ENFORCEABILITY OF INTERNATIONAL TRIBUNALS' DECISIONS IN THE UNITED STATES

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The United States has committed itself to many international institutions that make decisions affecting this country's rights and duties under international law. These international decision-making bodies include the International Court of Justice at the Hague, the North American Free Trade Agreement arbitration panels, and the Dispute Settlement Body of the World Trade Organization. The very important question arises of what effect, if any, such bodies' decisions should have in U.S. courts.

In 2004, the "principal judicial organ of the United Nations,"[1] the International Court of Justice (ICJ), determined that the United States had failed to comply with the Vienna Convention on Consular Relations' requirement[2] that foreigners arrested in the United States be informed of their right to contact their consulate for assistance.[3] The case, known as *Avena*, involved fifty-two Mexican nationals tried and convicted of capital crimes in the United States.[4] The ICJ decision held that California, Texas, and seven other states caused the United States to violate the Vienna Convention when they failed to inform fifty-one of these individuals of their right to contact the Mexican consul in conjunction with their arrests.[5] Most importantly, the ICJ ruled that the United States must remedy these violations by providing "review and reconsideration of the convictions and sen-

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* Judge, United States Court of Appeals for the Ninth Circuit. This introduction reflects a slightly revised version of the opening remarks that I delivered on February 25, 2006, at the Twenty-fifth Annual National Student Federalist Society Symposium at Columbia Law School.

1. U.N. Charter art. 92.

2. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 292.

3. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 53–54, 71 (Mar. 31).

4. *Id.* at 24–26.

5. *Id.* at 24, 53–55, 71.

tences of the Mexican nationals."[6] The ICJ further determined that the general procedural default rules should not apply to such claims.[7]

Soon thereafter, one of the fifty-one individuals, José Medellín, argued in the Fifth Circuit that the *Avena* decision bound courts in the United States.[8] The Fifth Circuit disagreed and followed its own precedent in determining that the Vienna Convention did not create a private cause of action for individuals in U.S. courts and that Medellín's claim was procedurally defaulted.[9]

After losing in the Fifth Circuit, Medellín filed a petition for certiorari, which the Supreme Court granted.[10] More than a month before oral argument, however, President George W. Bush issued a memorandum stating that the United States would "discharge its inter-national obligations under the [*Avena* judgment], by having State courts give effect to the [ICJ] decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."[11] Based on this memorandum, Medellín filed a successive state habeas petition, and thereafter the Supreme Court dismissed its writ of certiorari as improvidently granted.[12]

Although the Supreme Court never reached the merits of Medellín's claim, the Court recently seized the opportunity to shed light on the proper deference U.S. courts owe ICJ rulings in two consolidated cases, *Bustillo v. Johnson* and *Sanchez-Llamas v. Oregon*.[13] Those cases involved Mexican and Honduran nationals who were not among the fifty-one individuals affected by the President's *Avena* memorandum.[14] The Supreme Court

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6. *Id.* at 61–66, 72.

7. *Id.* at 57, 63.

8. Medellín v. Dretke, 371 F.3d 270, 279–80 (5th Cir.) (per curiam), *cert. granted*, 543 U.S. 1032 (2004), *and cert. dismissed as improvidently granted* 544 U.S. 660 (2005) (per curiam).

9. *Id.* at 280.

10. 543 U.S. 1032 (2004).

11. Memorandum from George W. Bush to the Attorney Gen. (Feb. 28, 2005), http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html.

12. *Medellín*, 544 U.S. at 663–664.

13. 126 S. Ct. 620 (2005) (granting certiorari).

14. Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2675–77 (2006). Although the Supreme Court announced its decision after these remarks were delivered, I have updated this introduction to provide helpful context to the challenging questions discussed by the panelists.

held, among other things,[15] that a state may apply its regular rules of procedural default to preclude review of a petitioner's Vienna Convention claim, notwithstanding the ICJ's *Avena* decision.[16] More importantly, rejecting the argument that U.S. courts are "*obligated* to comply with the Convention, *as interpreted by the ICJ*,"[17] the Supreme Court concluded that *Avena* is "entitled only to the 'respectful consideration' due an interpretation of an international agreement by an international court."[18]

Even in the wake of the Supreme Court's decision, many difficult questions remain. We are very fortunate to have the distinguished members of this panel to help us consider the role decisions of international adjudicatory tribunals should play in U.S. courts.

15. The Supreme Court avoided deciding whether Article 36 of the Vienna Convention creates individual rights enforceable in judicial proceedings. *Id.* at 2677–78. Instead, the Court concluded that "even assuming the Convention creates judicially enforceable rights, . . . suppression is not an appropriate remedy for a violation of Article 36 and . . . a State may apply its regular rules of procedural default to Article 36 claims." *Id.* at 2674.

16. *Id.* at 2674, 2682–87.

17. *Id.* at 2683.

18. *Id.* at 2684 (quoting Breard v. Greene, 523 U.S. 371, 375 (1998) (per curiam)).