
Editorial: *Medellín*; In this Issue

With some cases one just knows – they will be landmarks. *Medellín v. Texas* (<http://www.supremecourtus.gov/opinions/07pdf/06-984.pdf>) is one of those cases. It is the last chapter in the saga that commenced with the *Avena* decision of the World Court (*Mexico v USA*, ICJ Reports (2004), 12) concerning 51 Mexican nationals, on death row, whose rights under Article 36(1) of the Vienna Convention on Consular Relations were violated. The World Court found that the convicts were entitled to review and reconsideration of both their convictions and sentences.

The heinous crimes committed by the Petitioners¹ and the sentence of death faced by them provide the grisly background to this case. These death penalty cases have become a proxy for an issue which, at least among European elites, separates European and American political and cultural sensibilities and adds a macabre poignancy to the legal issues. (It is unlikely that even with a further review and reconsideration the convictions and sentences would have been set aside. The Talmud teaches that a Sanhedrin which executes more than one man in seven years is to be considered murderous. By this reckoning the state of Texas and its courts are mass murderers.)

But of course, at this level of appeal, the legal issues traduce the factual matrix and most notably the issue of the legal status of World Court decisions within the domestic legal order in general, and within sub-units of federal states more specifically. The Majority of the Supreme Court held that, in the circumstances of this case and operating under the Optional Protocol, decisions of the World Court had no direct binding effect on domestic courts.

Anyone who will read the decision, majority and dissent, will come to the conclusion that this is no black and white case – indeed it is awash with greys.

The ‘Gallery of Rogues’ is not what one would have expected. For example, in the wake of negative judicial response to the *Avena* decision, President George W. Bush issued a Memorandum to his Attorney General providing:

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

¹ As regards *Medellín* himself the Court found: ‘On June 24, 1993, 14 year old Jennifer Ertman and 16 year old Elizabeth Pena were walking home when they encountered *Medellín* and several fellow gang members. *Medellín* attempted to engage Elizabeth in conversation. When she tried to run, [he] threw her to the ground. Jennifer was grabbed by the other gang members when she, in response to her friend’s cries, ran back to help. The gang members raped both girls for over an hour. Then, to prevent their victims from identifying them, *Medellín* and his fellow gang members murdered the girls and discarded their bodies in a wooded area. *Medellín* was personally responsible for strangling at least one of the girls with her own shoelace.’ 552 U.S. at B.

The Supreme Court held that neither the World Court Decision nor the Bush Memorandum was binding on the Texas Courts.

The reasoning of the Supreme Court transcends issues of American constitutional law. That decisions of the World Court are binding on the states to whom they are addressed is beyond dispute. But do they produce as a matter of international law 'direct effect' so that individuals have the right to rely on them before domestic courts or is that a matter for municipal constitutional law? This is far from clear both as a matter of law and as a matter of policy. One might disagree with the majority, but the reasoning was not insular:

There are [stated the Supreme Court] 47 nations that are parties to the Optional Protocol^[2] and 171 nations that are parties to the Vienna Convention. Yet neither *Medellin* nor his *amici* have identified a single nation that treats ICJ judgments as binding in domestic courts.

In a footnote, the Supreme Court added:

The best that the ICJ experts as *amici* can come up with is the contention that local Moroccan courts have referred to ICJ judgments as 'dispositive....' Moroccan practice is at best inconsistent. (See fn 10 in the judgment of the Supreme Court).

Justice Breyer, dissenting, takes of course a different view as to the international practice as well as the requirement of US constitutional law. And we may add that it is not necessary to find that under international law there is a requirement to give internal binding effect to a decision of an international tribunal in order for a domestic court to give it such effect. International law may, and often does, leave the internal status of such decisions to the constitutional law of states. The European Court has famously given direct effect to its Cooperation Agreements even when such is not accorded by the other party.

This and other issues in *Medellin* have already filled the various legal blogs. Cyberspace has changed the face of legal publishing in more than one way. The first round of reactions to recent developments will always be on the net – EJIL will launch its own blog later this year (EJIL Talk or EJIL: Talk! the jury is still out) We see the role of the Journal itself as providing deeper, broader and more lasting reflection on such issues, once the dust has settled. I invite submissions dealing with *Medellin*, especially from an international and comparative perspective.

In this issue

Whether human rights within the European Union serve only as a judicial shield to protect the individual from violation at the hands of European public authorities (and in some limited cases those of the Member States) or whether the EU should proactively pursue policies for the realization of human rights has long been the subject of intense debate and has yet to be resolved. In its Opinion on the Accession of the Community to the ECHR (Opinion 2/94), the European Court of Justice stated that '[n]o Treaty provision confers on the Community institutions any general power to

² In and of itself a demoralizing statistic.

enact rules on human rights'. In our lead article in this issue, 'The European Union as Situation, Executive and Promoter of the International Law of Cultural Diversity – Elements of a Beautiful Friendship', *Armin von Bogdandy* presents the last instalment in this ongoing debate (in which he himself has actively taken part). Exiting the entirely self-referential European Law discussion and situating the debate, as he does, within international law more generally constitutes a notable contribution.

The remainder of the issue is a symposium on International Economic Law. The contribution by *Moshe Hirsch* ('The Sociology of International Economic Law: Sociological Analysis of the Regulation of Regional Agreements in the World Trading System') lies notably in its methodology. His is the first serious attempt to approach regional trade agreements from a symbolic-interactionist perspective. Hirsch's analysis of international trade, based on an understanding of international economic activity as a social phenomenon, allows him to explore the influence of social factors in the international economic arena in a new light. This applies particularly well to the relationship between the World Trade Organization and regional trade agreements.

Ole Kristian Fauchald ('The Legal Reasoning of ICSID Tribunals – An Empirical Analysis') contributes an impressive and extensive empirical analysis of ICSID hermeneutics. The recent farce in the Argentina Investment cases gives particular poignancy to his paper.

GATS is back in the news with decisions such as *Gambling* raising a host of issues. The timeliness of the contribution by *Panagiotis Delimatsis* ('Determining the Necessity of Domestic Regulations in Services: The Best is Yet to Come') is self evident. Issues such as a horizontal necessity test dealt with in this article may seem far removed from the interests of the general public international lawyer. This attitude is a luxury which can no longer be afforded. The issue of balancing the exigencies of international and multilateral regulation and governance on the one hand and domestic diversity and, yes, sovereignty on the other, is decided increasingly in these economic arenas. At EJIL we have long considered international economic law to be an integral part of general public international law precisely for this type of reason. Understanding the exercise of power in the international arena, its constraints and its ramifications for justice, for example, constitute a core interest of the Journal. GATS, TRIPS, WIPO, among others, are indispensable in this context.

The article by *Charlotte Streck and Jolene Lin* ('Making Markets Work: A Review of CDM Performance and the Need for Reform') was not an obvious candidate for this symposium, but the authors' skilful and elegant use of the market model in discussing the control of climate change in the context of Kyoto's Clean Development Mechanism (CDM) work tipped the scale. Here, too, the value of the article, in our eyes, transcends a narrow interest for international environmental law aficionados.

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