 71-997, slip op. at 64 (Tex. Crim. App. May 16, 1997); *see also supra* notes 14-19 and accompanying text (discussing the procedural default rule). The trial court in Medellín's state habeas petition also found that Medellín's claim failed on the merits, and that Medellín failed to show that his conviction or sentencing was impacted by him not being able to contact the Mexican authorities. *Medellin*, 552 U.S. at 501-02. In *Medellin*, the United States Supreme Court found that in only deciding whether ICJ judgments were binding on domestic courts, they were discharged from having to consider whether Medellín was at all prejudiced by the failure to notify the Mexican Consulate. *Id.* at 502 n.1.

83. *See id.* at 501-02 (explaining Medellín's habeas denial in state court and his filing of a habeas petition in federal court).

84. *Id.* at 501-04.

85. *Id.* at 502.

like the Texas state court, denied relief due to the procedural default rule.⁸⁶

While Medellín's appeal was pending in the United States Court of Appeals for the Fifth Circuit, the ICJ made its decision in *Avena*, in which Medellín was a named party.⁸⁷ Effectively, the ICJ ruled that the United States was obligated to reopen and review Medellín's conviction without regard to state procedural default rules.⁸⁸

Despite the *Avena* decision, the Fifth Circuit denied Medellín's application for a certificate of appeal by applying domestic law as opposed to the ICJ's ruling.⁸⁹ The United States Supreme Court granted certiorari.⁹⁰ However, while the case was pending and before oral arguments,⁹¹ President George W. Bush issued a Memorandum to the United States Attorney General ("President's Memorandum") ordering state courts to "give effect to the decision in accordance with general principles of comity."⁹² The United States Supreme Court dismissed Medellín's petition as improvidently granted as Medellín had filed a second application for habeas relief in state court based on *Avena* and the President's Memorandum.⁹³

The Texas Court of Criminal Appeals denied Medellín's second state habeas petition after finding that neither the *Avena* decision nor the President's Memorandum constituted binding federal law.⁹⁴ The United States Supreme Court again granted certiorari⁹⁵ and affirmed the dismissal upon similar findings.⁹⁶

After a four hour delay while the Supreme Court considered

86. *Medellin*, No. H-01-4078, 2003 WL 25321243, at *10-11 (S.D. Tex. June 26, 2003).

87. *Medellin*, 552 U.S. at 502.

88. See *supra* note 48 and accompanying text (discussing the ICJ's decision in *Avena*).

89. See *Medellin v. Dretke*, 371 F.3d 270, 280 (5th Cir. 2004) (concluding that the VCCR claims are indeed subject to procedural default rules as laid out in *Breard*).

90. *Medellin v. Dretke*, 543 U.S. 1032, 1032 (2004).

91. *Medellin*, 552 U.S. at 503.

92. President's Memorandum, *supra* note 5, at app. 2. For information on the separation of powers controversy created by the President's Memorandum see generally *Medellin*, 552 U.S. at 523-31 (explaining why the Executive Branch cannot unilaterally enforce ICJ decisions); John Cerone, *Making Sense of the U.S. President's Intervention in Medellin*, 31 SUFFOLK TRANSNAT'L L. REV. 279, 280 (2008) (arguing that the President's Memorandum was an attempt to use international law as a "power-grab" for the Executive branch).

93. See *Medellin v. Dretke*, 544 U.S. 660, 661-64 (2005) (dismissing the petition because Medellín's state court proceedings might provide the relief requested based on *Avena* and the President's Memorandum).

94. *Ex parte Medellin*, 223 S.W.3d at 352.

95. *Medellin v. Texas*, 550 U.S. 917, 917 (2007).

96. *Medellin*, 552 U.S. at 498-99; see *supra* notes 55-60 and accompanying text (discussing in detail the Supreme Court's reasoning in *Medellin*).

staying the execution, Medellín was executed on August 5, 2008.⁹⁷

C. Similarities Between O'Brien and Medellín

Despite their different national backgrounds, the cases of O'Brien and Medellín were similar in many respects. O'Brien, like Medellín, was also a member of the Black and Whites gang.⁹⁸ Involvement with the gang was a significant part of O'Brien's background and many previous violent incidents were brought out at the punishment phase of O'Brien's trial.⁹⁹ Like Medellín, O'Brien was linked to the murder of Patricia Lopez through physical evidence.¹⁰⁰ When confronted with this link, O'Brien gave an incriminating statement to the authorities.¹⁰¹ Clearly, both Medellín and O'Brien had violent histories before their final arrests for the murders of Ertman and Pena.

O'Brien's brutal participation in the Ertman and Pena murders is very similar to that of Medellín. Although O'Brien was not one of the gang members who gathered at Joe Cantu's house and bragged about the murders, Joe Cantu's tip to the police still led to O'Brien's arrest.¹⁰² According to O'Brien's confession, which was given shortly after his arrest, Medellín pulled one end of the belt used to strangle one of the girls while he pulled on the other.¹⁰³ A piece of the belt, which was introduced at trial, was recovered from O'Brien's home.¹⁰⁴ Furthermore, when a crowd gathered at the scene where the bodies were being recovered, O'Brien was among the crowd, where he was caught on videotape with a smile on his face.¹⁰⁵ A jury convicted O'Brien on April 9,

97. Texas Execution Information Center, *supra* note 67.

98. Texas Execution Information Center, Derrick O'Brien, <http://www.txexecutions.org/reports/369.asp> (last visited Aug. 21, 2010).

99. *Id.* O'Brien's prior criminal record showed arrests for shoplifting, assault, and stealing a car. *Id.* A Houston police officer testified that he saw O'Brien and Peter Cantu assault a man at a fast-food restaurant by punching, kicking, and dragging him. *Id.* A witness named Gregory Ristivo, a former partner in crime of O'Brien's, testified that himself and O'Brien had stolen between twenty-five and fifty cars together. *Id.* Ristivo also testified that O'Brien assaulted people to steal their shoes, and that O'Brien and Peter Cantu often started fights with random people. *Id.* Sadly, O'Brien's own mother and grandfather testified that he was "cruel" and "intentionally harsh." *Id.*

100. *See* Liebrum, *supra* note 70, at A17 (reporting that O'Brien's finger prints were found on a beer can underneath the body).

101. *See id.* (describing the evidence supporting the inference that Medellín and O'Brien murdered Lopez).

102. Texas Execution Information Center, *supra* note 98.

103. *See id.* (describing in greater detail the confession and the injuries sustained by Ertman and Pena).

104. *Id.*

105. *Id.*

1994, and the court sentenced him to death in the same month.¹⁰⁶ The Texas Court of Criminal Appeals affirmed both the conviction and sentence.¹⁰⁷

Like Medellín, O'Brien filed for a writ of habeas corpus in state court that the court denied.¹⁰⁸ O'Brien subsequently filed a habeas petition in federal district court based on alleged errors during his sentencing.¹⁰⁹ The district court denied O'Brien's petition and the denial was affirmed by the United States Court of Appeals for the Fifth Circuit.¹¹⁰

In 2006, O'Brien received a stay on his execution to review his second application for a writ of habeas corpus in state court.¹¹¹ O'Brien challenged his death sentence on the basis that the chemicals used in his lethal injection might cause him pain and suffering during his execution and therefore violate the Eighth Amendment.¹¹² This stay of execution was lifted and O'Brien's application was dismissed after the Texas Court of Criminal Appeals found the Eighth Amendment claim without merit.¹¹³ Furthermore, the Court of Criminal Appeals commented that they were unable to find any court that "has held that lethal injection in general, or a specific lethal-injection protocol in particular, violates the Eighth Amendment."¹¹⁴ In other words, O'Brien's

106. *Id.*

107. *Ex parte* O'Brien, 190 S.W.3d 677, 677 (Tex. Crim. App. 2006). While discussing the procedural history of the case, the court noted that a previous trial court had convicted and sentenced O'Brien. *Id.*

108. *See id.* (denying O'Brien's first writ of habeas corpus and a supplemental application as an abuse of the writ).

109. O'Brien v. Dretke, 156 Fed. Appx. 724, 729 (5th Cir. 2005).

110. *Id.* at 737.

111. *Ex parte* O'Brien, 190 S.W.3d at 677.

112. *Id.* Much like Medellín, O'Brien did not argue that the evidence used to convict him was insufficient or the trial was improper. *See id.* at 678 (noting that O'Brien "does not . . . challenge Texas' right to execute him."). In order to assess the validity of a claim of "cruel and unusual" punishment, the United States Supreme Court has discussed certain factors, "such as whether a method of punishment (1) deviates from contemporary norms and standards of society; (2) offends the dignity of the prisoner and society; or (3) inflicts unnecessary physical or psychological pain 'contrary to contemporary standards of decency.'" *Id.* at 679 (citing *Helling v. McKinney*, 509 U.S. 25, 36 (1993)).

113. *Id.* at 683. The Texas Court of Criminal Appeals found that of the thirty-eight states which still allow capital punishment, thirty-seven of them continue to use lethal injection as the primary means of execution and that almost every single one of those states uses the same three chemicals as used by Texas. *Id.* at 679-80. Those three chemicals are sodium pentothal, pancuronium bromide, and potassium chloride. *Id.* at 680-81. The United States Court of Appeals for the Ninth Circuit has noted that "according to the State's expert, over 99.999999999999% of the population would be unconscious within sixty seconds" from when the chemicals are first administered. *Beardslee v. Woodford*, 395 F.3d 1064, 1075 (9th Cir. 2005).

114. *Ex parte* O'Brien, 190 S.W.3d at 680; *see also id.* at 680 n.8 (citing a long

appeal had little chance of succeeding.

Without Mexican citizenship, and thus the VCCR claim, O'Brien's last minute appeal to the United States Supreme Court was dismissed in two sentences.¹¹⁵ Accordingly, O'Brien was executed on July 11, 2006, a full two years before Medellin was executed.¹¹⁶

D. *What the Cases of Medellin and O'Brien Tell Us About the VCCR and Its Application*

Despite the similar background and near matching culpability of Medellin and O'Brien, the VCCR had a profound effect on Medellin's appeals process and none on O'Brien's.¹¹⁷ Due to this difference, the VCCR can seem to act arbitrarily based on simple nationality, with no real equitable purpose.¹¹⁸

1. *The VCCR as a "Technicality"*

In the case of Medellin and O'Brien, the VCCR acts arbitrarily based on Medellin's technical status as a Mexican citizen, as there is no evidence that Medellin was ever disadvantaged by not being an American citizen like O'Brien.¹¹⁹ In

list of cases where lethal injection challenges were dismissed).

115. See *O'Brien v. Texas*, 548 U.S. 927, 927 (2006) ("Application for stay of execution of sentence of death presented to Justice SCALIA and by him referred to the Court denied. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied.") (emphasis in the original).

116. Texas Execution Information Center, *supra* note 98.

117. See *supra* notes 82-94 and accompanying text (explaining the additional steps Medellin's appeals took based on his VCCR claim).

118. See *supra* notes 82-96 and accompanying text and *infra* notes 117-123 and accompanying text (discussing the lack of prejudice created by the VCCR violations in Medellin's case).

119. See *Ex parte Medellin*, 223 S.W.3d at 358 (Hervey, J., concurring) (noting that Medellin has been in America since the age of three and is fluent in English). But see *Urgent Action Re: Jose Ernesto Medellin Rojas*, AMNESTYUSA.ORG, July 17, 2008, <http://amnestyusa.org/actioncenter/actions/uaa20408.pdf> (alleging certain failures of Medellin's court appointed counsel at trial). An Amnesty International urgent action memo claimed that according to Medellin's clemency petition: Medellin's court appointed attorney was under six-month suspension from practicing law for acting unethically in another case and spent time preparing and filing a habeas petition to keep himself out of jail. *Id.* Furthermore, the urgent action memo alleges that the investigator for the defense spent a total of "just eight hours" in preparation for trial and that Medellin's lawyer's presentation of mitigating evidence at the sentencing phase lasted less than two hours. *Id.* Although the memo alleges failures by Medellin's legal counsel, it does not allege that Medellin was unable to participate in his own defense due to any language barrier or lacked understanding of the American justice system. *Id.* Amnesty International only claims that, as a Mexican citizen, he should be entitled to another bank of lawyers funded by the Mexican government, rather than be prejudiced purely based on his citizenship. *Id.*

short, as stated by Justice Hervey of the Texas Court of Criminal Appeals, “[Medellin] is by no means a stranger in a strange land.”¹²⁰ Other courts have followed a similar line of reasoning in other cases involving alleged violations of the VCCR.¹²¹

Despite the denial of his VCCR claims, Medellin was protected by the rights afforded to all American citizens.¹²² Medellin’s rights under the United States Constitution still protected him from unfair treatment during his trial.¹²³ In the case of Medellin, his VCCR based appeals certainly seem predicated on a technicality given the lack of any substantive showing of prejudice in court.¹²⁴ Texas officials also view Medellin’s VCCR based claims as without merit and have been unequivocal in their opinions that Medellin’s sentence should be carried out.¹²⁵

Resistance to the enforcement of the VCCR will undoubtedly manifest in certain cases when the VCCR is used by convicts not suffering from prejudice.¹²⁶ This is dangerous as the VCCR serves

120. *Ex parte Medellin*, 223 S.W.3d at 358 (Hervey, J., concurring). In fact, Justice Hervey’s entire concurring opinion is written with a hostility towards the entire case as Medellin’s “current successive habeas corpus application provides applicant with much more than he deserves,” and that Medellin believes that “he is entitled to an immunity heretofore not afforded to any citizen or nonresident under Texas or Federal law—immunity from procedural default.” *Id.* Interestingly, Justice Hervey is the only justice to write the facts of the Ertman and Pena murders in any detail. *See id.* at 357 (recounting the manner in which Ertman and Pena were killed).

121. *See, e.g.*, *United States v. Chanthadara*, 230 F.3d 1237, 1256 (10th Cir. 2000) (holding that the defendant, a Laotian national, was not prejudiced by failure to notify the Laotian consulate due to his background). Chanthadara had lived in the United States since the age of six, spoke fluent English, and indicated no link to Laos other than technical citizenship. *Id.* In a similar case a federal court denied the habeas petition of a Columbian national who was “represented by able counsel” and did not show how his inability to confer with the Columbian consulate would have aided him at trial. *Hurtado v. United States*, No. 00 CIV. 409 SHS, 2000 WL 890189, at *5 (S.D.N.Y. Jul. 5, 2000).

122. *See Ex parte Medellin*, 223 S.W.3d at 358 (Hervey, J., concurring) (stating that Medellin had access to “the constitutional rights available to all accused persons in American courts” and that “according to the record, they were scrupulously protected”).

123. *See id.* at 322 (noting that the state district court reviewed alleged violations of Medellin’s Fifth, Sixth, and Fourteenth Amendment rights).

124. *See Medellin*, 552 U.S. at 501-02 (noting the Texas trial court’s finding in Medellin’s first habeas petition application that Medellin was not in any way prejudiced by not contacting the Mexican Consulate).

125. *See* Associated Press, *Lawyers for Jose Medellin Say Execution Violates Treaty*, DALLASNEWS.COM, Aug. 4, 2008, <http://www.dallasnews.com/sharedcontent/dws/news/world/mexico/stories/080408dnnatmedellinexecution.159bb9a6.html> (reporting on the views of Texas Governor Rick Perry and the Texas Attorney General’s office that the execution of Medellin should be carried out).

126. *See generally* *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997) (finding that a Mexican national convicted for murder-for-hire was not prejudiced because he failed to explain how contacting the Mexican consulate

important protective functions, both for foreign nationals in the United States and American citizens abroad.¹²⁷

2. *The VCCR as an Effective and Useful Treaty*

The VCCR is important in protecting the rights of foreign nationals arrested in the United States who truly are strangers in a strange land.¹²⁸ In *Standt v. New York*, law enforcement officers arrested a German foreign national for drunken driving.¹²⁹ The foreign national had difficulty understanding English and repeatedly asked to speak to his consulate but was denied.¹³⁰ In denying summary judgment for the defendants, the court allowed the foreign national to prove damages caused by the VCCR violations.¹³¹ In *Standt*, it was apparent that the VCCR has the important function of protecting the rights of foreign nationals.¹³²

The VCCR also works both ways. By not following the ICJ's interpretation of the VCCR, the United States risks not preserving those treaty rights to consular notification for American citizens.¹³³ In general, the United States government would prefer that American citizens arrested abroad be given "prompt, courteous notification to the foreign national of the possibility of consular assistance, and prompt, courteous notification to the foreign national's nearest consular officials."¹³⁴ Certainly, showing a commitment to the VCCR would cement the ability of the United

would have changed either his guilty plea or his death sentence); *United States v. Miranda*, 65 F. Supp. 2d 1002 (D. Minn. 1999) (adding that the defendant did not demonstrate that contacting the Mexican consulate would have prevented him from making statements to the police); *United States v. Esparza-Ponce*, 193 F.3d 1133 (9th Cir. 1999) (stating that an alien must show that denial of VCCR rights results in prejudice).

127. See *infra* notes 128-130 and accompanying text (discussing situations where the consular rights created by the VCCR serve an important function).

128. See, e.g., *Standt v. New York*, 153 F. Supp. 2d 417, 419-21 (S.D.N.Y. 2001) (holding that the VCCR applies in a civil action for police brutality against a foreign national when he is refused an opportunity to contact his consulate upon arrest). Again, such rights do not apply in Medellín's situation. See *Medellin*, 552 U.S. at 502 n.1 (explaining how Medellín was not prejudiced by his lack of consular communication).

129. *Standt*, 153 F. Supp. 2d at 420.

130. *Id.*

131. *Id.* at 431.

132. See *id.* at 420-21 (describing the alleged abuse suffered by Standt at the hands of law enforcement officers and his repeated requests to contact the German consulate).

133. See Bishop, *supra* note 31, at 11-12 (arguing that in applying a "golden rule" sort of approach to the VCCR, treating foreign nationals how the United States wants its citizens to be treated, the record of the United States could leave American citizens "rotting in prisons in Third-World countries"); see also *id.* at 2-9 (telling the fictional, yet believable, story of "Jack," an American citizen arrested in Paraguay).

134. *Id.* at 11.

States government to secure such rights for American citizens.¹³⁵

IV. FIXING THE ROOT OF THE PROBLEM

A solution is needed that balances the important functions of the VCCR in protecting valuable rights,¹³⁶ while at the same time reducing the risk of using the VCCR as a “technicality” to defy domestic criminal law.¹³⁷ Such a balanced solution could be supported by the United States wholeheartedly and strengthen the United States’ commitment to the rule of international law.¹³⁸

The main problem with the VCCR as written is that it is silent on the application of state procedural default rules.¹³⁹ In *LaGrand*, the ICJ determined that state procedural default rules did not apply to VCCR violations despite such a provision missing

135. See *United States v. Superville*, 40 F. Supp. 2d 672, 676 n.3 (D. Virgin Is. 1999) (noting that the United States specifically relied on the VCCR in 1979 when condemning Iran for not allowing United States diplomats to speak with hostages and in 1986 when officials were allowed to visit an American imprisoned in Nicaragua); *Standt*, 153 F. Supp. 2d at 427 (stating that “[r]eciprocity is the foundation of international law” and that the United States has consistently invoked the VCCR to protest other nations’ failures to provide Americans with consular assistance).

136. The dangers of not having successful consular relations in place was recently evidenced by the arrest of Esha Momeni, an American student and feminist activist, in Iran. Marie Colvin & Kayvon Biouki, *US Student Held in Notorious Iran Torture Prison*, THE SUNDAY TIMES, Nov. 2, 2008, at A4. Momeni has already been imprisoned and has not been allowed to speak to any lawyers or family members. *Id.* The United States is limited to dealing with Iran through the Embassy of Switzerland because the United States has no embassy or consulate in Iran. Iran: Country Specific Information, http://travel.state.gov/travel/cis_pa_tw/cis/cis_1142.html (last visited Jan. 28, 2009).

137. See *supra* note 121 (listing cases where the foreign national was unable to show any prejudice caused by a lack of consular assistance); *United States v. Page*, 232 F.3d 536, 541-42 (6th Cir. 2000) (refusing to apply the exclusionary or suppression rules to evidence obtained legally under the United States Constitution); *United States v. Lombra-Camorlinga*, 206 F.3d 882, 888 (9th Cir. 2000) (holding that, without more, incriminating statements made by foreign defendants before being informed of their VCCR rights should not be excluded).

138. See Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT’L L. 565, 599 (1997) (explaining that the federal government has expressed a great interest in seeing the VCCR upheld by the states). The United States Department of State periodically sends notices insisting on VCCR compliance to the governor and attorney general of each state and the mayors of all cities with a population greater than 100,000 people. *Id.*

139. See VCCR, *supra* note 7, at 79 (excluding a provision guiding the effect of state procedural rules in the VCCR’s application); *Sanchez-Llamas*, 548 U.S. at 358 (holding that Article 36 of the VCCR does not suspend procedural default rules); see also *LaGrand*, 2001 I.C.J. at 497-98 (interpreting the VCCR to disregard the procedural default rule).

from the treaty.¹⁴⁰

Without overruling *Medellin*, amending the VCCR to include a provision specifying certain situations in which procedural default rules would not apply would be appropriate. The amendment would specify certain facts that would trigger a disregarding of state procedural default rules when the defendant's case is being reviewed in an appellate court.¹⁴¹ The main fact that would render state procedural default rules inapplicable to alleged violations of the VCCR is the length of time the defendant had been living in the foreign country.¹⁴² Such an amendment should also list additional factors that a domestic judge could use in determining whether or not the usual default rules should apply.¹⁴³ These factors include the defendant's fluency in the language of the country in which he or she has been arrested and whether or not the defendant still possesses significant ties to their home country.¹⁴⁴

A. Amending Treaties

Although not an easy process, a treaty can be amended in a variety of ways.¹⁴⁵ For example, a treaty may be modified unilaterally by an act of Congress.¹⁴⁶ However, because the goal is

140. *LaGrand*, 2001 I.C.J. at 497-98. The ICJ reiterated the point in *Avena* that the procedural default rules did not apply to VCCR violations. *Avena*, 2004 I.C.J. at 53-57; see also *supra* note 48 and accompanying text (explaining the ICJ's holding in *Avena*).

141. See *supra* notes 45, 48 and accompanying text (describing the opinion of the ICJ that procedural default rules should not apply to violations of the VCCR).

142. Courts have found the amount of time a foreign national has spent in the United States relevant when determining whether or not the foreign national suffered from prejudice. See *Chanthadara*, 230 F.3d at 1256 (noting *Chanthadara* had lived in the United States since the age of six); *Medellin*, 552 U.S. at 500 (noting *Medellin* had lived in the United States since preschool).

143. Courts have also found other personal factors relevant in deciding whether VCCR violations have resulted in prejudice. See *Chanthadara*, 230 F.3d at 1256 (noting that *Chanthadara* had no significant ties to Laos); *State v. Montano*, 848 N.E.2d. 616, 622 (Ill. App. Ct. 2006) (finding that *Montano* could speak some English, had an interpreter before and during his trial, and had a Spanish speaking lawyer); *State v. Lopez*, 574 S.E.2d. 210, 214 (S.C. Ct. App. 2002) (refusing to allow *Lopez* to withdraw his plea agreement based on VCCR violations as *Lopez* could speak English fluently and fully participated in his agreement).

144. See *supra* note 142-43 and accompanying text (listing cases where courts have found certain personal factors of the defendant relevant in determining prejudice for VCCR violations).

145. See *infra* notes 150-54 (illustrating the ways in which treaties can be amended).

146. *Moser v. United States*, 341 U.S. 41, 45 (1951); *Clark v. Allen*, 331 U.S. 503, 508-09 (1947); *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934); *Head Money Cases*, 122 U.S. 580, 597-

to maintain the United States' commitment to international law, the VCCR should be renegotiated by the executive branch and the State Department internationally.¹⁴⁷

Admittedly, the procedural default rule, which is the focus of the proposed amendment, is mostly unique to American law.¹⁴⁸ However, the other nations which are parties to the VCCR may be willing to agree to this proposed amendment because of the incredible amount of foreign nationals that visit and live in the United States who may be affected.¹⁴⁹ If negotiations are successful, the President may choose to submit such an international agreement of amendment to the Senate for consent to its ratification.¹⁵⁰ This is known as an Article II treaty.¹⁵¹

Another option is to modify the treaty with a Congressional-Executive agreement.¹⁵² These agreements are international treaties that are concluded by a general or specific act of Congress instead of the Article II process of ratification.¹⁵³ These always have been treated as constitutionally equivalent to Article II treaties.¹⁵⁴

99 (1884). However, as a matter of statutory construction, absent explicit statutory language, courts have been extremely reluctant to conclude that congressional statutes conflict with treaty rights. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979).

147. See Phillip R. Trimble & Jack S. Weiss, *The Role of the President, The Senate and Congress With Respect to Arms Control Treaties Concluded by the United States*, 67 CHI.-KENT L. REV. 645, 647-48 (1991) (discussing the various constitutional methods negotiating and ratifying an international treaty).

148. See *Avena*, 2004 I.C.J. at 56 (describing the procedural default rule as a unique component of United States law); Posting of Professor Ernie Young to SCOTUSblog, <http://www.scotusblog.com/wp/medellin-discussion-board-the-case-going-forward> (Mar. 25, 2008, 17:42 EST) (noting that procedural default blocks a "second or third bite at the apple" while most legal systems only "give a single bite at the apple, period.").

149. See *Avena*, 2004 I.C.J. at 44 (recognizing the "millions of aliens" which reside within the United States); International Arrivals to the U.S.-Historical Visitation 1994-2000, <http://tinet.ita.doc.gov/view/f-2000-04-001/index.html> (last visited Aug. 21, 2010) (charting out the large numbers of foreigners which have visited the United States from over one-hundred countries).

150. Trimble & Weiss, *supra* note 147, at 649. The Senate does not actually ratify a new treaty; it merely expresses its consent to ratification by the President. *Id.* However, the Senate may also consent to a treaty's ratification subject to conditions that bind the President if he chooses to ratify the treaty. *Id.* The Senate conditions may have a variety of effects, including requiring the President to attach a reservation to United States adherence to the treaty, to amend the treaty by international agreement with the other treaty partners, or even to require the President to make a specified declaration to the other treaty partners in connection with ratification. *Id.*

151. *Id.* at 647.

152. See *id.* at 650 (defining and explaining agreements between Congress and the Executive Branch).

153. *Id.*

154. *Id.*

The executive branch submits a variety of treaties to the Senate for approval every year.¹⁵⁵ These submissions also include amendments to existing treaties.¹⁵⁶ The Senate has approved past amendments to treaties that have affected international law in a variety of areas.¹⁵⁷

B. A Proposed Amendment to the VCCR

An added provision to the VCCR must be clear to demonstrate the necessary intent that Article 36(1) does not allow the application of procedural default rules in certain situations. The proposed provision that should be included in Article 36(1) of the VCCR reads:

(d) Upon review of the conviction of a national of the sending State where an alleged violation of this Article is raised for the first time, State procedural default rules or the equivalent should be disregarded, and review of alleged violations be conducted only if the national of the sending State has lived in the receiving State for less than ten years. A receiving State judge may exercise discretion and ignore domestic procedural default rules even if the national of the sending State has been living in the receiving State for over ten years but is still not fluent in the language of the receiving State, still has significant ties to the sending State, or other factors.

1. The Ten-Year Residency Provision

The main provision in the amendment is the requirement that the state procedural default rules should not be applied to the review of alleged VCCR violations for foreign nationals who have resided in the foreign country for less than ten years.¹⁵⁸ Such a

155. See John R. Crook, *Administration Seeks Senate Approval of Eight Treaties During 2007*, 102 AM. JUR. INT'L L. 348, 348 (2008) (listing eight treaties prepared by the Department of State's Office of Treaty Affairs and submitted to the U.S. Senate).

156. See *id.* (including amendments to treaties in the list of eight treaties submitted to the U.S. Senate in 2007). The most recent proposed amendments included an amendment to the Convention on the Physical Protection of Nuclear Material and amendments to the Convention on the International Hydrographic Organization. *Id.*

157. See Kerry V. Kovarik, *A Good Idea Stretched Too Far: Amending the General Aviation Revitalization Act to Mitigate Unintended Inequities*, 31 SEATTLE U. L. REV. 973, 996 n. 167 (discussing the Montreal Convention, a treaty adopted in 1999, which amended the Warsaw Convention concerning compensation for air disaster victims); Joseph S. Henderson, *Effect of Tax Treaties on U.S. Activities of Nonresidents*, SP017 A.L.L.-A.B.A. CONTINUING LEGAL EDUC. 79, 108 (2008) (explaining the 1995 amendments to the United States-Canada Income Tax Treaty which addressed a variety of issues affecting American and Canadian estates); Jeffrey L. Rubinger, *Tax Planning With U.S. Treaties Without LOB Provisions*, 821 PRACTICING L. INST. TAX L. & EST. PLAN. HANDBOOK SERIES 229, 236 n.9 (2008) (noting that the United States recently amended the United States-Iceland Income Tax Treaty).

158. See *supra* note 142 (listing cases where courts have found time that a

provision would maintain the equitable purposes of the VCCR in preventing “strangers in a strange land” from being abused by the authorities due to lack of an understanding of the relevant legal system.¹⁵⁹

Ten years is an adequate time for a foreign national to come to grips with the exercise of law in his or her chosen land of residence through day-to-day experiences. Even American citizens without intimate knowledge of criminal law are expected to know the law because ignorance of the law is generally not a valid criminal defense.¹⁶⁰ This ten-year grace period is another layer of protection that stays the procedural default rule for foreign nationals in case their attorneys fail to demand VCCR rights for their clients before or during trial.¹⁶¹

2. *The Discretionary Factors*

The discretionary factors allow an appellate judge to use his or her discretion in examining alleged VCCR violations even when the foreign national has been living in the foreign country for more than ten years.

Because the ten-year time limit is by no means precise, other factors may be considered to determine the equitability of barring a review of alleged VCCR violations. Primarily, this includes language and cultural barriers which could greatly interfere with a foreign national’s defense and an attorney-client relationship.¹⁶²

foreign national has spent in the United States relevant to findings of prejudice).

159. *See, e.g.*, Bishop, *supra* note 31, at 6 (explaining that in Paraguay, it greatly benefits the defendant to confess guilt).

160. 22 C.J.S. *Criminal Law* § 13 (2008). It is not a defense that a defendant is honestly mistaken in believing that certain conduct is not an offense or even whether or not the defendant believed in good faith that he or she was acting lawfully. *Id.* Exceptions to this general rule do exist, particularly when there are due process concerns, such as notice. *See, e.g.* Burns v. Sate, 61 S.W.2d 512, 513 (Tex. Crim. App. 1933) (explaining that a mistake of law defense may be available when the law is not settled, is obscure, or is susceptible to more than one reasonable construction); United States v. Fierros, 692 F.2d 1291, 1295 (9th Cir. 1982) (holding that a defense of ignorance of the law may be available under “complex regulatory schemes that have the potential of snaring unwitting violators”). Such exceptions would also apply to foreign nationals arrested in this country.

161. *See* Gregory J. Kuykendall, Alicia Amezcua-Rodriguez & Mark Warren, *Mitigation Abroad: Preparing a Successful Case for Life for the Foreign National Client*, 36 HOFSTRA L. REV. 989, 993 (2008) (indicating that it is the duty of the attorney under ABA Guidelines to provide required consular information to clients and to notify consulates on their behalf, particularly after the United States Supreme Court’s decision in *Medellin*).

162. *Id.* at 989. Additionally, mitigating evidence is an important factor in whether or not a defendant convicted of a capital crime receives the death penalty. *Id.* at 1001. A key aspect of mitigation investigations are interviews with life-history witnesses. *Id.* at 1005. Life-histories are essentially presented

If a defendant has clearly been prejudiced by his or her status as a foreign national and lack of consular assistance, yet has lived in the foreign nation for more than ten years, it is still possible that their VCCR allegations may be considered on appellate review.¹⁶³ This gives appellate judges some discretion in enforcing the letter of the VCCR, and hopefully will help them achieve an equitable result.

In an additional nod to the ICJ's *Avena* decision, the appellate judge's discretion would not be able to cut the other way and find that procedural default rules don't apply to a foreign national who has been in the foreign country for less than ten years but seems particularly acclimated.

C. *The Advantages of Amending the VCCR*

Amending the VCCR would balance both the interests of domestic and international law.¹⁶⁴ An amendment to the VCCR would essentially bypass the United States Supreme Court's decision in *Medellin* because that decision dealt with whether or not ICJ judgments were binding on domestic courts—not the Court's own interpretations of the VCCR.¹⁶⁵ The amended treaty language will show intent by the President and Congress to be self-executing, and therefore, the practical effect of this bypass would be to allow the United States to enforce the amended VCCR as the law of the land¹⁶⁶ while letting the holding from *Medellin* stand: that ICJ decisions are not binding domestic law.¹⁶⁷

A solution to the problem of the application of procedural default rules to alleged VCCR violations should not be achieved by reversing the United States Supreme Court in *Medellin*, but

to the jury as a humanizing factor which may convince the jury that the defendant does not deserve the death penalty due to a troubled background. *Id.* at 1011-12. One of the discretionary factors the proposed amendment contains is whether there are significant ties remaining in the defendant's home country. This is to take into account the effect that a lack of consular assistance may have had a role in preventing effective mitigation in the defendant's case.

163. *See supra* note 143 and accompanying text (discussing cases where the court took language barriers, or lack thereof, into account when deciding if the foreign defendant was prejudiced).

164. *See infra* notes 165-69 and accompanying text (explaining how amending the treaty would allow domestic law to remain unaffected by ICJ judgments while increasing the United States' compliance with the VCCR).

165. *See supra* notes 56-61 and accompanying text (discussing the Supreme Court's decision in *Medellin*).

166. U.S. CONST. art. VI, cl. 2; *see also Medellin*, 552 U.S. at 519 (reiterating that when the textual provisions of a treaty show an intent by the President and the Senate that the treaty have domestic effect, that treaty is self-executing).

167. *Medellin*, 552 U.S. at 506.

instead by amending the VCCR itself.¹⁶⁸ Because the language of the added provision denotes a clear intent of the President and the Senate that procedural default rules do not apply in the certain listed situations, states would be forced to comply.¹⁶⁹

States may be much less resistant to forfeiting their procedural default rules when the treaty itself contains provisions that simply ensure that a foreign national who truly deserves VCCR protections actually gets such protections.¹⁷⁰ Hopefully, such full compliance by the United States will preserve VCCR protections for similarly deserving American citizens whose poor luck or poor choices lead to their arrest in foreign countries.

V. CONCLUSION

The VCCR is an important treaty in the landscape of international law. However, *Medellin*, like O'Brien, did not deserve the protections that the VCCR affords other foreign nationals. Amending the VCCR to include an extra set of protections—the waiver of procedural default rules—will further

168. Not even the dissent in *Medellin* agrees that ICJ judgments should be binding on American courts in all cases. *See id.* at 560 (Breyer, J., dissenting) (admitting that “Congress is unlikely to authorize automatic judicial enforceability of all ICJ judgments”). Such automatic self-executing judgments also make little sense when dealing with matters such as “military hostilities, naval activity, and handling of nuclear material.” *Id.* Presumably, if all ICJ judgments were binding on domestic courts then not only would state law be trumped, but federal law as well. *Id.* at 518 (citing *Cook v. United States*, 288 U.S. 102, 119 (1933) (stating that a later-in-time self-executing treaty supersedes a federal statute if there is a conflict)). Allowing American law to be superseded by the opinion of an international court could have severe practical effects on the United States sovereignty and eventually force the United States to withdraw from the ICJ altogether when one of its decisions truly harms a legitimate interest of the United States. *See Sanchez-Llamas*, 548 U.S. at 339 (noting that the United States gave notice of its withdrawal from the Optional Protocol on March 7, 2005 subsequent to the ICJ’s decision in *Avena*); *see also supra* note 60 (reporting the United States Supreme Court’s finding in *Medellin* that *Medellin* was unable to find any other foreign nation which gave ICJ judgments such binding effect). *But see* Camille Cancio, *The United States’ International Obligations and the Impact of Federalism: Medellin v. Dretke and the Force of Avena in American Courts*, 27 WHITTIER L. REV. 1047, 1075 (2006) (arguing that if *Medellin* had been an American citizen in Mexico, the United States would insist that ICJ judgments would create binding domestic law). Furthermore, the Constitution provides that “[t]he judicial Power of the United States” is “vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1. Such supreme judicial power in the United States should be wielded by American courts, and not the ICJ.

169. *See Medellin*, 552 U.S. at 517-18 (recalling that when treaties are intended to be self-executing, they are binding on the states).

170. *See Standt*, 153 F. Supp. 2d. at 420 (allowing a foreign national who spoke little English and repeatedly asked to speak to his consulate to proceed with his civil suit based on the VCCR).

help protect such situated foreign nationals. The proposed amendment raises the level of compliance to that mandated by the ICJ, without being forced to determine that all such ICJ decisions are binding on the United States. Hopefully, such a high level of compliance, strictly enforced by the United States, can reaffirm the United States' commitment to the rule of international law, while at the same time allowing for the strict prosecution of violent offenders whose demands for VCCR protections make little sense.