

Note

***Medellín* Stands Alone: Common Law Nations Do Not Show a Shared Postratification Understanding of the ICJ**

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I. INTRODUCTION

The International Court of Justice (ICJ) and the United States Supreme Court have reached a fundamental disagreement without a resolution. Recently, the ICJ has heard a series of cases that relate to the Vienna Convention on Consular Relations (VCCR),¹ and how it is implemented by the United States and specifically by American courts.² The Supreme Court,

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1. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR]. The ICJ had jurisdiction over disputes between the United States and other signatories to the VCCR through the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 [hereinafter Optional Protocol].

2. Concerning the United States's implementation of the VCCR, the ICJ has reached a final judgment in two cases. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31); *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27). Paraguay initiated an earlier case against the

meanwhile, has heard a series of cases that relate both to the issue of American implementation of the VCCR and the authority that ICJ rulings have in American domestic courts.³ The central issue in this struggle—one that has ignited fierce debate in American legal circles—is not what rights and duties are actually owed under the VCCR,⁴ but a broader question of how American courts should respond to the decisions of the ICJ. Are ICJ decisions merely persuasive authority (i.e., equivalent to a law review article that courts should follow if its logic is persuasive, but reject if it is unconvincing) or are they binding on American courts the way the ruling of a higher domestic court would be (i.e., where the ICJ has spoken authoritatively on a specific issue in a specific case, the domestic courts could not consider the logic or persuasiveness of the opinion but merely implement it as faithfully as possible)? This question was recently answered for American purposes in the 2008 Supreme Court case *Medellín v. Texas*.⁵

In *Medellín*, the Supreme Court ruled that the ICJ's *Avena* judgment regarding the use of state procedural default rules to block defendants' claims of prejudice based on VCCR violations did not "constitute[] directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions."⁶ The Court stated that its "conclusion that *Avena* does not by itself constitute binding federal law is confirmed by the 'postratification understanding' of signatory nations" that are party to the U.N. Charter, the ICJ Statute, and the Optional Protocol to the VCCR.⁷ The Court found it relevant that

neither *Medellín* nor his *amici* have identified a single nation that treats ICJ judgments as binding in domestic courts. . . . [T]he lack of any basis for supposing that any other country would treat ICJ judgments as directly enforceable as a matter of their domestic law strongly suggests that the treaty should not be so viewed in our courts.⁸

United States regarding the VCCR, but the case was dismissed after the execution of Angel Francisco Breard. Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 426 (Nov. 10) (ordering case removed from docket).

3. The Supreme Court has issued opinions that relate to ICJ decisions and the VCCR in three cases. *Medellín v. Texas*, 128 S. Ct. 1346 (2008); *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006); *Breard v. Greene*, 523 U.S. 371 (1998) (per curiam), *denying cert. to Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998).

4. Indeed, on the precise issue of what rights and duties are owed under the VCCR, the ICJ rulings may be moot, since the United States has withdrawn from the Optional Protocol of the VCCR that grants jurisdiction to the ICJ. See Letter from Condoleezza Rice, Sec'y of State, to Kofi Annan, Sec'y-Gen. of the U.N. (Mar. 7, 2005) (on file with author); see also *Sanchez-Llamas*, 548 U.S. at 338 (noting American withdrawal from the Optional Protocol).

5. 128 S. Ct. 1346 (2008).

6. *Id.* at 1353. The opinion also addressed a separate but related issue: whether the President's memorandum to the Attorney General, directing state courts to give effect to the *Avena* judgment, was binding federal law. The Court answered that question in the negative as well. *Id.* at 1363.

7. *Id.* at 1363. Justice Scalia, who joined the majority in *Medellín*, has written on the need to look to the interpretations of the courts of other signatories of a treaty on an issue governed by that treaty: "We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties." *Olympic Airways v. Husain*, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting).

8. *Medellín*, 128 S. Ct. at 1363 (footnote omitted).

Yet is this observation helpful? If the litigants in *Medellín* cannot cite to case law from another nation that incorporates ICJ judgments into domestic law, does that indicate that other nations have rejected the idea that ICJ judgments could be directly enforceable in domestic courts, or has the question just not presented itself?

The Court's statement that there is no evidence that the courts of other nations would treat ICJ decisions as binding seems at least possibly overbroad. Both Belgian and German courts have issued rulings or opinions that provide some suggestion that ICJ decisions are directly enforceable.⁹ Although these decisions can be criticized or interpreted in other ways, they raise enough of a question that a more comprehensive account of the question of domestic enforceability of ICJ judgments is needed.

This Note argues that the case law of courts in other nations does not support the Court's claim that the *Medellín* opinion follows the postratification understanding of other nations. The Court refers to a shared understanding; such an understanding would be best evidenced by the courts of other nations considering and rejecting the idea of direct enforcement of ICJ judgments. This Note shows that the courts of other nations that have been party to ICJ decisions have not considered or reached a conclusion about whether ICJ decisions would be enforceable domestically, at least among a certain subset of nations who have been party to ICJ decisions. The silence on the part of the courts of foreign nations negates any attempt to draw an inference of a particular understanding about the meaning of the U.N. Charter and the ICJ Statute.

While the Court could have been more careful by referring to a postratification *practice* instead of an *understanding*, even that wording would be misleading. Looking to a postratification practice, at least to the extent that such practice would be useful for courts seeking to answer the question of domestic enforceability of ICJ judgments, would require some form of deliberate decisionmaking on the part of the nation whose practice is under examination. The effect of the research presented in this Note suggests that such deliberation has seldom occurred. If a nation's courts have never even considered the question, how can that lack of thought be helpful in determining the intent of the U.N. Charter signatories? This Note argues that *Medellín* did not draw on a postratification practice or understanding, nor did it conflict with the postratification understanding adopted by other nations. The evidence from other nations is thus largely neutral to the outcome of *Medellín*. However, it is not neutral with regards to the logic of the *Medellín* opinion on this issue. If the Court's judgment in *Medellín* was a correct one, it is so only because of the domestic legal arguments, not because of an interpretation of what fellow signatories to the U.N. Charter have done.

Although I argue it is only rarely that domestic courts even face the decision of enforcing or rejecting an ICJ judgment, it seems probable that the issue will eventually arise in other nations. When the courts of those nations do seek to resolve the issue, they will need to consider *Medellín*. The Court's

9. See *infra* note 124.

statement regarding a shared understanding implies that the Court's decision is extensively supported by the courts of other nations. The research of this Note belies that implication. While a foreign court considering whether to enforce an ICJ judgment should consider *Medellín* as one indication of what the U.N. Charter requires, it need not think that *Medellín* provides a summary of the understanding of the court of any nation other than the United States. Furthermore, as Justice Breyer pointed out in his dissent to the *Medellín* judgment, numerous treaties to which the United States is a party include provisions that give the ICJ jurisdiction over disputes arising from those treaties.¹⁰ It is possible that the issue of direct enforcement of an ICJ judgment could arise as a result of one of those treaties; if that is the case, then future litigants in American courts might find it useful to investigate whether the Court in *Medellín* was accurate in describing a “postratification understanding” that ICJ judgments were not enforceable directly in domestic law.

This Note will attempt to begin a comprehensive account of foreign court application of ICJ judgments, focusing on common law nations that have been parties to final judgments of the ICJ. Part II will provide background on the ICJ and discuss the series of cases in both the ICJ and American courts about the VCCR, which culminated in the Supreme Court decision in *Medellín*. Part III will provide a brief sketch of how similar questions arose in the early period of the ICJ's history, both in academic literature and, in a few canonical cases, in some courts around the world. Section IV.A justifies the methodology this Note pursues and particularly explains the method of selecting cases to investigate. Section IV.B describes the extent to which common law nations that are the subject of this Note's study have considered whether to directly enforce ICJ judgments. Part V analyzes the results, and argues that the evidence suggests the issue of direct enforcement of ICJ judgments does not often present itself to domestic courts. However, no other common law nation has created case law that rejects direct enforcement of ICJ judgments either. Part VI concludes by arguing that the evidence from other nations does not directly support or contradict the Court's argument in *Medellín*—there is no noticeable postratification understanding—which suggests the opinion should be justified purely on its domestic legal arguments.

II. THE ICJ AND AMERICAN VIOLATIONS OF THE VCCR

The questions that the Supreme Court wrestled with in *Medellín* did not appear suddenly in that case. The issue of ICJ judgments in domestic law has been a complicated issue in American law for ten years. To fully understand the Supreme Court's opinion in *Medellín*, one must appreciate the ICJ and the series of cases both at the ICJ and in American courts that have addressed American breaches of the VCCR. This Part first explains the origin and

10. *Medellín*, 128 S. Ct. at 1393-96 app. B (Breyer, J., dissenting).

function of the ICJ and then describes the VCCR cases, which represent a flashpoint between American courts and the ICJ.

A. *The ICJ*

The ICJ is the “judicial organ of the United Nations.”¹¹ It consists of fifteen judges,¹² selected for terms of nine years¹³ by the General Assembly.¹⁴ The ICJ hears two types of cases: contentious and advisory. Advisory cases originate from the requests of various U.N. bodies and have little to do with the topic of this Note, because nations are not parties to those rulings and are not obligated under the U.N. Charter to obey them.¹⁵ Contentious cases, then, are the main focus of this Note. Only states can be parties to contentious ICJ cases.¹⁶ Contentious cases can reach the ICJ in three ways: two states that face a specific dispute can reach a special agreement to refer that dispute to the court for resolution;¹⁷ a state that has a disagreement with another state over the obligations of a treaty to which both are parties can bring a case to the ICJ if that treaty includes a “compromissory” clause whereby the signatories of the treaty agree in advance to the court’s jurisdiction over issues that arise under the treaty;¹⁸ and a state may consent generally to resolve any dispute before the ICJ that is referred by another nation that has made a similar agreement.¹⁹ Because the parties to the contentious cases are sovereigns, the court is usually quite careful in deciding whether it has jurisdiction over a case, and it dismisses many of its cases because of objections to jurisdiction from the responding state.

ICJ judgments are binding only on the specific parties and only in the specific case before the court.²⁰ Consequently, the U.N. Charter does not create any legal requirement that other nations, not party to a specific dispute, give precedential weight to the opinion that resolves a dispute. For the nations who are party to an ICJ judgment, it is considered binding, and the duty to comply with the judgment is codified in the U.N. Charter: “[e]ach Member of

11. U.N. Charter art. 92, para. 1.

12. Statute of the International Court of Justice art. 3, para. 1, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

13. *Id.* art. 13, para. 1.

14. *Id.* art. 4, para. 1.

15. The Security Council, the General Assembly, and other U.N. organs that are authorized by the General Assembly may request that the ICJ issue an advisory ruling on a given legal issue. U.N. Charter art. 96, paras. 1-2. The party that requested the ruling is not bound by the results of that ruling. Some of the more infamous ICJ cases have been advisory rulings. *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) (advising on the legality of Israel’s construction of a wall in the West Bank, at the request of the General Assembly); Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66 (July 8) (advising on the legality of the use of nuclear weapons at the request of the World Health Organization).

16. ICJ Statute, *supra* note 12, art. 34, para 1.

17. *Id.* art. 36, para. 1.

18. *Id.* Compromissory clauses can either be part of a treaty itself or included in an optional protocol to the treaty, which allows nations to sign the treaty itself and decide separately if they should be bound to the ICJ’s jurisdiction on that issue.

19. *Id.* art. 36, para 2.

20. *Id.* art. 59.

the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.”²¹ If a victorious party is unsatisfied with the efforts the losing party makes in complying with the judgment, it may seek Security Council intervention to enforce it:

If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.²²

The Security Council has never intervened to enforce an ICJ judgment under Article 94(2).²³

B. *The VCCR Series of Cases*

The current uncertainty regarding the role of ICJ decisions in American domestic courts has been ignited by a series of cases involving the interpretation of the VCCR.²⁴ The VCCR is a codification of preexisting customary practices on the role of consuls stationed in foreign countries.²⁵ The specific dispute has arisen over American states’ difficulty informing alien arrestees of their right to notify the consul of their nation of citizenship²⁶ and the ability of that consul to assist in the defense of the individual once he has been charged.²⁷ The United States ratified the VCCR in 1963 along with an

21. U.N. Charter art. 94, para. 1.

22. *Id.* art. 94, para. 2.

23. CONSTANCE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 39 (2004).

24. The Court of Appeals for the District of Columbia Circuit faced the issue of whether an ICJ judgment was domestically enforceable in a case that sought to enjoin the American government from aiding the Nicaraguan Contras. *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988). The plaintiffs based their claim in part on an ICJ judgment, *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27), which held that the United States had violated international law in its support of the Contra movement. *Id.* at 146. The court rejected this claim based in part on the idea that ICJ judgments were to be enforced through political channels, because the U.N. Charter and the ICJ Statute did not confer standing on individual actors. *Comm. of U.S. Citizens*, 859 F.2d at 937-38. The court cited ongoing attempts by Nicaragua to enforce the judgment through the Security Council as an example of political efforts to enforce ICJ decisions. *Id.* at 932.

25. VCCR, *supra* note 1, pmb1.

26. The text of the relevant provision of the VCCR is:

[I]f 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 sub-paragraph

Id. art. 36(1)(b).

27. The relevant provision of the VCCR is:

[C]onsular 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.

Optional Protocol to the Convention, which granted jurisdiction of disagreements over the Convention's terms to the ICJ.²⁸

These treaties, along with the U.N. Charter and its annexed ICJ Statute, were all ratified in accordance with American constitutional law—signed by the President and consented to by a two-thirds majority of the Senate.²⁹ A duly ratified treaty constitutes a binding international obligation on the nations that have ratified it as long as that treaty is in force.³⁰ It is thus a relatively uncontroversial statement to say that the United States is obligated to follow the U.N. Charter and the VCCR as a matter of international law.³¹ For some nations, admitting such a statement might have been powerful evidence for a resolution of *Medellín* in favor of the petitioner. So-called “monist” nations hold to a tradition that an international obligation usually creates a corresponding domestic legal obligation.³² “Dualist” nations, on the other hand, require domestic legislative enactments to translate international legal obligations into enforceable domestic obligations.³³ The American Constitution describes treaties as the “supreme law of the land,” along with itself and federal statutes.³⁴ However, such language does not mean that the United States is a monist nation. American courts have held that treaties can either be self-executing, thus forming domestic law, or non-self-executing, thus creating only international obligations.³⁵ The determination of whether a treaty is self-executing or non-self-executing depends on whether “the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on those terms.”³⁶ As a result of this jurisprudence, admitting that the U.N. Charter binds the United States internationally, and thus that ICJ judgments to which the United States is a party are also binding,³⁷ does not resolve the status of these documents in American domestic law.

In 1998, Paraguay, which like the United States is a signatory to the VCCR and the Optional Protocol, brought a claim against the United States in the ICJ over the conviction of Paraguayan national Angel Francesco Breard. Breard was convicted of capital murder and rape in Virginia without being informed of his right to require authorities to notify his consul of his arrest, and thus without the assistance of the consul.³⁸ Paraguay sought provisional protection by the ICJ because Breard was scheduled to be executed shortly

Id. art. 36(1)(c).

28. Optional Protocol, *supra* note 1, art. 1.

29. U.S. CONST. art. II, § 2, cl. 2.

30. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 9-10 (4th ed. 2003).

31. *Medellín v. Texas*, 128 S. Ct. 1346, 1356 (2008). By acknowledging that *Avena* is binding on the United States as a matter of international law, the Court implicitly acknowledged that the U.N. Charter and the VCCR, necessary predicates for the *Avena* ruling, were also binding on the United States.

32. France may be the most prominent example of a monist nation. *See* JANIS, *supra* note 30, at 100.

33. The United Kingdom has traditionally been a strongly dualist nation. *See id.* at 98-99.

34. U.S. CONST. art. VI, cl. 2.

35. *Medellín*, 128 S. Ct. at 1356.

36. *Id.* (quoting *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc)).

37. U.N. Charter art. 94, para. 1.

38. Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 249 (Apr. 9).

after the case was filed; in response, the ICJ ordered that the United States “take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings.”³⁹ At the same time, Breard attempted to raise the VCCR issue in a federal habeas petition, and Paraguay filed suit in district court raising parallel issues; when the lower courts ruled against both cases, the litigants sought a writ of certiorari and stay of execution, in part claiming the Supreme Court should enforce the provisional measures and allow the ICJ to complete its proceedings.⁴⁰ However, the Supreme Court rejected the petitions for certiorari and the requests for stay of execution. It held that Breard had procedurally defaulted on his Vienna Convention claim by not raising the issue during his original proceeding; that the Antiterrorism and Effective Death Penalty Act provided an independent ground to bar the claim because of its requirement that habeas petitioners develop a claim in state court proceedings; that the Eleventh Amendment barred Paraguay from suing Virginia to halt the execution; and that Paraguay could not pursue a 42 U.S.C. § 1983 action.⁴¹ After Virginia executed Breard, Paraguay requested that the ICJ remove the case from its docket.⁴²

In 1999, the issue of American obligations under the VCCR reached the ICJ again in the case Germany instituted against the United States over the LaGrand brothers. The LaGrands were German citizens convicted of murder and attempted robbery in Arizona. They were not informed of the option of notifying the German consul; the consul thus was not able to assist in the defense; the two were sentenced to death. After the execution of Karl LaGrand, Germany instituted proceedings against the United States in the ICJ and sought an order for provisional measures protecting Walter LaGrand against execution.⁴³ This order was granted, but LaGrand was executed the same day.⁴⁴ Nonetheless, Germany continued with the case. The ICJ reached the merits of the case and held that the VCCR did create individual rights;⁴⁵ it also ruled that the United States had violated the rights of Germany and the LaGrands by not informing the LaGrands of their rights to consular notification.⁴⁶ The court held that procedural default rules should not have been used to bar review of the LaGrands’ claims of violations of VCCR rights.⁴⁷ The ICJ also found that if a German citizen were in the future sentenced to severe penalties after a violation of her right to consular notification under the VCCR, the United States should permit review and reconsideration of the sentence in a manner of its choosing.⁴⁸

39. *Id.* at 258.

40. *Breard v. Greene*, 523 U.S. 371, 374 (1998).

41. *Id.* at 376-78.

42. *Vienna Convention on Consular Relations (Para. v. U.S.)*, 1998 I.C.J. 426, 427 (Nov. 10).

43. *LaGrand Case (F.R.G. v. U.S.)*, 1999 I.C.J. 9, 16 (Mar. 3).

44. *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 479-80 (June 27).

45. *Id.* at 494.

46. *Id.* at 492.

47. *Id.* at 497-98.

48. *Id.* at 513-14.

American obligations under the VCCR reached the ICJ a third time in the *Avena and other Mexican Nationals* case.⁴⁹ The ICJ reached the merits of Mexico's claims regarding fifty-two Mexican nationals;⁵⁰ it repeated its *LaGrand* holding that the VCCR did create individual rights and held that the United States had violated the VCCR rights of both Mexico and its nationals.⁵¹ The ICJ mandated that the United States provide review and reconsideration of the convictions and sentences of the Mexican nationals involved in light of the violation of the VCCR rights and the reasoning of the court's opinion.⁵² The court repeated the conclusion it reached in *LaGrand* that procedural default rules could not bar the required review;⁵³ it noted that the review and reconsideration procedure should be carried out by American courts, not executive clemency proceedings.⁵⁴ The court also held that a similar duty existed for any future violation of the VCCR rights by the United States.⁵⁵ The court explained that the fact that its determinations in the *Avena* judgment addressed Mexican nationals did not mean that it would not reach a similar judgment in the future regarding other nations that brought VCCR claims.⁵⁶

Jose Ernesto Medellín, one of the Mexican nationals on whose behalf Mexico sought the ICJ judgment in *Avena*,⁵⁷ cited the violation of his VCCR rights as one ground for relief in his federal habeas petition from a conviction for two rape-homicides in Texas.⁵⁸ The Court of Appeals for the Fifth Circuit denied the claim and dismissed Medellín's citations to both *LaGrand* and *Avena*, ruling that the Supreme Court's prior ruling in *Breard* that procedural default rules apply to claims of VCCR violations controlled the case.⁵⁹ It also noted that even if the procedural bar did not apply, the Fifth Circuit had previously ruled that the VCCR did not create individual rights, which conflicted with the holdings in *LaGrand* and *Avena* that the VCCR did create such rights.⁶⁰ The Supreme Court granted certiorari on the case, but then dismissed the writ as improvidently granted.⁶¹ Between the grant of certiorari and oral argument at the Supreme Court, President Bush issued a memorandum which stated that the United States would fulfill its duties under *Avena* by "having State courts give effect to the [ICJ] decision in accordance

49. (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

50. *Id.* at 42.

51. *Id.* at 53-54. The court did rule that one Mexican national's rights were not violated. *Id.* at 46.

52. *Id.* at 60, 65-66.

53. *Id.* at 63.

54. *Id.* at 66.

55. *Id.* at 73.

56. *Id.* at 69-70. One could ask whether this is an attempt by the ICJ to evade the U.N. Charter's limitations on the effect of ICJ judgments, but that question is beyond the scope of this Note.

57. *Id.* at 25.

58. Medellín v. Dretke, 371 F.3d 270 (5th Cir. 2004), *cert. granted*, 543 U.S. 1032 (2004). The facts of Medellín and his associates' assault and murder of the two adolescent girls, as recounted by Medellín in a detailed confession, were horrific. See Brief for Respondent at 1-2, Medellín v. Texas, 128 S. Ct. 1346 (2008) (No. 06-984).

59. See Medellín v. Dretke, 371 F.3d at 280.

60. *Id.*

61. Medellín v. Dretke, 544 U.S. 660 (2004) (per curiam), *dismissing cert. to* 371 F.3d 270 (5th Cir. 2004).

with general principles of comity.”⁶² Medellín then commenced a new state habeas corpus proceeding seeking to enforce the President’s memorandum.⁶³ The Supreme Court subsequently dismissed the writ as improvidently granted based on the new state filing.⁶⁴

While the *Medellín* case went through the state habeas proceeding, two foreign nationals—Moises Sanchez-Llamas, a Mexican national not referenced in the *Avena* judgment, and Mario A. Bustillo, a Honduran national—brought the issue of the VCCR back to the Supreme Court through appeals from state court proceedings.⁶⁵ In the case of Sanchez-Llamas, the Court concluded that suppression of statements taken after a violation of a suspect’s VCCR rights⁶⁶ was an inappropriate remedy.⁶⁷ In the case of Bustillo, who argued that *Breard*’s earlier holding that procedural default rules apply to VCCR claims should be set aside in light of *Avena*, the Court was faced with the question of whether to alter its own precedent because of its inconsistency with the *LaGrand* and *Avena* opinions.⁶⁸ The Court rejected that argument, noting that ICJ judgments are binding only between the parties and in that particular case,⁶⁹ and that the United States no longer recognizes the jurisdiction of the ICJ in VCCR matters.⁷⁰ The Court determined that ICJ opinions are entitled only to “respectful consideration,”⁷¹ and concluded that *Breard*’s ruling that procedural default rules govern VCCR claims should stand.⁷²

The Texas Court of Criminal Appeals rejected Medellín’s habeas petition (filed after President Bush’s memorandum) because neither the *Avena* decision nor the President’s memorandum were binding law that required the court to set aside the state’s procedural default rules and to review Medellín’s claims of prejudice.⁷³ The Supreme Court granted certiorari.⁷⁴ While Texas argued that the question of whether the state courts must give effect to the *Avena* judgment was answered in *Sanchez-Llamas*,⁷⁵ the petitioner argued that *Sanchez-Llamas* dealt with whether *Avena* is general precedent, whereas in the instant case it should be used as binding authority, because in the instant case the ICJ statute requirement of “same parties, same case” for binding

62. Memorandum from George W. Bush, President of the U.S., to the Att’y Gen. (Feb. 28, 2005), available at http://brownwelsh.com/Archive/2005-03-10_Avena_compliance.pdf.

63. *Medellín v. Dretke*, 544 U.S. at 662.

64. *Id.*

65. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 339-42 (2006).

66. *Id.* at 343. The Supreme Court assumed, without deciding, that the VCCR did create individual rights. The Supreme Court has yet to decide whether the VCCR creates individual rights for an alien defendant in a criminal case.

67. *Id.* at 350-51.

68. *Id.* at 352-53.

69. *Id.* at 354-55 (citing ICJ Statute, *supra* note 12, art. 59).

70. *Id.* at 355.

71. *Id.*

72. *Id.* at 360.

73. *Ex parte Medellín*, 223 S.W.3d 315 (Tex. Crim. App. 2006), *cert. granted*, *Medellín v. Texas*, 127 S. Ct. 2129 (2007).

74. *Id.*

75. Brief for Respondent, *supra* note 58, at 11.

force is satisfied.⁷⁶ The Supreme Court, as discussed above, ruled in favor of Texas and held that the ICJ opinion did not create federal law that trumped the state procedural default rules.⁷⁷

The Supreme Court rested its decision in *Medellín* on the grounds that none of the relevant treaties—the Optional Protocol, the U.N. Charter, and the ICJ Statute—were self-executing.⁷⁸ The Court interpreted the language of the U.N. Charter to mean that a government party to ICJ disputes was obligated to enforce the provisions, but that it “is not a directive to domestic courts.”⁷⁹ The Court argued that Article 94(2) of the Charter, which permits a victorious party to seek the Security Council’s assistance in enforcing a judgment, was “evidence that ICJ judgments were not meant to be enforceable in domestic courts” because it was a diplomatic, rather than a judicial, remedy.⁸⁰ The Court believed that, at the time of ratification of the Charter, the President and the Senate wished to preserve “the option of noncompliance,” which would exist if Article 94(2) were the sole remedy.⁸¹ The Court further drew on the structure of the ICJ Statute, which states that ICJ judgments are binding between the parties and that only nations may be parties.⁸²

When determining the meaning of a treaty, in addition to considering textual arguments, “[b]ecause a treaty ratified by the United States is ‘an agreement among sovereign powers,’ [the Court has] also considered as ‘aids to its interpretation’ the negotiation and drafting history of the treaty as well as ‘the postratification understanding’ of signatory nations.”⁸³ In *Medellín*, the Court argued that the postratification understanding of other nations

76. Brief for Petitioner at 21-22, *Medellín v. Texas*, 128 S. Ct. 1346 (2008) (No. 06-984). Bustillo, the petitioner in *Sanchez-Llamas* who urged the Court to follow *Avena*, was a Honduran national; *Medellín* was a Mexican national who was specifically listed in the *Avena* decision.

77. *Medellín v. Texas*, 128 S. Ct. at 1367. This March 25 Supreme Court opinion did not conclude the saga of litigation surrounding *Medellín*. Mexico sought further ICJ intervention in the form of a request for an interpretation of the *Avena* judgment; the ICJ responded by issuing provisional measures, including an order that the United States take necessary measures to ensure that *Medellín* was not executed before the court came to a full decision on Mexico’s request. Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2008 I.C.J. 3, 19 (Order of June 16). After the ICJ issued the provisional measures, *Medellín* filed additional habeas petitions before the Texas Court of Criminal Appeals, the U.S. District Court for the Southern District of Texas, and the U.S. Supreme Court. However, each of these courts rejected his request to grant a stay of execution. *Medellín v. Texas*, 129 S. Ct. 360, 361-62 (2008); *Medellín v. Quarterman*, No. H-06-3688, 2008 WL 2937750, at *4 (S.D. Tex. July 22, 2008); *Ex parte Medellín*, No. WR-50191-03, 2008 WL 2952485, at *2 (Tex. Crim. App. July 31, 2008). On August 6, 2008, *Medellín* was executed. Michael Graczyk, *Mexican-Born Killer Executed: Divided High Court Rejected Reprieve*, CHI. TRIB., Aug. 6, 2008, at 4. The ICJ ultimately rejected Mexico’s request for an interpretation of its previous judgment in the *Avena* case, noting that the *Avena* opinion did not include a ruling as to whether it would be directly domestically enforceable or not. Request for Interpretation of the Judgment of 31 March 2004 (Mex. v. U.S.), paras. 44-46 (Order of Jan. 19, 2009), available at <http://www.icj-cij.org/docket/files/139/14939.pdf> (last visited Mar. 26, 2009). The court did hold that the United States failed to uphold its obligations to stay the execution of *Medellín* as the court had ordered in its July 2008 provisional measures ruling. *Id.* paras. 52-53.

78. *Medellín v. Texas*, 128 S. Ct. at 1357.

79. *Id.* at 1358.

80. *Id.* at 1359.

81. *Id.* at 1360.

82. *Id.* at 1361.

83. *Id.* at 1357.

“confirmed” the conclusion reached by the textual arguments.⁸⁴ The Court noted that “neither Medellín nor his *amici* have identified a single nation that treats ICJ judgments as binding in domestic courts,” a fact which the Court concluded “strongly suggests” that the judgments should not be treated as binding by American courts.⁸⁵

The holdings of *LaGrand* and *Avena*, that procedural default rules could not apply to VCCR claims, directly contradict the position reached in *Breard*. *Sanchez-Llamas* was an opportunity for the U.S. Supreme Court to reposition its case law to comply with *Avena* as a matter of general precedent. However, it declined to do so. *Medellín* offered the Court the opportunity to decide whether *Avena* should be respected by American courts as a binding judgment. Based on the Court’s ruling in *Medellín*, *Avena* appears to be unimportant for American courts wrestling with VCCR questions. But was this a foregone conclusion? Had other courts already considered the issue of domestic application of an ICJ decision?

III. EARLY DEBATES ON DOMESTIC ENFORCEMENT OF ICJ DECISIONS

Although *Medellín* and the cases associated with it brought the issue of domestic enforcement of ICJ decisions to the forefront in the United States, this is not a new issue. Scholars debated whether domestic courts were bound by ICJ decisions shortly after the creation of the court. Domestic courts, meanwhile, in some cases considered the domestic enforcement question directly when litigants called upon those courts to recognize the case law of the ICJ or its predecessor, the Permanent Court of International Justice (PCIJ). Although the scholarly writings and the domestic court case law from this period are educational, they do not point to a single conclusion on whether ICJ opinions should be domestically enforceable. Instead, both the idea of domestic enforceability and refutations of it are found in the early examinations of the subject.

A. *Early Scholarship on Domestic Court-ICJ Interaction*

International law scholars considered the issue of how domestic courts should respond to ICJ judgments during the court’s early period. Shabtai Rosenne, for instance, claimed that “[t]he duty to carry out, or comply with, such a judgment is imposed upon the courts of a State party to litigation before the International Court no less than it is incumbent upon the other organs of that state,”⁸⁶ such as that state’s executive. Oscar Schachter also discussed the possibility of using domestic court proceedings to enforce ICJ judgments.⁸⁷ Schachter assumed that a creditor nation could seize the property of a debtor state in its borders by executive action, so that a creditor nation

84. *Id.* at 1363.

85. *Id.*

86. SHABTAI ROSENNE, *THE INTERNATIONAL COURT OF JUSTICE* 88 (1957).

87. Oscar Schachter, *The Enforcement of International Judicial and Arbitral Decisions*, 54 AM. J. INT’L L. 1, 12-14 (1960).

would not need to resort to its own courts. Instead, Schachter envisioned the possibility of a nation seeking enforcement of a judgment against the assets of a nation held in a third nation, using that third nation's courts.⁸⁸ He argued that such a suit should be immune from sovereign immunity protection and pointed to the Article 94(1) obligation of U.N. members to undertake to enforce ICJ judgments as justification for that argument.⁸⁹

However, Schachter did not address other situations where ICJ judgments might be relevant to domestic court proceedings. The first is the possibility of a creditor nation seeking relief in the courts of a debtor nation if the political branches refused to provide compensation. Another situation would be a suit by a private party affected by an ICJ judgment. Such situations sometimes arise when the claims of the private party actually led to the ICJ suit. Such questions raise issues similar to those raised by the use of nonmutual collateral estoppel in American courts.⁹⁰

Ian Brownlie argued that ICJ judgments should not be binding on domestic courts when he stated:

In principle decisions by organs of international organizations are not binding on national courts without the co-operation of the internal legal system It follows that a decision of the International Court, though it concerns substantially the same issues as those before a municipal court, does not of itself create a *res judicata* for the latter.⁹¹

However, Brownlie modified this answer by arguing that “it does not follow that a municipal court could not . . . recognize the validity of the judgment of an international tribunal . . . at least for certain purposes.”⁹² Possible examples include domestic courts using the judgments of international military tribunals as evidence that an occupation is illegal and using the judgments of international courts as evidence of the territorial sovereignty of a state.⁹³ Brownlie's modified answer still did not give ICJ judgments the strength that Rosenne and Schachter argued they should have. It appears that early scholars were troubled by the question of how a domestic court might interact with an

88. *Id.* at 13.

89. *Id.* at 14.

90. Collateral estoppel may not be granted where the prior judgment is inconclusive as to what issues were actually decided. *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 343 (5th Cir. 1982) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 29 cmt. g (1982)). Thus, a preliminary question in applying an ICJ judgment to an individual litigant's case might be whether the judgment actually decided the relevant issue. More fundamentally, use of collateral estoppel has raised questions of due process, such that collateral estoppel may not be used against a party that was not a party to the first action. *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) (“Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.”). This principle might suggest that an individual litigant could never be estopped from litigating an issue decided unfavorably by an ICJ decision, because an individual litigant could never, in the strict sense of the word, be a party to an ICJ judgment. However, this precise question depends on how broadly one construes concepts of privity and virtual representation, and whether nations virtually represent their individual citizens in international contexts.

91. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 51 (6th ed. 2003) (citations omitted).

92. *Id.*

93. *Id.* at 51-52.

ICJ judgment. Several floated ideas about how to resolve the question, but none answered it definitively.

B. *Canonical Case Law on Domestic Court Use of World Court Opinions*

The question of domestic court use of international court judgments arose in several different nations in the 1950s. Although one famous case involved a judgment issued by the PCIJ,⁹⁴ the remainder of these cases dealt with some of the early decisions of the ICJ.⁹⁵

“*Socobel*” v. *Greek State*,⁹⁶ *Administration des Habous v. Deal*,⁹⁷ and *Mackay Radio & Telegraph Co. v. Lal-La Fatma Bent si Mohamed El Khadar*⁹⁸ are the primary examples cited by scholars when discussing the approach that foreign courts have taken toward the interaction between the ICJ and domestic courts.⁹⁹ While other domestic court cases interacted with ICJ proceedings during the early period of the court’s creation, they are not relevant to this Note because these cases did not deal with a final ICJ judgment.¹⁰⁰ As discussed in Section IV.A below, the subject of this Note is

94. “*Socobel*” v. *Greek State*, 18 I.L.R. 3, 5 (Belg. Trib. Civ. de Bruxelles 1951).

95. The ICJ is very similar to the PCIJ, and consequently the issue of municipal court acknowledgement of PCIJ judgments involves mostly the same questions as municipal court use of ICJ judgments. *But see* U.N. Charter art. 94, para. 2 (providing that the Security Council “decide upon measures to be taken to give effect to the judgment,” but only “if it deems necessary”); League of Nations Covenant art. 13, para. 4 (providing that the League Council “shall propose what steps should be taken to give effect” to judgments of the Permanent Court of International Justice “[i]n the event of any failure to carry out such an award or decision”). The U.N. Security Council appears to have greater flexibility in deciding whether to enforce an ICJ judgment than the League Council did with regard to a PCIJ judgment. This could create some legitimate difference between the municipal effect of PCIJ judgments and ICJ judgments; however, I have not found a case that distinguishes the two based on that difference.

96. *Socobel*, 18 I.L.R. at 3.

97. 19 I.L.R. 342 (Morocco Ct. App. Rabat 1952).

98. 21 I.L.R. 136 (Tangier Ct. App. Int. Trib. 1954).

99. *See, e.g.*, Curtis Bradley, Lori Fisler Damrosch & Martin Flaherty, *Medellín v. Dretke: Federalism and International Law*, 43 COLUM. J. TRANSNAT’L L. 667, 690 (2005) (providing comments by Curtis Bradley at a debate held at Columbia Law School on February 21, 2005); A. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT’L L. 877, 886 (2000); Philip V. Tisne, Note, *The ICJ and Municipal Law: The Precedential Effect of the Avena and LaGrand Decisions in U.S. Courts*, 29 FORDHAM INT’L L.J. 865, 903 (2006).

100. The ICJ case *Anglo-Iranian Oil Co.*, (U.K. v. Iran), 1952 I.C.J. 93 (July 22) (Judgment on Preliminary Objections), paralleled litigation in several municipal courts worldwide. The United Kingdom brought the case complaining of Iran’s nationalization of Anglo-Iranian Company’s oil holdings under a theory of diplomatic protection. Although the ICJ found that it did not have jurisdiction over the case, *id.* at 114, its opinion was cited by courts in both Italy and Japan in support of the conclusion that a prior agreement between Anglo-Iranian and Iran was not a treaty. *Anglo-Iranian Oil Co. v. S.U.P.O.R. Co.*, 22 I.L.R. 23, 41 (Italy Civ. Ct. Rome 1955); *Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha*, 20 I.L.R. 305, 308 (Japan High Ct. Tokyo 1953). Perhaps most interesting, however, is the omission of any reference to the ICJ proceedings by a court in the British colony of Aden when that court addressed the question of whether Iran’s actions were violations of international law. *Anglo-Iranian Oil Co. v. Jaffrate*, 20 I.L.R. 316, 328 (Aden Sup. Ct. 1953). While the ICJ judgment was only on the issue of jurisdiction, courts in countries that were not parties to the case found it useful to cite the judgment as a reason to support their conclusions, but a court in a territory of a nation that was a party completely ignored the ICJ proceedings that at least related to the case before it.

limited to final judgments of the ICJ. These three cases provide useful background when considering the contemporary question of whether to enforce the ICJ judgments on the VCCR in domestic American courts. The cases themselves, however, provide little guidance. One case (*Socobel*) famously rejected judicial enforcement of World Court opinions; the second (*Deal*) accepted such enforcement; and the third (*Mackay Radio & Telegraph Co.*) followed the first in rejecting such enforcement, but did so in what would be considered dicta.¹⁰¹

The first prominent case that addressed the issue of how domestic courts should deal with World Court judgments was the “*Socobel*” v. *Greek State* case in Belgium. The Belgian plaintiff sought to execute an arbitral award against Greece by seizing Greek property in Belgium. The plaintiff claimed that it did not need an *exequatur*¹⁰² to enforce the arbitral award because the binding nature of the award had been approved by the PCIJ and because the PCIJ judgment dispensed with the need for an *exequatur*.¹⁰³ The Belgian court disagreed:

The plaintiff Company claims that it cannot be conceived that a decision emanating from the International Court, which decides disputes between States, should require the exequatur of Belgian tribunals. *De lege ferenda* such an exemption from exequatur seems conceivable or even legitimate. However, at the present time, no international arrangement has introduced such a principle into the Belgian legal system.¹⁰⁴

While the Belgian court conceded that it could be logical to design a system where World Court judgments are directly binding, it did not see the League of Nations Covenant or any subsequent multilateral convention as providing such a system. A provision for direct enforcement required further legal innovation. The court also noted that the plaintiff was seeking the benefit of a judgment generated by a case which was officially between Belgium and Greece. “It is inconceivable that a party which, by definition, is not admitted to the bar of an international court should be able to rely on a judicial decision in a case to which it was not a party.”¹⁰⁵ Yet, the Belgian court did not categorically rule that international court judgments could never be enforced by the courts of Belgium; it required that such judgments must at least be put through the *exequatur* process like the judgment of any foreign court.

The ICJ decision on *Rights of Nationals of the United States of America in Morocco*¹⁰⁶ triggered two opinions by courts in Morocco that addressed the issue of the relationship between ICJ opinions and domestic courts. The ICJ faced a claim that United States consular courts had jurisdiction over any case,

101. *Socobel*, 18 I.L.R. at 5; *Deal*, 19 I.L.R. at 344; *Mackay Radio*, 21 I.L.R. at 136.

102. An *exequatur*, or executive judgment or executory judgment, is an action by which a court in nation A may recognize the validity of the judgment of a court of nation B so that the successful party may directly enforce the judgment in nation A. Nations differ in how readily executive judgments are granted. In English law, “the valid foreign judgment is conclusive as to its merits [so] the English courts have not the right . . . to re-examine the whole case and to refuse the exequatur if they hold the foreign judgment bad.” MARTIN WOLFF, PRIVATE INTERNATIONAL LAW § 250 (2d ed. 1950).

103. *Socobel*, 18 I.L.R. at 3-4.

104. *Id.* at 4.

105. *Id.* at 5.

106. (Fr. v. U.S.), 1952 I.C.J. 176 (Aug. 27).

civil or criminal, in which an American citizen was a defendant in the French zone of Morocco.¹⁰⁷ The ICJ rejected this claim and ruled that U.S. consular courts had jurisdiction only in disputes between American citizens.¹⁰⁸ An appeals court in Rabat, when faced with a dispute where an American was a defendant, based its jurisdiction of the dispute on the ICJ ruling: “since the Hague Judgment, and subject to the reservations therein contained, American nationals . . . are subject to the same courts as other foreign nationals.”¹⁰⁹ The Moroccan court appeared to take the ICJ judgment as a conclusive description of its jurisdiction with regard to American citizens. While the court did not discuss the intent of the parties to the U.N. Charter, it found it unproblematic to apply the World Court judgment to a domestic court proceeding.

However, the complicated history of colonial involvement in Morocco meant that this decision did not apply to the entire country. While the bulk of Morocco was under a French “protectorate” (hence France was the respondent in the ICJ), parts of Morocco were controlled by the Spanish, and the city of Tangier was internationally controlled.¹¹⁰ The appellate court of Tangier responded to the ICJ decision quite differently from the court in Rabat. Responding to a finding by a trial court that the ICJ decision governed its jurisdiction, the Court of Appeal rejected the applicability of the decision

because, first, it does not create precedent, the Judgment itself declaring that its applicability is limited to the French Zone of Morocco; secondly, because, even if this were not so . . . its judgments [do not] have any binding force in municipal courts; and, thirdly, because the judgments of the International Court of Justice resolve differences arising between States¹¹¹

The court’s position was thus opposite to the opinion of the Rabat court. While it based its disregard for the ICJ judgment first on the fact that the International Zone of Tangier was not a party to the case, it continued its discussion and (in dicta) categorically rejected the idea that ICJ judgments are binding on domestic courts at all. Neither the Rabat court nor the Tangier court provided evidence for their starkly opposing views of the effect of ICJ judgments in domestic courts; neither considered its opinion problematic.

While the cases discussed above (*Socobel*, *Deal*, *Mackay Radio & Telegraph Co.*) present intriguing questions, they provide few answers to the question of how the signatories to the U.N. Charter conceived of the relationship between an ICJ judgment and the domestic courts of a nation party to that judgment. The court in Rabat, Morocco, applied the ICJ judgment from *Rights of U.S. Nationals in Morocco*, but did not discuss the reasons why it was appropriate to do so. The most extensive court discussions appear in *Socobel* and *Mackay Radio*, both of which came down against the direct enforcement of ICJ judgments by domestic courts. However, the

107. *Id.* at 190.

108. *Id.* at 201.

109. *Admin. des Habous v. Deal*, 19 I.L.R. 342 (Morocco Ct. App. Rabat 1952).

110. *See* C.R. PENNELL, MOROCCO SINCE 1830, at 158, 166-67 (2000).

111. *Mackay Radio & Tel. Co. v. Lal-La Fatma Bent si Mohamed El Khadar*, 21 I.L.R. 136 (Tangier Ct. App. Int. Trib. 1954).

Tangier court in *Mackay Radio* first found that the ICJ judgment by its own terms did not apply to Tangier,¹¹² so the subsequent discussion that suggests that ICJ judgments could never be binding on domestic courts is technically dicta. The Belgian court in *Socobel* focused primarily on the lack of an *exequatur* in explaining why the PCIJ judgment was not binding. Although language that appears later in the opinion focuses on the issue of whether a private party can claim the benefit of a judgment the parties to which were states,¹¹³ this language is also dicta and the court never explicitly stated that it would be impossible to obtain an *exequatur* for a World Court judgment and thus render it enforceable in domestic courts. These cases, though frequently cited in the academic literature,¹¹⁴ do not provide any clear evidence of how the relationship between ICJ judgments and domestic courts was viewed at the beginning period of the ICJ.

IV. THE PRACTICE OF COURTS ABROAD: DOES IT CONFORM TO *MEDELLÍN*?

While the issue of domestic enforcement of ICJ decisions arose in the court's early period, these cases might not be helpful in comparing American practice to the postratification practice of other members of the U.N. Charter. I discuss why, and propose a different set of nations to examine—specifically, common law nations that have been party to ICJ judgments—in Section IV.A. In Section IV.B, I describe the ICJ cases each such nation has been party to, and whether these cases could be helpful to American understanding of national obligations to the ICJ.

A. *Methodology*

A striking feature of *Socobel*, *Deal*, and *Mackay Radio & Telegraph Co.* is that none of these cases occurred in a common law nation. The relevance of postratification understanding is not formally limited to the nations of the same legal tradition—especially with regards to the U.N. Charter. Technically, any party to the treaty can shed light on the shared understanding of the signatories at the time of drafting. Nor did the Court in *Medellín* discuss the difference between common and civil law nations. However, the Court in *Medellín* also did not attempt to search for evidence of foreign court practice at all.¹¹⁵ It relied on the parties to brief the Court on the issue.¹¹⁶ It is not possible to know whether the Court would have been equally persuaded by evidence of domestic enforcement from a civil law or a common law nation. However, for reasons that I explain below, if a court of a common law nation has addressed the issue of enforcement, then I believe American courts may find such evidence particularly persuasive.

The United States, as a common law nation, shares more of its legal heritage and structure with other common law nations than it does with civil

112. *Id.* at 137.

113. “*Socobel*” v. Greek State, 18 I.L.R. 3, 5 (Belg. Trib. Civ. de Bruxelles 1951).

114. *See* Weisburd, *supra* note 99, at 883.

115. *See* *Medellín v. Texas*, 128 S. Ct. 1346 (2008).

116. *Id.* at 1363.

law nations. The common law tradition views judges as “culture heroes, even parental figures.”¹¹⁷ Although infrequently discussed in contemporary American legal scholarship, the common law “was originally created and has grown and developed in the hands of judges We are accustomed, in the common law world, to judicial review of administrative action”¹¹⁸ In contrast, the civil law tradition has a strict view of separation of powers that cabins the judicial role.¹¹⁹ In that tradition, *stare decisis* is rejected, at least formally, and “[t]he net image is of judges as operators of a machine designed and built by legislators.”¹²⁰ The contrasting views the two traditions hold of judges could cut either way. On the one hand, a tradition that formally embraces *stare decisis* and is accustomed to superior courts instructing inferior courts (the common law tradition) might be more willing to accept the ICJ as yet another superior court to be followed. On the other hand, the civil law tradition conceptualizes a judge as a mechanic, rather than as a powerful lawmaker, and so it might be less threatening psychologically for a civil law nation to acknowledge the opinion of the ICJ than a common law nation, which so emphasizes the role of the judge; in a system that emphasizes the power and importance of a judge, giving weight to the judgment of a foreign court is to acknowledge the power and importance of that foreign court. Of even more practical importance, most common law nations, following the tradition of the United Kingdom, reject the idea of self-executing international legal obligations and embrace a firmly dualist view.¹²¹ On the other hand, some civil law nations tend toward a monist view of international law, such that a binding international legal obligation can become a binding source of municipal law without additional legislative assistance.¹²² To put it another way, a common law nation such as the United Kingdom would be the least obvious case to find direct enforcement, and the most likely to reject that idea. If nations that, by virtue of their legal tradition, are the most likely to reject direct enforcement of ICJ judgments, do not actually demonstrate a postratification understanding which supports *Medellín’s* claim, then a postratification understanding which does support *Medellín* is unlikely to exist in the practice of other nations either.

Such common heritage and structure suggests that the views of judiciaries in other common law countries would be more influential than the judiciaries of nations following a different legal tradition. The question presented focuses on the role of courts (which as discussed above, is a special and troubling role in the common law tradition), and on the interaction of municipal and international law (about which the common law has a dualist view). Thus, the practice of other common law nations might be especially helpful in answering American concerns, or, at the very least, is a good

117. JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 34 (3d ed. 2007).

118. *Id.*

119. *Id.* at 36.

120. *Id.*

121. JANIS, *supra* note 30, at 85.

122. Janis cites France as an example. *Id.* at 100.

starting point for such answers. For these reasons, I have chosen to focus my study on common law nations.¹²³

The nature of the ICJ Statute and the U.N. Charter determines the set of nations within this Note's research. By the terms of the ICJ Statute, the court's judgments are binding only upon the nations that are party to the particular judgment, and only in regards to that specific case.¹²⁴ Thus, while a court in a nonparty country might use an ICJ judgment as precedent, it is not legally obligated to follow the judgment in the way that—at least according to some legal scholars—the national courts of parties to the judgment are bound. In determining whether other nations treat ICJ judgments as binding on domestic courts, one should examine only those countries that have been parties to an ICJ case as opposed to all common law nations. Finally, the legal weight of ICJ orders indicating provisional protection was for a long time unclear. It was not until the *LaGrand* case that the ICJ ruled that nations were as legally bound to follow provisional orders as they are to follow final judgments.¹²⁵ Because of this legal uncertainty, it would be unfair to attempt to evaluate whether nations treated provisional orders as directly enforceable in domestic courts. To my knowledge, the only common law nation since *LaGrand* that has been the subject of provisional orders is the United States.¹²⁶ As a result,

123. Unfortunately, time and resource constraints did not permit this Note to address every judgment the ICJ has issued. While alternative methods of selecting cases exist—only the oldest cases, only the most recent cases, a purely random selection of final judgments, only cases involving nations that are repeat players—I believe the common/civil division is an efficient one precisely because common law nations are the most likely to reject direct enforcement of ICJ judgments in a way that supports *Medellín*.

124. See ICJ Statute, *supra* note 12, art. 59. Two foreign judicial opinions that arguably cut against the *Medellín* opinion, from the Belgian Court of Cassation and the German Federal Constitutional Court, involve application of ICJ opinions in instances that violate the “same parties, same case” requirement of the ICJ Statute. In *Arrest Warrant of 11 April 2000*, the ICJ ruled that Belgium was required to cancel an arrest warrant issued against the then-sitting foreign minister of the Democratic Republic of the Congo. (*Dem. Rep. Congo v. Belg.*), 2002 I.C.J. 121 (Feb. 14). Belgium did cancel the arrest warrant. SCHULTE, *supra* note 23, at 269. However the court that cancelled the arrest warrant did not produce a written opinion to explain its rationale. In a case that related to the same Belgian statute that sparked the *Arrest Warrant* case, the Belgian Court of Cassation applied at least part of the ICJ decision's definition of official immunity. However, the court also reached a contrary opinion from another part of the ICJ decision. Antonio Cassese, *The Belgian Court of Cassation v. The International Court of Justice: The Sharon and Others Case*, 1 J. INT'L CRIM. JUST. 437, 437 (2003). More recently, in discussing the VCCR and *Avena*, the German Federal Constitutional Court “held that the failure of the criminal courts to consider and evaluate the legal consequences of a violation of Article 36(1)(b) infringed the defendants' right to a fair trial.” Klaus Ferdinand Garditz, *Article 36, Vienna Convention on Consular Relations—Treaty Interpretation and Enforcement—International Court of Justice—Fair Trial—Suppression of Evidence*, 101 AM. J. INT'L L. 627, 628 (2007). Even though Germany was not a party to the *Avena* suit, because Germany is a party to the Vienna Convention on Consular Relations and its Optional Protocol for ICJ interpretation, German courts are henceforth obligated to consider ICJ judgments on the issue. *Id.* at 629. The German Constitutional Court required lower courts to use ICJ decisions as precedent and to treat them as providing a “guiding function” on treaties that the ICJ had interpreted, regardless of whether Germany is a party to the particular ICJ case. *Id.* A commentator claims that the result “entrusts the ICJ with functions that are beyond its legal competence as a mere dispute settlement organ.” *Id.* at 633.

125. *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 506 (June 27).

126. See *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2003 I.C.J. 77 (Order of Feb. 5) (granting request for provisional measures); Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena and Other Mexican Nationals (Mex. v. U.S.)* (Order of July 16, 2008), available at <http://www.icj-cij.org/docket/files/139/14639.pdf> (last visited Mar. 26, 2009) (granting request for provisional measures); Request for Interpretation of the Judgment of 31 March

the scope of an attempt to determine whether other nations give ICJ judgments binding legal effect in domestic courts is restricted only to nations that have been party to those cases that have generated final judgments by the ICJ in this Note.

Combining these required factors (common law nations which have been parties to ICJ final judgments) yields a targeted set of countries to investigate. The United Kingdom has been party to five final judgments,¹²⁷ India has been party to two,¹²⁸ and the following nations have each been party to one judgment: Canada,¹²⁹ Nigeria,¹³⁰ Pakistan,¹³¹ and Malaysia.¹³²

B. *National Results*

1. *The United Kingdom*

The United Kingdom has been party to five final ICJ judgments on the merits: *Corfu Channel*,¹³³ *Fisheries Jurisdiction (United Kingdom v. Norway)*,¹³⁴ *Ambatielos*,¹³⁵ *Minquiers and Ecrehos*,¹³⁶ and *Fisheries Jurisdiction (United Kingdom v. Iceland)*.¹³⁷ As the discussion of each case below suggests, in four of the five cases where the United Kingdom was a party to an ICJ judgment, the rights of private parties were implicated in the underlying dispute. Given that fact, it would seem reasonable to expect that some of these private parties engaged in parallel litigation in domestic British courts to either take advantage of an ICJ judgment or to avoid one (depending

2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) (Order of Jan. 19, 2009), available at <http://www.icj-cij.org/docket/files/139/14939.pdf> (last visited Mar. 26, 2009) (holding that the United States failed to follow the 2008 provisional measures order in permitting the execution of Medellín to go forward).

127. *Fisheries Jurisdiction (U.K. v. Ice.)*, 1974 I.C.J. 3 (July 25); *Minquiers & Ecrehos (Fr. v. U.K.)*, 1953 I.C.J. 47 (Nov. 17); *Ambatielos (U.K. v. Greece)*, 1953 I.C.J. 10 (May 19); *Fisheries Jurisdiction (U.K. v. Nor.)*, 1951 I.C.J. 116 (Dec. 18); *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4 (Apr. 9).

128. *Appeal Relating to Jurisdiction of ICAO Council (Pak. v. India)*, 1972 I.C.J. 46 (Aug. 18); *Right of Passage over Indian Territory (Port. v. India)*, 1960 I.C.J. 6 (Apr. 12).

129. *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246 (Oct. 12).

130. *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.)*, 2002 I.C.J. 303 (Oct. 10).

131. *Jurisdiction of ICAO Council (India v. Pak.)*, 1972 I.C.J. 46 (Aug. 18).

132. *Sovereignty over Pulau Ligitan & Pulau Sipadan (Indon. v. Malay.)*, 2002 I.C.J. 625 (Dec. 17). Malaysia and Singapore, both common law nations, were also party to another ICJ judgment: *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge (Malay. v. Sing.)* (Order of May 23, 2008), available at <http://www.icj-cij.org/docket/files/130/14490.pdf> (last visited Mar. 26, 2009). However, the ICJ's judgment was issued within a year of this writing; it is unclear that a domestic litigant would learn of the ICJ decision, find her legal interests adversely impacted, bring suit in domestic court, and receive a judicial opinion dealing with the issue of domestic enforcement of an ICJ judgment. Because of this timing issue, I believe it would be inappropriate to include that case in this analysis. At this time, searches of Lexis-Nexis's combined Malaysian, Singaporean, and Bruneian court reporters database reveal no reference to this case.

133. (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

134. (U.K. v. Nor.), 1951 I.C.J. 16 (Dec. 18).

135. (Greece v. U.K.), 1953 I.C.J. 10 (May 19).

136. (Fr. v. U.K.), 1953 I.C.J. 47 (Nov. 17).

137. (U.K. v. Ice.), 1974 I.C.J. 3 (July 25).

on whether the judgment favored the party's legal claims or not). If private parties did pursue such cases, then perhaps the British domestic courts would have the opportunity to reach the question of enforceability of ICJ judgments.¹³⁸

The United Kingdom sued Albania in the ICJ after two British naval vessels were damaged (killing forty-four and injuring forty-two) in a minefield in Albanian waters.¹³⁹ This was the genesis of the well-known *Corfu Channel* decision. The United Kingdom initially claimed damages in the amount of £875,000,¹⁴⁰ but later reduced its claim to £843,947.¹⁴¹ The ICJ found that it had jurisdiction over the dispute despite Albania's objection,¹⁴² and ultimately ruled that Albania bore responsibility for the explosions that damaged the British ships.¹⁴³ In a later ruling, the ICJ ruled that Albania owed the British government £843,947.¹⁴⁴ Albania refused to pay the amount, and for many years refused to comply with the judgment entirely.¹⁴⁵ The British government attempted to find Albanian assets located within the jurisdiction of the United Kingdom to seize to satisfy the judgment.¹⁴⁶ It was unable to do so, and its subsequent attempts to enforce the judgment led to another ICJ case.¹⁴⁷ The issue was not resolved until the two nations reached a settlement in 1992, with Albania finally agreeing to pay the United Kingdom \$2,000,000.¹⁴⁸

Because the *Corfu Channel* case involved death and injury to eighty-six British sailors, for which Albania was eventually found to be responsible, it would have seemed plausible that there was parallel litigation in British courts by the injured parties against Albania. The survivors and the injured would seem to have tort claims against Albania. However, the United Kingdom considered itself liable to the survivors and the injured for medical costs,

138. The Lexis-Nexis Combined U.K. Database, which includes most of the relevant British case reporters, does not contain any case that is a domestic parallel to any of the ICJ cases to which the United Kingdom was a party (it does contain cases that cite to these ICJ cases for their general precedential value, but that is legally different from using the ICJ decision as binding judgment or as having *res judicata* effects). *Halsbury's Laws of England* contains entries for each of the above-discussed cases, but does not provide any suggestion that a domestic court reached the issue. HALSBURY'S LAWS OF ENGLAND (5th ed. 2008).

139. Memorial of United Kingdom, *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. Pleadings 19, 20-21 (Sept. 30, 1947).

140. *Id.* at 52.

141. Observations Submitted Under the Order of the Court of the United Kingdom, *Corfu Channel* (U.K. v. Alb.), 1950 I.C.J. Pleadings 394 (July 28, 1949).

142. *Corfu Channel* (U.K. v. Alb.), 1948 I.C.J. 15 (Mar. 25) (Judgment on Preliminary Objections).

143. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 36 (Apr. 9). The ICJ also ruled that a subsequent British mine-sweeping operation was a violation of international law but that the judgment itself provided satisfaction for Albania's claim. *Id.*

144. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 244, 250 (Dec. 15) (Judgment on Compensation).

145. SCHULTE, *supra* note 23, at 95-98.

146. Schachter, *supra* note 87, at 8 (citing the statement of the British Foreign Secretary).

147. *Monetary Gold Removed from Rome in 1943* (Italy v. Fr.), 1954 I.C.J. 19 (June 15) (Judgment on Preliminary Objections).

148. SCHULTE, *supra* note 23, at 98. The increased figure from the initial judgment is unsurprising given the forty-three year gap between the judgment in the United Kingdom's favor and the final settlement and the difference in the value of the two currencies.

pensions, etc.¹⁴⁹ Additionally, there was a very practical reason why a survivor might not bring suit against Albania—Albania did not have any assets in the United Kingdom.¹⁵⁰ Perhaps due to the statutory arrangement that made the U.K. government liable for the injuries that the British sailors suffered, or due to the fact that there were no Albanian assets within the reach of British courts, the injured sailors and the survivors of the deceased sailors did not pursue claims against Albania, and, as a result, the British courts did not face the question of whether the ICJ judgment in the *Corfu Channel* case was binding on them.

The *Fisheries Jurisdiction* (United Kingdom v. Norway) case before the ICJ raised an inverse question—might a British court ignore an ICJ judgment that was to the detriment of a British citizen? In 1951, the United Kingdom sued Norway regarding the method by which Norway drew the baselines that it used in delimiting its exclusive fishing zone off of its coast.¹⁵¹ This dispute had simmered for years, but Norway began enforcing its claims more vigorously in 1948,¹⁵² and British fishing ships were arrested by Norwegian officials for violating what Norway considered its fishing zone.¹⁵³ As part of its claims before the ICJ, the United Kingdom claimed compensation for these arrests.¹⁵⁴ However, the ICJ decided against the United Kingdom; it held the method Norway used in determining the fishing zone, and the baselines that Norway drew, were not contrary to international law.¹⁵⁵ The U.K. Foreign Office accepted the opinion and acknowledged its precedential value for future international negotiations.¹⁵⁶

The owners of the fishing ships that were arrested by Norway suffered losses in the form of opportunity costs, as well as litigation and other fees. The lack of subsequent domestic litigation in the Norwegian case presents a particularly interesting question. The British ship owners who suffered from Norway's arrest of their ships must have been disappointed by the ICJ holding, which found for Norway and precluded any order of compensation directed at Norway.¹⁵⁷ Why did the fishing vessel owners not seek to sue in British domestic courts? Possibly because the Norwegian courts had already adjudicated the cases of the fishing vessels.¹⁵⁸ Of course, *res judicata* only applies to a court of competent jurisdiction; if Norway had violated

149. Memorial of United Kingdom, *Corfu Channel* (U.K. v. Alb.), *supra* note 139, at 25, Annex 12-13.

150. Schachter, *supra* note 87, at 8. Plaintiffs may sue, even when they are aware that the relevant defendant does not have assets available, to achieve a moral victory; however, this type of suit represents something of a luxury (the plaintiff must pay legal expenses without hope of a financial return on such an investment) and thus is probably less likely to occur than suits where a plaintiff has a chance of receiving a pay-off.

151. Memorial of United Kingdom, *Fisheries Jurisdiction* (U.K. v. Nor.), 1951 I.C.J. Pleadings 17, 17 (Jan. 27, 1950).

152. *Id.* at 54.

153. *Id.* at 97.

154. *Id.* at 101.

155. *Fisheries Jurisdiction* (U.K. v. Nor.), 1951 I.C.J. 116, 143 (Dec. 18).

156. *Fisheries Case Decision: Judgment Against Britain*, *TIMES* (London), Dec. 19, 1951, at 5.

157. *Fisheries Jurisdiction*, 1951 I.C.J. at 143.

158. *See, e.g.,* *Rex v. Cooper*, 20 I.L.R. 166 (Nor. App. Ct. 1953).

international law by the manner in which it drew its baselines, then the Norwegian courts would have been outside their jurisdiction in fining the fishing vessels. However, the Foreign Office quickly accepted the ICJ judgment, which had held that Norway did not violate international law.¹⁵⁹ Once the Foreign Office accepted the conclusion of the ICJ judgment, a litigant trying to show that the Norwegian court lacked jurisdiction would have had to convince a British court to disregard the British government's definition of what constituted Norwegian territory. Potential litigants may have seen that as an impossible task, and accepted the preclusive effects of the Norwegian court judgments. Thus, the doctrines of *res judicata*, as much as the existence of the ICJ judgment in favor of Norway, might have prevented the British fishing vessel owners from instituting a claim in domestic courts.

The next case in which the United Kingdom was a party to a final judgment of the ICJ was the *Ambatielos* case. *Ambatielos* was a Greek citizen who sought to force the United Kingdom to submit to arbitration in a dispute regarding a contract that *Ambatielos* buy several ships from the British government.¹⁶⁰ The British government and *Ambatielos* were involved in domestic litigation regarding the ships and *Ambatielos* was unsuccessful in his appeals.¹⁶¹ *Ambatielos* then sought the protection of the Greek government, which claimed that by virtue of a 1926 commerce and navigation treaty between the two nations, the dispute should be submitted to arbitration.¹⁶² The ICJ ultimately ruled for Greece and determined that the United Kingdom had an obligation to consent to arbitration.¹⁶³ The British Foreign Office accepted the ruling and eventually the dispute was submitted to arbitration.¹⁶⁴ Ultimately, the arbitration panel decided against *Ambatielos*'s claim.¹⁶⁵

Apparently, the *Ambatielos* case did not lead to any subsequent domestic litigation. *Ambatielos* and the British government had already been parties to a domestic suit regarding the ships that formed the heart of the dispute that led to the ICJ case. *Ambatielos* lost in British courts—at both the trial and appellate court levels—*before* the Greek government brought the case to the ICJ to compel arbitration.¹⁶⁶ Thus, within the British court system, *Ambatielos*'s claim was settled before the ICJ was seized of the case. Once the ICJ did issue a ruling, the British Foreign Office responded promptly in negotiating with Greece to reach an agreement to refer the case to arbitration.¹⁶⁷ Additionally, even though the case involved the rights of a private litigant, the very nature of the ICJ ruling—that the British government ought to refer a dispute to arbitration—is not the type of command that is easily enforced by a nation's domestic courts. Considering all of these factors,

159. See *Fisheries Case Decision: Judgment Against Britain*, *supra* note 156.

160. Counter-Memorial of United Kingdom, *Ambatielos* (Greece v. U.K.), 1951 I.C.J. Pleadings 129, 130-31 (Feb. 4, 1952).

161. *Id.* at 131.

162. *Id.*

163. *Ambatielos* (Greece v. U.K.), 1953 I.C.J. 10, 23 (May 19).

164. Agreement Regarding Submission to Arbitration of *Ambatielos* Claim, Greece-U.K., Feb. 24, 1955, 209 U.N.T.S. 187.

165. *Ambatielos* (Greece v. U.K.), 12 R. Int'l Arb. Awards 83 (Comm'n of Arb. 1956).

166. SCHULTE, *supra* note 23, at 113.

167. Agreement Regarding Submission to Arbitration of *Ambatielos* Claim, *supra* note 164.

it should probably not be surprising that there was no litigation in British courts following the issuance of the ICJ judgment.

A dispute in the ICJ over which nation—the United Kingdom or France—owned two small, uninhabited island groups in the English Channel demonstrated that border controversies might not implicate the legal interests of private individuals.¹⁶⁸ The dispute ultimately involved a great deal of historical evidence regarding whether the medieval kings of England exercised control over the islands.¹⁶⁹ The ICJ eventually issued a declaratory judgment that the islands were part of the territory of the United Kingdom.¹⁷⁰ On the facts of the case, there was no suggestion that private parties would have legal interests that would spark parallel or subsequent domestic litigation, and it is unsurprising that British courts have not addressed the applicability of the *Minquiers and Ecrehos* judgment to domestic courts.

The *Fisheries Jurisdiction* (United Kingdom v. Iceland) case was reminiscent of *Corfu Channel* in that the ICJ sided with the United Kingdom on a case that involved injury to private parties and yet, like *Corfu Channel*, British courts evidently did not consider the effect of that ruling. In this case, Iceland asserted a right to a broad exclusive fishing zone (fifty miles from the Icelandic coast) that the United Kingdom and Germany claimed violated international law.¹⁷¹ Icelandic ships threatened to arrest British shipping vessels, although none were actually arrested.¹⁷² Other British ships suffered damage in the form of being ordered to haul up nets and leave the fifty-mile area.¹⁷³ Icelandic ships attempted to cut the trawl wires of fishing ships¹⁷⁴ and even fired on other British vessels.¹⁷⁵ The United Kingdom claimed compensation for the costs and losses suffered in these incidents.¹⁷⁶

The ICJ ultimately agreed with the British and German position, finding that Iceland could not legally exclude the fishing ships of the two nations from such a broad zone and that the parties were under an obligation to negotiate to resolve the differences between them.¹⁷⁷ The ICJ did not reach a ruling regarding the British claim for compensation. Iceland refused to comply, however, and relations between Iceland and the United Kingdom continued to deteriorate, to the point where the Security Council became briefly involved.¹⁷⁸ Ultimately the ICJ ruling was rendered moot by the United Nations Law of the Sea Convention, which recognized the right of coastal nations to claim a 200 nautical mile exclusive economic zone.¹⁷⁹

168. *Minquiers & Ecrehos* (U.K. v. Fr.), 1953 I.C.J. 47 (Nov. 17).

169. *See, e.g., id.* at 55.

170. *Id.* at 72.

171. Memorial of United Kingdom, *Fisheries Jurisdiction* (U.K. v. Ice.), 1973 I.C.J. Pleadings 267, 277-78 (July 31, 1973).

172. *Id.* at 375.

173. *Id.*

174. *Id.* at 375-76.

175. *Id.* at 377.

176. *Id.* at 378.

177. *Fisheries Jurisdiction* (U.K. v. Ice.), 1974 I.C.J. 3, 34 (July 25).

178. SCHULTE, *supra* note 23, at 151-54.

179. United Nations Convention on the Law of the Sea art. 57, Dec. 10, 1982, 1833 U.N.T.S. 397.

Due to the damage that the Icelandic regime caused to both the United Kingdom and individual fishing concerns, it would be plausible to assume that private parties might have tried to pursue domestic litigation against Iceland. The lack of litigation over the Iceland *Fisheries Jurisdiction* case is thus one of the most difficult absences to explain. The judgment was in the United Kingdom's favor,¹⁸⁰ there were no Icelandic court decisions,¹⁸¹ and private interests were significantly affected by Iceland's actions.¹⁸²

2. *India*

India has been party to two cases before the ICJ that have gone to final judgment. The first was in the *Right of Passage* case brought by Portugal. Portugal possessed three dependencies in India at the time the rest of India became independent from the United Kingdom: Goa, Diu, and Daman. Daman is composed of two territories: a littoral district of Daman itself and inland enclaves Dadra and Nagar-Aveli. Nagar-Aveli was overrun by rebels and India refused to allow Portugal to send either delegates of the governor of Daman or troops to suppress the revolt. Portugal brought a case in the ICJ against India, alleging that custom established a right of transit and communication from Daman to Dadra and Nagar-Aveli.¹⁸³ India argued that such a custom did not exist, and, in the alternative, if it did exist, it was only for commercial and governmental communication, not military passage.¹⁸⁴ The Court adopted something of a “split-the-baby” approach, ruling that Portugal possessed a right of transit from Daman to Dadra and Nagar-Aveli through Indian territory, but that such territory was subject to Indian regulation. It also ruled that the right did not include a right to send military forces or arms through Indian territory.¹⁸⁵

This case did not generate Indian case law on the issue of domestic enforceability of ICJ judgments.¹⁸⁶ Given the facts of the case, this is unsurprising. The ruling did not include a right to send troops through Indian territory—the right Portugal probably most desired. Additionally, the ICJ had specifically upheld the restrictions in governmental traffic between Daman and the enclaves. This would seem to provide very few issues for Portugal to litigate. Moreover, Portugal would have been faced with the practical problem of seeking to enforce the ICJ judgment in the court system of a nation that was deeply opposed to the continued Portuguese presence.

Dramatic changes on the ground further reduced whatever chance there would have been for domestic litigation. The ICJ issued its opinion in 1960.

180. *Fisheries Jurisdiction*, 1974 I.C.J. at 34.

181. Memorial of United Kingdom, *Fisheries Jurisdiction* (U.K. v. Ice.), *supra* note 171, at 376 (discussing ship damage without subsequent judicial condemnation).

182. *Id.* at 378.

183. *Right of Passage over Indian Territory* (Port. v. India), 1960 I.C.J. 6, 9 (Apr. 12).

184. Counter-Memorial of India, *Right of Passage over Indian Territory* (Port. v. India), 1958 I.C.J. Pleadings 146-49 (Mar. 25, 1958).

185. *Right of Passage over Indian Territory*, 1960 I.C.J. at 40-43.

186. Searches of Manupatra, a service of Indian court opinions equivalent to Lexis-Nexis or Westlaw, reveals that the *Right of Passage* opinion has not been cited by any Supreme Court or High Court opinion.

By December 1961 not only Dadra and Nagar-Aveli, but Daman, Goa, and Diu had been overrun by Indian troops and annexed to India. Given that the ICJ opinion defined the right of passage as existing between Daman and Dadra and Nagar-Aveli,¹⁸⁷ without a presence in Daman, Portugal would have no way to claim a right of transit between Daman and the enclaves.

When Portugal did allege noncompliance with the judgment (somewhat implausibly), it did so through a message to the Security Council,¹⁸⁸ not domestic court litigation. The *Right of Passage* judgment suggests that some of the cases that the ICJ hears do not involve private rights, only public rights. This case also indicates how contextual some of the ICJ judgments are, such that changes in the political situation can render a judgment essentially moot.

The second case before the ICJ in which India has faced a final judgment of the court was the appeal relating to the jurisdiction of the International Civil Aviation Organization (ICAO) Council. This case had its genesis in the hijacking of an Indian plane, which was diverted to Pakistan and destroyed.¹⁸⁹ India suspended the rights of Pakistani planes to fly over India in retaliation.¹⁹⁰ Pakistan appealed to the ICAO Council to seek a ruling against India's suspension.¹⁹¹ India, in turn, objected to the jurisdiction of the Council; when the Council ruled against its jurisdictional challenges, India appealed to the ICJ.¹⁹² The ICJ decision was in favor of Pakistan: the ICAO had properly rejected the Indian jurisdictional challenges. This judgment, in effect, remanded the case because it did not make a decision on the merits of the case—whether India could lawfully suspend Pakistani flights. From India's perspective, the ICJ ruling did not entail any final resolution of the dispute.

The *ICAO Council* case also failed to lead to domestic case law.¹⁹³ While private interests were indirectly at stake, the ruling itself was a narrow one that related solely to the jurisdiction of an international organization. The only plausible scenario involving domestic court action would have been a private litigant seeking to force the government of India to participate in ICAO proceedings if the government refused. Conversely, the only party that could have objected to the judgment would have been the Indian government, since the judgment did not determine any private rights. India complied with the ruling in that it participated in the ICAO proceedings after the judgment.¹⁹⁴

187. *Right of Passage over Indian Territory*, 1960 I.C.J. at 40-41.

188. Letter from Vasco Vieira Garin, Permanent Representative of Port., to the President of the U.N. Sec. Council (Aug. 16, 1961), U.N. Doc S/4929 (Aug. 17, 1961).

189. Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.), 1972 I.C.J. 46, 51 (Aug. 18).

190. *Id.*

191. *Id.* at 50.

192. *Id.*

193. Manupatra shows that neither the Supreme Court nor the high courts of India have cited the ICAO judgment.

194. Int'l Civil Aviation Org. [ICAO], *Action of the Council*, 88th Sess., at 22, ICAO Doc. 9171-C/1033 (June 30, 1976).

The *ICAO Council* case parallels the *Right of Passage* case: it focused on a narrow issue, relating to subjects that are peculiar to states, and was eventually rendered irrelevant by later factual developments.¹⁹⁵

3. *Pakistan*

The only case to which Pakistan has been a party that has resulted in a final judgment by the ICJ is the previously discussed *ICAO Council* case. From the Pakistani perspective, the case was unlikely to generate domestic litigation: it was a case on a subject that only indirectly affected private rights, it was on a narrow issue that focused solely on state interests, and it was a Pakistani victory. It would be difficult to propose a plausible scenario in which a private litigant in Pakistan would file suit to enforce the *ICAO Council* judgment, or to challenge it. Therefore, it is unsurprising that *ICAO Council* did not lead to domestic litigation.¹⁹⁶ This case again illustrates how frequent it is for an ICJ case to have no relevance to private rights such that domestic litigation would be possible.

4. *Canada*

Canada has been party to one ICJ case that resulted in a final judgment. *The Delimitation of the Maritime Boundary in the Gulf of Maine* focused on the maritime boundary between Canada and the United States in the Gulf of Maine.¹⁹⁷ The two parties brought the case to the ICJ by a special agreement,¹⁹⁸ and a chamber of the court issued a precise ruling drawing the boundary line.¹⁹⁹ Both governments accepted the ruling. Canadian courts have not had a reason to address the domestic enforcement of the decision.²⁰⁰ Two courts have referenced the judgment as part of the factual background of the case before them.²⁰¹ This is unsurprising because the case dealt with a boundary dispute, it was accepted by both parties, and both nations now

195. The ICAO proceedings were discontinued without a formal resolution. *Id.*

196. Thorough research of Pakistani case law digests from 1970 to 1980 has revealed no evidence of a citation by Pakistani courts to the *ICAO Council* opinion; additionally, searches of Pakistanlawsite, <http://www.pakistanlawsite.com> (last visited Apr. 19, 2009), a Pakistani electronic case law database, did not reveal any case law dealing with the *ICAO Council* case.

197. Special Agreement Between Canada and the United States, Maritime Delimitation in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. Pleadings 7 (Mar. 29, 1979).

198. *Id.*

199. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246, 345 (Oct. 12).

200. A search of Lexis-Nexis databases for Canadian cases shows no citation to the *Gulf of Maine* case by Canadian courts that either challenged or sought to enforce the boundary line delimitation.

201. *See* Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans), [1992] 3 F.C. 54 (Fed. Ct.) (Can.) (noting the ICJ decision as background in a dispute between a Canadian fisherman and the Canadian government regarding a claim that the government reneged on a promised license), *rev'd*, [1995] 2 F.C. 467 (Can. Fed. Ct. App.), *aff'd*, [1997] S.C.R. 12 (Can.) (neither the appellate court nor the Supreme Court of Canada referenced the ICJ judgment in resolving the instant case); *Mersey Seafoods Ltd. v. Minister of Nat'l Revenue*, [1985] 2 C.T.C. 2485, 2514 (Can. Tax Ct.) (noting that the Canadian and American governments had reserved certain issues in the Special Agreement that referred the boundary dispute to the ICJ and that this reservation explained any discrepancy between what the Canadian government argued in the instant case and in the ICJ case).

consider it a closed matter. Any party that did try to challenge the maritime border would have to argue against the opinions of both governments as well as the ICJ judgment.

5. *Nigeria*

Nigeria has also been party to one boundary dispute case before the ICJ. This concerned its boundary with Cameroon, particularly in the Lake Chad region and over the possession of the Bakassi Peninsula (which is adjacent to the Gulf of Guinea).²⁰² The two also disagreed over the maritime boundary claims in the Gulf of Guinea; Equatorial Guinea joined the case to press its own claims in that regard.²⁰³ This was not a small border dispute—the populations inhabiting the disputed areas numbered in the many thousands. Moreover, there had been intermittent violence in the disputed areas that had led to several deaths. The ICJ found jurisdiction over the case and issued an opinion that favored Cameroon in most respects, including granting its claim to the Bakassi peninsula.²⁰⁴ The maritime boundary division tended to favor Nigeria, but perhaps equally importantly, the ICJ rejected Cameroon's claims for state responsibility for the violence that had occurred along the border.²⁰⁵

Nigeria accepted part of the ruling and moved to implement some of it;²⁰⁶ however, Nigeria was also firmly opposed to surrendering the Bakassi peninsula. Many Nigerians bitterly refused to accept the proposed transfer, and some alleged that such an act would be unconstitutional.²⁰⁷ However, in June 2006, Nigeria and Cameroon entered an agreement that involved ceding the peninsula to Cameroon, and the Nigerian military was evacuated from the area in August 2006.²⁰⁸

202. In a related matter, an organization that claimed Cameroon illegally controlled the part of the country formerly ruled by the United Kingdom—the Southern Cameroons Peoples Organization (SCAPO)—brought suit in Nigeria to force the Nigerian government to bring SCAPO's claims before the ICJ; according to SCAPO, in 2002 a federal high court in Abuja granted a mandatory injunction obligating the Nigerian federal government to bring such claims to the ICJ. *Southern Cameroon Petitions UN, Seeks Independence, THIS DAY* (Nig.), July 9, 2006, available at <http://www.thisdayonline.com/nview.php?id=52544>. This is the only case of which the author is aware where a nongovernmental entity tried to force a government to bring an ICJ case; in any event, SCAPO's claims were not taken up by Nigeria.

203. *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.: Eq. Guinea intervening)*, 2002 I.C.J. 303 (Oct. 10).

204. *Id.* at 455.

205. *Id.* at 458.

206. Stanley Nkwazema, '*Nigeria, Cameroun Yet To Resolve Bakassi Peninsula' Dispute*, *THIS DAY* (Nig.), Nov. 7, 2006, available at <http://www.thisdayonline.com/nview.php?id=62553>.

207. Several Nigerian senators have stated that the Nigerian Constitution would need to be amended to implement the judgment. Sufuyan Ojeifo, *Senate Moves To Reclaim Bakassi: Says Cession Unconstitutional*, *THIS DAY* (Nig.), Nov. 22, 2007, available at <http://www.thisdayonline.com/nview.php?id=96031>. A Nigerian newspaper's editors stated that "the overwhelming opinion, especially among legal experts, is that the ceding of Bakassi and the manner in which it was carried out, was a travesty of justice and a flagrant disregard of the nation's constitution." *Id.* Moreover, according to at least some Nigerians, "it is doubtful that the country had the best legal representation at the ICJ." Editorial, *Revisiting Bakassi*, *THIS DAY* (Nig.), Dec. 4, 2007, available at <http://www.thisdayonline.com/nview.php?id=97038>.

208. Editorial, *Nigeria's Withdrawal From Bakassi*, *THIS DAY* (Nig.), June 29, 2006, available at <http://www.thisdayonline.com/nview.php?id=50522>; Paul Ohia, *Britain Hails Nigeria, Cameroun*

The issue of the Bakassi peninsula has led to litigation, if not case law. Several suits have challenged the actions the Nigerian government has taken to implement the judgment, although the focus of the challenges is the agreement implementing the judgment as opposed to the judgment itself.²⁰⁹ A trial-level court in the Nigerian capital Abuja issued a temporary restraining order against the Nigerian government shortly before the government was to engage in the final handover of control to Cameroon.²¹⁰ The restraining order provoked a fierce response from some government officials, who claimed that the order was an attempt by the local court to function as an appellate court to the ICJ.²¹¹ However, the plaintiffs in the case claimed to be attacking the method in which the ICJ judgment had been implemented—the agreement between Nigeria and Cameroon—rather than the judgment itself.²¹² The opposition to the ICJ judgment has appeared in two ways in addition to court suits. The first has been the appearance of rebel groups, and threats to declare the independence of the peninsula, after the Nigerian troops withdrew.²¹³ The second avenue of opposition has been legislative refusal to ratify the agreement Nigeria reached with Cameroon. The National Assembly has called the President's actions in signing the agreement and withdrawing from the peninsula unconstitutional without formal legislative approval²¹⁴ and withheld such approval until just before the final transfer of territory to Cameroon.²¹⁵ The government, however, has appeared untroubled by the domestic court injunction, the threats of violence, and the legislative opposition. Nigeria completed the territorial transfer process in spite of the restraining order.²¹⁶ It is unclear whether the litigation that led to the restraining order will continue now that the transfer is complete.²¹⁷ Defenders of the government's conduct have argued that it is both a *fait accompli*—the military withdrawal from the peninsula is complete, and the peninsula is now part of Cameroon—and that the ICJ judgment and the agreement implementing it are superior to the Nigerian constitution. For much of the dispute, the involvement of the Nigerian courts was secondary to the other avenues of resistance; it appears

over *Bakassi*, THIS DAY (Nig.), June 14, 2006, available at <http://www.thisdayonline.com/nview.php?id=5052>.

209. See, e.g., Ernest Chinwo, *Indigenes Urge Court To Stop Election in Bakassi*, THIS DAY (Nig.), Mar. 27, 2007, available at <http://www.thisdayonline.com/nview.php?id=73996>; Funso Muraina, *Bakassi: Indigenes Seek Court's Intervention*, THIS DAY (Nig.), July 19, 2006, available at <http://www.thisdayonline.com/nview.php?id=53509>.

210. *Nigerian Court Poses Legal Obstacle to Bakassi Handover*, AGENCE FRANCE PRESSE, July 31, 2008, available at <http://afp.google.com/article/ALeqM5hzvemp1mL0ULNS4YMY3rUIW1uONQ>.

211. *Id.*

212. *Id.*

213. Laurence Ani, *Bakassi: Cameroon Takes Charge, Nigeria Lowers Flag*, THIS DAY (Nig.), Aug. 15, 2006, available at <http://www.thisdayonline.com/nview.php?id=55766>.

214. Ojeifo, *supra* note 207.

215. Emmanuel Aziken & Inalegwu Shaibu, *Goodbye Bakassi*, VANGUARD (Nig.), Aug. 13, 2008, available at <http://www.vanguard.ngr.com/content/view/14253>; Stanley Nkwazema, *Bakassi: House Sends Treaty Back to Yar'Adua*, THIS DAY (Nig.), Jan. 18, 2008, available at <http://www.thisdayonline.com/nview.php?id=100764>.

216. *Ceding Control: Nigeria Hands Territory to Cameroon*, ECONOMIST, Aug. 15, 2008, http://www.economist.com/displayStory.cfm?story_id=11950441.

217. Tashikalmah Hallah & Francis Okeke, *Nigeria: Opposition Seeks To Join Suit Against Yar'Adua over Bakassi Handover*, WORLD NEWS CONNECTION, Aug. 22, 2008 (on file with author).

that none of these avenues were effective in opposing the ICJ judgment and the implementing agreement.

6. *Malaysia*

Malaysia has been party to one ICJ final judgment that is included in this study:²¹⁸ a dispute between it and Indonesia regarding two islands northeast of Borneo, Pulau Ligitan and Pulau Sipadan.²¹⁹ Only the larger island, Sipadan, was inhabited at the time of the case. The ICJ ruled in favor of Malaysia, recognizing its sovereignty over the islands.²²⁰ Indonesia agreed to abide by the ruling. It does not appear that Malaysian courts have referenced the judgment in their own jurisprudence.²²¹ This is another example of an ICJ judgment that dealt with a dispute whose subject matter is not applicable to domestic litigation: it was essentially a border dispute, both parties accepted the outcome, and very few people were even indirectly affected by the case. The only imaginable suit that this case could have generated would have been some attempt to force Malaysia not to accept sovereignty over the islands, a farfetched scenario that clearly did not come to pass.

However, another case, while technically outside the scope of this survey, is worth noting. In 1996, a Malaysian attorney, who was appointed to be a U.N. Special Rapporteur on the Independence of Judges and Lawyers, made comments in a magazine interview that were interpreted as defamatory toward a Malaysian company.²²² When the Malaysian company sued the Rapporteur in Malaysian courts, he asserted a defense of immunity. The Malaysian government and the United Nations agreed to refer the question of immunity to the ICJ through its advisory jurisdiction provision, as called for in section 30 of the Convention on the Privileges and Immunities of the United Nations.²²³ The ICJ ruled that the rapporteur was entitled to immunity.²²⁴ A Malaysian high court ruled that the ICJ opinion was conclusive as to the issue of immunity, because the Malaysian government had specifically consented to refer the case for the advisory opinion.²²⁵ The court, however, could not resist criticizing both the ICJ and the rapporteur in dicta.²²⁶ This case falls outside of the scope of this survey because it came to

218. See *supra* note 132 for a discussion of why *Sovereignty over Pedra Branca/Pulua Batu Puteh, Middle Rocks and South Ledge* (Malay. v. Sing.), 2008 I.C.J. (May 23), available at <http://www.icj-cij.org/docket/files/130/14492.pdf> (last visited Mar. 26, 2009), is not included in this study.

219. *Sovereignty over Pulau Ligitan & Pulau Sipadan* (Indon. v. Malay.), 2002 I.C.J. 625 (Dec. 17).

220. *Id.* at 686.

221. Searches of Lexis-Nexis's combined Malaysian, Singaporean, and Bruneian court reporters database reveal no reference to the Pulau Ligitan and Pulau Sipadan case.

222. *Cumaraswamy v. MBf Capital Bhd*, [1997] 3 MALAY. L.J. 824, 853 (Ct. App. Kuala Lumpur).

223. *Convention on the Privileges and Immunities of the United Nations* § 30, Feb. 13, 1946, 1 U.N.T.S. 15.

224. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, 1999 I.C.J. 62 (Apr. 29).

225. *Insas Bhd v. Cumaraswamy*, [2000] 4 MALAY. L.J. 727, 734 (High Ct. Kuala Lumpur).

226. *Id.* at 734-35.

the ICJ through its advisory jurisdiction, rather than its contentious case jurisdiction. However, it indicates that Malaysian courts could be willing to defer to ICJ judgments if such a situation arose.

V. ANALYSIS

The most relevant points from the survey of the common law nations that have been party to ICJ decisions are: there is no evidence of a doctrine of direct enforcement of ICJ decisions in domestic courts; on the other hand, there is no evidence that such a proposal was considered and rejected by domestic courts; most of the cases on the ICJ docket do not implicate private interests; and, even those cases that do implicate private interests only very rarely lead to domestic litigation.

It seems clear that other common law nations have not developed a doctrine of direct incorporation of ICJ judgments. Does this fact support the Supreme Court's argument in *Medellín* that its decision is in line with the other signatories of the U.N. Charter? Not exactly; instead, what is revealed is that few courts have considered this question—there is almost no doctrine in either direction. Domestic court litigants very rarely seek to enforce ICJ judgments. Two dichotomies may help answer this question: public concerns versus private concerns at the international level, and private individuals as plaintiffs versus private individuals as defendants.

The docket of the ICJ probably accounts for a large part of the explanation for the lack of cases: the majority of the cases in which common law nations have been parties were border or maritime delimitations.²²⁷ Other than the fishing jurisdiction cases to which the United Kingdom was a party, and the Nigerian border dispute, most of the border and maritime delimitation cases do not appear to involve actions that damaged private interests. Moreover, most of the boundary delimitation cases have been accepted by the nations involved. This places a litigant trying to challenge the judgment in a double bind: not only would such a litigant have to argue against the ICJ judgment, but also against the boundaries that both of the relevant nations claim to respect. The cases to which India was a party (one of which also involved Pakistan),²²⁸ while not boundary disputes, were also unlikely to produce domestic litigation. Both cases involved issues that were not directly relevant to private interests, and both were quickly rendered irrelevant by further factual developments.

The British fisheries cases, which did involve allegations of injuries to private persons,²²⁹ and the *Corfu Channel* case, which involved close to one

227. See, e.g., *Sovereignty over Pulau Ligitan & Pulau Sipadan (Indon. v. Malay.)*, 2002 I.C.J. 625 (Dec. 17); *Land & Maritime Boundary Between Cameroon & Nigeria (Cameroon v. Nig.)*, 2002 I.C.J. 303 (Oct. 10); *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246 (Oct. 12); *Fisheries Jurisdiction (U.K. v. Ice.)*, 1974 I.C.J. 3 (July 25); *Minquiers & Ecrehos (Fr. v. U.K.)*, 1953 I.C.J. 47 (Nov. 17); *Fisheries Jurisdiction (U.K. v. Nor.)*, 1951 I.C.J. 116 (Dec. 18).

228. *Jurisdiction of ICAO Council (India v. Pak.)*, 1972 I.C.J. 46 (Aug. 18); *Right of Passage over Indian Territory (Port. v. India)*, 1960 I.C.J. 6 (Apr. 12).

229. Memorial of United Kingdom, *Fisheries Jurisdiction (U.K. v. Ice.)*, *supra* note 171, at 277-78; Memorial of United Kingdom, *Fisheries Jurisdiction (U.K. v. Nor.)*, *supra* note 151, at 17.

hundred casualties,²³⁰ appeared on their facts to have been likely candidates for domestic litigation. Does the absence of British domestic court cases in which either of these ICJ judgments were given direct effect suggest that the United Kingdom does not consider ICJ judgments automatically binding on domestic courts? It is still impossible to say; even in cases such as these, which involved private interests, the issue appears not to have been litigated in British courts, or such litigation never generated a written opinion. Perhaps doctrines such as the mutuality requirement of *res judicata* and foreign sovereign immunity may have conspired to render neither a suit to enforce ICJ judgments nor a challenge to ICJ judgments a likely outcome.

At least some Nigerian litigants did attempt to challenge a governmental action justified by an ICJ decision.²³¹ Even though a court issued a restraining order, the government was able to continue with its plans.²³² The issue never reached the Supreme Court of Nigeria. The lesson to be drawn from this case is obscure; the litigants challenged the implementing agreement as much as the ICJ decision. Additionally, the government ignored the court order without any apparent repercussions. Perhaps the simplest lesson is that courts are not always effective even if they do become involved in a dispute.

Despite the slant in the ICJ's case law toward public concerns, there is no guarantee that future cases will not involve private rights. Justice Breyer's dissent in *Medellín* included an appendix of treaties to which the United States was a party that gave jurisdiction over disputes to the ICJ.²³³ Many of these treaties are economic cooperation or friendship, commerce, and navigation agreements that include property, contract, and freedom of commerce as subject matters.²³⁴ Other conventions where the United States has acceded to ICJ jurisdiction deal with copyright and patent issues.²³⁵ Despite its public law focus, the United States has agreed that the ICJ can be called upon to consider what would be essentially private rights claims.

The distinction between a plaintiff and a defendant in a domestic court may be important as well. Doctrines such as *res judicata* and sovereign immunity may substantially reduce the possibility that a private plaintiff would be able to sue a government to enforce an adverse ICJ judgment in that nation's own courts; the pragmatic concern that the debtor nation might not have any assets in the reach of a court in the creditor state or a third-party state would be an additional disincentive to bringing a suit. However, the problems of sovereign immunity and lack of available assets would be less burdensome where a private individual is a defendant against the government and raises an ICJ judgment as a defense to the government's action.

A subset of the plaintiff-defendant distinction may be the particular concerns of a criminal defendant. It should be noted that none of the cases in

230. Memorial of United Kingdom, *Corfu Channel (U.K. v. Alb.)*, *supra* note 139, at 25.

231. *See, e.g., Chinwo*, *supra* note 209; *Muraina*, *supra* note 209.

232. *See Ceding Control: Nigeria Hands Territory to Cameroon*, *supra* note 216; *Nigerian Court Poses Legal Obstacle to Bakassi Handover*, *supra* note 210.

233. *Medellín v. Texas*, 128 S. Ct. 1346, 1393-96 app. B (2008) (Breyer, J., dissenting).

234. *Id.*

235. *Id.* at 1395.

this study involved alleged treaty violations in the area of criminal law. The VCCR series of cases appears to be unique in that respect. The involvement of criminal law probably simultaneously raises the likelihood that domestic courts must wrestle with any ICJ decisions on the subject—a criminal defendant would not be barred by doctrines such as sovereign immunity the way a civil plaintiff might be—while at the same time possibly increasing the resistance on the part of domestic courts to accept international supervision. The difference in expertise between an international court, which rarely is called upon to consider issues of criminal procedure, and domestic courts, which deal with criminal issues regularly, is particularly stark. The *Avena* judgment and the *Arrest Warrant* judgment are two of only a few ICJ judgments that dealt with a criminal case. Currently pending in the ICJ is a case between the Republic of the Congo and France involving French assertions of criminal jurisdiction over Congolese leaders; it should be interesting to see how French prosecutors and courts react to any judgment in that case.²³⁶

VI. CONCLUSION

This Note started with the Supreme Court's opinion in *Medellín*. That decision held that the ICJ's decision in the *Avena* case had no binding effect on American courts. The Court justified its decision in part through reference to the postratification understanding of fellow signatories of the U.N. Charter. To put that assertion to the test, I focused on the common law nations that have been party to ICJ final judgments. I examined each case to determine which cases could plausibly provoke domestic litigation wherein the question of the interaction between domestic courts and the ICJ could be answered. I found that few ICJ cases presented facts that could implicate private interests. I also found that even those few cases that did implicate private interests still did not result in domestic case law that addressed the relevant question. The postratification understanding of other nations, at least other common law nations, has been a silence: the question answered in *Medellín* has not been asked in most other national courts.

My research was limited only to common law nations that have been party to an ICJ final judgment. Although the limitation to common law nations was logically justified, given the unique view of judges and courts that distinguishes the common law tradition, and due to the prevalence of dualism among common law nations, many U.N. Charter signatories belong to other legal traditions. As a result, my study is not a conclusive answer to the postratification practice of U.N. Charter signatories. It is merely the starting point. Future scholarship should account for the practice of civil law nations that have been party to ICJ judgments. Any discrepancy between that future scholarship and my own findings would be interesting not only for what it might say about domestic enforcement of ICJ judgments, but also for what it might say about the differing ways civil and common law nations view

236. Application of Congo, Certain Criminal Proceedings in France (Congo v. Fr.), 2003 I.C.J. 129 (Apr. 11).

international judgments. However, if common law nations, for the reasons I have discussed above, are the nations most likely to reject automatic enforcement of an ICJ judgment as domestic law, and yet have not developed a postratification understanding that does indeed manifest such a rejection, then it seems plausible that a broader survey—one that include civil law nations—would not demonstrate a postratification understanding that supports the position of *Medellín*.

I have argued that foreign nations do not show a shared understanding of how ICJ judgments enter domestic law. While the *Medellín* court may or may not have reached the correct outcome, my findings suggest that the Court's arguments about domestic law are the sole support for its opinion. But disputing this one reference to the postratification understanding of other nations is still a valuable exercise. Other nations, or indeed American litigants in future cases that raise issues relating to ICJ decisions, might look back to *Medellín* and take the majority's statement regarding postratification understanding as a suggestion that other nations have reached positions similar to the Court's conclusion. This Note shows that, in fact, the *Medellín* Court was one of the first courts to address this question; it stands not as a summary of the postratification practice of many nations but as the statement of how one nation addressed this question. The courts of other nations, if they are faced with similar questions of domestic enforcement of ICJ opinions, may feel greater liberty to come to contrary conclusions if they understand that *Medellín* essentially wrote on a blank slate.

The litigants in *Medellín* were unfortunate enough to face a question that the courts of few other nations have asked themselves. Yet past practice is no guarantee of the future: the ICJ's docket has grown in the last decade, and many treaties that give jurisdiction to the ICJ involve subject matters that affect individual rights.²³⁷ It is possible that in the future, other nations will wrestle with the question of whether ICJ decisions should be enforced through domestic court decisions. If that is the case, the United States might be forced to revisit the decision in *Medellín* to maintain the uniformity of understanding of which Justice Scalia spoke:

When federal courts interpret a treaty to which the United States is a party, they should give considerable respect to the interpretation of the same treaty by the courts of other signatories. Otherwise the whole object of the treaty, which is to establish a single, agreed-upon regime governing the actions of all the signatories, will be frustrated.²³⁸

As the U.N. Charter celebrates its sixty-fourth birthday, with every indication of permanence and success, it is important to recognize that Justice Scalia's call for an analysis of postratification uniformity of practice is in essence a call for continual comparative analysis. More nations that are party to the Charter will be forced to answer these questions, and their answers may not be in agreement with the U.S. Supreme Court's. *Medellín* might be described as

237. *Medellín*, 128 S. Ct. at 1393-96 app. B (Breyer, J., dissenting).

238. Justice Antonin Scalia, Keynote Address Before the Ninety-Eighth Annual Meeting of the American Society of International Law: Foreign Legal Authority in the Federal Courts (Apr. 2, 2004), in 98 AM. SOC'Y INT'L L. PROC. 305, 305 (2004).

the last word on the question of direct enforcement of ICJ decisions by American courts, but perhaps the better description is that it is merely the latest word, subject to revision as other nations weigh in.