

## **CHAPTER 12**

### **FIXING *MEDELLIN*: ENSURING CONSULAR ACCESS THROUGH COMPLIANCE WITH INTERNATIONAL LAW**

## THE ISSUE

In 2008, the United States Supreme Court decided *Medellín v. Texas*,<sup>1</sup> a case in which José Ernesto Medellín, a Mexican national on death row in Texas, challenged his conviction. Mr. Medellín claimed that after being taken into law enforcement custody he was not afforded his right of consular notification and access, pursuant to the Vienna Convention on Consular Relations (VCCR).<sup>2</sup> The Court found that the International Court of Justice's (ICJ) 2004 decision in *Avena and Other Mexican Nationals (Avena)*—which interpreted the VCCR as requiring the U.S. to provide further "review and reconsideration" of the convictions of Mr. Medellín and 51 other Mexican nationals on death row in the U.S.—was not binding domestic law.<sup>3</sup> As a result, the Court held that, absent implementing legislation passed by Congress and signed by the President, neither the VCCR nor the ICJ's *Avena* decision were enforceable by federal courts against Texas.<sup>4</sup> This decision effectively barred Mr. Medellín and others who had previously been denied their consular notification and access rights from seeking judicial review of these violations of the VCCR, and caused the U.S. to breach its commitment to the VCCR.

The President and Congress should ensure that the United States honors its commitment to the VCCR by taking the following steps: first, the President should rejoin the Optional Protocol concerning the Compulsory Settlement of Disputes of the Vienna Convention on Consular Relations; second, Congress should pass legislation providing foreign nationals with judicial remedies for violations of their rights under the VCCR; and finally, the President should require that the Department of State and the Department of Justice provide further education and support to state and local law enforcement about the right to consular access and compliance with this obligation going forward.

Addressing these issues is critical not only to protect foreign nationals in U.S. law enforcement custody, but also to ensure that U.S. citizens and service members abroad receive the full protections of the VCCR.

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<sup>1</sup> *Medellín v. Texas (Medellín III)*, 554 U.S. 759 (2008); *Medellín v. Texas (Medellín II)*, 552 U.S. 491 (2008).

<sup>2</sup> Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/9\\_2\\_1963.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf).

<sup>3</sup> *Medellín II*, 552 U.S. at 504-05.

<sup>4</sup> *Id.* at 522-23.

## HISTORY OF THE PROBLEM

### 1. History of the VCCR

The United Nations proposed the VCCR in 1963.<sup>5</sup> Now ratified by more than 170 countries, the VCCR regulates the establishment and functions of consulates worldwide.<sup>6</sup> Article 36 of the VCCR grants a foreign citizen the right to notify and communicate with his or her country's consulate when arrested, detained, or imprisoned in a foreign country that is also a party to the treaty.<sup>7</sup> Article 36 also confers on consulates the right to communicate with, visit, and offer assistance to their detained nationals, including the right to arrange for their legal representation.<sup>8</sup> It further requires that local laws and regulations "must enable full effect to be given" to the rights accorded to detained foreigners and their consular representatives.<sup>9</sup> These rights are entirely reciprocal in nature.<sup>10</sup>

To ensure U.S. citizens detained abroad are provided the right to consular access, the U.S. ratified the VCCR without reservation in 1969.<sup>11</sup> The understanding prior to the U.S. Supreme Court decision in *Medellín* was that the treaty's provisions would be entirely self-executing, meaning Congress would not need to pass legislation to implement it, and it would prevail over any conflicting state laws.<sup>12</sup> Consequently, both federal and state law enforcement agencies are required to comply with Article 36 when detaining foreign nationals, including advising them of their right to consular notification and access. Despite this requirement, U.S. domestic compliance

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<sup>5</sup> Juan Manuel Gómez Robledo, Deputy Foreign Minister for Multilateral Affairs and Human Rights, Ministry of Foreign Affairs, Mexico, *The Vienna Convention on Consular Relations* (2008), available at [http://untreaty.un.org/cod/avl/pdf/ha/vccr/vccr\\_e.pdf](http://untreaty.un.org/cod/avl/pdf/ha/vccr/vccr_e.pdf).

<sup>6</sup> See United Nations Treaty Collection Database, Status of Vienna Convention on Consular Relations, available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtdsg\\_no=III-6&chapter=3&lang=en#Participants](http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=III-6&chapter=3&lang=en#Participants)

<sup>7</sup> Vienna Convention on Consular Relations, art. 36, *supra* note 2.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See United Nations Treaty Collection Database, Status of the Vienna Convention on Consular Relations, *supra* note 6.

<sup>12</sup> See Robert Greffenius, *Selling Medellín: The Entourage of Litigation Surrounding the Vienna Convention on Consular Relations and the Weight of International Court of Justice Opinions in the Domestic*, 23 AM. U. INT'L L. REV. 943, 948 (2008) (citing, *Breard v. Pruett*, 134 F.3d 615, 621 (4th Cir. 1998) (Butzner, J. concurring) (stating that the treaty is self-executing because it confers "rights to individuals rather than merely setting out the obligations of signatories"); *Paraguay v. Allen*, 949 F. Supp. 1269, 1274 (E.D. Va. 1996) (noting that both parties to the litigation agree that the VCCR is self-executing in the sense that it does not require any implementing legislation to become federal law); 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, 588 n.147 (1997) (citing governmental officials' statements referring to the VCCR as "entirely self-executive"); Howard S. Schiffman, *Breard and Beyond: The Status of Consular Notification and Access Under the Vienna Convention*, 8 CARDOZO J. INT'L & COMP. L. 27, 40-42 (2000) (citing multiple cases concluding that Article 36 conferred judicially enforceable rights and commenting that this conclusion appears logical since the construction of Article 36 sets out not merely the obligations of the signatories, but also mandatory, unequivocal recognition of the importance of consular access to those detained by foreign governments)).

with Article 36 obligations has long been significantly deficient—even in cases where foreign nationals face capital prosecution—as evidenced by the more than 50 Mexican nationals who were a party to the *Avena* case.

Also in 1969, the U.S. unconditionally ratified the Optional Protocol to the VCCR concerning the Compulsory Settlement of Disputes.<sup>13</sup> Under the Optional Protocol, the U.S. consented to have the ICJ, the principal judicial body of the United Nations, settle any disagreements over the interpretation or application of Article 36.<sup>14</sup> Article 59 of the ICJ statute makes the ICJ's decisions binding on the parties to a dispute.<sup>15</sup> Additionally, under Article 94 (1) of the United Nation's Charter, each member nation agrees to comply with any ICJ decision to which it is a party.<sup>16</sup>

The U.S. was the first nation to bring a case under the Optional Protocol, in response to the seizure of U.S. diplomatic and consular personnel in Iran in 1979.<sup>17</sup> The ICJ ruled in favor of the U.S., which asserted the binding nature of that judgment, insisting that Iran comply with the decision.<sup>18</sup>

## 2. *Avena* Litigation

In January 2003, Mexico filed with the ICJ an application instituting proceedings against the U.S. on behalf of a group of 52 Mexican nationals, including Mr. Medellín, who had been sentenced to death without being advised of their consular rights.<sup>19</sup> Mexico asked the court to consider whether these Mexican nationals were entitled to a legal remedy for the violation of Article 36.<sup>20</sup> The U.S. participated fully in the case.<sup>21</sup>

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<sup>13</sup> See United Nations Treaty Collection Database, Status of Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, *available at* [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-8&chapter=3&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-8&chapter=3&lang=en).  
[http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtdsg\\_no=III-6&chapter=3&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=III-6&chapter=3&lang=en) - Participants.

<sup>14</sup> Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 71, 596 U.N.T.S. 487.

<sup>15</sup> Statute of the Court of International Justice, art. 59.

<sup>16</sup> U.N. Charter, art. 94.

<sup>17</sup> United States Diplomatic and Consular Staff in Tehran (*U.S. v. Iran*), 1980 I.C.J. 451 (May 24).

<sup>18</sup> *Id.*

<sup>19</sup> Case Concerning *Avena* and Other Mexican Nationals, (Mex. v. U.S.) (*Avena*), 2004 I.C.J. 12 (Mar. 31).

<sup>20</sup> In *LaGrand* Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27), the ICJ ruled that the VCCR confers judicially enforceable rights on foreign nationals detained for prolonged periods or sentenced to severe penalties without notice of their right to communicate with their consulates. The court also ruled that states that fail to give timely notice cannot later invoke procedural default to bar individuals from judicial relief. However, the court did not clearly address other issues, such as requiring individuals to show prejudice to the outcome of the trial, or denial of certain remedies for Convention violations, which may effectively foreclose relief.

<sup>21</sup> *Avena*, 2004 I.C.J. 12 (Mar. 31).

During the proceedings, Mexico did not call into question the heinous nature of the crimes or the legitimacy of the death penalty. Rather, Mexico asserted that each of its nationals was entitled to a remedy for the denial of the protections he was entitled under the VCCR.<sup>22</sup>

On March 31, 2004, the ICJ held, by a vote of fourteen to one, that the U.S. had breached Article 36(1) in the cases of 51 of the 52 Mexican nationals.<sup>23</sup> The ICJ declined to vacate the convictions and death sentences of the Mexican nationals, but held that U.S. courts must provide "review and reconsideration" of the convictions and sentences to determine in each case if the Article 36 violation was harmful to the defendant.<sup>24</sup> The ICJ held that the remedy of "review and reconsideration" applied to all 51 cases, including those where the VCCR claim would otherwise be procedurally barred because of the defendants' failure to raise the issue at trial.<sup>25</sup>

### 3. Executive, Judicial and Legislative Response to *Avena*

In 2005, President George W. Bush withdrew the U.S. from the VCCR Optional Protocol, although he recognized the ICJ decision in *Avena* as binding.<sup>26</sup> On February 28, 2005, the President issued a Memorandum to the U.S. Attorney General stating that the U.S. would "discharge its international obligations" under the ICJ's decision "by having State courts give effect to the decision," which required "review and reconsideration" of the decisions to determine if the violation prejudiced the defendant.<sup>27</sup>

Texas refused to recognize the ICJ's decision or the President's Memorandum as binding law and continued its plans to execute Mr. Medellín.<sup>28</sup> The issue went to the Supreme Court in *Medellín v. Texas*, where Mr. Medellín asserted that he had a judicially enforceable right to review of his case, pursuant to *Avena*.<sup>29</sup> President Bush argued that, while he had authority to enforce the *Avena* decision, there was no private right of action under the VCCR.<sup>30</sup> The Supreme Court ruled that *Avena* is not directly enforceable in the domestic courts because none of the relevant treaty sources – the VCCR Optional Protocol, the U.N. Charter, or the ICJ Statute – create binding federal law in the absence of implementing legislation by Congress.<sup>31</sup> The Supreme Court also held that the

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See Letter from Condoleezza Rice, U.S. Secretary of States, to Kofi Annan, U.N. Secretary General (Mar. 7, 2005); see also Memorandum from George W. Bush, President of the United States, to the Attorney General of the United States (Feb. 28, 2005); Brief for the United States as Amicus Curiae Supporting Respondent at app. 2, *Medellin v. Dretke (Medellin I)*, 544 U.S. 660 (2005) (No. 04-5928), 2005 WL 504490.

<sup>27</sup> Memorandum from George W. Bush, President of the United States, to the Attorney General of the United States (Feb. 28, 2005).

<sup>28</sup> *Medellin II*, 552 U.S. at 491.

<sup>29</sup> Brief for Petitioner at 30, *Medellin II*, 552 U.S. 491 (2008) (No. 06-984), 2007 WL 1886212.

<sup>30</sup> Brief for Respondent at 38-39, *Medellin II*, 552 U.S. 491 (2008) (No. 06-984), 2007 WL 2428387.

<sup>31</sup> *Medellin II*, 552 U.S. at 506.

President did not have the authority to implement *Avena* unilaterally.<sup>32</sup> The Court unanimously agreed, however, that compliance with *Avena* is an international legal obligation of the U.S. and that Congress has the authority to implement that obligation.<sup>33</sup>

Adhering to the VCCR and its Optional Protocol would not affect the ability of states or the federal government to prosecute and subsequently jail or execute foreign nationals. Consular notification and access does not enable foreign nationals who commit crimes to avoid legal consequences. Rather, as the U.S. Department of State acknowledges, “one of the basic functions of a consular officer is to provide a ‘cultural bridge’ between the host country” and foreign nationals.<sup>34</sup> The consul helps “to ensure [a foreign national detained by law enforcement] is aware of his rights, to advise him of the availability of legal counsel, to give him a list of local attorneys, to help him get in touch with his family and friends, to alert him to the legal and penal procedures of the host country, and to observe if he has been or is in danger of being mistreated.”<sup>35</sup> The solutions outlined below would ensure that not only foreign nationals in U.S. custody but also U.S. citizens and service members traveling abroad would be afforded the full protections of consular access.

## RECOMMENDATIONS

### 1. Rejoining the VCCR’s Optional Protocol

#### A. *Withdrawal from the Optional Protocol Harms U.S. Citizens*

In 2005, President Bush withdrew from the VCCR’s Optional Protocol concerning the Compulsory Settlement of Disputes.<sup>36</sup> The aim was to prevent future ICJ decisions against the U.S. similar to *Avena*. Unfortunately, because rights and obligations under the Optional Protocol are entirely reciprocal, the decision to withdraw also stripped U.S. citizens abroad of a binding enforcement mechanism for their right to access their consulate when detained or arrested outside of the U.S.

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<sup>32</sup> *Id.* at 532.

<sup>33</sup> *Id.* at 521-22.

<sup>34</sup> UNITED STATES DEPARTMENT OF STATE, FOREIGN AFFAIRS MANUAL (1984) Ch. 400, Introduction. In the most recent update of the *Foreign Affairs Manual* the State Department acknowledges that “Abuse is an unfortunate reality that can occur even in the most enlightened police and penal systems for any number of reasons, including... [a] reaction to cultural or language differences and misunderstandings.” UNITED STATES DEPARTMENT OF STATE, FOREIGN AFFAIRS MANUAL (2004) Ch. 420, Notification and Access.

<sup>35</sup> *U.S. Citizens Imprisoned in Mexico*: Hearing before H. Subcomm. on International, Political and Military Affairs (Part I), 94th Cong. 16 (1975) (statement of Leonard F. Walentynowicz, United States Assistant Secretary of State for Security and Consular Affairs).

<sup>36</sup> See Letter from Condoleezza Rice, U.S. Secretary of States, to Kofi Annan, U.N. Secretary General (Mar. 7, 2005)..

## B. *The U.S. Should Rejoin the Optional Protocol*

### *Legislative*

The House and Senate Judiciary and Foreign Relations Committees should examine the impact of our withdrawal from the Optional Protocol on U.S. citizens living, working, and traveling abroad. As part of their fact-finding responsibilities, these committees and their relevant subcommittees should hold hearings to determine the effects of withdrawal from the Optional Protocol.

The committees should be particularly concerned with the impact on U.S. military personnel abroad. The risks for detained American personnel if consular access is withheld are both real and widespread. In 1998, host country governments processed 5,092 cases against U.S. military personnel.<sup>37</sup> Maintaining access to consular support is indispensable for the protection of American service members facing incarceration by foreign authorities. Congressional hearings to determine the extent to which loss of the Optional Protocol's enforcement mechanism affects military personnel and other U.S. citizens are crucial to drawing attention to the issue and demonstrating the widespread support for rejoining the Optional Protocol.

### *Executive*

The President should rejoin the Optional Protocol, reversing the 2005 withdrawal by the Bush Administration in response to the *Avena* decision. The success and usefulness of multilateral and bilateral treaties depend upon a shared trust that each nation will honor its obligations and resolve disputes in a fair manner and in accordance with the treaty's terms. In 1979, the U.S. was the first country to invoke the Protocol before the ICJ, suing Iran for taking 52 U.S. diplomats and consular personnel hostage in Tehran.<sup>38</sup> The ICJ ruled in favor of the U.S., which subsequently asserted the binding nature of that judgment and insisted that Iran comply with the decision.<sup>39</sup> U.S. withdrawal from the Protocol as the result of an adverse decision by the ICJ weakens the VCCR's effectiveness by subverting the ICJ's role as arbiter of VCCR-related disputes between nations.

Moreover, withdrawing from the Optional Protocol after the *Avena* decision sends the wrong signal to other nations. It suggests that the U.S. will only honor the rule of law embodied by the Optional Protocol so long as ICJ decisions favor the U.S. The President can undo this damage by rejoining the Optional Protocol.

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<sup>37</sup> UNITED STATES. DEPARTMENT OF STATE, BACKGROUNDER: STATUS OF FORCES AGREEMENT (Jan. 4, 2000), *available at* <http://www.bu.edu/globalbeat/usdefense/USIA010400.html>.

<sup>38</sup> U.S. v. Iran, 1980 I.C.J. 451 (May 24).

<sup>39</sup> *Id.*

## 2. Addressing the Legacy of *Avena* and *Medellín*

### A. *The U.S. is Not Honoring Its Treaty Obligations*

In the nearly seven years since the *Avena* decision, the U.S. has failed to comply with the ICJ ruling. All three branches of the federal government, along with state governments, have failed to take the measures necessary to honor the decision or the U.S.'s obligations under the VCCR and the Optional Protocol. As a result, the U.S. no longer recognizes the mechanism for the enforcement of foreign nationals' right to receive access to their consulate when detained, and can no longer expect its citizens to receive reciprocal protections abroad.

### B. *The U.S. Should Implement Avena*

#### *Legislative*

Congress should pass legislation to provide judicial remedies for foreign nationals who have been denied their right to consular access pursuant to the VCCR. Such legislation would directly address the Supreme Court's holding in *Medellín* that the VCCR is not self-executing by creating binding federal law that provides remedies for foreign nationals denied consular access.

Federal legislation addressing the *Medellín* decision must give federal courts jurisdiction to review the merits of claimed violations of the VCCR and to provide appropriate relief, including overturning convictions, ordering new trials or sentencing proceedings, and providing other declaratory or equitable relief necessary to secure the foreign national's rights. Such legislation must also permit federal court review in cases where the petitioner filed a *habeas corpus* petition under chapter 153 of title 28 before enactment of the proposed legislation, though they would otherwise be procedurally barred from raising the claim. This will ensure that foreign nationals previously denied review of their claims under the *Medellín* decision will have an opportunity to assert their rights under the VCCR.

#### *Executive*

The President should encourage Congress to pass legislation implementing the *Avena* judgment and commit to signing such legislation once it passes. Demonstrating leadership on this issue will signal to the international community that the Administration is committed to meeting the U.S.'s treaty obligations. As Secretary of State Madeleine Albright wrote in 1998, "[W]e must be prepared to accord other countries the same scrupulous observance of consular notification requirements that we expect them to accord the U.S. and its citizens aboard."<sup>40</sup>

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<sup>40</sup> Letter from Madeleine Albright, Secretary of State, to Victor Rodriguez, Chairman of the Texas Board of Pardons and Paroles (Nov. 27, 1998).



The President should also direct executive agencies to provide adequate training to federal law enforcement agents regarding their obligations under the VCCR to make foreign nationals aware of their right to consular notification and access. Finally, the Administration should provide guidance and support for similar training for state and local law enforcement agents, whether through technical training or grants.

*Judicial*

Once federal law permits foreign nationals to pursue remedies for denial of their right to consular access pursuant to the VCCR and the *Avena* decision, federal courts should rigorously enforce these provisions to ensure that they are given full effect. In so doing, federal courts will encourage federal and state law enforcement to honor the VCCR's consular notification requirements, thereby protecting the rights of foreign nationals and preventing the need for federal courts to overturn convictions or sentences.

## APPENDICES

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### Further Resources

Cases Concerning Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31), *available at* <http://www.icj-cij.org/docket/files/128/8188.pdf>.

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Brief *Amicus Curiae* of the Government of the United Mexican States in Support of Petitioner José Ernesto Medellín, *Medellin v. Texas*, 552 U.S. 491 (2008) (No. 06-984), *available at* <http://www.debevoise.com/publications/pdf/ForeignSovereignsAmicusMerits.pdf>.

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Brief for the United States as *Amicus Curiae* Supporting Petitioner, *Medellin v. Texas*, 552 U.S. 491 (2008) (No. 06-984), *available at* <http://www.debevoise.com/publications/pdf/medellin06984amicus.pdf>.

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