

# Foreword

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The impact of international law has reached past foreign policy and has now extended into every part of U.S. government. Our last issue emphasized the increasing importance of globalization on domestic issues such as national elections. In the past decade, international laws have had a practical effect upon the interpretation of United States domestic law. Influential jurists such as former Justice Sandra Day O'Connor have expressed "that with time [the judiciary] will rely increasingly on international and foreign law in resolving what now appear to be domestic issues, as we both appreciate more fully the ways in which domestic issues have international dimension, and recognize the rich resources available to us in the decisions of foreign courts."<sup>1</sup>

The case of *Medellin v. Dretke* provides a recent example of this phenomenon.<sup>2</sup> José Medellín is a Mexican national who confessed to participating in the gang rape and murder of two girls in 1993.<sup>3</sup> He was tried, convicted and sentenced to death.<sup>4</sup> In his habeas corpus action, Medellín claimed that Texas had failed to notify him of his right to consular access as required by the Vienna Convention on Consular Relations.<sup>5</sup>

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1. Sandra Day O'Connor, Retired Associate Justice of the United States Supreme Court, Remarks at the Southern Center for International Studies (Oct. 28, 2003), available at [http://www.southerncenter.org/OConnor\\_transcript.pdf](http://www.southerncenter.org/OConnor_transcript.pdf).

2. *Medellin v. Dretke*, 544 U.S. 660 (2005).

3. *Id.* at 662.

4. *Id.*

5. *Id.*

While a federal court considered Mr. Medellín's habeas corpus petition, Mexico instituted proceedings against the United States of America before the International Court of Justice (ICJ) concerning alleged violations of the Vienna Convention.<sup>6</sup> Mexico accused the United States of systematically violating its obligation under Article 36 of the Convention by failing to inform 54 Mexican nationals of their right to consular assistance and to provide adequate relief to redress such violations.<sup>7</sup>

While Mr. Medellín's application to the Fifth Circuit was pending, the ICJ issued its decision in *Cases Concerning Avena and other Mexican Nationals (Mexico v. United States of America)*.<sup>8</sup> The ICJ ruled that the United States had violated individually enforceable rights that the Vienna Convention had guaranteed.<sup>9</sup> The ICJ concluded that the United States must "provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals" to establish whether U.S. actions "caused actual prejudice."<sup>10</sup>

The Fifth Circuit denied Medellín's habeas corpus application based on procedural default. It based its holding on *Breard v. Green*,<sup>11</sup> a prior Supreme Court precedent which held that the Vienna Convention did not create an individually enforceable right. While acknowledging the ICJ's *Avena* judgment, the Court of Appeals did not give any dispositive effect to that judgment. The Supreme Court of the United States granted certiorari on the validity and enforceability of the ICJ decision in *Avena*.

A month before oral arguments in the Supreme Court, President George W. Bush issued a memorandum that announced "[t]he United States will discharge its international obligation under the decision of the International Court of Justice in [*Avena*], by having State courts give

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6. Application Instituting Proceedings (Req. for Advisory Op.) (Jan 9. 2003), available at <http://www.icj-cij.org/docket/files/128/1913.pdf> (last visited Apr. 30, 2007).

7. Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Article 36, paragraph 1(b) of the Convention provides in particular:

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.

8. Case Concerning *Avena* and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. No. 128 (Judgment of Mar. 31), available at <http://www.icj-cij.org/docket/files/128/8188.pdf> (last visited Apr. 30, 2007).

9. *Id.* ¶¶ 128-131, 153.

10. *Id.* ¶¶ 121-122, 153. See also Medellín, 544 U.S. at 663.

11. 523 U.S. 371, 375 (1998).

effect to the decision in accordance with general principles of comity.”<sup>12</sup> Based on the Presidential Memorandum, the Supreme Court dismissed the writ in order to allow the state courts to reassess the validity of the claim.<sup>13</sup>

The *Medellin* case shows us the ever-increasing importance of international law and international courts in domestic law. Both the Executive and the Judiciary decided to review an issue, previously settled by precedent, solely because an international court questioned its validity. Such action by two branches of the federal government demonstrates to the American legal community that international law presently has a significant effect upon domestic jurisprudence. Given the increasing level of deference and respect granted to international law and international courts, a prudent attorney practicing either international or domestic law must be aware of important international issues.

This issue of the *San Diego International Law Journal* brings to the forefront significant issues of international and comparative law. Dana Falstrom analyzes the current state of international law, its relevance, and importance in a post-Cold War, post-9/11 world. In assessing the status of international law, Falstrom's article explores the similarities between the global changes occurring during international legal scholar Alberico Gentili's time period and our own. On the financial front, Ibironke Odumusu explores the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), current relationship with third world countries and how that relationship can be improved.

In addition, three articles in this issue touch on the impact that law and lawmaking in other countries may have on our domestic laws. David Rudstein analyzes the effect England's Criminal Justice Act 2003 may have on Double Jeopardy, by allowing withdrawal of a defendant's acquittal for certain serious crimes in light of “new and compelling evidence.” This topic is important to the United States since Double Jeopardy, derived from English Common Law, is a foundational principle of our criminal law. Lawrence Donnelly's comparative piece contrasts the roles of the judiciary under the U.S. Constitution and the Irish Constitution. Jorge Vargas examines Mexican tort law and the legal path American practitioners must follow in dealing with cases of personal injury occurring in Mexico which are adjudicated in American courts.

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12. Memorandum for the Attorney General (Feb, 28, 2005), App. 2 to Brief for United States as Amicus Curiae 9a.

13. *Medellin*, 544 U.S. at 666-67.

This issue concludes with two comments concerning intellectual property. Kate Hunter examines China's laws to determine whether it is meeting its obligation to protect IP rights under the TRIPS agreement. The article also investigates the enforcement of such laws and offers suggestions for improvement. Mary Hess Eliason addresses how the regulatory framework of pharmaceutical registration serves as a barrier to developing countries in establishing their own pharmaceutical industry and pharmaceutical markets. The article also examines how the WTO agreement on Technical Barriers to Trade may affect the legality of such protectionist policies.

I hope you find these articles interesting, not just in the international context, but as possible trends that may affect United States national law.