INSTITUTE FOR THE ADVANCEMENT OF JUSTICE & HUMAN RIGHTS

The Completion of the Non-Self-Execution Analysis: *Medellín v. Texas*, the Equivalence Representation, and the Test of Domestic Equivalence

An analytical inquiry into the bounded ratio of Medellín and the analysis its general use omits

ABSTRACT

This Advisory Opinion examines the use made by courts of the United States of *Medellín v. Texas*, 552 U.S. 491 (2008), as a threshold instrument for the disposal of claims founded on treaty obligations of the United States, and asks whether the decision supports that use.

The IAJ concludes that it does not. *Medellín* is not invalid as a decision within the controversy it adjudicated. Its generalized use as a terminal disposal formula is invalid as an application because that use is unsupported by *Medellín* itself and suppresses the domestic-equivalence inquiry the ratification architecture requires. The three possibilities discussed in *Medellín* were not legal conditions of the Court's holding. They nevertheless constituted the concrete implementation possibilities appearing in the record, and the opinion itself established that none supplied an available domestic mechanism—eliminating each on the record before it: the Security Council route supplied no assured or claimant-accessible mechanism because it remained subject to the United States' retained and unqualified veto right, Congress had enacted no implementing legislation furnishing the requested remedy, and the asserted presidential route was rejected in the case itself.

The IAJ further concludes, as a proposed doctrinal development rather than existing Supreme Court doctrine, that a bare non-self-execution determination leaves unanswered a domestic-equivalence inquiry: which lawful domestic mechanism is said to perform the obligation; whether it applies to the claimant and claim; and whether it delivers the required function in operation. A failed comparison does not itself create jurisdiction, a cause of action, a constitutional claim, an immunity waiver, or a remedy.

The deposited Instrument of Ratification defines the international undertaking accepted by the United States and directs attention to domestic constitutional and statutory law; it does not itself establish the elements of a constitutional claim or supply a remedial vehicle. *The Paquete Habana*, 175 U.S. 677, 700 (1900), and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), preserve a disciplined method for identifying customary international law, but customary law likewise requires an appropriate jurisdictional and remedial vehicle.

For Article 16, the represented constitutional substitute is itself composite. The Executive proposed, the Senate accepted, and the United States deposited a formulation equating cruel, inhuman or degrading treatment or punishment with the "cruel, unusual and inhumane treatment or punishment" prohibited collectively by the Fifth, Eighth, and Fourteenth Amendments. That wording does not amend those Amendments or create a freestanding claim. It does establish that the represented domestic comparator extends beyond the Eighth Amendment's post-conviction field and includes due-process protection against qualifying inhumane governmental treatment.

The Detainee Treatment Act of 2005 is material subsequent evidence. Congress enacted an express, geographically unrestricted prohibition after detainee abuse, conflicting governmental standards, and claims that foreign prisoners lacked protections otherwise associated with domestic constitutional law had exposed failure in the represented architecture. Section 2000dd does not, by itself, prove that every component of the ratification representation was knowingly false when made. It does establish operational non-equivalence in a central custodial field, the necessity of additional domestic legislation, and a bounded cure

that left substantial preventive, investigative, accountability, and remedial duties unresolved. Continued unqualified reliance on the original representation after notice supports a serious institutional inference of knowing continued nonperformance.

Medellín prevents a court from treating a non-self-executing treaty stipulation, standing alone, as a freestanding domestic cause of action or remedy where the constitutional treaty process and domestic law have supplied none. It does not authorize adjudicators to erase the underlying international obligation, ignore independently existing domestic grounds, disregard lawful treaty-consistent interpretation, or suppress the compliance significance of a demonstrated failure in the domestic mechanisms on which the United States relied when ratifying UNCAT. The equivalence representation is established through the integrated sequence of Executive representation, Senate advice and consent, congressional pre-deposit implementation, Executive deposit, and continuing Executive reporting. Failure of that architecture does not make UNCAT self-executing: it requires the identified domestic mechanisms to be tested within lawful competence, the residual gap to be stated accurately, and responsibility to be routed to the competent institutions while the failure remains part of the United States' international compliance record.

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PART I. THE QUESTION BEFORE THE IAJ

1.01 The question

The question has three components. The first is descriptive: what use is made of *Medellín v. Texas* in the courts of the United States when a claim founded on a treaty obligation is presented? The second is doctrinal: does the decision support that use? The third is constructive: if the decision does not support the use, what analysis is required in its place, and on what authority?

1.02 Why the IAJ examines it

The IAJ's institutional purpose includes identifying pathways for prevention, accountability, remedy, and reform, and documenting when a pathway exists formally but not functionally. Courts have repeatedly used non-self-execution at the threshold of claims invoking UNCAT and other treaties. This Opinion examines the legal validity and practical consequence of that recurring pattern; it does not claim a quantified empirical frequency beyond the authorities and records reviewed.

1.03 What this Opinion does and does not do

This Opinion advances an analytical argument. It does not promulgate a rule. It does not predict success in any particular litigation. It does not represent that any reader can, by following its analysis, obtain relief from any court.

The Institute writes between two errors identified in the controlling *Guide to Domestic Criminal Enforcement*. The first is doctrinal overstatement: treating the Convention as an invariably freestanding domestic cause of action, treating non-self-execution as merely formal, or eliding domestic jurisdiction, fair warning, immunity, and remedial limits. The second is institutional deference presented as doctrinal caution: retreating so far behind *Medellín* that the Convention appears irrelevant to domestic practice, the implementation gap becomes consequence-free, and source-status qualifications consume the operational conclusion. The first weakens authority by claiming too much. The second converts obligations into paper norms and permits impunity to remain undocumented. This Opinion occupies the disciplined space between them. Its source-status labels identify the legal character of each proposition; they do not diminish the IAJ determinations to which the labels are attached.[1]

It states what *Medellín* decided; identifies the boundary of that decision; documents the use made of it beyond that boundary; sets out the founding constitutional record against which the use is to be measured; states, as a proposed doctrinal extension, the analysis the IAJ considers necessary to complete a non-self-

[1] *A Guide to Domestic Criminal Enforcement of Torture and Cruel, Inhuman, or Degrading Treatment in the United States*, Part A, "Why This Document Exists," and Part C, §§ C-I, C-II and C-V. The Guide is an IAJ institutional publication. Its characterizations are attributed as IAJ determinations, not as holdings of a court or treaty body.

execution determination; identifies the affirmative domestic routes that do not depend on that extension; and records, in candid form, the obstacles each would encounter.

This Opinion does not assert that the decision was wrongly decided on the questions it decided. It asserts that the decision is bounded by those questions, and that the general use is unsupported by anything within the boundary.

1.04 Source status and the two planes

Consistently with the General Comment, this Opinion distinguishes throughout among binding domestic law, authoritative treaty text and the deposited Instrument of Ratification, treaty-body interpretation, persuasive international and comparative material, customary international law, IAJ analytical positions, proposed doctrinal extensions, and anticipated domestic barriers.

It further distinguishes the two planes of the IAJ's analytical architecture.

Plane A is the content of the obligation: what is owed, to whom, and in what operative dimensions. Plane A statements are determinations about the substantive norm. They are unaffected by domestic doctrinal foreclosure.

Plane B is the domestic enforcement reality: what mechanisms exist, whether they apply, whether they deliver, and how a court will in fact receive an argument. Plane B statements are findings about domestic mechanisms.

The distinction governs. Where this Opinion states that an obligation requires something, that is a Plane A determination. Where it states that a court is unlikely to give effect to it, that is a Plane B assessment. The second never qualifies the first. The international substantive norm continues to bind the United States regardless of any domestic doctrinal foreclosure on the procedural plane.

1.05 Relationship to companion IAJ publications

This Opinion is a procedural-pathway analysis. It presupposes, and does not restate, the IAJ's institutional position on the substantive norm, which is set out in *UNCAT and jus cogens: A contemporary perspective*. Readers seeking the IAJ's position on the content and peremptory character of the prohibition should consult that publication, which governs.

The ratification-record analysis on which Part VIII rests is developed in *The Equivalence Representation and the Ex Post Facto Lockout*. The controlling companion for domestic criminal enforcement is *A Guide to Domestic Criminal Enforcement of Torture and Cruel, Inhuman, or Degrading Treatment in the United States*. *Quia Timet and the Prevention of Threatened Torture and Cruel, Inhuman or Degrading Treatment by Domestic Authorities* supplies the preventive-equity analogue. The *Structural Foreclosure of Effective Protection and Remedy for Rights-Violating Judicial Conduct in the Courts of the United States of America* supplies the immunity analogue. *Harmonizing the Architecture of Disability Rights* supplies an earlier seven-step treaty-analysis taxonomy and its “Terminal Non-Self-Execution Formula”; section 8.03A below reconciles that taxonomy with this Opinion’s five-step protocol.[2]

The Institute’s Advisory Opinion *On the Bounded Applicability of Lehman v. Lycoming County Children’s Services Agency* addresses the application of the *Charming Betsy* canon to the *Lehman* doctrine. The present Opinion supplies the Institute’s controlling and complete treatment of *Medellín*, non-self-execution, and domestic equivalence. The *Lehman* Advisory Opinion is to be read, and revised where necessary, consistently with this Opinion.

1.06 Governing corpus hierarchy

The governing hierarchy is substantive rather than bibliographic. *UNCAT and jus cogens: A Contemporary Perspective* states the IAJ’s institutional position on the substantive norm. *A Guide to Domestic Criminal Enforcement* governs enacted vehicles, fair warning, investigation, charging, preservation, referral, and gap documentation. The notices to prosecutors and legislatures apply those standards to institutional addressees. The *General Comment on IAJ Advisory Opinions* governs epistemic labeling and institutional form. This hierarchy does not convert an IAJ position into a judicial holding or erase contrary authority.

Reconciliation preserves compatible propositions, narrows shorthand, and follows the higher instrument where a genuine conflict remains. No IAJ publication is represented as binding law merely because the Institute issued it. A proposition is identified as binding domestic law, authoritative treaty material, customary or peremptory international law, treaty-body interpretation, persuasive material, IAJ determination, inference, or proposed extension according to its actual status.

PART II. THE PRACTICE UNDER REVIEW

2.01 The disposal formula

There is a formula in current use throughout the courts of the United States. It runs, in substance: the treaty invoked is not self-executing; see *Medellín v. Texas*; the claim is dismissed. It is deployed at the threshold. It is deployed without identifying what domestic provision is to answer the obligation instead. It is deployed without asking whether that provision exists, whether it applies, or whether anything in the legal order could deliver what the obligation requires. It is frequently deployed in a single sentence.

The formula is applied to the Convention against Torture and to the International Covenant on Civil and Political Rights. It is applied to obligations that are peremptory and to obligations that are not, without distinction. It is applied by state trial judges, by federal magistrate judges, by district courts, and by courts of

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[2] A Guide to Domestic Criminal Enforcement of Torture and Cruel, Inhuman, or Degrading Treatment in the United States, Part A, “Why This Document Exists,” and Part C, §§ C-I, C-II and C-V; Harmonizing the Architecture of Disability Rights, § 21.2 and § 24.2.1. These are IAJ institutional publications. Their characterizations are attributed as IAJ determinations, not as holdings of a court or treaty body.

appeals. The Institute does not assert a figure for the number of judicial officers to whom the formula is available and records any order-of-magnitude estimate as an approximation pending verification; the point does not depend on the figure.

2.02 The transmission mechanism

The transmission mechanism is identifiable with precision.

Medellín contains a footnote — footnote 12 of the opinion of the Court — offered in answer to a point made in dissent about how rarely the Supreme Court has found a treaty non-self-executing. The Court replied that the courts of appeals have regularly done so, and gave three examples: a Second Circuit holding that the Convention against Torture is non-self-executing; a Sixth Circuit holding to the same effect; and a Fifth Circuit holding that the International Covenant on Civil and Political Rights is non-self-executing.[3] The IAJ's investigation includes a case in the Ninth Circuit using non-self-execution of UNCAT.[4]

That footnote was an aside. It was offered to rebut a claim about frequency. It decided nothing. It has since become the passage in which the Supreme Court of the United States can be said, at one remove and without deciding, to have gestured at the non-self-executing character of the Torture Convention — and it now carries, in practice, the weight of a holding on that question.

2.03 The mischaracterization the formula depends upon

The IAJ has previously recorded that the non-self-execution doctrine is not, properly understood, an obstacle to a domestic pathway that uses the international framework interpretively rather than as a cause of action; that opposing counsel nonetheless routinely characterize any reliance on the Convention, the Covenant, or the Committee's General Comments as an attempted treaty-based cause of action; and that courts often credit that characterization.[5]

That finding stands. This Opinion supplies what it did not address: why the mischaracterization succeeds so reliably. It succeeds because the decision invoked to support it stops where it does. A court told that a treaty is non-self-executing, and given no further analysis by the authority cited, has been given nothing with which to distinguish the interpretive use from the cause-of-action use. The formula supplies a label in place of an inquiry, and the label absorbs every use of the instrument indiscriminately. The absence of developed analysis of the domestic effect of treaties, and of the equivalence the RUDs presuppose, leaves the formula operating in a doctrinal vacuum.

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[3] *Medellín v. Texas*, 552 U.S. 491 (2008) (opinion of the Court, n.12), citing *Pierre v. Gonzales*, 502 F.3d 109, 119–20 (2d Cir. 2007) (Convention against Torture non-self-executing); *Singh v. Ashcroft*, 398 F.3d 396, 404 n.3 (6th Cir. 2005) (same); *Beazley v. Johnson*, 242 F.3d 248, 267 (5th Cir. 2001) (International Covenant on Civil and Political Rights non-self-executing).

[4] 23-50690, Bankruptcy court, Northern California, escalating to the Bankruptcy Appellate Panel and to the Ninth Circuit Court of Appeals.

[5] *Quia Timet and the Prevention of Threatened Torture and Cruel, Inhuman or Degrading Treatment by Domestic Authorities*, § 6.08. This Opinion completes the diagnosis stated there.

2.04 What the formula omits

The formula does not ask what the obligation is. It does not ask what the obligation requires in operation. It does not identify the domestic mechanism said to discharge it. It does not test that mechanism. It does not ask whether any forum exists in which the claim could be heard on its merits. It does not ask whether relief of the kind the obligation contemplates could be awarded by any court in the United States. It does not distinguish an obligation from which derogation is permitted from one from which it is not.

The ratification record shows that insulation from judicial review was not solely a later judicial consequence. In discussing Article 3, the Senate ratification record stated that because the Convention was not self-executing, the determinations of the competent administrative authorities responsible for decisions to extradite, expel, or return would not be subject to judicial review in domestic courts. The statement concerned the Article 3 administrative route; it does not establish that every treaty-related issue was intended to be unreviewable. It does establish that withdrawal of at least one class of determinations from domestic judicial review was identified in the Senate report recommending advice and consent as an effect of the declaration.[6]

The statement did not remain historical; Congress enacted it. Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 directed the responsible agencies to implement Article 3 subject to the reservations, understandings, declarations, and provisos contained in the Senate resolution of ratification, and provided that no court shall have jurisdiction to review the implementing regulations or to consider claims under the Convention or the section, except as part of the review of a final order of removal.[7] The State Department's implementing regulation for extradition states the consequence in terms: decisions of the Secretary concerning the surrender of fugitives are matters of executive discretion not subject to judicial review.[8]

Section 2242(f)(2) further provides that terms used in the section carry the meanings given them in the Convention, subject to the reservations, understandings, declarations, and provisos of the resolution of ratification — a statutory incorporation of the Convention's own vocabulary, as filtered by the ratification conditions. In the removal channel, the Supreme Court has since confirmed that CAT orders are judicially reviewable as part of the review of a final order of removal; the extradition channel remains closed by regulation.[9] The 1990 statement, the 1998 statute, and the 1999 regulations are one continuous design: a

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[6] S. Exec. Rep. No. 101-30, at 17-18 (1990) (Article 3 discussion). The Opinion confines the proposition to the class of administrative determinations addressed in that passage.

[7] Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, § 2242, 112 Stat. 2681-761, 2681-822 (codified at 8 U.S.C. § 1231 note); subsection (b) (implementing regulations "subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification"); subsection (d) (review limits, excepting review of a final order of removal under 8 U.S.C. § 1252); subsection (f)(2) (terms carry Convention meanings subject to the resolution of ratification).

[8] 22 C.F.R. § 95.4; Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999) (Department of Justice interim rule, 8 C.F.R. pts. 208, 235, 238); 22 C.F.R. pt. 95 (Department of State, extradition).

[9] Nasrallah v. Barr (2020).

class of Article 3 determinations was routed away from judicial examination by identified, enacted architecture. The design's existence is evidence for section 14.04's routing analysis — Congress executes represented functions by statute when it chooses; the design's operation belongs to the equivalence ledger of section 9.01A.

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The counterfactual is developed in Appendix B, A Completed Adjudication of Medellín. It preserves the Court's authority to reject the particular domestic sources asserted, but requires the adjudicator to identify the continuing obligation, test the mechanisms appearing in the record, decide every independent domestic ground, state the residual compliance gap, and confine the holding so that non-self-execution does not become a universal disposal formula.

PART III. TREATIES AND THE LAW OF NATIONS IN THE FOUNDING OF THE UNITED STATES

The place of treaties and of the Law of Nations in the legal order of the United States is a matter of record. The record is unusually complete, because the framing generation had just lived through a national emergency caused by the condition this Opinion addresses: an obligation binding on the nation, and no domestic route by which it could be made effective.

3.01 The Confederation and the Law of Nations

The Articles of Confederation vested in Congress the sole and exclusive right of entering into treaties and alliances,[10] and provided that every state should abide by the determinations of Congress and that the Articles should be inviolably observed.[11] What the Articles did not supply was any means by which those determinations could be given effect within a state that declined to give them effect.

In the Law of Nations the emblematic case is *Respublica v. De Longchamps*.[12] In May 1784 a French adventurer verbally and physically assaulted the Secretary of the French Legation at Philadelphia. The affair produced a prosecution and a diplomatic crisis, and exposed the absence of any judicial power competent to the cognizance of such cases. The Continental Congress had anticipated the problem: in 1781 it called upon

[10] Articles of Confederation art. IX.

[11] Articles of Confederation art. XIII.

[12] *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (Pa. Ct. Oyer & Terminer 1784), as recounted in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (opinion of the Court, Part III.A.2).

the states to provide expeditious, exemplary and adequate punishment for the violation of safe conducts or passports, for acts of hostility against persons in amity with the United States, for infractions of the immunities of ambassadors and other public ministers, and for infractions of treaties and conventions to which the United States were a party, and recommended that the states authorise suits for damages by the party injured.[13] Apparently one state acted upon the recommendation.[14] During the Constitutional Convention itself a New York City constable produced a reprise of the affair, and Secretary Jay reported the Dutch Ambassador's protest with the explanation that the federal government did not appear to be vested with any judicial powers competent to the cognizance and judgment of such cases.[15]

3.02 The Treaty of Peace and the crisis of state defiance

The Definitive Treaty of Peace of 1783 stipulated in its fourth article that creditors on either side should meet with no lawful impediment to the recovery of bona fide debts, and in its sixth article that there should be no future confiscations or prosecutions of Loyalists.[16] Those stipulations were not merely ignored; they were deliberately flouted by state legislatures.[17] John Jay wrote to John Adams on 1 November 1786 that there had not been a single day since the Treaty took effect on which it had not been violated in America by one or another of the states.[18] Madison recorded at the Convention that the files of Congress contained complaints already from almost every nation with which treaties had been made.[19]

Hamilton had met the problem in litigation in *Rutgers v. Waddington*, arguing that the New York Trespass Act could not be applied so as to defeat the Treaty of Peace and the Law of Nations; the court construed the statute to avoid the conflict.[20] Three years later he pressed the same point in the New York Assembly on a bill to repeal laws inconsistent with the Treaty.[21]

3.03 Jay's Report of 13 October 1786

The decisive document is Jay's Report to Congress of 13 October 1786.[22] Its first resolution is the germ of the Supremacy Clause. It declared that the legislatures of the several states cannot of right pass any act for

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[13] 21 Journals of the Continental Congress 1136–37 (1781), as set out in *Sosa* (opinion of the Court, Part III.A.2).

[14] *Sosa* (opinion of the Court, Part III.A.2), citing First Laws of the State of Connecticut 82, 83 (1784 compilation).

[15] *Sosa* (opinion of the Court, Part III.A.2), citing W. Casto, 18 Conn. L. Rev. 467, 494 & n.152 (1986).

[16] Definitive Treaty of Peace, U.S.–Gr. Brit., 3 Sept. 1783, arts. 4, 6.

[17] See Treaties as Law of the Land, Constitution Annotated, art. II, § 2, cl. 2.

[18] Letter from John Jay to John Adams (1 Nov. 1786), in 2 The Diplomatic Correspondence of the United States … at 674 (1837).

[19] 1 The Records of the Federal Convention of 1787, at 316 (Farrand ed. 1911) (notes of James Madison).

[20] *Rutgers v. Waddington* (Mayor's Ct. of the City of New York 1784). The historical proposition is stated from the historical record of the case; no modern reporter pagination is asserted.

[21] Alexander Hamilton, Remarks on an Act Repealing Laws Inconsistent with the Treaty of Peace, New York Assembly, 17 Apr. 1787.

[22] Report of John Jay, Secretary for Foreign Affairs, 13 Oct. 1786; resolutions at 31 Journals of the Continental Congress 869–70.

interpreting, explaining or construing a national treaty, nor for restraining, limiting or in any manner impeding, retarding or counteracting the operation or execution of the same; for that on being constitutionally made, ratified and published, treaties become, in virtue of the Confederation, part of the law of the land, and are not only independent of the will and power of such legislatures but also binding and obligatory on them.[23]

Two features deserve emphasis, because they are the two the disposal formula erases.

The first is that the resolution is addressed to **impediment**. It condemns not only acts that contradict a treaty but acts that restrain, limit, impede, retard or counteract its operation or execution. The framing generation understood that an obligation can be defeated by obstruction as effectively as by contradiction. A doctrine that leaves a treaty formally in force while withdrawing every route by which it might operate is an instrument of retardation.

The second is that treaties were declared part of the law of the land **in virtue of the instrument of union itself**, without any further legislative act.

The resolutions were taken up on 20 March 1787. Mr. Yates objected to the first, which declared the Treaty to be a law of the land; he said that the states, or at least his state, did not admit it to be such until clothed with legal sanction.[24] The objection is the antecedent of the modern doctrine that a treaty does nothing until a legislature clothes it with legal sanction. It was made, heard, and rejected. Congress adopted Jay's resolutions on 21 March 1787,[25] and on 13 April 1787 agreed to his circular letter calling for the repeal of all state acts repugnant to the Treaty.[26]

3.04 The Convention and the text of Article VI

On 15 June 1787 the New Jersey Plan was laid before the Convention. Its sixth resolution provided that all acts of Congress made in pursuance of the powers vested in them, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective states, and that the judiciary of the several states shall be bound thereby in their decisions, anything in the respective laws of the individual states to the contrary notwithstanding.[27]

The Convention rejected the Plan as a whole, discarded the Virginia Plan's congressional negative and its provision for force against recalcitrant states, and in their place unanimously approved a provision closely tracking the New Jersey Plan's sixth resolution.[28] Refined by the Committee of Style, it is Article VI, clause 2:

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[23] 31 Journals of the Continental Congress 869–70, quoted in James Madison, Notes on Debates, 20 Mar. 1787, editorial note.

[24] James Madison, Notes on Debates, 20 Mar. 1787.

[25] Resolutions of the Continental Congress, 21 Mar. 1787.

[26] Circular letter to the States, 13 Apr. 1787, 32 Journals of the Continental Congress 177–84.

[27] New Jersey Plan, res. 6 (15 June 1787), in 1 The Records of the Federal Convention of 1787 (Farrand ed. 1911).

[28] See The Supremacy Clause and the Constitutional Convention, Constitution Annotated, art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

Three textual features are decisive.

(a) The asymmetry of qualification. Laws are supreme when made *in Pursuance* of the Constitution; treaties are supreme when made *under the Authority* of the United States. The difference was necessary: the Treaty of Peace had been made under the Confederation, not in pursuance of a Constitution that did not yet exist, and it was the very instrument whose defiance had produced the crisis. A clause drafted to reach backwards and capture an already-existing treaty cannot be read as making treaties conditional on future legislative acts.[29]

(b) The address to judges. The clause does not say the political branches shall be bound. It says that *the Judges in every state shall be bound thereby*. The obligation Article VI creates is, in terms, a judicial obligation.

(c) The absence of any implementation condition. Nothing in Article VI conditions the supremacy of a treaty on legislative implementation.

3.05 The allied provisions

Congress is given power to define and punish offences against the Law of Nations.[30] The Supreme Court is given original jurisdiction over all cases affecting ambassadors, other public ministers and consuls — the direct answer to the Marbois affair.[31] The judicial power is extended to all cases arising under treaties made under the authority of the United States.[32] The President is given power, with the advice and consent of the Senate, to make treaties.[33] Treaties and the Law of Nations are placed inside the judicial function, and a specific head of federal jurisdiction is created to receive them.

3.06 The Federalist and the ratification debates

Hamilton stated the point without qualification in *The Federalist* No. 22:

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[29] Definitive Treaty of Peace, U.S.–Gr. Brit., 3 Sept. 1783 (ratified by the Confederation Congress 14 Jan. 1784); see § 3.02 above (arts. 4 and 6 and the record of state defiance) and § 3.07 below (*Ware v. Hylton*, applying Article VI to this pre-Constitution treaty without implementing legislation).

[30] U.S. Const. art. I, § 8, cl. 10.

[31] U.S. Const. art. III, § 2, cl. 2; see *Sosa* (opinion of the Court, Part III.A.2).

[32] U.S. Const. art. III, § 2, cl. 1.

[33] U.S. Const. art. II, § 2, cl. 2.

Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations.[34]

Treaties must be part of the law of the land *to have any force at all* — the alternative being a dead letter, not a differently-routed obligation. Their import *as far as respects individuals* is a judicial question. And they are ascertained *like all other laws*, not by a special methodology under which they alone may be disposed of by a label.

Madison defended the power to define and punish offences against the Law of Nations as a supply of a Confederation defect;[35] Jay addressed the binding force of treaties once made;[36] Hamilton grounded the extension of the federal judicial power to treaty cases on the proposition that the peace of the whole ought not to be left at the disposal of a part.[37] Iredell's exposition in the North Carolina Convention was relied upon by Story as evidence of the reasons for which the Clause was drafted.[38]

3.07 Early judicial construction

In *Ware v. Hylton* (1796) the Court held a Virginia sequestration statute invalid against the fourth article of the Treaty of Peace, although Congress had enacted no implementing statute.[39] Justice Wilson stated that on declaring independence the United States were bound to receive the Law of Nations in its modern state of purity and refinement.[40] Justice Iredell distinguished treaty provisions that are *executed* from those that are *executory*, and explained that after the adoption of the Constitution the position in the United States was altered from what it had been before.[41]

In *Murray v. The Schooner Charming Betsy* (1804) Chief Justice Marshall laid down the canon that an act of Congress ought never to be construed to violate the Law of Nations if any other possible construction remains.[42] In *The Nereide* (1815) he stated that the Court is bound by the Law of Nations, which is a part of

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[34] The Federalist No. 22 (Alexander Hamilton) (14 Dec. 1787).

[35] The Federalist No. 42 (James Madison).

[36] The Federalist No. 64 (John Jay).

[37] The Federalist No. 80 (Alexander Hamilton).

[38] See 3 J. Story, Commentaries on the Constitution of the United States 696–97 (1833), relied upon in *Medellín* (Breyer, J., dissenting, Part I.A).

[39] *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), as recounted in *Medellín* (Breyer, J., dissenting, Part I.A), which records that Congress had enacted no statute implementing the provision at issue.

[40] *Ware v. Hylton*, 3 Dall. at 281 (Wilson, J.), quoted in *Sosa* (opinion of the Court, Part III.A.1).

[41] *Ware v. Hylton*, 3 Dall. at 272, 274–77 (Iredell, J.), as recounted in *Medellín* (Breyer, J., dissenting, Part I.A).

[42] *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

the law of the land.[43] In *The Paquete Habana* (1900) the Court restated the proposition in the form carried forward ever since:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.[44]

3.08 Finding

The IAJ finds as follows. The Constitution was drafted in direct response to a condition in which the United States was bound by treaty and had no domestic route by which the obligation could be given effect. Article VI was drafted to abolish that condition, in terms reaching acts of impediment and retardation as well as acts of contradiction, and is addressed to judges. The position that a treaty does nothing until clothed with legal sanction by a legislature was advanced in Congress in March 1787, considered, and rejected. From 1796 to 1900 the Supreme Court applied the settlement as designed, including where no implementing legislation existed.

A doctrine permitting a court to receive a treaty obligation of the United States, decline to give it any effect, and identify no other route by which it might be given effect restores the condition Article VI was written to abolish. That is a Plane A finding about the constitutional settlement. It is not a prediction about what any court will do.

PART IV. NON-SELF-EXECUTION: ORIGIN, SCOPE, AND WHAT IT DECIDES

4.01 *Foster* and the correction in *Percheman*

The doctrine originates in *Foster v. Neilson* (1829), where Marshall distinguished a treaty equivalent to an act of the legislature, operating of itself, from one that addresses itself to the political department and which the legislature must execute before it can become a rule for the Court.[45] Four years later, on materials that included the Spanish text for the first time, the Court reached the opposite conclusion on the same article.[46] The *Medellín* Court recorded the sequence accurately.[47]

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[43] *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (Marshall, C.J.), quoted in *Sosa* (opinion of the Court, Part IV.B).

[44] *The Paquete Habana*, 175 U.S. 677, 700 (1900), quoted in *Sosa* (opinion of the Court, Part IV.B).

[45] *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314–15 (1829), as quoted in *Medellín* (opinion of the Court, Parts II and II.B).

[46] *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 87, 89 (1833), as recounted in *Medellín* (opinion of the Court, Part II.B).

[47] *Medellín* (opinion of the Court, Part II.B).

The sequence is the single most instructive fact about the doctrine and is routinely passed over. Non-self-execution is not a **status** a treaty possesses. It is the **outcome of an interpretive determination**, made on the materials before the court, and revisable when the materials change. Marshall, the doctrine's author, revised his own determination within four years.

A doctrine of that character cannot support a threshold disposal formula. A label may be applied once and carried forward; an interpretive determination must be made afresh, on the materials, for each stipulation and in each case.

4.02 The operative line

The cases between *Foster* and the modern period describe a practice of examining stipulations one at a time. The *Head Money Cases* stated the line: where a treaty contains a provision prescribing a rule by which the rights of the private citizen may be determined, that provision is to be regarded by the courts as equivalent to an act of the legislature.[48] *Whitney v. Robertson* restated it.[49] *Rauscher* enforced an extradition treaty in favour of an individual defendant;[50] *Asakura* held a treaty of commerce operative of itself against a municipal ordinance;[51] *Clark v. Allen* and *Kolovrat v. Oregon* gave effect to treaty provisions against contrary state law.[52] The *Medellín* Court acknowledged these authorities and did not disturb them.[53]

4.03 What a finding of non-self-execution decides

The *Medellín* Court defined its terms with care: a non-self-executing treaty does not by itself give rise to domestically enforceable federal law, and whether such a treaty has domestic effect depends upon implementing legislation passed by Congress.[54]

Read exactly, that decides one thing: **the source of domestic legal effect**. It says the effect comes from a statute rather than from the treaty text. The moral measure of that austerity — what it costs when the promised statute never comes — is taken at sections 4.04 and 4.05, and in the divergence record of Part XIV.

4.04 What it does not decide

(a) Whether the obligation exists. The Court was explicit that it does: no one disputed that the judgment constituted an international law obligation on the part of the United States.[55]

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[48] *Head Money Cases*, 112 U.S. 580, 598–99 (1884). The first branch is quoted in *Medellín* (opinion of the Court, Part II); the pinpoint for the second is 598–99, the operative sentence crossing to page 599.

[49] *Whitney v. Robertson*, 124 U.S. 190, 194–95 (1888), quoted in *Medellín* (opinion of the Court, Part II).

[50] *United States v. Rauscher*, 119 U.S. 407, 422–23 (1886), cited in *Medellín* (opinion of the Court, n.11).

[51] *Asakura v. City of Seattle*, 265 U.S. 332, 341–43 (1924).

[52] *Clark v. Allen*, 331 U.S. 503 (1947); *Kolovrat v. Oregon*, 366 U.S. 187 (1961), both cited in *Medellín* (opinion of the Court, Part II.D).

[53] *Medellín* (opinion of the Court, Part II.D).

[54] *Medellín* (opinion of the Court, n.2).

(b) Whether the obligation must be performed. A state may not invoke the provisions of its internal law as justification for its failure to perform a treaty. That rule is stated in Article 27 of the Vienna Convention on the Law of Treaties and is invoked here as customary international law, the United States not being a party.[56] Non-self-execution is a rule of internal law. It has no operation whatever upon the obligation. *(Plane A.)*

(c) Whether the claimant has any right. The doctrine addresses the source of the rule of decision, not the existence of the substantive entitlement.

(d) Whether any domestic route exists. The doctrine assumes a route and says it runs through Congress rather than the treaty text. It does not address the case in which the route has not been built, cannot be built, or is barred to the claimant.

The doctrine is therefore, by construction, a rule about **allocation**. It presupposes that something is allocated somewhere. It is silent on allocation to a destination that does not exist.

4.05 Non-self-execution was not non-execution

The IAJ has recorded the point in the terms that govern here. The declaration of non-self-execution attached to the Convention against Torture was not a statement that torture and cruel, inhuman or degrading treatment would remain domestically unenforced unless Congress later enacted a comprehensive torture code. It rested on the opposite premise: that domestic execution already existed through federal and state statutes, doctrines, and institutions. Non-self-execution was therefore not non-execution. **Equivalence was the stated premise for non-self-execution, not an inference from it.**[57]

That proposition is the hinge of this Opinion. If equivalence is the premise of the declaration, then the declaration's operation is conditional on the premise holding. Part VIII sets out what testing the premise requires.

PART V. *MEDELLÍN* EXAMINED

5.01 The ratio

Medellín v. Texas decided two questions and no others. The Court said so.[58]

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[55] *Medellín* (opinion of the Court, Part II).

[56] Vienna Convention on the Law of Treaties, 23 May 1969, art. 27. The United States is a signatory but not a party; the Convention is invoked throughout this Opinion only as evidence of customary international law.

[57] *A Guide to Domestic Criminal Enforcement of Torture and Cruel, Inhuman, or Degrading Treatment in the United States*; see also *The Equivalence Representation and the Ex Post Facto Lockout*.

[58] *Medellín* (opinion of the Court, introduction and Part III, n.13).

First, whether the judgment of the International Court of Justice in *Avena* was directly enforceable as domestic law in a state court. The Court held that it was not, because none of the three treaty sources relied upon — the Optional Protocol, Article 94 of the Charter of the United Nations, and the Statute of the International Court of Justice — creates binding federal law absent implementing legislation.

Second, whether the Presidential Memorandum of 28 February 2005 independently required the states to provide review and reconsideration. The Court held that it did not, on separation-of-powers grounds.

The Court recorded that it was unnecessary to resolve whether the Vienna Convention on Consular Relations is itself self-executing or grants individually enforceable rights, the petitioner having disclaimed reliance upon it, and assumed without deciding that Article 36 grants such a right.[59]

The Court marked its own boundary: its holding did not call into question the ordinary enforcement of foreign judgments; an agreement to give the result of an international adjudication domestic legal effect can be a treaty obligation like any other; and it did not suggest that treaties can never afford binding domestic effect to international tribunal judgments — only that the Charter, the Optional Protocol and the ICJ Statute do not.[60]

Medellín does not concern the Convention against Torture. It does not concern the International Covenant on Civil and Political Rights. It does not concern customary international law, peremptory norms, the Alien Tort Statute, or the Torture Victim Protection Act.

5.02 The three implementation possibilities appearing in the record

The three possibilities discussed in *Medellín* were not legal conditions of the Court's holding. They nevertheless constituted the concrete implementation possibilities appearing in the record, and the opinion itself established that none supplied an available domestic mechanism—eliminating each on the record before it: the Security Council route supplied no assured or claimant-accessible mechanism because it remained subject to the United States' retained and unqualified veto right, Congress had enacted no implementing legislation furnishing the requested remedy, and the asserted presidential route was rejected in the case itself.

Assertion one: the Security Council. The Court reasoned that Article 94(2) supplies the sole remedy for non-compliance — referral to the Security Council by an aggrieved State — and that the provision of an express diplomatic rather than judicial remedy was itself evidence that ICJ judgments were not meant to be enforceable in domestic courts.[61]

Two sentences later the Court recorded that even this remedy is not absolute: the Security Council must deem a recommendation or measure necessary, and, as the President and Senate were undoubtedly aware,

[59] *Medellín* (opinion of the Court, n.4).

[60] *Medellín* (opinion of the Court, Parts II.C and II.D).

[61] *Medellín* (opinion of the Court, Part II.A and n.6).

the United States retained the unqualified right to exercise its veto of any such resolution.[62] The Court then made the veto load-bearing: if judgments were automatically enforceable, the option of non-compliance through exercise of the veto would no longer be viable; there would be nothing to veto.[63]

The structure must be stated plainly. The Court identified the substitute remedy; established that it is subject to unilateral cancellation by the party in default; and treated the availability of that cancellation as a reason for withholding the judicial remedy. The claimant is directed to a forum in which the respondent holds a veto, and the respondent's veto is given as the reason for closing every other forum. That is not an equivalent.

Assertion two: Congress. The Court said Congress is up to the task of implementing non-self-executing treaties and knows how to accord domestic effect to international obligations when it desires such a result.[64] Every proposition in the passage is true and none is responsive. The question was what a court is to do where Congress has not legislated, the claimant has no means of compelling it to, and the claimant's life is at stake in the interval. The capacity of a legislature to act is not a remedy available to a litigant.

Assertion three: the President. The Court said that a non-self-executing treaty and the absence of implementing legislation do not preclude the President from acting to comply by other means consistent with the Constitution.[65] It said this in the case in which the President had attempted precisely that and in which the Court struck the attempt down — holding that because the treaties were non-self-executing, the ratifying Senate's implicit understanding not only failed to authorise the President to make the obligation binding on domestic courts but implicitly prohibited him from doing so.[66] Non-self-execution was thus held to operate as an affirmative bar to executive implementation, in the same opinion that offered executive implementation as the alternative to judicial enforcement.

The composite. The three possibilities were not conditions of the Court's holding, but the opinion eliminated each as an available mechanism on the record before it. The Security Council route supplied no assured or claimant-accessible mechanism because it remained subject to the United States' retained and unqualified veto right; Congress had enacted no implementing legislation furnishing the requested remedy; and the asserted presidential route was rejected in the case itself. After declining the asserted judicial route, the Court did not undertake the separate domestic-equivalence inquiry developed in this Opinion.

5.03 What the opinion does not address

(a) Equivalence. The Court asserted the availability of substitutes and did not test them.

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[62] *Medellín* (opinion of the Court, Part II.A).

[63] *Ibid.*

[64] *Medellín* (opinion of the Court, Part II.D and n.12).

[65] *Medellín* (opinion of the Court, Part III.B.1).

[66] *Ibid.*, applying *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

(b) The reservation practice. The opinion contains no analysis of reservations, understandings and declarations, although the declaration of non-self-execution is the principal modern instrument by which human-rights obligations are withdrawn from judicial cognizance in the United States. Its legal character is not classified; its relation to object and purpose is not considered; its relation to the representations on which advice and consent was given is not considered.

(c) Object and purpose. The Court began with the text,[67] and considered drafting history and post-ratification understanding.[68] It did not consider the object and purpose of the instruments before it. Under customary international law a treaty is to be interpreted in good faith in accordance with the ordinary meaning of its terms in their context and in the light of its object and purpose.[69]

The UNCAT ratification record is unusually explicit on this point. The Executive described the Convention's object and purpose as establishing an effective international legal prohibition against torture. The Committee warned that reciprocal constitutional reservations could alter or negate the prosecute-or-extradite obligation and severely undermine the absolute prohibition, and called it imperative that the lawful-sanctions clause not permit a State to declare torture lawful through domestic law. It adopted the RUD package on the stated belief that the conditions fully resolved potential conflicts with United States law. These are not later IAJ glosses; they are part of the United States' own explanation of the instrument and its conditions.[70]

(d) Peremptory norms. No peremptory norm was presented in Medellín. The decision therefore did not adjudicate whether *jus cogens* changes any consequence of non-self-execution. Its generally stated separation-of-powers and domestic-effect rules may remain relevant by analogy, but any consequence for immunity, jurisdiction, cause, or remedy requires independent authority.

5.04 The separate opinions

Justice Breyer, joined by Justice Souter and Justice Ginsburg, complained that the majority looks for the wrong thing, using the wrong standard, in the wrong place, and proposed a multifactor inquiry.[71]

Justice Stevens, concurring in the judgment, agreed that the text and history of the Supremacy Clause and the Court's treaty cases do not support a presumption against self-execution;[72] endorsed the proposition that the Vienna Convention on Consular Relations is itself self-executing and judicially enforceable;[73] and observed that the fact that the President cannot legislate unilaterally does not absolve the United States from its

[67] *Medellín* (opinion of the Court, Part II.A), citing *Air France v. Saks*, 470 U.S. 392, 396–97 (1985).

[68] *Medellín* (opinion of the Court, Parts II.A and II.C), citing *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996).

[69] Vienna Convention on the Law of Treaties art. 31(1), invoked as customary international law.

[70] S. Exec. Rep. No. 101-30, at 4–6, 43 (1990). The quoted propositions are part of the Executive and Committee ratification record; the consequences drawn in the text are IAJ analysis.

[71] *Medellín* (Breyer, J., dissenting), quoted in the opinion of the Court, Part II.B.

[72] *Medellín* (Stevens, J., concurring in the judgment).

[73] *Ibid.*

promise to take action necessary to comply, that under the express terms of the Supremacy Clause the obligation falls on each of the states as well as on the Federal Government, and that the judgment did not foreclose further appropriate action by Texas.[74]

Justice Stevens thus recognised that the finding of non-self-execution left the obligation intact and the question of performance open. No member of the Court asked what a court is to do when the obligation is intact, performance has not occurred, and no forum exists in which it can be compelled.

The majority's objection to the dissent — that a multifactor inquiry would be arrestingly indeterminate and would leave treaty language barely probative[75] — has force against that proposal. It has no force against the analysis proposed in Part VIII, which is not a test of *whether the treaty binds* but of *whether the domestic order has delivered what the binding treaty requires*.

5.05 The bounded ratio and the unsupported general use

The IAJ's finding on *Medellín* is stated in four parts, and the distinctions are to be preserved.

(i) As a determination that the Optional Protocol, Article 94 and the ICJ Statute do not of their own force make an ICJ judgment binding domestic law, the decision is a determination about those instruments and stands as such.

(ii) As a determination that a Presidential memorandum cannot convert a non-self-executing treaty into domestic law, it is a determination on a separation-of-powers question and stands as such.

(iii) As authority for the proposition that a finding of non-self-execution disposes of a claim, it is **unsupported**. The reasoning that would sustain that proposition is absent. Its structure is:

Premise 1. The obligation binds the United States as a matter of international law.

Premise 2. The treaty sources do not, of their own force, create domestically enforceable federal law.

Conclusion. The claim is dismissed.

Something must be supplied between Premise 2 and the Conclusion: either *and the domestic legal order otherwise provides what the obligation requires*, or *and it is lawful for a court to dismiss a claim founded on a binding obligation of the United States although the domestic legal order provides nothing*. The Court gestured at the first three times and refuted its own gestures. It never stated the second.

(iv) Medellín did not adjudicate the consequences of a peremptory norm because none was before the Court. It is therefore not direct authority for either an automatic *jus cogens* exception or an automatic denial of every such exception.

[74] *Ibid.*

[75] *Medellín* (opinion of the Court, Part II.B).

The IAJ does not assert that Medellín was wrongly decided. Treating a bare finding of non-self-execution as disposing of independent and otherwise cognizable domestic grounds is an unsupported extrapolation. The decision stands; the broader disposal formula requires claim-specific authority beyond Medellín.

Appendix B demonstrates how the Court could have preserved that bounded result, made the record-based non-equivalence finding, and supplied precedent-containment language without creating a treaty cause of action or enlarging judicial power.

PART VI. *SOSA* MISREAD

6.01 What *Sosa* holds

Sosa v. Alvarez-Machain held unanimously that the Alien Tort Statute is in terms only jurisdictional, and held further that the grant was enacted on the understanding that the common law would provide a cause of action for a modest number of international law violations, and that federal courts retain a residual discretion to recognise claims resting on norms of international character accepted by the civilized world and defined with a specificity comparable to the eighteenth-century paradigms.[76]

On the central question the language is not ambiguous. Justice Scalia would have closed the door. The Court declined:

Whereas Justice Scalia sees these developments as sufficient to close the door to further independent judicial recognition of actionable international norms, other considerations persuade us that the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.[77]

The Court then set out the affirmative authority: for two centuries it has affirmed that the domestic law of the United States recognises the Law of Nations, citing *Sabbatino*, *The Paquete Habana* at page 700, and *The Nereide*.[78] And it closed the passage with the sentence that ought to be dispositive of the modern practice:

It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.[79]

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[76] *Sosa* (opinion of the Court, Parts III.A, III.B and IV).

[77] *Sosa* (opinion of the Court, Part IV.B).

[78] *Ibid.*, citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964); *The Paquete Habana*, 175 U.S. at 700; *The Nereide*, 9 Cranch at 423.

[79] *Sosa* (opinion of the Court, Part IV.B).

6.02 Why Alvarez lost

Alvarez lost on the definiteness of the particular norm he invoked and on nothing else. A rule prohibiting officially sanctioned detention exceeding positive authorisation under any government's domestic law, regardless of circumstances, had not attained the status of a binding customary norm with the required specificity; a single illegal detention of less than a day, followed by transfer to lawful authorities and prompt arraignment, violates no norm so well defined as to support a federal remedy.[80] That is a holding about *that norm*, on *those facts*, reached by applying — not discarding — the method of *The Paquete Habana*.[81]

The Court cited *Filártiga v. Peña-Irala* with approval, quoting the proposition that for purposes of civil liability the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind;[82] observed that the position had been assumed by federal courts ever since *Filártiga*; and described the Torture Victim Protection Act as establishing an unambiguous and modern basis for federal claims of torture and extrajudicial killing.[83]

Those passages strongly support the inference that a sufficiently defined norm prohibiting official torture is paradigmatic of the norms capable of satisfying *Sosa*'s specificity inquiry. The Court did not adjudicate a torture claim in *Sosa*.

6.03 The Covenant sentence

Addressing *Alvarez's* reliance on the International Covenant on Civil and Political Rights, the Court said that although the Covenant binds the United States as a matter of international law, the United States ratified it on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts; and that accordingly *Alvarez* could not say that the Declaration and the Covenant themselves establish the relevant and applicable rule.[84]

Three features are systematically overlooked.

(a) It is not footnote 20. The passage appears in the body of the opinion. Footnote 20 addresses whether international law extends the scope of liability to the perpetrator being sued;[85] footnote 21 addresses exhaustion and case-specific deference.[86] Attributions of the Covenant sentence to footnote 20 are inaccurate.

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[80] *Sosa* (opinion of the Court, Part IV.C).

[81] *Ibid.*, quoting *The Paquete Habana*, 175 U.S. at 700.

[82] *Sosa* (opinion of the Court, Part IV.C), quoting *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

[83] *Sosa* (opinion of the Court, Parts IV.A and IV.B), citing the Torture Victim Protection Act of 1991, 106 Stat. 73.

[84] *Sosa* (opinion of the Court, Part IV.C); see 138 Cong. Rec. 8071 (1992).

[85] *Sosa* (opinion of the Court, n.20).

[86] *Sosa* (opinion of the Court, n.21).

(b) It decides the source of the rule, not the availability of the claim. The point was that *Alvarez* could not treat the Covenant as itself the operative rule of decision. The next sentence records what he did instead: he sought to show that the prohibition had attained the status of binding customary international law.[87] The Court then examined that contention at length and rejected it on specificity. The sentence does not close the customary route; it is the sentence that opens it.

(c) It concerns a treaty carrying an express declaration. It is not a general proposition about international law, customary norms, or peremptory norms.

6.04 Footnote 21 and the availability inquiry

In footnote 21 the Court noted the European Commission's submission that basic principles of international law require a claimant to have exhausted remedies available in the domestic legal system before asserting a claim in a foreign forum, and observed that it would certainly consider that requirement in an appropriate case.[88]

An exhaustion inquiry is, in structure, an availability inquiry: it asks what remedies exist in a legal order and whether they operate. It is the same species of question as the test proposed in Part VIII, applied in the opposite direction.

6.05 Later ATS contraction

Kiobel v. Royal Dutch Petroleum Co., *Jesner v. Arab Bank, PLC*, and *Nestlé USA, Inc. v. Doe* substantially restrict the present ATS pathway, particularly as to extraterritorial conduct, foreign corporate defendants, and domestic conduct insufficiently connected to the alleged violation.[89] Those decisions concern the ATS vehicle. They do not convert the underlying customary norm into no law, decide treaty self-execution, or foreclose constitutional, statutory, defensive, interpretive, or state-law routes otherwise supplied by domestic law.

6.06 Finding

The current judicial use of *Sosa* is a misuse of a determinate kind. It is cited for the proposition that federal courts may not entertain claims founded on international law; it holds that a narrow class may be recognized, subject to specificity, and supplies strong support—not an adjudicated holding—for official torture as a paradigmatic qualifying norm. It is cited for the proposition that the Covenant declaration extinguishes international law claims; it holds that the declaration prevents the Covenant from serving as the operative rule, and proceeds to examine the customary route. It is cited as if it had narrowed *The Paquete Habana*; it reaffirms *The Paquete Habana* by name.

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[87] *Sosa* (opinion of the Court, Part IV.C).

[88] *Sosa* (opinion of the Court, n.21).

[89] *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Jesner v. Arab Bank, PLC*, 584 U.S. 241 (2018); *Nestlé USA, Inc. v. Doe*, 593 U.S. 628 (2021).

PART VII. THE AFFIRMATIVE ROUTES IN DOMESTIC LAW

The routes set out in this Part do not depend on the extension proposed in Part VIII. They do not run through the treaty text, and therefore do not meet the non-self-execution objection on its own ground. Their status is stated for each.

7.01 The sourcing rule: the deposited Instrument of Ratification

The Convention as ratified subject to the United States conditions of consent is the relevant Article VI treaty instrument. The Instrument of Ratification deposited with the United Nations on 21 October 1994 is the authoritative record of the international commitment; the Senate Executive Reports remain important evidence of the represented execution architecture but do not themselves alter the deposited terms. Article VI status does not, without further domestic authority, create a cause of action, waive immunity, confer jurisdiction, or dictate a remedy. The distinction is the IAJ's standing position and governs the three routes that follow.[90] *(Source status: authoritative treaty instrument.)*

7.01A Why the Senate report and deposited numbering differ

The resolution printed in S. Exec. Rep. No. 101-30 was the Committee-reported text, not the final resolution as amended on the Senate floor. In that reported text, the federalism provision appeared as Reservation I(1), the Article 16 constitutional provision as Reservation I(2), and there was no Understanding II(5). On 27 October 1990, the Senate agreed to four amendments before approving advice and consent.[91] The final ratification terms, later reflected in the deposited instrument, place the Article 16 provision at Reservation I(1) and the federalism provision at Understanding II(5). The difference is therefore a documented consequence of the Senate's amendment process, not an Executive alteration of the Senate's consent and not an interchangeable numbering convention. The amendment process also formally reclassified the federalism condition within the Senate's conditions of consent—from Committee-reported Reservation I(1) to final Understanding II(5). That formal reclassification is substantively relevant to characterization of the condition, but the label alone does not conclusively determine its legal operation; the condition's text, context, object, and practical effect remain controlling.[92]

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[90] The distinction is developed in the IAJ *Amicus Curiae* brief filed in the Supreme Court of Texas (Cause No. 24-0881), Part II, and applied in *On the Bounded Applicability of Lehman v. Lycoming County Children's Services Agency*, Part III.A.

[91] Resolution of ratification agreed to in Senate, with amendments, Oct. 27, 1990, Treaty Doc. 100-20 (record available at Congress.gov).

[92] S. Exec. Rep. No. 101-30, at 29–31 (1990) (Committee-reported resolution); 136 Cong. Rec. S17,486–92 (daily ed. Oct. 27, 1990) (resolution of advice and consent and as-agreed reservations, understandings, and declarations); *id.* at S17,904 (S. Amdts. 3200–3203 to Treaty Doc. 100-20, agreed to by voice vote); United States Instrument of Ratification, deposited 21 Oct. 1994, 1830 U.N.T.S. 320–22. The final and deposited terms number the Article 16 condition as Reservation I(1) and the federalism provision as Understanding II(5).

7.02 Reservation I(1): the constitutional bridge

The deposited instrument provides that the United States considers itself bound by the obligation under Article 16 to prevent cruel, inhuman or degrading treatment or punishment only insofar as that term means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments.[93]

The reservation runs from domestic constitutional law to the scope of the obligation accepted by the United States: Article 16, as accepted by the United States, reaches the cruel, unusual, or inhumane treatment prohibited by the Fifth, Eighth, and Fourteenth Amendments.[94] A broader international finding under unreserved Article 16 is not automatically a holding that every element of a United States constitutional claim has been established.

The linkage nevertheless matters. Where the pleaded conduct independently satisfies the governing constitutional standard, the claimant invokes domestic constitutional law rather than asking the treaty text alone to create a cause of action. The court must then decide separately the right, jurisdiction, vehicle, cause of action, immunity, and available remedy. Reservation I(1) makes non-self-execution an incomplete response to that independently pleaded route; it does not predetermine the route's success. *(Source status: text of the deposited instrument plus IAJ analytical determination.)*

7.02A The composite constitutional comparator: "cruel, unusual and inhumane treatment or punishment"

The documentary sequence must be named correctly. S. Treaty Doc. No. 100-20 is the President's 1988 transmittal of UNCAT and contains the Executive Branch Summary and Analysis. The Executive proposed that Article 16 be made coextensive with constitutional guarantees against "cruel, unusual, and inhumane treatment." The Senate Foreign Relations Committee later recommended the formulation in S. Exec. Rep. No. 101-30, and the Senate accepted it as a condition of consent. The deposited Instrument records the resulting reservation.[95][96]

The formulation is not a quotation of the Eighth Amendment. The constitutional text prohibits "cruel and unusual punishments"; the ratification formulation instead identifies "cruel, unusual and inhumane treatment or punishment" prohibited collectively by the Fifth, Eighth, and/or Fourteenth Amendments.

[93] United States Instrument of Ratification of the Convention against Torture, deposited 21 Oct. 1994, Reservation I(1), as set out in *On the Bounded Applicability of Lehman v. Lycoming County Children's Services Agency*, Part III.B.

[94] Note Congress' addition of "inhumane" to "cruel and unusual" "treatment or punishment" in Senate Executive Report 100-20

[95] Message from the President Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20, at 15–16 (1988) (Executive Branch Summary and Analysis); S. Exec. Rep. No. 101-30, at 8, 25–26 (1990). S. Treaty Doc. No. 100-20 is the presidential transmittal, not a Senate Executive Report. The Senate Foreign Relations Committee later recommended the formulation in S. Executive Report No. 101-30.

[96] United States Instrument of Ratification of the Convention Against Torture, Reservation I(1), deposited 21 Oct. 1994; 136 Cong. Rec. 36,198 (1990).

"Inhumane" and "treatment" therefore perform work. They prevent the stated domestic comparator from being collapsed into post-conviction punishment and direct attention to due-process protection against abusive governmental treatment outside the Eighth Amendment's field.

The Supreme Court had already placed the concept within Fifth Amendment doctrine. In *Murphy v. Waterfront Commission*, the Court identified among the values protected by the privilege against self-incrimination "our fear that self-incriminating statements will be elicited by inhumane treatment and abuses." The Court later repeated that account. *Murphy* did not create a general constitutional tort for all inhumane treatment; it is nevertheless majority-opinion recognition that protection against inhumane governmental methods belongs within the Fifth Amendment's constitutional field.[97]

The operative branches of the comparator are supplied by settled doctrines with different domains. *Rochin* condemns conscience-shocking coercive conduct under due process; *Bell* distinguishes impermissible punishment of persons not yet convicted; and *Youngberg* recognizes substantive liberty, safety, and bodily-restraint protections for involuntarily confined persons. *Estelle* supplies the Eighth Amendment's post-conviction prohibition of unnecessary and wanton infliction of pain, including deliberate indifference to serious medical needs.[98][99]

Candor requires a further boundary. The *Ingraham* majority held that the Eighth Amendment does not govern public-school corporal punishment and described the Clause as protecting persons convicted of crimes. Justice White's dissent argued that the Amendment prohibits all inhumane or barbaric punishments and objected to leaving severe treatment of schoolchildren outside it. The dissent is illuminating but is not the Court's holding. The ratification synthesis accordingly rests on the combined Fifth-, Eighth-, and Fourteenth-Amendment fields, not on converting the *Ingraham* dissent into law.[100]

Congress later adopted the same composite definition in the Detainee Treatment Act. Section 2000dd prohibits cruel, inhuman, or degrading treatment or punishment of any individual in United States custody or physical control, regardless of nationality or physical location, and defines that term as the "cruel, unusual, and inhumane treatment or punishment" prohibited by the Fifth, Eighth, and Fourteenth Amendments as defined in the UNCAT RUDs. That enactment is not evidence of what the Senate subjectively intended in

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[97] *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1964) (identifying among the values of the Fifth Amendment privilege the fear that self-incriminating statements will be elicited by "inhumane treatment and abuses"); *Carter v. Kentucky*, 450 U.S. 288, 299–300 (1981); *Doe v. United States*, 487 U.S. 201, 212–13 (1988); *United States v. Balsys*, 524 U.S. 666, 691–92 (1998).

[98] *Rochin v. California*, 342 U.S. 165, 172–74 (1952) (conscience-shocking coercive conduct); *Bell v. Wolfish*, 441 U.S. 520, 535–39 (1979) (due-process protection against punishment before conviction); *Youngberg v. Romeo*, 457 U.S. 307, 315–25 (1982) (liberty, safety, and freedom from unreasonable bodily restraint in involuntary confinement).

[99] *Estelle v. Gamble*, 429 U.S. 97, 102–05 (1976) (deliberate indifference to serious medical needs can constitute unnecessary and wanton infliction of pain prohibited by the Eighth Amendment).

[100] *Ingraham v. Wright*, 430 U.S. 651, 664–71 (1977) (opinion of the Court) (holding the Eighth Amendment inapplicable to public-school corporal punishment and describing the Clause as designed to protect persons convicted of crimes); *id.* at 683–700 (White, J., dissenting) (arguing that the Clause prohibits inhumane or barbaric punishment beyond that boundary). The latter formulation is dissenting reasoning, not the Court's holding.

1990; it is later positive law confirming that the composite formulation is operational statutory language rather than ornamental phrasing.[101]

The historical setting gives the enactment additional evidentiary force. Section 2000dd followed documented detainee abuse, including at Abu Ghraib; conflicting interrogation standards across agencies and operational theaters; legal claims that foreign prisoners held abroad lacked relevant domestic protections; international condemnation; concern for the treatment of captured United States personnel; and injury to the Nation's alliances and international standing. The legislative record describes the Act as a means of establishing a single standard and reaffirming international obligations to allies and the world.[102][103]

The Act is therefore not merely later repetition of an uncontested rule. By commanding that no individual in United States custody or physical control—regardless of nationality or location—be subjected to cruel, inhuman, or degrading treatment or punishment, Congress supplied express personal, custodial, and geographic coverage where the preexisting architecture had proved contestable and ineffective.[104]

The evidentiary conclusion must be stated directly. The enactment demonstrates that the ratification representation failed in operation in a field central to UNCAT and that additional domestic legislation was required to supply protection previously represented as available. It does not establish that every component of the representation was knowingly false in 1990 or 1994. That temporal distinction does not weaken the finding: after Abu Ghraib, governmental investigations, litigation, legislative debate, and international criticism, the political branches possessed actual notice that the represented architecture had not operated as claimed.

The resulting synthesis is exact. The Article 16 reservation narrows the international undertaking to conduct prohibited by the identified constitutional guarantees, while simultaneously representing that those guarantees collectively reach cruel, unusual, and inhumane treatment or punishment. A claimant must still establish the applicable constitutional rule, state action, jurisdiction, vehicle, cause of action, immunity rule, and remedy. But a court cannot answer an independently pleaded Fifth- or Fourteenth-Amendment

[101] Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1003, 119 Stat. 2680, 2739–40 (codified at 42 U.S.C. § 2000dd(a), (d)); see also 42 U.S.C. § 2000dd-0(1)–(2). Section 2000dd prohibits cruel, inhuman, or degrading treatment or punishment of any individual in United States custody or physical control regardless of nationality or physical location and defines the term through the Fifth-, Eighth-, and Fourteenth-Amendment composite used in the UNCAT RUDs.

[102] 151 Cong. Rec. S11061–92 (daily ed. Oct. 5, 2005) (debate on the McCain amendment); S. Amdt. 1977 to H.R. 2863, 109th Cong. (2005). The debate tied the legislation to abuses at Abu Ghraib, conflicting interrogation policies, protection of United States personnel, international obligations, and the message sent to allies and the world.

[103] 151 Cong. Rec. S688–89 (daily ed. Jan. 26, 2005) (recounting written testimony that an earlier prohibition would have provided foreign prisoners legal protections to which they were not then entitled); 151 Cong. Rec. S3007–10 (daily ed. Mar. 17, 2005) (connecting proposed corrective legislation to Abu Ghraib, international obligations, and restoration of United States credibility).

[104] Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1003(a)–(d), 119 Stat. 2680, 2739–40 (codified at 42 U.S.C. § 2000dd).

treatment claim merely by invoking the Eighth Amendment's post-conviction boundary or UNCAT's non-self-execution.[105]

7.03 Understanding II(1)(c): object and purpose within the instrument

The deposited instrument further records the understanding that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture. That sentence was not present in the Committee-reported resolution. Through Senate Amendment 3202, the Senate replaced the reported text's narrower proviso—that domestic sanctions and enforcement actions were included only if "not clearly prohibited under international law"—with the express limitation that domestic sanctions could not defeat the Convention's object and purpose.[106]

The substitution converted an open-ended inquiry into whether a domestic sanction was clearly prohibited somewhere within international law into a more determinate inquiry focused on this Convention: whether the sanction defeats its object and purpose. Although narrower in reference, the final language is more directly operational because it identifies the governing instrument, the protected purpose, and the consequence domestic arrangements may not produce.

This is not the Institute's interpretive gloss. It is the United States' own statement, in the instrument it deposited. It is the most direct answer available to a doctrine that leaves an obligation formally in force while withdrawing every route by which it might operate: the United States has recorded that its domestic arrangements may not be used to defeat the Convention's object and purpose, and a domestic doctrine that extinguishes every route does exactly that. *(Source status: authoritative treaty instrument.)*

7.04 Understanding II(5): the constituent units as competent authorities

The instrument records that the Convention shall be implemented by the United States Government to the extent of its legislative and judicial jurisdiction and otherwise by the state and local governments, and that in implementing Articles 10 to 14 and 16 the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units may take appropriate measures for the fulfilment of the Convention.[107]

The instrument therefore assigns implementation responsibilities beyond the federal government and requires appropriate federal measures directed toward competent state and local authorities. Courts may be among the competent authorities when domestic law assigns them the relevant function, but the text does not designate every state court as the implementing authority for every Convention duty. The federalism

[105] *Medellín v. Texas*, 552 U.S. 491, 504–06, 514, 522–23 (2008). Neither the ratification formulation nor § 2000dd converts every Article 16 allegation into a constitutional claim or supplies jurisdiction, a private cause of action, an immunity waiver, or a remedy beyond enacted law.

[106] United States Instrument of Ratification, deposited 21 Oct. 1994, Understanding II(1)(c), 1830 U.N.T.S. 320–22; S. Exec. Rep. No. 101-30, at 30 (1990) (Committee-reported text); 136 Cong. Rec. S17,904 (daily ed. Oct. 27, 1990) (S. Amdt. 3202 to Treaty Doc. 100-20, agreed to by voice vote). Congress.gov describes Amendment 3202's purpose as clarifying the relationship between domestic and international law.

[107] United States Instrument of Ratification, deposited 21 Oct. 1994, Understanding II(5), 1830 U.N.T.S. 320–22.

allocation nevertheless bears directly on *Medellín*, which arose from a state's refusal, and prevents federalism from being treated as an excuse for national nonperformance. *(Source status: authoritative treaty instrument.)*

7.05 *The Paquete Habana* and customary international law

Where a treaty stipulation has been found non-self-executing, that finding governs the treaty **as a source**. It does not govern the corresponding norm of customary international law, which enters by a different door.

The Paquete Habana holds that international law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination, and supplies the method: where there is no treaty and no controlling executive or legislative act or judicial decision, resort is had to the customs and usages of civilized nations and to the works of jurists as trustworthy evidence of what the law really is.[108] It is a holding of the Supreme Court, never overruled, mandatory in form, addressed to courts, and reaffirmed by name in 2004.[109] *(Source status: binding domestic law.)*

7.06 Restatement (Third) § 702

Section 702 states that a State violates customary international law where, as a matter of state policy, it practises, encourages or condones any of an enumerated set of acts, among them torture and other cruel, inhuman or degrading treatment.[110]

The Restatement is not law. Its value is evidentiary and institutional. Evidentially it is exactly the source *The Paquete Habana* directs courts to consult. Institutionally it is a source the Supreme Court already uses in this field: *Sosa* reasoned from § 702,[111] *Medellín* cited §§ 481 and 907,[112] and Justice Breyer's concurrence in *Sosa* cited §§ 402 and 404.[113]

The evidentiary force runs both ways, and this should be stated frankly. *Sosa* used § 702 to defeat Alvarez, because § 702 requires state policy and, for detention, prolongation. The same section establishes torture and cruel, inhuman or degrading treatment as a violation of customary international law without any comparable qualification of duration. *(Source status: persuasive material, evidentiary of customary international law.)*

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108 *The Paquete Habana*, 175 U.S. 677, 700 (1900).

109 *Sosa* (opinion of the Court, Part IV.B).

110 Restatement (Third) of the Foreign Relations Law of the United States § 702 (1987). The content of the section is stated in the Institute's own words and is not quoted.

111 *Sosa* (opinion of the Court, Part IV.C), reasoning from § 702's requirements of state policy and, for detention, prolongation.

112 *Medellín* (opinion of the Court, Part II.D and n.3).

113 *Sosa* (Breyer, J., concurring in part and concurring in the judgment).

7.07 Why these are stronger than the Preamble route

An argument for the domestic reception of international human-rights obligations can be constructed from the Preamble to the Constitution, reinforced by the Articles of Confederation and the founding writings. That construction is not wrong. It is weaker, for structural reasons.

(a) The Supreme Court has held that the Preamble has never been regarded as the source of any substantive power or of any right.[114] An argument routed through it can be answered in one sentence.

(b) The Articles of Confederation are superseded. They are of the first importance as evidence of what Article VI was designed to cure — which is the use Part III makes of them — but they are not a source of present obligation.

(c) The Preamble route asks a court to accept something new. The routes in 7.02 to 7.06 ask a court to apply the United States' own deposited instrument, and a rule of decision the Court has stated in mandatory terms and recently reaffirmed.

(d) The Preamble route supplies no method for ascertaining the content of a norm. *The Paquete Habana* does, and § 702 supplies the content it directs the court to find.

(e) The Preamble route invites the political-question answer. An argument from the purposes of the Union is readily characterised as an argument about the ends of government. An argument from the text of a deposited ratification instrument is not.

The deposited instrument is authoritative evidence of the international undertaking and its ratification conditions; *The Paquete Habana* supplies the customary-law ascertainment method within an appropriate jurisdiction; and Restatement (Third) § 702 is persuasive evidence rather than law. None independently creates jurisdiction, a cause of action, an immunity waiver, or a remedy.

PART VIII. THE PROPOSED EXTENSION: THE TEST OF DOMESTIC EQUIVALENCE

8.01 Epistemic status of this Part

This Part states a proposed doctrinal extension. It is not settled domestic law. No United States court has articulated the analysis in the form set out here, and the IAJ does not represent that any court will adopt it.

The equivalence representation and its role in the non-self-execution declaration are matters of the ratification record. CAT and Human Rights Committee materials consistently assess remedies in practical operation rather than solely by formal existence; those materials are treaty-body interpretations, not controlling domestic judgments. The proposed domestic-equivalence inquiry is the IAJ's synthesis of those sources.

[114] *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905).

For measurement, this Part uses the Guide's defined **Plane A treaty-compliance baseline**. The Convention's obligations are treated solely as an analytic counterfactual—as though self-executing—for the limited purpose of identifying what performance the domestic architecture must equal. The comparator does not assert that the Convention is self-executing after *Medellín*; does not posit a freestanding domestic cause of action; does not claim that a United States court will enforce the treaty text directly; and does not prescribe the disposition of any case. It prevents the measure of equivalence from being reduced to whatever the domestic route happens to deliver.[115]

8.02 The premise of the declaration

The declaration of non-self-execution attached to the Convention against Torture was explained to the Senate on the ground that the majority of the obligations to be undertaken were already covered by existing law, so that additional implementing legislation would be needed only with respect to Article 5.[116] The Article 4 analysis was categorical: existing law was said to be sufficient to implement Article 4, except to reach torture occurring outside United States jurisdiction.[117] The Article 5 discussion confined the admitted gap with precision, and the gap was supplied by statute before deposit.[118]

The institutional sequence is exact. The Executive made the equivalence representation; the Senate accepted that premise in giving advice and consent subject to the RUDs; Congress supplied the identified Article 5 extraterritorial gap through §§ 2340–2340A before deposit; the Executive deposited the instrument; and the Executive repeated the position that existing federal and state law implement the Convention in the United States' periodic reports. The sixth periodic report, received on 24 September 2021, maintains that all acts of torture as understood in the Convention are punishable under United States law and that the United States maintains its RUDs.[119] The equivalence representation is therefore not merely a historical premise found in a 1990 committee report. It is a position carried through the complete ratification sequence and renewed on the international plane.

The complete governmental sequence is therefore continuous rather than episodic. The Executive identified existing domestic law as the anticipated execution architecture; the Senate gave advice and consent subject to RUDs constructed on that premise; Congress enacted the specifically identified Article 5 legislation before deposit; the United States deposited the instrument; and the Executive thereafter continued to report that

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[115] *Id.*, Plane A treaty-compliance baseline and UNCAT counterfactual-baseline discussions. The four disclaimers in the text preserve the Guide's distinction between an analytic comparator and direct domestic enforceability.

[116] S. Exec. Rep. No. 101-30, at 10 (1990).

[117] *Id.* at 19; see *id.* at 18–19 (the survey of Fifth, Eighth and Fourteenth Amendment protections and the color-of-law criminal statutes).

[118] *Id.* at 20; Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506, 108 Stat. 382, 463–64 (1994) (codified at 18 U.S.C. §§ 2340–2340A).

[119] United States, Sixth periodic report submitted under article 19 of the Convention, U.N. Doc. CAT/C/USA/6, paras. 1–3, 8 (received 24 Sept. 2021; distributed 5 Apr. 2022). Paragraph 8 states the United States' continuing positions on domestic criminal coverage and its RUDs. The report is the State Party's representation; it is not an independent finding of equivalence.

domestic law supplied the required protection. Operational events then exposed material personal, territorial, custodial, institutional, and remedial gaps, after which Congress enacted 42 U.S.C. §2000dd to supply an express prohibition within a central field in which the preexisting architecture had failed. This sequence does not convert equivalence into an express judicially enforceable condition subsequent or make UNCAT self-executing upon failure. Neither is it legally meaningless political rhetoric. It is evidence of the execution architecture on which ratification proceeded, the United States' explanation of how performance would occur, the accuracy of subsequent compliance reporting, the existence of residual implementation gaps, actual institutional notice, and responsibility for continued nonperformance after notice.

The Executive stated the representation even more directly in its written response to Senator Pressler. It explained that the proposed non-self-execution declaration meant that prosecutions and civil actions would proceed under existing or subsequently enacted federal or state law, and that existing federal and state law appeared sufficient to implement the Convention, with new federal legislation required only for the specifically identified Article 5 jurisdictional gaps. The same correspondence thus contains both the routing decision and the asserted sufficiency of the route.[120]

Two consequences follow, and both are Plane A determinations.

(a) The declaration is an instrument of **routing**, not of content. It states how the United States proposed to give the obligation domestic effect. It does not reduce what the United States owes.

(b) The declaration's premise is testable on the international-compliance plane. If the represented domestic architecture fails in operation, the equivalence representation has failed as a compliance account. That failure does not make the treaty self-executing, revive direct treaty enforcement, or itself create a domestic claim or remedy.

8.02A Consignment and custodianship

The governing IAJ corpus describes the ratification structure as a **consignment**. The United States did not represent that the Convention's obligations could remain unperformed until Congress chose to act. It represented that, apart from the specifically identified jurisdictional gap, performance had already been assigned to an existing domestic constitutional, statutory, common-law, federal, and state architecture. Non-self-execution was therefore not a disclaimer of performance; it was a designation of the domestic means by which performance was said to occur.[121]

The IAJ describes the institutions to which performance was assigned as custodians of the consignment, each strictly within its lawful competence. Courts perform that role only when jurisdiction exists and a domestic

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[120] Letter from Janet G. Mullins, Assistant Secretary of State for Legislative Affairs, to Senator Larry Pressler (4 Apr. 1990), reprinted in S. Exec. Rep. No. 101-30, app. B, at 41.

[121] *UNCAT and jus cogens: A contemporary perspective*, ch. 17.B (the equivalence representation as a consignment to domestic constitutional law; failure of consignment returns responsibility to the competent institutions); *The Equivalence Representation and the Ex Post Facto Lockout*; S. Exec. Rep. No. 101-30, at 10, 18–20, 24 (1990), as recorded in the controlling IAJ corpus.

claim, defense, interpretive question, or other cognizable matter is properly presented. "Custodianship" is an IAJ institutional description, not an enlargement of jurisdiction or remedial authority.

Consignment succeeds only where the represented architecture remains **present**, **applied**, and **systemically possible**, and performs the particular duty across the controlling dimensions at 8.05. Where it does not, the consignment has failed on its own terms. International responsibility does not disappear with the failed domestic route; responsibility for completing performance remains with, or returns to, the competent institutions. This is the doctrinal relationship between the equivalence representation, the operational test, and the corpus rule stated at 8.06.

8.02B The *Medellín* Paradox and the judicial backstop

The Guide names the structural consequence the ***Medellín* Paradox**. Ratification materially depended on the adequacy of existing domestic institutions, including courts, to deliver the Convention's functions. If those institutions no longer deliver functionally equivalent protection, prevention, relief, remedy, and punishment, the doctrine that consigned performance to them cannot coherently be invoked as the reason their nonperformance requires no further analysis.[122]

The proposed judicial backstop does not ask a court to create a treaty cause of action or disregard Medellín. A court should adjudicate independent domestic grounds that are properly pleaded, within its jurisdiction, and otherwise cognizable; apply treaty-consistent construction where statutory text fairly permits; and, where appropriate, state the residual compliance gap. The last step is an IAJ recommended practice, not a generally binding duty already imposed on every court.

8.02C Both doors closed on one assurance

The ratification correspondence reveals a second structural consequence. The domestic treaty route was restricted through the non-self-execution declaration on the representation that existing domestic law was sufficient. The United States also declined to accept the Article 22 individual-communications procedure because, the Executive stated, United States law provided extensive remedies and no additional international remedy was needed for persons subject to United States jurisdiction.[123]

The Institute records a structural finding: the same domestic-remedy assurance supported both restriction of direct domestic reliance on UNCAT and refusal to accept Article 22 individual communications. If identified domestic routes fail in a defined case, individual access to redress may be seriously impaired. This finding does not accept Article 22 retroactively or create jurisdiction or a domestic cause of action.

[122] *Guide to Domestic Criminal Enforcement*, § C-V.D, "The Medellín Paradox and the Judicial Backstop." The Guide addresses line prosecutors; the application to courts in this Opinion is an IAJ synthesis, not a quotation or displacement of the Guide's prosecutorial instruction. The Guide's separate assertion that the *Medellín* majority "expressly reserved" the jus cogens question is not adopted because no pinpoint in the decision has been identified.

[123] Letter from Janet G. Mullins to Senator Claiborne Pell (9 July 1990), reprinted in S. Exec. Rep. No. 101-30, app. B, at 44–45; letter to Senator Larry Pressler, *id.* at 40. The *forum nullus* classification is the IAJ's institutional finding from the two represented closures.

8.03 The analysis stated

A finding that a stipulation is non-self-executing determines that it does not by itself supply domestically enforceable federal law. It does not, without more, adjudicate independent constitutional, statutory, regulatory, common-law, or properly vehicled customary-law grounds. The following completion protocol is an IAJ proposal; no United States court is represented as having adopted it in this form.

Step 1 — The obligation. Identify the obligation, its content, its addressee, and its object and purpose. Determine whether it is peremptory.

Step 2 — The route. Determine whether the stipulation operates of itself or addresses itself to the political department. This is an interpretive determination made afresh on the materials before the court, stipulation by stipulation, in the manner of *Foster* as corrected by *Percheman*. It is not a status carried forward from determinations about other instruments.

Step 3 — Identification of the substitute. Identify, specifically and by name, the domestic mechanism said to discharge the obligation in the case at hand. It must be a mechanism, not a possibility. The capacity of a legislature to enact something is not a mechanism. A diplomatic channel against the respondent State is not a mechanism.

Step 4 — The test of equivalence. Determine whether the identified mechanism is equivalent to the obligation in operation, on the three conditions and across the dimensions the obligation engages.

The measure at Step 4 is the Plane A treaty-compliance baseline defined at 8.01. The question is whether the lawful domestic mechanism actually delivers the functions and outcomes the obligation requires, not whether the treaty itself supplies the domestic vehicle.

Step 5 — Consequence. As set out at 8.06 and 8.07.

8.03A Reconciliation with the seven-step treaty-analysis taxonomy

Harmonizing the Architecture of Disability Rights earlier described seven analytical operations: identify treaty status; determine self-execution; apply treaty-consistent construction where permissible; examine the ratification record; apply constitutional-avoidance principles where their predicates exist; ascertain independently established customary international law through a lawful vehicle; and decide the case under domestic law while identifying any residual compliance gap.[124]

This Opinion's five-step protocol consolidates, rather than abandons, those operations. Step 1 (the obligation) incorporates treaty status, scope, addressee, object and purpose, and any asserted peremptory character. Step 2 (the route) contains the stipulation-specific self-execution determination. Step 3 (the substitute) identifies the enacted or otherwise lawful domestic mechanism and therefore incorporates the relevant ratification-record inquiry. Step 4 (equivalence in operation) tests the substitute and permits

[124] Harmonizing the Architecture of Disability Rights, § 21.2 and § 24.2.1. This citation identifies the published taxonomy; the reconciliation and compression stated in the text are determinations of this Opinion.

Charming Betsy and constitutional avoidance only within their ordinary textual and constitutional predicates; it also permits customary-law analysis only through an appropriate jurisdictional and remedial vehicle. Step 5 (consequence) decides the domestic issues within lawful competence and separately records any residual international-compliance gap.

The "Terminal Non-Self-Execution Formula" is the truncated practice in which analysis stops after Step 2: the treaty is declared non-self-executing and every remaining question is treated as disposed of. The defect is not that Step 2 is illegitimate; it is that Steps 3–5, and the corresponding operations in the seven-step taxonomy, are never performed. The five-step protocol is therefore the operational compression of the seven-step taxonomy for the particular problem addressed by this Opinion.

8.04 The three conditions

Present. The mechanism exists in law at the time of the claim — not in prospect, not by analogy.

Applied. The mechanism is available to this claimant on these facts. A remedy barred by immunity, procedural default, standing, limitation, sovereign immunity, abstention, the political-question doctrine, or the absence of a cause of action is not applied.

Systemically possible. The mechanism is capable of operating in the class of cases to which this case belongs. Where the legal order forecloses the class, the absence is systemic and is not curable by the individual claimant's diligence.

The three conditions are a refinement of the operational-effectiveness inquiry the IAJ has already applied, and are to be read with it. The condition in which no domestic forum provides meaningful access is the condition the IAJ has named *forum nullus*; that term governs and is not displaced by anything in this Opinion.[125]

8.05 The five required outcomes and this Opinion's four analytical dimensions

The IAJ corpus defines the equivalence condition by five required outcomes—**prevention, protection, remedy, relief, and punishment**. Those outcomes state what the architecture must deliver. This Opinion adopts four analytical dimensions to test whether the required outcomes are delivered in law and operation. The dimensions are an IAJ analytical method developed and applied in this Opinion; they are not attributed to the controlling thesis or the Guide. The three gateway conditions at 8.04 and the dimensions engaged by the particular treaty duty are conjunctive; the outcome set is applied duty by duty rather than as an undifferentiated demand in every proceeding.[126]

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[125] *On the Bounded Applicability of Lehman v. Lycoming County Children's Services Agency*, Part X; *Quia Timet and the Prevention of Threatened Torture and Cruel, Inhuman or Degrading Treatment by Domestic Authorities*, Part VI and § 6.01.

[126] *UNCAT and jus cogens: A contemporary perspective*, pp. 93, 202; *Guide to Domestic Criminal Enforcement*, Parts A and C. The controlling instruments state the five required outcomes; the flagship also states the Plane A conditions of zero immunity and zero limitation period once torture or CIDT is shown. The four dimensions—legal reach, institutional operation, timely prevention, and individual accessibility—are the analytical method adopted by this Opinion for testing delivery of those outcomes and are not attributed to either controlling instrument.

Legal reach. Does the combined domestic architecture cover the conduct, actor, victim, mode of responsibility, territory, time, and required duty? Similar vocabulary is insufficient. Reach must include applicable attempt, complicity, participation, omission, supervision, official-purpose, discrimination, causation, and extraterritorial rules where the treaty duty requires them.

Institutional operation. Do competent institutions actually receive, preserve, investigate, adjudicate, protect, refer, prosecute, punish, repair, coordinate, and record the matter independently and effectively? A formally available statute is not equivalent for a function that no institution performs.

Timely prevention. Can a person facing a concrete risk obtain protection before irreparable infliction? An after-the-fact declaration or damages theory cannot be treated as equivalent to a duty of prevention merely because both concern the same conduct.

Individual accessibility. Can the protected person actually use the complaint, examination, protection, review, and redress mechanisms, accounting for disability, cost, delay, retaliation, custody, procedural burden, and capacity loss caused by the alleged violation itself? Low complaint numbers do not establish low incidence where the mechanism may suppress access.

The four dimensions measure a single quantity, which this Opinion names **parity of outcome**. The substitute architecture is equivalent when it delivers, to the protected person at bar and to the class the duty protects, the outcome the stipulation would deliver if it operated of itself as a rule of decision. The stipulation's content supplies the benchmark; the substitute's operation supplies the object of comparison. Parity of outcome is a standard of measurement, not a rule of decision: it takes the source of domestic legal effect exactly as section 4.03 records it, and it neither revives direct treaty enforcement nor creates a claim or remedy (section 8.07). Its function is to make the comparison exact — a substitute is measured not against the vocabulary of the stipulation but against what the stipulation, operating of itself, would have required the domestic order to do.

Equivalence must be tested duty by duty. A system may reach core torture as a crime while failing investigation, complaint protection, prevention, redress, or non-repetition. Conversely, failure of one vehicle does not prove failure of every duty if other mechanisms lawfully and effectively supply the missing function.

The Guide restates the same cross-cutting outcome set in the order **protection, prevention, relief, remedy, and punishment**. The variation in sequence is not a substantive divergence. Adjudication, investigation, compensation, rehabilitation, and satisfaction remain component functions of relief or remedy as the particular duty requires.

The IAJ proposes that proven torture, and CIDT meeting its defined threshold, should not be insulated from required accountability and redress by immunity or prescription. Torture is jus cogens. The reviewed authorities do not establish as settled universal law that this status displaces every civil immunity or limitations rule in every forum, or that all CIDT has identical peremptory consequences. Domestic legal effect is recorded separately on Plane B.

8.05A The complete equivalence protocol

The following protocol is an IAJ institutional determination and proposed decisional method. No Supreme Court decision has adopted it as a single comprehensive standard.

1. **Source.** Identify the exact treaty article, RUD, deposited terms, ratification representation, customary or peremptory norm, and domestic authorities.
2. **Conduct.** Describe the alleged conduct before translating it into narrower domestic labels.
3. **Elements.** Compare intent, purpose, severity, official involvement, causation, omission, attempt, complicity, and participation.
4. **Persons.** Compare protected persons and covered public, private, supervisory, judicial, military, corporate, and accomplice actors.
5. **Territory and time.** Test territorial, extraterritorial, nationality, custody, temporal, and continuing-violation coverage.
6. **Duty.** Separate prohibition, prevention, investigation, prosecution or submission, exclusion, protection, non-refoulement, training, redress, and reporting.
7. **Vehicle.** Identify jurisdiction, cause of action, defense, habeas rule, administrative review, criminal referral, or other lawful path.
8. **Procedure.** Test standing, exhaustion, pleading, proof, discovery, limitation, preservation, access to evidence, and review.
9. **Barriers.** Test sovereign, judicial, prosecutorial, qualified, official, and foreign-official immunity; abstention; preclusion; finality; and political-question rules.
10. **Outcome.** Compare cessation, protection, investigation, adjudication, exclusion, accountability, punishment, compensation, rehabilitation, satisfaction, and non-repetition.
11. **Case application.** Determine whether this person can obtain the required outcome against the relevant actor in the relevant forum.
12. **Operation.** Evaluate actual receipt, investigation, independence, coordination, tracking, reasons for closure, discriminatory effect, and recurrence.
13. **Timely prevention.** Determine whether threatened irreparable harm can be prevented rather than merely recognized afterward.
14. **Accessibility.** Test whether disability, cost, delay, retaliation, custody, procedural burden, or capacity loss makes the channel nominal.
15. **Residual gap.** State precisely what remains uncovered; distinguish reach from operation; identify the institution competent to cure it.

16. **Object, purpose, and RUD consequence.** State separately treaty performance, any reservations-law question, severability, domestic authority, and the independent peremptory floor.

The protocol does not direct a court to legislate. It requires accurate classification of what the court has decided, adjudication of independently presented domestic grounds, and transparent identification of any remaining compliance gap.

8.05B The residual-gap determination

Every equivalence evaluation must conclude with a written residual-gap determination. The determination shall identify:

1. the precise treaty duty and required function or outcome that was not delivered;
2. the constitutional, statutory, administrative, judicial, prosecutorial, or other domestic mechanism represented or asserted as the substitute and the manner in which it failed;
3. whether the failure is confined to the claimant, recurring within a class of cases, or systemic by law, structure, policy, practice, or institutional operation;
4. every institution possessing authority to prevent continuation, investigate, protect, adjudicate, punish, compensate, rehabilitate, legislate, supervise, discipline, report, or otherwise correct or route the failure;
5. the residual international obligation and State responsibility that remain notwithstanding the domestic barrier; and
6. the record, notice, referral, treaty-reporting, victim-protection, monitoring, and follow-up measures required until equivalent performance is demonstrated.

A bare statement that the treaty is non-self-executing, that a particular cause of action is unavailable, or that an official possesses immunity does not answer any of these six questions. Each may describe a domestic barrier; none establishes that the represented substitute performed the obligation.

8.06 Consequence on Plane A

Where equivalence obtains, the obligation is discharged through domestic law and the non-self-execution determination is complete: the claimant's remedy lies in the identified mechanism, which the court should name.

Where equivalence fails, non-self-execution has failed to route performance to an effective domestic mechanism; it has not extinguished the obligation. The obligation remains binding. Responsibility for completing performance remains with, or returns to, the institutions competent under domestic law, with redoubled force. Depending on the duty and the existing allocation of authority, those institutions may be legislative, executive, prosecutorial, administrative, state, or judicial. As a Plane A allocation and an IAJ institutional conclusion, each remains responsible for employing every lawful means within its competence;

whether a particular actor can be judicially compelled on Plane B depends on enacted authority, jurisdiction, vehicle, remedy, immunity, and controlling domestic doctrine. Internal law furnishes no international legal justification for non-performance, and a domestic arrangement operating to defeat the Convention's object and purpose is one the United States has itself recorded that a State Party could not employ.[127]

8.07 Consequence on Plane B

The IAJ records candidly what follows in a United States courtroom.

A court invited to give a non-self-executing stipulation direct domestic effect on the ground that equivalence has failed will decline. The interpretive use of the international framework cannot, in the present state of United States doctrine, override clear statutory text, create a cause of action where domestic law supplies none, or nullify the Senate's declarations. The IAJ has previously recorded that limit and does not withdraw it.[128]

Nor does the *Charming Betsy* canon authorize a court to rewrite unambiguous statutory text, create an offense Congress did not enact, enlarge punishment retroactively, or evade fair-warning limits. Within those boundaries, however, it is not optional scenery. When pre-existing domestic text is genuinely susceptible to a construction consistent with the Convention, the equivalence representation and the canon require the treaty-consistent construction to be confronted and, where ordinary interpretive rules permit, applied. The represented execution architecture must not be construed unnecessarily narrowly in a way that turns the assurance of equivalence into impunity.[129]

Medellín assigns a genuine implementation gap to Congress prospectively. It does not disable a court from applying domestic law already in force when the conduct occurred, and the possibility of future legislation is not a reason to withhold present law. Otherwise decades of post-ratification conduct could be placed beyond domestic criminal accountability by the *Ex Post Facto* Clause before Congress acts. Conduct already criminal must be tested and prosecuted through the pre-existing vehicle. Conduct genuinely uncovered may be cured only prospectively; the resulting impunity must be recorded as equivalence failure, not treated as authority to invent a retroactive offense or as proof that the constitutional design performed the Convention.[130]

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[127] *UNCAT and jus cogens: A contemporary perspective*, ch. 17.B (consignment failure returns responsibility to the competent institutions); Convention against Torture art. 2; Vienna Convention on the Law of Treaties art. 27, invoked to the extent reflective of customary international law.

[128] *Quia Timet …*, § 3.04. That statement is a Plane B finding about the domestic mechanism and does not qualify the Plane A determination at 8.06. See General Comment on IAJ Advisory Opinions, § 6.

[129] *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *Guide to Domestic Criminal Enforcement*, § C-V.A. The statement that the canon must be confronted within its ordinary limits is an IAJ interpretive determination; the canon does not override clear text, lenity, fair warning, or the Ex Post Facto Clause.

[130] *Guide to Domestic Criminal Enforcement*, Parts A and C; *The Equivalence Representation and the Ex Post Facto Lockout*. See U.S. Const. art. I, § 9, cl. 3. The distinction is between applying an offense already enacted when conduct occurred and creating new liability after the fact.

A failed equivalence comparison does not produce direct treaty enforcement. It may support a *Charming Betsy* argument within permissible textual bounds; direct attention to an independent domestic claim whose elements and vehicle remain to be proved; support customary-law analysis only through a lawful vehicle; and document a compliance gap.[131]

The divergence between 8.06 and 8.07 is the finding. The obligation requires what Plane A states. The domestic order delivers what Plane B describes. The distance between them is the compliance gap, and recording it is the purpose of this Opinion.

The gap has already been measured once, on the international plane, in this very case. After the *Medellín* judgment, Mexico returned to the International Court of Justice. On 16 July 2008 the Court ordered the United States to take all measures necessary to ensure that Mr. Medellín and four other named nationals were not executed pending its decision unless they received the review and reconsideration the *Avena* judgment required. Mr. Medellín was executed on 5 August 2008 without that review. On 19 January 2009 the Court unanimously found that the United States had breached the obligation incumbent upon it under the provisional-measures order, and reaffirmed the continuing binding character of the *Avena* obligations.[132] The international plane thus recorded, in the person of the same litigant, precisely the sequence this Part describes: the obligation continuing, the domestic route absent, the breach entered on the record of the competent international organ.

8.07A The Marbury design

The judicial act that section 8.07 describes — deciding within lawful competence while stating on the record what the lawful routes cannot deliver — is not an innovation of this Opinion. It is the oldest design in the constitutional case law. In *Marbury v. Madison* the Court found the right vested and the withholding of the commission violative of a vested legal right; stated as the general rule that where there is a legal right there is a legal remedy, and that a government ceases to deserve the name of a government of laws if its laws furnish no remedy for the violation of a vested legal right; and then declined the writ, because the statutory route asserted for it did not lawfully exist within the Court's original jurisdiction, and the Court would not build it.[133]

Three operations were performed in a single judgment: the law was declared; the violated right was recorded; and relief was confined to what the lawful route could carry, with the deficiency stated rather than concealed. The declaration outlived the denial. Step 5 performs the same three operations under the Convention: the domestic issues are decided within lawful competence; the obligation and the right are

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[131] *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

[132] Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment of 19 January 2009 (operative clause (2), unanimous finding of breach of the Order indicating provisional measures of 16 July 2008; clause (3), reaffirming the continuing binding character of the Avena obligations); Order of 16 July 2008 (provisional measures).

[133] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162–63, 176–80 (1803); the right-and-remedy passages at 162–63; the province-and-duty statement at 177.

stated in their own registers; and where the route has not been built, its absence is entered on the record. A court that states a residual gap without legislating is not departing from *Marbury*; it is executing *Marbury*'s own sequence, in which saying what the law is includes saying where the law has failed to provide — and in which the recorded deficiency, not the withheld writ, proved to be the judgment's enduring act.

The design also fixes the addressee. *Marbury* did not enlarge the Judiciary Act to reach the outcome; the cure for the defective route lay with the branch that builds routes. Section 12.03 states the corresponding assignment under the Convention.

But where equivalence is promised by the branch that builds routes, it constitutes reliance on the independence of the judicial branch to deliver the equivalence, and Marbury is not the gate. Equivalence in operation means parity of outcome: the substitute must deliver, to the claimant at bar, what the stipulation would deliver if it operated of itself. The question to be asked and answered is what the treaty would provide were it self-executing, and to then meticulously interpret and apply the equivalent domestic mechanisms identified as equivalent to measurably yield the equivalent outcome.

8.07B The judicial response under pressure: the detainee cases

The limits and duties stated at sections 8.07 and 8.07A are not projections. They were performed, under maximum institutional pressure, in the detainee litigation that followed the ratification era's most severe documented execution failure — the same failure whose legislative acknowledgment section 14.05D records.

The first lawful mode — treaty content delivered through the performing construction of an enacted vehicle — was performed in *Hamdan v. Rumsfeld*. The Court did not hold the Geneva Conventions self-executing. It held that Article 21 of the Uniform Code of Military Justice conditions the authority to convene military commissions on compliance with the law of war; that Common Article 3 applies to the conflict as part of that law regardless of its characterization; and that the commission's procedures therefore failed the statute.[134] Treaty substance reached the judgment through congressional text — the substitute vehicle performing the represented function, which is the operation sections 8.07 and 12.02 describe as canon-governed rather than discretionary.

The second lawful mode — the constitutional floor that no enactment may breach — was performed in *Boumediene v. Bush*. When section 7 of the Military Commissions Act withdrew the habeas route, the Court held that the Suspension Clause has full effect at Guantanamo Bay and that the withdrawal operated as an unconstitutional suspension of the writ; the political branches do not have the power to switch the Constitution on or off at will, for that would permit them, and not the courts, to say what the law is.[135] The

[134] *Hamdan v. Rumsfeld*, 548 U.S. 557, 625–31 (2006); the condition on UCMJ Article 21 authority at 626–28; the applicability of Common Article 3 irrespective of the conflict's characterization at 628–31.

[135] *Boumediene v. Bush*, 553 U.S. 723 (2008); the Suspension Clause's full effect at 771; the unconstitutional-suspension holding at 787–92; the statement that the political branches may not switch the Constitution on or off, quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), at 765.

Court's formulation rested expressly on the same page of *Marbury* that section 8.07A records: the province-and-duty statement is the operative check when a route is not merely unbuilt but unlawfully demolished.

The negative result of the same period completes the record. At the height of the pressure, with the execution failure at its most visible, no court gave the Convention Against Torture self-executing effect. The consequence stated at section 8.07 was thus confirmed under conditions approaching a controlled test: the judiciary's response to documented non-performance ran entirely through the two lawful modes — the performing construction and the constitutional floor — while Congress supplied the third response, the corrective enactment analyzed at section 14.05D. The three responses together are the separation-of-powers answer to an execution failure: none of the three branches performed another's function, and each performed its own.

8.08 The peremptory overlay

The governing IAJ thesis treats effect rather than form as controlling. The prohibition of torture is a peremptory norm of general international law. The prohibition of cruel, inhuman or degrading treatment or punishment is absolute and non-derogable. Neither permits balancing against administrative convenience, institutional finality, official status, or asserted governmental necessity. Torture and CIDT retain distinct classifications and element tests, but they form an integrated continuum of prohibited ill-treatment.

The prohibition of torture is a peremptory norm of customary international law. UNCAT also imposes an absolute obligation to prevent cruel, inhuman or degrading treatment. Treaty obligation, non-derogability, and *jus-cogens* status remain analytically distinct. Torture and CIDT may be examined as an integrated protective continuum while preserving their distinct elements, thresholds, sources, and legal consequences.[136]

The Institute adopts as its institutional position that proven torture—and CIDT meeting its defined threshold—should not be insulated from required accountability and redress by immunity or prescription. It is not presented as a universal holding. Jurisdictional Immunities and *Jones* are material contrary authorities on civil immunity and must be stated accurately; domestic effect remains governed by Plane B. The question reserved in the original *Lehman* Advisory Opinion is treated here as resolved by the controlling IAJ thesis; Lehman is to be revised consistently with this Opinion.[137]

On **Plane B***, jus cogens* does not automatically create federal jurisdiction, an offense, a private cause of action, a domestic immunity waiver, authority to disregard a controlling limitation rule, or authority for retroactive punishment. A lower court remains bound by controlling domestic precedent, including contrary

[136] *UNCAT and jus cogens: A contemporary perspective*, chs. 7 and 18.H; see *Caesar v. Trinidad and Tobago*; *Ximenes-Lopes v. Brazil*, para. 126; *Bueno Alves v. Argentina*; *Bayarri v. Argentina*; IACtHR Advisory Opinion OC-26/20. These authorities are cited as the stated foundation of the controlling IAJ thesis; the sentence in the text is expressly an IAJ institutional determination, not a representation that any one regional decision adopted the complete formulation.

[137] *UNCAT and jus cogens: A contemporary perspective*, ch. 18.H. The sentences stating that immunity "falls away absolutely and is never available" and that procedural attrition cannot accomplish what open authorization may not accomplish are adopted here as controlling IAJ institutional determinations, not represented as holdings of a domestic court or universal tribunal.

immunity and limitation decisions, unless and until competent authority changes that law. It must nevertheless administer every lawful existing vehicle, avoid unnecessary interpretations that deepen the conflict, distinguish absence of remedy from legality, and identify the residual gap. This Opinion states that domestic consequence accurately and records the resulting divergence; it does not adopt the domestic limitation as a qualification of the IAJ's Plane A holding. Nor does the Opinion derive an immunity override from ILC Draft Conclusion 22, which leaves immunity questions without prejudice.[138]

Classification remains indispensable. Gravity, severity, intent, purpose, discrimination, official involvement, powerlessness, causation, and the applicable legal threshold require particularized proof. The continuum does not erase the distinct elements of torture and CIDT; it prevents their artificial severance from the absolute prohibition.

The immunity analogue remains probative. International standards pair personal judicial immunity with disciplinary procedures, appeal, and state compensation. A domestic system that takes the immunity while withholding the paired safeguards presents the same structural question as a non-self-execution declaration justified by substitutes that do not operate.[139]

8.09 Application to the facts of *Medellín*

Step 1. The obligation: to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the named nationals. Binding; not peremptory.

Step 2. The Court held the three instruments non-self-executing. That determination is accepted for this application.

Step 3. The substitutes named by the Court: referral under Article 94(2); implementing legislation; executive action by other means.

Step 4. The first is neither applied nor systemically possible, being subject to the unqualified veto of the respondent State, as the Court itself recorded. The second was not present, and the claimant had no means of compelling enactment. The third was not present and, on the Court's own holding, affirmatively prohibited.

Step 5. Equivalence fails on every named substitute. On Plane A the obligation remained undischarged. On Plane B, as Justice Stevens observed, the judgment did not foreclose further appropriate action by Texas, and the course Oklahoma had taken in a parallel case was available.[140]

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[138] International Law Commission, Conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), U.N. Doc. A/77/10 (2022), Draft Conclusions 22 and 23 and the annexed non-exhaustive list. Institute standing determination: the "without prejudice" clause on immunity is Draft Conclusion 22, not 23.

[139] *The Structural Foreclosure of Effective Protection and Remedy for Rights-Violating Judicial Conduct in the Courts of the United States of America*, Executive Summary; UN Basic Principles on the Independence of the Judiciary, Principle 16.

[140] *Medellín* (Stevens, J., concurring in the judgment, and n.4), recording the course taken in *Torres v. Oklahoma*.

The complete worked adjudication—including the distinction between different reasoning and a not-necessarily-different formal judgment—is set out in Appendix B.

8.09A Subsequent legislation, exposed non-equivalence, and notice

Subsequent legislation can test an earlier equivalence representation without being misused as a categorical admission about every earlier legal proposition. The inquiry separates five questions: what domestic protection was represented at ratification; what the preexisting law formally prohibited; whether that law reached the persons, places, actors, and duties at issue; whether institutions made the protection accessible and effective; and what the political branches did after operational failure and notice.

Applied to § 2000dd, the record establishes more than prudential clarification. Congress confronted a setting in which officials disputed applicable protections, government lawyers asserted gaps affecting foreign detainees, multiple standards contributed to abuse, and existing mechanisms failed to prevent prohibited treatment. Congress then enacted a direct rule applicable to every individual in United States custody or physical control regardless of nationality or location. Those features are objective evidence that the original domestic architecture was not clear, uniform, territorially sufficient, or operationally effective in that field.

The cure was nevertheless bounded. Section 2000dd supplies an express prohibition within its custody-or-control field; it does not comprehensively create a private cause of action, damages remedy, general immunity waiver, independent complaint institution, complete criminal code, or the full preventive, investigative, prosecutorial, protective, and redress machinery implicated by UNCAT Articles 10 through 16.[141]

The resulting institutional finding is not rhetorical accusation. Before demonstrated failure, deficiencies might be defended as unforeseen or contested. After notice, partial correction coupled with continued unqualified reliance on the original equivalence representation has a different evidentiary character. Where a competent institution knows that represented mechanisms have failed, knows that specified treaty functions remain uncovered, possesses authority to correct or route the failure, and nevertheless maintains the representation without correction, the record supports a serious inference of knowing continued nonperformance. A determination of willfulness must identify the responsible institution, the duty and gap known to it, the period of notice, its corrective authority, and the evidence of conscious refusal, deliberate limitation, or knowing tolerance.

Four legal questions remain distinct. The compatibility of the Article 16 reservation with the Convention's object and purpose concerns the legal validity of the reservation. The truth of the equivalence representation concerns whether the cited domestic architecture supplied the coverage represented. Performance concerns whether the United States actually prevented, investigated, punished, and remedied prohibited conduct. Post-notice responsibility concerns what institutions did after failure became demonstrable. The United

[141] Convention Against Torture arts. 10–16. Article 16 expressly applies the obligations stated in Articles 10, 11, 12, and 13 to other cruel, inhuman, or degrading treatment or punishment; the Convention's architecture therefore extends beyond a bare substantive prohibition.

States has defended the reservation as valid and the domestic protections as extensive; those assertions are part of the record, not self-proving answers to the operational evidence.[142][143]

8.09B Consequences of post-notice institutional refusal

A demonstrated failure of domestic equivalence changes the legal and evidentiary significance of subsequent institutional conduct. Before a failure has been identified, a deficiency may be disputed, latent, unforeseen, or attributable to an unresolved question concerning institutional competence. Once a competent institution or official possesses an allegation or other information supplying reasonable grounds to believe that torture or CIDT may have occurred, may be continuing, or may recur, protective, preservative, and investigative duties arise without awaiting a formal or legally elaborated complaint. If subsequent inquiry demonstrates that a represented domestic mechanism failed to deliver a required treaty function, continued inaction, deliberate limitation, procedural obstruction, or unqualified repetition of the original equivalence representation acquires a different character. The issue is no longer only whether the original architecture was adequate when ratification occurred. It is whether institutions possessing lawful authority have knowingly permitted an identified protection, prevention, investigation, accountability, or remedial gap to continue.

A. Triggering standard and definition of institutional refusal

"Institutional refusal," as used in this Opinion, does not arise merely because an institution reaches an adverse result, rejects a particular legal argument, or declines to adopt the IAJ's analytical terminology. Nor, however, is institutional responsibility conditional upon the alleged victim's submission of a formal complaint, citation to the Convention, identification of the applicable domestic substitute, specification of the responsible institution, or presentation of a perfected legal claim.

The relevant threshold is functional and unburdensome. Duties of recognition, protection, preservation, documentation, investigation, and referral arise when a public institution or official receives an allegation, report, observation, record, medical or psychological indication, third-party communication, judicial statement, or other information that, considered individually or cumulatively, supplies reasonable grounds to believe that torture or other cruel, inhuman or degrading treatment or punishment may have occurred, may be continuing, or may recur. The information need not arrive through a designated complaint procedure. It may be informal, incomplete, indirect, imprecisely expressed, or communicated by a person whose ability to

[142] Committee Against Torture, Second Periodic Report of the United States of America, CAT/C/48/Add.3/Rev.1, paras. 87, 144–47 (13 Jan. 2006) (asserting extensive federal and state protection and defending the Article 16 reservation as compatible with the Convention's object and purpose). The existence of that stated position does not resolve whether the represented mechanisms performed as claimed.

[143] Vienna Convention on the Law of Treaties arts. 26–27, 31, May 23, 1969, 1155 U.N.T.S. 331. The United States has signed but not ratified the Vienna Convention; the provisions cited here are used to the extent they reflect customary rules accepted by the United States, with the status of each proposition separately stated.

report has been impaired by trauma, detention, disability, fear, coercion, dependence upon the alleged perpetrator, lack of counsel, or risk of retaliation.[144]

The trigger must be distinguished from the ultimate standard of proof. Reasonable grounds sufficient to require protective and investigative action are not a final adjudication that torture occurred, that a particular official possessed the requisite mental state, or that civil, criminal, disciplinary, or institutional liability has been established. The purpose of the investigation is to determine those questions. An institution therefore may not avoid investigation by demanding, as a precondition to investigation, the proof that a competent and independent investigation is supposed to obtain.

Once the triggering information exists, the institution must respond within the authority available to it. Depending upon its functions, that response includes recognizing and recording the allegation without distortion or premature reclassification; assessing immediate danger; protecting the alleged victim, complainants, witnesses, and family members from retaliation, intimidation, and renewed exposure to harm; safeguarding the integrity and confidentiality of relevant evidence; and preventing its alteration, concealment, destruction, or other interference; facilitating independent medical and psychological documentation where appropriate; preserving records and other evidence; initiating a prompt, effective, and impartial investigation; or transmitting the matter promptly to a genuinely competent and independent authority while maintaining sufficient follow-up to determine whether protection and investigation actually occurred. A referral that merely transfers the information into an institution implicated in the alleged conduct, or into a process lacking practical independence, accessibility, or protective capacity, does not by itself discharge these responsibilities.

The alleged victim bears no antecedent obligation to identify: (1) the precise treaty provision implicated; (2) the domestic mechanism previously represented as performing that obligation; (3) the technical manner in which that mechanism failed; (4) every resulting form of injury; or (5) the institution possessing ultimate corrective authority. Those are matters for institutional clarification, investigation, coordination, and reasoned disposition. Requiring a person alleging torture to perform that analysis before the State recognizes the allegation would convert an investigative safeguard into a pleading barrier and reproduce the very implementation gap under examination.[145]

"Institutional refusal" may therefore arise when, after the relevant trigger has been reached, an institution knowingly, deliberately, or through institutionally attributable disregard fails to undertake the protective, preservative, investigative, supervisory, adjudicative, prosecutorial, disciplinary, reporting, or referral measures reasonably available to it. Refusal may be express, but it need not be. It may consist of failing to record or transmit an informal report; fragmenting related facts so that no decision-maker confronts their cumulative significance; reclassifying a torture or CIDT allegation as an ordinary grievance without adequate inquiry; insisting upon a formal complaint when the institution already possesses reasonable grounds;

[144] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 12–13, 16; Office of the United Nations High Commissioner for Human Rights, Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. HR/P/PT/8/Rev.2 (2022).

[145] Encarnación Blanco Abad v. Spain, Comm. No. 59/1996, U.N. Doc. CAT/C/20/D/59/1996, ¶¶ 8.4–8.6 (May 14, 1998); Dhaou Belgacem Thabti v. Tunisia, Comm. No. 187/2001, U.N. Doc. CAT/C/31/D/187/2001, ¶¶ 10.4–10.6 (Nov. 14, 2003).

returning the person to the alleged perpetrator's control; failing to protect against retaliation; permitting evidence to disappear; assigning the investigation to a body lacking independence; invoking jurisdictional, remedial, immunity, or procedural barriers without addressing an independently existing duty to protect, investigate, preserve, report, or refer; or continuing to represent that domestic equivalence exists without reasonably examining demonstrated contrary evidence.

An adverse judicial or administrative decision is not, without more, institutional refusal. But the characterization of an act as "adjudication" does not immunize it from examination. A decision may participate in institutional refusal when the adjudicator possesses information reasonably indicating torture or CIDT yet uses pleading, jurisdictional, remedial, immunity, or non-self-execution rules to terminate the claim without preserving the allegation, addressing immediate risk, considering independently available domestic grounds, or referring the matter to an authority capable of conducting an independent investigation. The distinction is between a good-faith determination of questions properly before the institution and the use of a limited procedural ruling to suppress, erase, or leave institutionally unaddressed a credible allegation that separately activates protective and investigative responsibilities.

Only after those immediate responsibilities have been addressed should the institution conduct the more developed equivalence inquiry: what international duty was implicated; what domestic mechanism was represented or asserted as performing it; whether that mechanism was legally available and operationally effective in the particular circumstances; whether the failure was individual, recurrent, or systemic; which institution possesses corrective authority; and what residual international responsibility, reporting consequence, or need for legislation remains. These questions define the institution's work. They do not define the alleged victim's entry burden.

The absence of a Paris-Principles-accredited national human rights institution in the United States intensifies the danger of fragmentation. It does not extinguish or postpone the responsibilities of courts, prosecutors, inspectors general, correctional and detention authorities, law-enforcement supervisors, medical institutions, civil-rights bodies, legislatures, and executive agencies within their respective authority. Instead, that absence makes accurate recording, protective referral, institutional coordination, independent investigation, and public identification of unresolved responsibility especially important. No institution may treat the lack of a single national receiving body as permission to disregard information within its possession or to return the entire burden of routing the allegation to the alleged victim.

Accordingly, "post-notice" in this Opinion means the period after a competent public institution or official actually receives—or, through records, observations, reports, proceedings, or other information attributable to the institution, possesses—facts supplying reasonable grounds to believe that torture or CIDT may have occurred. It does not mean the period after a victim has successfully drafted and delivered a five-element legal memorandum. The former standard activates the State's responsibilities. The latter would impermissibly make protection and investigation depend upon the sophistication, resources, physical condition, and procedural fortune of the person whom those responsibilities exist to protect.

The consequences of such refusal must be assessed separately on the international and domestic planes. Failure of equivalence does not make UNCAT self-executing, create jurisdiction, imply a private cause of action, waive immunity, establish damages, or determine the elements of a domestic offense. Those limitations do not render post-notice conduct consequence-free. They require the tribunal or reviewing institution to identify the precise consequence that follows under each applicable source of law and to preserve the residual international responsibility that domestic law does not discharge.

B. International responsibility and continuing nonperformance

On the international plane, the obligation remains binding notwithstanding the failure or unavailability of the domestic mechanism selected to perform it. A State cannot convert its internal allocation of authority, its non-self-execution declaration, or the limitations of its judicial remedies into a justification for nonperformance. If the represented substitute does not deliver the prevention, investigation, protection, accountability, redress, rehabilitation, training, review, or non-repetition function required by the Convention, the relevant obligation remains unperformed.

The resulting breach may be continuing rather than confined to the original act. The initial torture or cruel, inhuman, or degrading treatment may be complete, while later failures to protect the victim, investigate promptly and impartially, preserve evidence, prevent retaliation, prosecute or submit the matter to competent authorities, provide an effective complaint mechanism, afford redress, or secure rehabilitation may constitute distinct and continuing failures. The international analysis must therefore separate the original prohibited conduct from the State's subsequent performance of each Convention duty.

Post-notice refusal strengthens attribution of responsibility at the institutional level. Once competent authorities know that the represented mechanism has failed, the State cannot continue to rely upon the existence of that mechanism in the abstract while disregarding its demonstrated failure in operation. The duty is not discharged by naming a constitutional provision, statute, administrative process, common-law action, or institutional office. The relevant question is whether the mechanism actually delivered the required function to the protected person and, if it did not, whether the State acted with due diligence to prevent continuation, investigate the failure, protect the victim, and complete performance through another competent route.

International responsibility does not depend upon establishing a domestic private cause of action against every responsible official. State responsibility and individual domestic liability are separate questions. A domestic barrier may prevent a particular judgment against a particular defendant while leaving the United States internationally responsible for the unperformed obligation and responsible for providing another effective means of performance.

The required consequence on Plane A is therefore explicit: the failed duty must remain recorded as unperformed; the resulting injury and risk must be assessed; the competent institutions must be identified; and the State must pursue cessation, protection, investigation, accountability, redress, rehabilitation, and guarantees of non-repetition as applicable. A domestic dismissal does not close the international compliance record.

C. Evidentiary consequences: knowledge, acquiescence, consent, and continued nonperformance

Post-notice institutional conduct is also evidence. The probative inference depends upon the nature, reliability, and cumulative significance of the information attributable to the institution; the institution's authority; the foreseeability of continued harm; the feasibility of lawful protective action; the reasons given for inaction; and the institution's subsequent treatment of the evidence and victim. This later evidentiary assessment must not be confused with the lower, unburdensome threshold that activates protection, preservation, documentation, investigation, and referral.

A sufficiently developed record may support findings of actual knowledge, deliberate indifference, knowing tolerance, conscious nonperformance, ratification of subordinate conduct, failure to intervene, or purposeful obstruction. The inference becomes stronger where the institution: repeatedly receives the same evidence; controls access to the mechanism or evidence needed for relief; refuses to investigate despite reasonable grounds; protects the alleged perpetrators from scrutiny; imposes retaliatory or medically dangerous procedures upon the complainant; mischaracterizes the complaint to avoid the governing duty; or continues to report that equivalent protection exists without examining documented failures.

The terms "consent" and "acquiescence" must not be used as rhetorical substitutes for proof. Under the United States' UNCAT understanding, acquiescence requires that a public official have prior awareness of the activity constituting torture and thereafter breach the official's legal responsibility to intervene to prevent it. Other international materials may describe the required knowledge or due-diligence responsibility differently. The decision-maker must identify the governing formulation and apply its elements to the particular official, institution, conduct, time, and duty.

For these later attribution and liability determinations, actual knowledge may be established by direct notice, official records, medical evidence, prior complaints, judicial filings, investigative reports, recurring patterns, public findings, or circumstances from which the relevant official could not reasonably remain unaware. This is not the threshold for commencing protection or investigation. A legal responsibility to intervene may arise from constitutional, statutory, regulatory, supervisory, professional, custodial, prosecutorial, judicial, or treaty-implementation authority. The availability of an effective intervention must be determined rather than presumed.

Where officials possessing the requisite awareness and responsibility deliberately leave the victim exposed to the prohibited conduct, prevent access to protection, suppress or falsify the material record, or use institutional authority to perpetuate the conditions producing the harm, the evidence may support acquiescence, consent, participation, facilitation, or another applicable form of responsibility. No such conclusion follows automatically from an adverse ruling or remedial failure. It follows from proof of the applicable mental state, duty, authority, conduct, and causal relationship.

The IAJ's finding of "knowing continued nonperformance" is an institutional compliance finding. It does not automatically establish the *mens rea* of a domestic crime or the personal liability of every officer associated with the institution. It establishes that the documented failure can no longer be classified merely as an unknown or unforeseen defect and that competent authorities must investigate individual responsibility under the applicable legal standards.

D. Victim-centered consequences and institutional perpetuation of harm

The consequences must also be evaluated from the position of the victim. Torture and CIDT operate through pain, fear, coercion, dependency, discrimination, isolation, humiliation, and powerlessness. A remedial system that requires the victim to return repeatedly to institutions associated with the original harm, reconstruct an integrated treaty wrong as numerous narrower domestic claims, overcome inaccessible procedures, confront alleged perpetrators without protection, and endure disbelief, hostility, retaliation, or deliberate delay may reproduce those same conditions.

The inquiry is not limited to emotional discomfort associated with litigation. It must examine reasonably foreseeable physical, psychological, neurological, medical, social, financial, and evidentiary harm. Relevant consequences include retraumatization; recurrence or aggravation of illness; interruption of treatment or rehabilitation; loss of housing, family, liberty, livelihood, or safety; destruction or deterioration of evidence; forced exposure to the alleged perpetrators; stigmatization; retaliatory proceedings; exhaustion of the victim's physical or cognitive capacity; and the progressive foreclosure of meaningful redress.

The State must not make protection dependent upon a torture victim successfully navigating mechanisms whose complexity, delay, hostility, or inaccessibility aggravates the very impairments caused by the prohibited conduct. Nor may an institution treat disability, trauma, incapacity, poverty, custody, fear of retaliation, or inability to satisfy procedures made inaccessible by the State as evidence that no violation occurred or that protection is unnecessary.

A domestic proceeding can therefore become part of the continuing course of harm. That conclusion requires evidence, including: institutional awareness—actual or otherwise cognizable under the governing law—of the victim's condition and risk; institutional control over the procedure or protective mechanism; foreseeability of aggravation; availability of reasonable protective or accommodating measures; failure or refusal to employ those measures; and a causal contribution to continuing or increased injury. Where those elements are present, the proceeding must be investigated not merely as an ineffective remedy but as possible institutional participation in, acquiescence in, or perpetuation of the prohibited treatment.

The proper response is immediate prevention and protection, not postponement until final adjudication of every disputed issue. Protective measures may include separation from alleged perpetrators, preservation and disclosure of evidence, independent medical and psychological evaluation, reasonable accommodation, confidentiality, protection against retaliation, suspension of dangerous procedures, independent investigation, access to counsel or assistance, and referral to an institution capable of providing effective relief.

E. Domestic responsibility and liability consequences

Plane B remains source-specific. International responsibility, treaty classification, and an IAJ finding do not automatically satisfy the elements of a domestic constitutional claim, statutory cause of action, crime, professional violation, or tort. Each consequence must be connected to an existing domestic source, jurisdictional basis, vehicle, defendant, mental-state requirement, defense, and remedy.

Post-notice conduct may nevertheless be materially relevant to domestic responsibility. Depending upon the governing law and facts, it may establish or support proof of knowledge, intent, deliberate indifference, recklessness, causation, continuing violation, failure to intervene, supervisory responsibility, ratification, conspiracy, joint action, retaliation, obstruction, evidence suppression, discriminatory purpose, denial of reasonable accommodation, or the need for prospective relief. It may also establish a new act, injury, accrual date, continuing risk, or independent violation distinct from the original conduct.

The domestic analysis must identify who possessed which authority at which time. Legislative responsibility differs from executive responsibility; prosecutorial discretion differs from a custodial duty to protect; judicial adjudication differs from administrative implementation; and institutional State responsibility differs from personal civil or criminal liability. Collective descriptions such as “the government” or “the courts” cannot substitute for attribution where individual liability is alleged. Conversely, the absence of personal liability against one official does not establish that the institution or State performed the underlying obligation.

Where the evidence supplies reasonable grounds to believe that domestic offenses, professional violations, disciplinary breaches, obstruction, retaliation, evidence alteration, or failure-to-protect duties may be implicated, the appropriate consequence is investigation by an independent competent authority. The equivalence inquiry does not adjudicate guilt without process. It identifies facts and gaps that must not be suppressed merely because the treaty itself does not create the domestic prosecution or civil action.

A court that lacks authority to award a requested remedy should state that limitation accurately. It should not convert absence of jurisdiction, cause of action, Bivens remedy, immunity waiver, or available damages into a merits finding that the conduct was lawful, that no torture or CIDT occurred, that domestic protection was equivalent, or that no other institution bears responsibility.

F. Immunity, remedial foreclosure, and the prohibition against false equivalence

Immunity requires particular care. Under existing United States doctrine, an allegation or even proof of torture, CIDT, or treaty nonperformance does not automatically displace sovereign, judicial, prosecutorial, qualified, official, or foreign-official immunity. Jus cogens status likewise does not, without additional authority, automatically create domestic jurisdiction, a cause of action, an immunity waiver, or a damages remedy. Contrary authorities must be recorded and applied according to their actual scope on Plane B.

But immunity decides a protected defendant’s amenability to a particular proceeding or remedy; it does not determine whether the underlying conduct was lawful, whether the United States performed UNCAT, whether the victim received equivalent protection, or whether other institutions remain competent to act. An immunity ruling cannot be counted simultaneously as the domestic substitute and as proof that the substitute performed the treaty obligation.

Where immunity forecloses the mechanism identified at ratification—such as damages against a responsible official—the foreclosure is affirmative evidence in the equivalence assessment. The evaluator must determine whether another mechanism supplies the same required function and outcome. A disciplinary process is not compensation; an administrative grievance is not necessarily an independent investigation; prospective relief is not redress for completed injury; and an inaccessible theoretical cause of action is not an effective remedy. Different mechanisms may collectively perform the obligation, but equivalence must be demonstrated rather than assumed.

The IAJ adopts the institutional position that proven torture and qualifying CIDT should not be insulated from required accountability and redress by immunity or prescription. That position does not misstate contrary domestic holdings or direct a lower court to disregard controlling authority. It requires the domestic consequence to be recorded accurately and the residual gap to be routed to institutions capable of changing the law, compensating the victim, disciplining or prosecuting responsible persons where authorized, providing prospective protection, or otherwise completing performance.

Post-notice reliance on immunity may itself have additional evidentiary significance where officials use the doctrine not merely as a defense in a defined proceeding but as a means to suppress investigation, destroy evidence, retaliate against complainants, prevent prospective protection, or represent that no wrong occurred. Immunity from one remedy is not authority to continue, conceal, authorize, consent to, or acquiesce in prohibited conduct.

G. Recording, reporting, referral, correction, and continuing review

Every post-notice refusal must produce a reviewable record. Using the complete equivalence protocol and residual-gap determination, the institution should identify: the duty that failed; the represented substitute and manner of failure; the persons and conduct affected; whether the failure is individual, recurring, class-wide, or systemic; the continuing harm and risk; the institution or institutions possessing corrective authority; the domestic barriers encountered; the residual international responsibility; and the action required to complete performance.

The record must distinguish adjudicative conclusions from compliance findings. A tribunal may conclude that it lacks jurisdiction, that no private cause of action exists, that a defendant is immune from damages, or that a claim is procedurally barred. The compliance record must separately state whether the underlying obligation was performed, whether another effective mechanism exists, what outcome remains unavailable, and which institution must receive the unresolved matter. Domestic finality concerning one proceeding does not create factual or institutional finality concerning treaty performance.

The triggering information and resulting findings should be routed according to competence. Depending upon the failure, appropriate recipients may include legislative bodies, executive agencies, inspectors general, prosecutors, professional and judicial disciplinary bodies, custodial or supervisory authorities, civil-rights offices, disability-rights officials, treaty-reporting authorities, independent investigative mechanisms, national human-rights institutions, civil-society monitoring bodies, United Nations treaty bodies, or Special Procedures. Routing is not a substitute for action by the institution already possessing preventive authority; nor may referral be used to abandon responsibility.

The victim must be informed, protected, and enabled to participate without bearing the State's entire implementation burden. Records and evidence should be preserved; material evidence should be made accessible subject to lawful protections; confidentiality and informed consent should be respected; retaliation should be prevented; and necessary medical, psychological, rehabilitative, legal, and accommodation support should not be conditioned upon successful completion of prolonged litigation.

Reporting must continue until the gap is cured or accurately classified as unresolved. A State report that repeats the existence of a constitutional provision, statute, grievance procedure, or cause of action without disclosing demonstrated barriers, exclusions, failures, and materially affected classes does not provide an adequate account of performance. Post-notice omission of known contrary evidence may itself support an inference of knowing misrepresentation or continued nonperformance.

An NHRI applying the Paris Principles should report these findings directly. Its function is not limited to repeating governmental positions or awaiting a final judicial recognition of every institutional defect. It must identify violations and systemic risks, assess harmonization of national law and practice with international obligations, recommend corrective measures, contribute independently to treaty reporting, protect the integrity of the evidentiary record, and monitor implementation. Where the evidence supports a serious inference of knowing continued nonperformance, the institution should state that finding without apology, while publishing the evidentiary predicates, the governing standards, the responsible institutional functions, the limits of the finding, and the measures capable of rebutting or curing it.

The final consequence is therefore neither automatic treaty enforcement nor consequence-free dismissal. It is disciplined allocation of responsibility. The domestic decision must state what it lawfully decides; the international record must preserve what remains unperformed; competent institutions must receive and act upon the residual gap; the victim must be protected against continuation and institutional aggravation of the harm; and the adequacy of the response must remain subject to independent review.

PART IX. APPLICATION TO MAJOR UNITED STATES HUMAN-RIGHTS TREATIES

9.01 Convention against Torture

For UNCAT, the analysis begins with the deposited RUDs and then separates the Convention duties: prevention; criminalization of attempt, complicity, and participation; jurisdiction; prompt and impartial investigation; submission for prosecution; complainant protection; exclusion of torture-derived statements; redress; prevention of CIDT; and non-refoulement. A conclusion that the Convention supplies no direct private action does not determine whether federal civil-rights statutes, 18 U.S.C. §§ 2340–2340A, state crimes, state torts, immigration statutes and regulations, habeas, administrative review, professional discipline, or other enacted mechanisms perform the duty.[146]

The analysis must accept negative answers. Section 2340A principally addresses torture outside the United States and is not a universal domestic master statute. Civil-rights crimes have their own elements and federal

[146] Convention against Torture arts. 2, 4–7, 10–16; United States Instrument of Ratification, deposited 21 Oct. 1994; 18 U.S.C. §§ 241, 242, 2, 2340–2340A; 8 C.F.R. §§ 1208.16–1208.18. The federal criminal provisions are cited only according to their enacted elements and jurisdictional limits.

bases. Private parties ordinarily cannot compel prosecution. *Bivens* doctrine is sharply restricted. Sovereign and judicial immunities may foreclose damages. Those barriers may establish non-equivalence for a particular function; they must not be relabeled as proof that the represented architecture operates.

9.01A Article 14 equivalence ledger

The ratification record did not rely on "domestic law" in the abstract. In explaining existing avenues of civil redress for Article 14, the record identified four principal categories: common-law tort actions; federal civil-rights remedies collected at 42 U.S.C. §§ 1981–1992; the damages action then represented by Bivens and Carlson; and Federal Tort Claims Act jurisdiction and liability under 28 U.S.C. §§ 1346(b) and 2674. (S. Exec. Rep. No. 101-30, at 24 (1990).) The test proposed by this Opinion therefore begins with those named mechanisms. It asks what each mechanism covered at ratification, what it covers now, what claimant and defendant it reaches, which treaty duty it performs, and whether the combined architecture remains equivalent in operation.

The same record's immunity discussion must be characterized precisely. The Executive stated that criminal immunities were not explicitly discussed during negotiation and argued that Article 7(2) implicitly recognized their continued operation; at Article 14, it relied on the absence of legislative-history evidence that the provision was intended to affect immunities. Those are interpretive arguments from implication and silence, not evidence that the Convention's negotiators expressly bargained for an immunity exception. The IAJ records the United States' position as contrary ratification material and tests its operation against the peremptory and non-derogable floor stated at 8.08.[147]

Common-law tort. Assault, battery, false imprisonment, intentional infliction of emotional distress, negligence, and related state causes of action may provide compensation in some cases. They are not a unitary federal Article 14 mechanism. Their reach varies by jurisdiction, actor, limitation period, notice rule, immunity, preemption, scope-of-employment determination, and available defendant. For federal employees, Westfall Act certification can substitute the United States and eliminate personal common-law liability; the claimant must then satisfy the FTCA and its exceptions. The mechanism must therefore be tested as applied, not counted merely because a familiar tort label exists. See 28 U.S.C. § 2679(b)–(d); *Saleh*, 848 F.3d at 889–902.

Federal civil-rights statutes. Sections 1983, 1985, 1986, and related provisions can supply powerful remedies within their enacted fields, but they are not interchangeable. Section 1983 addresses action under color of state law, not a general damages action against federal officers. Sections 1985 and 1986 contain their own conspiracy, class-based, knowledge, power-to-prevent, and limitations requirements. Other provisions in the cited statutory range protect particular rights or classes. Equivalence exists only for the conduct, actor, duty, and remedy actually reached by the applicable statute.

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[147] S. Exec. Rep. No. 101-30, at 21–22, 24 (1990). The report states that criminal immunities were not explicitly discussed in negotiation, infers recognition from Article 7(2), and records no legislative-history indication that Article 14 was intended to affect immunities.

Bivens and Carlson. *Carlson v. Green* remains one of the three inherited Supreme Court contexts in which a damages action against federal officers has been recognized. But *Ziglar v. Abbasi* and *Egbert v. Boule* made recognition of a new context a disfavored judicial activity, and *Goldey v. Fields* held that an Eighth Amendment excessive-force claim presented a new context outside *Carlson*'s inadequate-medical-care setting. The governing question is whether the proposed claim differs meaningfully from the inherited contexts—not whether the alleged facts are sufficiently grave to constitute torture. This means that *Carlson* survives in its own context while the represented federal-officer remedy has been narrowed, substituted, or barred at decisive points for many other claims. See *Ziglar*, 582 U.S. at 135–40; *Egbert*, 596 U.S. at 490–98; *Goldey*, 606 U.S. at 942–45.

The Goldey double closure. *Goldey v. Fields* exposes the difference between an abstract constitutional prohibition and an equivalent remedy. A federal prisoner alleging physical abuse by federal prison officials may be unable to invoke UNCAT directly because of the non-self-execution declaration. The prisoner is therefore directed to domestic constitutional law and may plead that the same conduct violated the Eighth Amendment. Yet *Goldey* holds that Eighth Amendment excessive force presents a new *Bivens* context for which the judiciary will not imply a damages action. Congress has enacted no general substitute federal-officer damages cause of action, and the administrative alternatives relied upon to foreclose *Bivens* need not be as effective as an individual damages remedy. The claimant may therefore possess a substantive constitutional protection while lacking the compensation mechanism represented as part of Article 14 implementation. This is not proof that UNCAT becomes self-executing or that no remedy could exist on different facts. It is a demonstrated anatomy of potential non-equivalence: direct treaty enforcement is closed, the identified domestic right remains abstract, the damages vehicle is withheld, and an admittedly less-effective procedure is treated as sufficient to prevent recognition of the missing remedy.

Federal Tort Claims Act. The FTCA can furnish a remedy against the United States for specified torts governed by state law, subject to exhaustion, substitution, exceptions, and other jurisdictional conditions. It does not impose personal accountability on the responsible officer. The intentional-tort exception and law-enforcement proviso, discretionary-function exception, foreign-country exception, scope certification, choice of state law, and the kind of relief available must be tested against the particular Article 14 claim. See 28 U.S.C. §§ 1346(b), 2674–2675, 2679, 2680(a), (h), (k).

Combined finding. No single contraction proves total national non-equivalence, and formal survival of one mechanism does not prove equivalence. The corpus finding is more exact: every named mechanism has since been **narrowed, substituted, or barred at its decisive point** for material classes of claims. The resulting system must be evaluated as a whole, duty by duty and claimant by claimant. If one mechanism closes but another supplies the same legal reach, institutional operation, timely protection, and accessible redress, equivalence may remain. If the mechanisms operate sequentially to substitute away the responsible person, foreclose the forum, or leave the claimant without the required outcome, the resulting procedural attrition is the equivalence failure. See *UNCAT and jus cogens*, chs. 17, 18.H.

The ratification representation and the Committee against Torture's later call for a conforming federal offense are read conjunctively. Existing law must be tested and used for conduct it already covered. Prospective legislation may clarify, concentrate, coordinate, track, and complete the architecture. For previously uncovered conduct, fair-warning and ex post facto limits remain absolute domestic constraints; the shortfall is a Plane A equivalence failure, not authority to invent a retroactive crime. See CAT/C/USA/CO/3-5 (2014); U.S. Const. art. I, § 9, cl. 3.

9.01AA The Committee against Torture's 2014 observations as operational corroboration

The Committee's 2014 concluding observations are not a domestic judgment and do not themselves employ the ratification-record test formulated in Part VIII. They are, however, authoritative treaty-body interpretation and powerful external evidence about whether the represented domestic architecture performs in practice. The Committee regretted that no specific federal offense of torture in full conformity with Article 1 had been introduced; found that the "prolonged mental harm" understanding creates actual or potential loopholes for impunity; described the Article 16 reservation's use in Office of Legal Counsel memoranda advancing deeply flawed arguments by which techniques amounting to torture could be authorized; and expressed concern over the absence of prosecutions and destruction-of-evidence accountability arising from the CIA detention and interrogation program. It recommended a conforming federal offense, reintroduction of the Law Enforcement Torture Prevention Act, reconsideration of the interpretive understandings and reservations, and withdrawal of the Article 16 reservation.[148]

The State's sixth periodic report, submitted in 2021, did not accept those central recommendations. It maintained that all acts of torture are already punishable under United States law and expressly maintained the RUDs.[149] The present record therefore supports a precise conclusion: the Committee documented material failures and gaps in the very fields—criminalization, interpretation, investigation, prosecution, and redress—that the United States had represented as domestically performed, while the United States continued to assert the sufficiency of its architecture. The Committee did not adjudicate the IAJ's equivalence-representation condition. The IAJ applies the condition to those authoritative observations and finds that they materially corroborate, rather than independently decide, the operational failure examined here.

[148] Committee against Torture, Concluding observations on the combined third to fifth periodic reports of the United States of America, U.N. Doc. CAT/C/USA/CO/3-5, paras. 9–12 (2014). The statement that these observations corroborate failure of the equivalence representation is the IAJ's application of the observations; it is not language attributed to the Committee.

[149] United States, Sixth periodic report submitted under article 19 of the Convention, U.N. Doc. CAT/C/USA/6, paras. 1–3, 8 (received 24 Sept. 2021; distributed 5 Apr. 2022). Paragraph 8 states the United States' continuing positions on domestic criminal coverage and its RUDs. The report is the State Party's representation; it is not an independent finding of equivalence.

9.01B The ratification representation, duty by duty

The Article 14 ledger is one part of a larger representation. The Senate record, as preserved and source-verified in the controlling IAJ corpus, represented that existing constitutional protections and federal color-of-law statutes addressed conduct within Articles 2, 4, and 16; identified a confined extraterritorial criminal-jurisdiction gap under Articles 4 and 5; and described the civil-redress routes at Article 14. (S. Exec. Rep. No. 101-30, at 10, 18–20, 24 (1990); the deposited RUD terms control.) Those statements must be read with the deposited RUDs and tested against the distinct Convention duties. They are evidence of the architecture the United States said would perform the Convention, not conclusive proof that every element, actor, territory, procedure, and outcome was or remains equivalent.

Articles 2 and 16 — prevention and absolute prohibition. The Fifth, Eighth, and Fourteenth Amendments and 18 U.S.C. §§ 241 and 242 may prohibit or punish material classes of official abuse. Their existence does not by itself establish equivalence to a duty of effective prevention. The test must ask whether the relevant actor and conduct are reached; whether timely injunctive, custodial, administrative, supervisory, or other preventive means are available to this person; and whether immunity, standing, jurisdiction, or institutional practice makes prevention systemically impossible. The Article 16 reservation defines the international obligation accepted by reference to specified constitutional prohibitions, but it does not establish that every domestic remedy for enforcing those prohibitions is effective.

The constitutional comparator must therefore be tested by domain rather than reduced to a single Eighth Amendment formula. For convicted persons, the relevant branch includes Eighth Amendment doctrines governing unnecessary and wanton pain, medical indifference, force, and conditions. For pretrial detainees, persons subjected to coercive investigation, involuntarily confined persons, and others outside post-conviction punishment, the Fifth or Fourteenth Amendment may supply the relevant treatment standard. Section 2000dd independently supplies an enacted prohibition within its custody-or-control field. Equivalence requires identification of the applicable branch, actor, territorial and custodial reach, prevention mechanism, vehicle, and remedy; the existence of the composite phrase is evidence of the represented architecture, not proof that the architecture succeeds in a particular case.

Section 2000dd consequently operates as a natural experiment within the equivalence inquiry. Its nationality-neutral, extraterritorial, custody-or-control prohibition identifies defects that required express repair. The evaluator must compare that repair with what remained outside it: prevention before custody, conduct outside United States custody or physical control, independent investigation, complaint protection, prosecution, civil redress, review, accountability for prior violations, and the effects of jurisdictional and immunity barriers. The question is not whether Congress enacted something relevant; it is whether the resulting domestic system, taken as a whole and duty by duty, now produces the protection and outcomes represented at ratification.

Articles 4 and 5 — criminalization and jurisdiction. The record identified existing criminal law as sufficient for Article 4 except for torture outside United States jurisdiction, and identified Article 5 as the area requiring legislation. Section 2340A supplied that federal extraterritorial completion before deposit. See S. Exec. Rep. No. 101-30, at 19–20; Pub. L. No. 103-236, § 506 (1994). The representation therefore requires a granular concordance: completed torture, attempt, complicity and participation; public-official involvement; territorial and extraterritorial jurisdiction; available modes of liability; fair warning; and the institutions capable of investigation, referral, prosecution, and punishment. Section 2340A is a completion statute for the identified federal extraterritorial gap, not a domestic master statute whose narrower elements may be used to erase conduct already reached by other law.

Articles 12, 13, and 16 — investigation, complaint, and protection. A substantive prohibition is not an operational substitute for a prompt and impartial investigation, an accessible right to complain and have the case examined, or protection against ill-treatment and intimidation. Equivalence requires evidence that competent institutions receive and preserve allegations, act independently and promptly, protect complainants and witnesses, give reasons, coordinate across jurisdictional lines, and do not convert non-prosecution or procedural closure into a finding that no violation occurred.

Article 14 — redress and rehabilitation. The four represented categories are tested in the ledger at 9.01A. The relevant question is not whether one can still name common-law tort, civil-rights, *Bivens*, or FTCA doctrine. It is whether the combined system supplies enforceable redress, fair and adequate compensation, and the means for as full rehabilitation as possible to the claimant and conduct before the institution. The same duty-specific method must be applied to non-refoulement, exclusion of torture-derived statements, training, review, and non-repetition. A conclusion of equivalence for one function cannot be carried silently into another.

9.02 International Covenant on Civil and Political Rights

The ICCPR declaration prevents the Covenant, standing alone, from operating as a private federal cause of action under prevailing doctrine. It does not cancel the international obligation or answer whether constitutional, statutory, customary-law, defensive, or interpretive routes exist. Article 2's effective-remedy obligation and Article 50's federal-structure provision make the operation of represented substitutes material to international compliance.[150]

[150] International Covenant on Civil and Political Rights arts. 2, 50; United States declaration of non-self-execution, 138 Cong. Rec. 8068, 8071 (1992).

9.03 International Convention on the Elimination of All Forms of Racial Discrimination

ICERD presents a visible equivalence problem because its definition addresses racial distinctions having a prohibited purpose or effect, while major United States constitutional routes ordinarily require discriminatory purpose and statutory disparate-impact remedies depend on enacted text. A court cannot establish equivalence merely by naming the Equal Protection Clause or Title VI. It must identify the asserted treaty duty, the applicable RUD, the actor, effect, vehicle, proof rule, and available remedy.[151]

9.04 Vienna Convention on Consular Relations

The VCCR illustrates the need for treaty-specific analysis. *Medellín* did not decide whether Article 36 itself is self-executing or creates individual rights. Even after a court resolves those questions, it must separately analyze implementing rules, suppression or prejudice doctrine, procedural default, habeas limits, and any independent domestic ground. The equivalence test does not predetermine the remedy; it exposes whether any mechanism supplies the review and reconsideration owed.

PART X. DOMESTIC DECISION PROTOCOL

When non-self-execution is invoked as a material ground of decision, the IAJ proposes that the tribunal state the following matters expressly:

1. The exact claim, legal source, and requested relief, including whether the treaty is invoked as a cause of action, rule of decision, defense, interpretive aid, evidence of custom, or source of governmental duty.
2. The relevant treaty article, deposited RUD, implementing legislation, and controlling domestic precedent.
3. The precise proposition for which *Medellín* is cited and whether the case actually decided it.
4. The separate determinations concerning right, cause of action, jurisdiction, immunity, vehicle, remedy, and merits.
5. Any represented domestic substitute and its relationship to the particular treaty duty.
6. Presence, application to the claimant, systemic possibility, and the four analytical dimensions adopted by this Opinion.
7. Any independently alleged customary or peremptory norm and the lawful domestic vehicle, if any, through which it is presented.

[151] International Convention on the Elimination of All Forms of Racial Discrimination arts. 1–2; *Washington v. Davis*, 426 U.S. 229 (1976); *Alexander v. Sandoval*, 532 U.S. 275 (2001).

8. Any permissible treaty-consistent construction, with no rewriting of unambiguous domestic text.
9. The exact domestic barrier remaining after the available routes are analyzed.
10. The residual implementation gap and the institution competent to cure it.

Model disposition language:

The treaty provision does not, by itself, supply the asserted cause of action under controlling domestic doctrine. That conclusion does not determine whether the alleged conduct violates an independently applicable constitutional or statutory rule, whether the same prohibition exists in customary international law, or whether the United States has fulfilled its obligation through equivalent domestic mechanisms. The Court addresses those questions separately to the extent presented and within its jurisdiction.

PART XI. OBJECTIONS AND LIMITS

11.01 Binding-authority objection

Lower courts cannot add a rule contrary to *Medellín*. They can and must decide the claims actually presented. The opinion's treaty-specific analysis, its "by itself" formulation, and its express reservations do not authorize dismissal of independent constitutional, statutory, implementing-law, customary-law, or interpretive grounds. The broader equivalence protocol is candidly identified as an IAJ proposed extension. Where present doctrine forecloses relief, the court should state the boundary and the resulting compliance gap.

11.02 Separation of powers

The protocol does not authorize courts to appropriate legislative or executive power. It requires courts to apply enacted law, construe open text through accepted methods, respect controlling limits, and describe accurately what remains unperformed. Legislatures must create offenses and remedies where law is absent; executives must investigate, enforce, coordinate, report, and use their lawful preventive authority.

11.03 Jurisdiction, finality, abstention, and immunity

The Institute recognizes present domestic limits arising from Article III, successive *habeas* rules, *Rooker–Feldman*, *Younger* abstention, preclusion, sovereign immunity, official immunity, judicial immunity, and restrictions on implied causes of action. International invalidity does not itself erase those doctrines. Prospective relief under an enacted vehicle, including appropriately pleaded § 1983 relief under *Ex parte Young* principles, and direct Supreme Court review remain distinct from forbidden collateral review or retrospective damages.[152]

[152] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Younger v. Harris*, 401 U.S. 37 (1971); *Ex parte Young*, 209 U.S. 123 (1908); 28 U.S.C. § 1257.

11.04 Object and purpose

The United States has not ratified the Vienna Convention on the Law of Treaties but treats many of its provisions as reflecting customary rules. Good-faith performance, the rule against invoking internal law as justification for nonperformance, and interpretation in light of text, context, object, and purpose operate on the international plane to the extent they reflect custom. They do not, without more, supply a private domestic action. The exact conclusion is that the United States must perform, domestic institutions must employ every lawful means within their competence, and any remainder is a compliance defect requiring cure.

PART XII. INSTITUTIONAL FINDINGS AND RECOMMENDATIONS

12.01 Findings

1. *Medellín* answered a narrow question involving *Avena*, specified treaty instruments, Texas *habeas* procedure, and unilateral presidential implementation.
2. Footnote 12 transmitted lower-court descriptions of UNCAT and ICCPR non-self-execution without adjudicating those treaties.
3. The opinion identified three possible substitutes—Security Council recourse, congressional implementation, and executive action—but none was present, claimant-accessible, and systemically possible on the facts and reasoning the opinion itself records.
4. Non-self-execution allocates domestic means; it does not convert an obligation into permission for nonperformance.
5. A ratification-era representation of existing-law equivalence identifies an architecture that must be tested rather than presumed.
6. *The Paquete Habana* and *Sosa* preserve judicial engagement with customary international law through an appropriate jurisdictional and remedial vehicle; the later ATS cases restrict that particular vehicle rather than erasing the norm.
7. *Jus cogens* prevents normative erasure and excuse by internal law; it does not automatically create domestic jurisdiction, offenses, causes of action, immunity waivers, or retroactive punishment.
8. A complete analysis tests presence, claimant application, systemic possibility, legal reach, institutional operation, timely prevention, and individual accessibility, duty by duty.
9. The Article 16 reservation uses a composite constitutional comparator—Fifth-, Eighth-, and Fourteenth-Amendment protection against cruel, unusual, and inhumane treatment or punishment. Supreme Court doctrine recognizes inhumane governmental methods within Fifth Amendment

values and supplies distinct due-process and post-conviction branches; the composite phrase does not itself create a freestanding claim.

10. Section 2000dd demonstrates operational non-equivalence in a central custodial field: after failure and notice, Congress found express nationality-neutral and geographically unrestricted legislation necessary to supply protection previously represented as available. The enactment was a bounded cure and did not complete the preventive, investigative, accountability, and remedial duties implicated by UNCAT.

11. Where competent institutions possessed actual notice of operational failure, retained authority to correct or route identified gaps, and continued to rely upon the original equivalence representation while leaving material duties unresolved, the record supports a serious inference of knowing continued nonperformance.

12.02 Courts

Courts should require the party asserting equivalence to identify the domestic mechanisms and map them to the duty at issue; permit appropriate amendment where facts may be cognizable under an existing vehicle; avoid dicta declaring that a treaty, custom, or peremptory norm is “not law” when the holding concerns only enforcement or remedy; and state any residual gap without purporting to legislate.

Where the text of an enacted mechanism is genuinely susceptible of a construction under which the represented function is performed and a construction under which it is not, the choice between them is governed by canon rather than preference: an act of Congress ought never to be construed to violate the Law of Nations if any other possible construction remains (section 8.07). Within the canon's ordinary textual and constitutional predicates, the performing construction is not an indulgence to the claimant; it is the construction the interpretive rule selects, and its unexplained rejection is ordinary interpretive error, reviewable as such.

12.03 Legislatures and executives

The political branches should publish treaty-by-treaty implementation concordances; establish permanent federal–state equivalence review; identify executing institutions whenever a non-self-execution declaration is adopted; enact named offenses and civil remedies where fragmentation or jurisdiction makes protection ineffective; respect fair-warning limits; and require reasoned preservation and documentation of investigation and prosecution decisions involving credible allegations of torture or other peremptory violations.

A national human-rights institution is not confined to describing official positions. Under the Paris Principles, its responsibilities include reporting on any human-rights matter, drawing attention to violations, proposing corrective initiatives, promoting harmonization of national law and practice with international instruments, contributing independently to treaty reporting, and cooperating with international institutions.[153]

Those responsibilities require critical findings when the evidence supports them. An NHRI that found demonstrated operational non-equivalence, actual institutional notice, a bounded legislative cure, and identified residual duties could not discharge its mandate by repeating the original representation or by suppressing the inference that follows from continued inaction. It should state the finding plainly: the record supports a serious inference of knowing continued nonperformance. The discipline lies not in apologizing for the finding, but in publishing its evidentiary chain, identifying the responsible institutions and unresolved duties, distinguishing finding from allegation, permitting response, and correcting the record if contrary evidence warrants correction.

The United States has no Paris-Principles-accredited federal NHRI with a general mandate to perform this function. The IAJ does not claim governmental designation or accreditation. It performs an analogous independent civil-society investigation and reporting function and therefore states institutional findings according to their evidentiary support, including findings adverse to governmental institutions.[154]

12.04 Judicial education

Benchbooks should teach *Medellín*, *Sosa*, the later ATS cases, and *The Paquete Habana* together. *Medellín* supplies a domestic-effect and separation-of-powers boundary. *Sosa* supplies a cautious customary-law method within the ATS compartment. The later ATS cases constrain that vehicle. *The Paquete Habana* supplies the affirmative source method. Teaching only the negative sentence reproduces the incompleteness examined here.

Article 16 instruction should likewise resist an Eighth-Amendment-only shortcut. Benchbooks should distinguish the *Murphy* majority's recognition of inhumane treatment within Fifth Amendment values, the due-process lines represented by *Rochin*, *Bell*, and *Youngberg*, the post-conviction rule represented by *Estelle*, the holding/dissent boundary in *Ingraham*, and Congress's later enactment of the RUD-based composite definition in 42 U.S.C. § 2000dd.

Education should also distinguish statutory enactment from statutory sufficiency. Section 2000dd is evidence that express legislation became necessary after the represented architecture failed in a central field; it is not proof that the bounded enactment completed every Article 16 duty. Judicial and governmental training

[153] Principles Relating to the Status of National Institutions (The Paris Principles), G.A. Res. 48/134, annex, Competence and Responsibilities paras. 3(a)(iii), 3(b)–(d) (20 Dec. 1993) (directing national institutions to submit opinions, recommendations, proposals, and reports; promote harmonization of national law and practice with international instruments; encourage ratification and implementation; contribute to State reports; and cooperate with international institutions).

[154] The IAJ does not claim governmental designation or accreditation as the United States national human-rights institution. It applies the independence, investigation, reporting, and harmonization functions associated with the Paris Principles as a civil-society institution addressing the continuing absence of a United States NHRI.

should require separate findings on substantive prohibition, personal and territorial reach, prevention, investigation, accountability, remedy, and post-notice institutional conduct.

12.05 Method for classifying contrary decisions

A domestic decision inconsistent with an asserted international rule is relevant State practice, but it does not automatically narrow the rule. ILC Conclusion 8 requires practice to be sufficiently widespread, representative, and consistent. Its commentary, quoting the International Court of Justice's judgment in *Nicaragua*, states the controlling caution: instances of inconsistent State conduct should generally be treated as breaches of the rule rather than as recognition of a new rule, particularly where the State denies the violation or appeals to exceptions or justifications within the rule.[155]

The second limb of *Nicaragua* is affirmative and especially material here: when a State professes a rule while acting inconsistently with it, its reliance on the rule and on claimed exceptions or justifications **confirms rather than weakens** the rule. The United States has ratified the Convention, repeatedly affirmed the absolute prohibition, reported that domestic law implements it, and enacted § 2340A for the identified extraterritorial gap. Decisions and practices that fail to deliver the represented prevention, protection, remedy, relief, or punishment are therefore not evidence that the prohibition silently acquired an impunity exception. The profession of the rule is evidence for the rule; the inconsistent conduct is tested as performance or breach.[156]

The Institute applies that method to its divergence notices. It asks whether the decision is evidence of a genuinely different rule accepted as law, a lawful exception already contained within the rule, or a failure to give effect to the existing rule. One judgment, even a significant one, does not alone revise a peremptory norm. Nor does calling a decision a breach resolve its domestic precedential force: on Plane B, lower courts remain bound by controlling domestic authority; on Plane A, the decision is classified according to the international rule it applies or fails to apply. This method allows the Opinion to state domestic law truthfully without converting domestic foreclosure into normative permission.

[155] International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 8, commentary paras. 7–8, U.N. Doc. A/73/10 (2018), quoting *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14, para. 186. The conclusion requires practice to be sufficiently widespread, representative, and consistent; the breach-versus-new-rule formulation appears in the commentary, not in the text of Conclusion 8 itself.

[156] International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, Conclusion 8, commentary paras. 7–8, U.N. Doc. A/73/10 (2018), quoting *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14, para. 186. The conclusion requires practice to be sufficiently widespread, representative, and consistent; the breach-versus-new-rule formulation appears in the commentary, not in the text of Conclusion 8 itself.

PART XIII. DIVERGENCE NOTICES

The following notices identify authorities or practices that diverge from the IAJ's proposed completion method or institutional position. Each controlling holding is stated before the Institute's critique. "Divergence" is an IAJ evaluative classification; it does not negate the authority's legal force.

Divergence 1. *Medellín v. Texas*, in its generalized use: an analysis terminating at the determination of direct domestic effect; three concrete implementation possibilities that were not conditions of the holding but that the opinion itself eliminated as available mechanisms on the record before it; and no treatment of the broader domestic-equivalence inquiry proposed by this Opinion, reservation practice generally, object and purpose, or peremptory norms.

Divergence 2. The propagation of footnote 12 of the opinion of the Court as though it were a holding on the domestic status of the Convention against Torture.

Divergence 3. The current judicial use of *Sosa v. Alvarez-Machain*, for the reasons at Part VI.

Divergence 4. *Saleh v. Bush*, 848 F.3d 880, 889–902 (9th Cir. 2017), involved ATS and common-law claims alleging aggression, not torture or CIDT. The panel assumed without deciding that aggression was *jus cogens*, applied the Westfall Act, substituted the United States, and affirmed dismissal for failure to exhaust the resulting FTCA claim. Saleh rejected a jus-cogens exception in that claim context; it did not adjudicate UNCAT or criminal immunity.[157]

Saleh exposes a structural risk: covered tort claims alleging grave international wrongs may be converted through scope certification and substitution into FTCA claims that later fail. That risk is significant but not literally limitless; claim type, statutory exceptions, scope review, sovereign exceptions, and noncivil consequences remain distinct.[158]

Siderman and *Saleh* show that domestic immunity rules may be applied notwithstanding an alleged *jus-cogens* violation. Their holdings must be assessed in their actual State/official, civil, statutory, and procedural contexts; they do not establish universal immunity or universal impunity.[159]

The Institute records *Saleh* as contrary to its Plane A reform position while acknowledging its binding force within its jurisdiction and claim context. The sequence of scope determination, substitution, and dismissal supports an equivalence-gap inquiry; it does not prove that every route is foreclosed.

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[157] *Saleh v. Bush*, 848 F.3d 880, 901–02 (9th Cir. 2017), relying on *Siderman de Blake v. Argentina*, 965 F.2d 699, 718–19 (9th Cir. 1992). The panel assumed without deciding that the prohibition of aggression was jus cogens, held that Congress could provide domestic-

[158] *UNCAT and jus cogens: A contemporary perspective*, ch. 18.G; Judgment of the International Military Tribunal, 1 Oct. 1946, reprinted in 22 *Trial of the Major War Criminals Before the International Military Tribunal* 411, 426 (1948) (describing aggressive war as the "supreme international crime").

[159] *Saleh v. Bush*, 848 F.3d 880, 901–02 (9th Cir. 2017), relying on *Siderman de Blake v. Argentina*, 965 F.2d 699, 718–19 (9th Cir. 1992). The panel assumed without deciding that the prohibition of aggression was jus cogens, held that Congress could provide domestic-

Divergence 5. Jurisdictional Immunities of the State (*Germany v. Italy: Greece intervening*), Judgment, 2012 I.C.J. Rep. 99. The Court held that State immunity was not displaced by the *jus cogens* character of the substantive norms alleged. The judgment is central contrary authority. The IAJ criticizes its separation of substance and procedure but does not omit or re-label the holding.

Divergence 6. *Jones and Others v. United Kingdom*, Apps. Nos. 34356/06 & 40528/06, Judgment (ECtHR, 14 Jan. 2014). The Court found no Article 6 violation in applying Saudi State and official immunity to civil torture claims. The IAJ records *Jones* as contrary authority and distinguishes civil from criminal responsibility.

Divergence 7. *Stump v. Sparkman* and *Mireles v. Waco* establish broad civil damages immunity for judicial acts, subject to the nonjudicial-act and clear-absence-of-jurisdiction exceptions. Immunity does not declare conduct lawful and does not itself create criminal immunity or foreclose every appellate, disciplinary, prospective, or institutional route.

PART XIV. CONCLUSIONS OF THE IAJ

Epistemic status of the conclusions. The conclusions below are IAJ institutional positions drawn from doctrinal analysis, the ratification record, and the documentary review set out above. They are not findings by a court, treaty body, or governmental authority. They distinguish settled domestic law, authoritative treaty instrument, proposed doctrinal extension, anticipated domestic resistance, and the IAJ's assessment of equivalence. The General Comment on IAJ Advisory Opinions, incorporated by reference, governs their institutional weight.

Governing synthesis. *Medellín* establishes a boundary on direct domestic enforcement; it is not an instrument for normative erasure. A non-self-execution determination does not itself decide independently pleaded domestic grounds, lawful interpretive uses, or whether the mechanisms represented as performing the obligation actually operate. For UNCAT, equivalence rests on the integrated ratification, pre-deposit implementation, deposit, and reporting sequence. Failure does not create direct treaty enforcement. It requires mechanism-specific adjudication within existing domestic authority, precise identification of the residual compliance gap, and response by the institutions competent to complete performance.

14.01 Scope of Medellín

Medellín v. Texas decided two questions concerning three named instruments and one executive act. Its ratio is bounded accordingly, and within that boundary the decision stands as a determination about those instruments.

Appendix B states the corresponding safe disposition and the limiting language that would have prevented the bounded ratio from becoming a generalized terminal formula.

14.02 Independent domestic grounds

Medellín does not support disposing of independent domestic grounds solely because the treaty itself is non-self-executing. The broader disposal formula requires separate authority resolving the claim, jurisdiction, vehicle, immunity, and remedy questions.

14.03 Domestic-equivalence completion

The analysis the decision leaves incomplete is the test of domestic equivalence stated at Part VIII. The Institute adopts that test as the necessary completion of non-self-execution analysis. It is an IAJ institutional doctrinal development, not represented as a holding already adopted by the Supreme Court.

14.04 Routing, not content

A declaration of non-self-execution is an instrument of routing and not of content.[160] It does not reduce the obligation on the international plane, and internal law furnishes no justification for non-performance.

14.05 Testable equivalence representation

A ratification representation that existing law supplied equivalent protection is testable as an international-compliance premise. Failure in operation does not make the treaty self-executing or create a domestic cause; it establishes a compliance gap requiring accurate documentation and competent institutional response.

14.05A Consignment and custodianship

The representation consigned performance to an identified domestic architecture and made the competent institutions custodians of that performance within their lawful powers. Where the consignment fails the present, applied, and systemically-possible test, responsibility to complete performance remains with, or returns to, those institutions; the failed route does not extinguish the obligation.

[160] The routing construction has independent scholarly support, recorded here as scholarly positions and not as adopted authority. David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 Yale J. Int'l L. 129 (1999) (construing the declarations to preclude a private right of action while leaving other judicial applications available); Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 Yale J. Int'l L. 51, 76–77 (2012) (indirect, defensive, and interpretive enforcement); Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 Chi.-Kent L. Rev. 515 (1991); Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695 (1995). The Congressional Research Service itself records the narrow construction, *International Law and Agreements: Their Effect upon U.S. Law* (CRS Rep. RL32528). The spectrum is recorded, not adopted: the position that the declarations are invalid (e.g., Jordan J. Paust, *Avoiding "Fraudulent" Executive Policy*, 42 DePaul L. Rev. 1257 (1993)) is a position this Opinion does not take. David L. Sloss, *Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 Harv. Int'l L.J. 135 (2012) (the self-execution inquiry comprises two distinct questions — what the treaty obligates the United States to do, a question of international law, and which domestic actors are responsible for implementation, a question of domestic law); Carlos Manuel Vázquez, *Chief Justices Marshall and Roberts and the Non-Self-Execution of Treaties*, 53 Harv. Int'l L.J. Online (2012) (agreeing that the two-step approach is generally correct); David L. Sloss, *The Death of Treaty Supremacy: An Invisible Constitutional Change* (Oxford Univ. Press 2016) (documenting the post-1945 de facto transformation by which self-execution doctrine was merged into, and displaced, the original treaty-supremacy rule).

14.05B UNCAT sequence and the IAJ position

For UNCAT, the integrated sequence was Executive representation that existing federal and state law covered most domestic obligations; Senate advice and consent on that premise subject to the RUDs; congressional pre-deposit enactment of 18 U.S.C. §§ 2340–2340A to fill the identified Article 5 extraterritorial jurisdiction gaps; Executive deposit; and continuing Executive reporting of the domestic-implementation position. Equivalence is therefore the represented premise and execution architecture supporting non-self-execution, not express language of a condition subsequent in Declaration III(1) and not an inference drawn from that declaration alone. The Institute separately proposes that proven torture and qualifying CIDT should not be defeated by immunity or prescription; that consequence is an IAJ position, not settled universal domestic law.

14.05C The Article 16 composite constitutional comparator

The Article 16 reservation does not merely substitute the Eighth Amendment's words for the treaty phrase. It identifies the "cruel, unusual and inhumane treatment or punishment" prohibited collectively by the Fifth, Eighth, and Fourteenth Amendments. *Murphy* supplies majority-opinion recognition of inhumane treatment within Fifth Amendment values; due-process and Eighth Amendment precedents supply distinct operative domains; *Ingraham* limits the Eighth Amendment's domain while its broader language remains dissenting; and 42 U.S.C. § 2000dd later adopts the composite formulation as positive statutory law. This synthesis strengthens the represented-equivalence inquiry but does not create a constitutional claim, jurisdiction, vehicle, immunity waiver, or remedy where domestic law supplies none.

14.05D The Detainee Treatment Act and knowing continued nonperformance

The *Detainee Treatment Act* materially changes the evidentiary assessment of the equivalence representation. Enacted after disclosed abuse, conflicting standards, asserted protection gaps, and international condemnation, § 2000dd supplied an express prohibition for every individual in United States custody or physical control regardless of nationality or location. The Act demonstrates that the earlier architecture had failed operationally in that central field and that additional legislation was required to provide coverage previously represented as available.

The enactment did not complete UNCAT implementation. Its limited field and absence of comprehensive preventive, investigative, prosecutorial, remedial, jurisdictional, and accountability machinery leave a residual equivalence inquiry. Once the political branches possessed actual notice of demonstrated failure, a bounded cure could not preserve the original representation as an unqualified description of domestic performance. Continued reliance on that representation while identified gaps remained uncorrected supports the IAJ's serious finding of knowing continued nonperformance. That finding is tied to objective predicates—notice, competence, unresolved duty, capacity to correct or route, and continued omission—and is reported as part of the independent human-rights function that a United States NHRI should perform.

14.06 Instrument, custom, and lawful vehicles

The deposited Instrument defines the undertaking and directs attention to domestic law but does not establish a constitutional claim or remedy. *The Paquete Habana* supplies a customary-law ascertainment method, and Restatement (Third) § 702 supplies persuasive evidence; both require an appropriate jurisdictional and remedial vehicle.

14.07 Sosa and the Alien Tort Statute

Sosa v. Alvarez-Machain leaves a narrow ATS door open subject to vigilant door-keeping, reaffirms *The Paquete Habana* and *The Nereide*, and supplies strong support for the inference that sufficiently defined official torture is paradigmatic of a specific and accepted norm. *Kiobel*, *Jesner*, and *Nestlé* restrict the ATS vehicle; none makes non-self-execution a universal bar to other lawful uses of international law.

14.08 Article VI and the founding record

The founding record strongly supports reading Article VI as a response to state obstruction and national nonperformance. It does not establish that every international obligation automatically supplies an individual judicial cause of action or remedy.

14.09 Judicial treatment after non-self-execution

A court will ordinarily decline direct enforcement of a non-self-executing stipulation. It must nevertheless decide independent domestic grounds that are properly pleaded, within its jurisdiction, and otherwise cognizable. Treaty-consistent construction remains bounded by text, fair warning, lenity, and constitutional limits. A residual-gap statement is an IAJ recommended practice.

14.10 Jus cogens, immunity, and prescription

Torture is *jus cogens*. That status does not itself establish jurisdiction, a cause of action, an immunity waiver, a universal limitations rule, or retroactive liability. The IAJ adopts as an institutional and reform position that proven torture, and CIDT meeting its defined threshold, should not be insulated from required accountability and redress by immunity or prescription.

14.11 Institutional independence and contrary authority

Institutional independence does not permit omission or misstatement of contrary authority. Jurisdictional Immunities, *Jones, Saleh, Stump*, and *Mireles* are stated according to their holdings and then subjected to the IAJ's critique.

14.12 Documentation and reporting

The analysis in Parts II and VIII depends, for its continuing institutional force, on documented evidence of how courts in fact respond when the disposal formula is met with the completed analysis. The IAJ invites any complainant, counsel, or supporting party who invokes this Advisory Opinion in any court of the United States to share the record of the proceeding for the purpose of cumulative documentation: the filing or its substance, the procedural disposition, the reasoning of the court, and the participant's own description of the proceeding and its effect.

Sharing is voluntary and participants control what they share. The IAJ respects requests for confidentiality, pseudonymization, and limited use, and will not disclose identifying information without consent. Materials shared in confidence may be aggregated in anonymized form for inclusion in Shadow Reports to United Nations treaty bodies, in submissions to Special Procedures, and in subsequent IAJ advisory opinions. The IAJ does not, by extending this invitation, undertake to advise any participant, to represent any participant in any forum, or to enter an attorney-client relationship. The General Comment governs.

APPENDIX A. AUTHORITIES CITED

Constitutional, statutory, and treaty instruments

U.S. Const. art. I, § 8, cl. 10; art. II, § 2, cl. 2; art. III, § 2; art. VI, cl. 2. Articles of Confederation arts. IX, XIII. Definitive Treaty of Peace, U.S.–Gr. Brit., 3 Sept. 1783, arts. 4, 6. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 1, 2, 4–7, 12–14, 16. United States Instrument of Ratification, deposited 21 Oct. 1994: Reservation I(1); Understandings II(1)(c), II(5); Declaration III(1). International Covenant on Civil and Political Rights, arts. 2, 7. Vienna Convention on the Law of Treaties, arts. 19(c), 26, 27, 31 (invoked as customary international law only; the United States is not a party). 18 U.S.C. §§ 2340–2340A. U.N. Charter art. 94. Vienna Convention on Consular Relations art. 36. Optional Protocol concerning the Compulsory Settlement of Disputes. Tex. Code Crim. Proc. art. 11.071, § 5. 42 U.S.C. §§ 2000dd, 2000dd-0. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, § 2242 (8 U.S.C. § 1231 note). 22 C.F.R. pt. 95. G.A. Res. 48/134, annex, Principles Relating to the Status of National Institutions (Paris Principles).

Cases

Asakura v. City of Seattle, 265 U.S. 332 (1924). *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). *Boumediene v. Bush*, 553 U.S. 723 (2008). *Carlson v. Green*, 446 U.S. 14 (1980). *Clark v. Allen*, 331 U.S. 503 (1947). *Egbert v. Boule*, 596 U.S. 482 (2022). *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829). *Goldey v. Fields*, 606 U.S. 942 (2025) (per curiam). *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). *Head Money Cases*, 112 U.S. 580 (1884). *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). *Jones v. United Kingdom*, ECtHR. *Jurisdictional Immunities of the State (Germany v. Italy)*, I.C.J. *Kolovrat v. Oregon*, 366 U.S. 187 (1961). *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *Medellín v. Texas*, 552 U.S. 491 (2008). *Mireles v. Waco*, 502 U.S. 9 (1991). *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). *The Nereide*, 13 U.S. (9 Cranch) 388 (1815). *The Paquete Habana*, 175 U.S. 677 (1900). *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (1784). *Rutgers v. Waddington* (Mayor's Ct. N.Y. 1784). *Saleh v. Bush*, 848 F.3d 880 (9th Cir. 2017). *Siderman de Blake v. Argentina*, 965 F.2d 699 (9th Cir. 1992). *Sosa v. Alvarez-*

Machain, 542 U.S. 692 (2004). *Stump v. Sparkman*, 435 U.S. 349 (1978). *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). *United States v. Rauscher*, 119 U.S. 407 (1886). *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796). *Whitney v. Robertson*, 124 U.S. 190 (1888). *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). *Ziglar v. Abbasi*, 582 U.S. 120 (2017). *Nasrallah v. Barr* (2020). *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. 108 (2013). *Jesner v. Arab Bank*, *PLC*, 584 U.S. 241 (2018). *Nestlé USA, Inc. v. Doe*, 593 U.S. 628 (2021). Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment of 19 January 2009. *Avena and Other Mexican Nationals (Mexico v. United States),* Judgment, 2004 I.C.J. Rep. 12. *Ex parte Medellín*, 223 S.W.3d 315 (Tex. Crim. App. 2006). *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). *Bell v. Wolfish*, 441 U.S. 520 (1979). *Carter v. Kentucky,* 450 U.S. 288 (1981). *Doe v. United States*, 487 U.S. 201 (1988). *Estelle v. Gamble*, 429 U.S. 97 (1976). *Ingraham v. Wright*, 430 U.S. 651 (1977). *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964). *Rochin v. California*, 342 U.S. 165 (1952). *United States v. Balsys*, 524 U.S. 666 (1998). *Youngberg v. Romeo,* 457 U.S. 307 (1982).

Founding and legislative materials

Jay, Report to Congress, 13 Oct. 1786, and resolutions, 31 Journals of the Continental Congress 869–70. Resolutions of Congress, 21 Mar. 1787; circular letter to the States, 13 Apr. 1787, 32 Journals of the Continental Congress 177–84. Madison, Notes on Debates, 20 Mar. 1787. New Jersey Plan, res. 6 (15 June 1787). 1 Records of the Federal Convention of 1787 (Farrand ed. 1911). 21 Journals of the Continental Congress 1136–37 (1781). The Federalist Nos. 22, 42, 64, 80. 3 J. Story, Commentaries on the Constitution (1833). S. Exec. Rep. No. 101-30 (1990). 138 Cong. Rec. 8071 (1992). Memorandum for the Attorney General, Compliance with the Decision of the International Court of Justice in Avena (28 Feb. 2005). S. Treaty Doc. No. 100-20 (1988). Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1003, 119 Stat. 2680, 2739–40. 151 Cong. Rec. S688–89, S3007–10, S11061–92 (2005).

International and institutional materials

Committee against Torture, General Comment No. 2, U.N. Doc. CAT/C/GC/2 (24 Jan. 2008). OHCHR, Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, rev. ed. (2022). International Law Commission, Draft Conclusions on Identification of Customary International Law, U.N. Doc. A/73/10 (2018), Conclusion 8. International Law Commission, Conclusions on Peremptory Norms, U.N. Doc. A/77/10 (2022), Conclusions 22, 23 and Annex. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, Judgment, 1986 I.C.J. Rep. 14, ¶ 186. Restatement (Third) of the Foreign Relations Law of the United States (1987). Committee against Torture, Concluding observations on the combined third to fifth periodic reports of the United States of America, U.N. Doc. CAT/C/USA/CO/3-5 (2014). United States, Sixth periodic report, U.N. Doc. CAT/C/USA/6 (2021).

Companion IAJ publications, cited by title

UNCAT and jus cogens: A Contemporary Perspective. The Equivalence Representation and the Ex Post Facto Lockout. A Guide to Domestic Criminal Enforcement of Torture and Cruel, Inhuman, or Degrading Treatment in the United States. Quia Timet and the Prevention of Threatened Torture and Cruel, Inhuman or Degrading

Treatment by Domestic Authorities. On the Bounded Applicability of Lehman v. Lycoming County Children's Services Agency. The Structural Foreclosure of Effective Protection and Remedy for Rights-Violating Judicial Conduct in the Courts of the United States of America. How to Personally Enforce the Torture Convention. On the Duty of the Prosecutors in the United States under the Convention against Torture. On the Duty of the Legislatures of the United States to Complete the Nation's Compliance with the Convention against Torture. Harmonizing the Architecture of Disability Rights. IAJ Amicus Curiae, Texas Supreme Court No. 24-0881. General Comment on IAJ Advisory Opinions.

APPENDIX B. A COMPLETED ADJUDICATION OF MEDELLÍN: FINDINGS, LIMITS, AND A SAFE DISPOSITION

This Appendix supplies the worked adjudication referenced in § 2.04. It asks a counterfactual but disciplined question: if the Supreme Court had separated the international obligation from the domestic vehicle, tested the implementation mechanisms appearing in the record, and confined its holding to the questions actually presented, what could it properly have found and how could it safely have disposed of the case?[161]

The answer is not that the Court was required to declare the Avena judgment self-executing, invent a cause of action, disregard Texas finality rules without authority, or validate unilateral presidential lawmaking. The answer is that the Court could have decided the two domestic-force questions against Medellín while expressly preserving the obligation, identifying the failed implementation architecture, testing every independently available domestic ground, and preventing its bounded decision from becoming a universal terminal formula.

B.01 Status, method, and limits

This Appendix distinguishes five propositions that must not be collapsed. First, the existing holding is binding domestic law: the treaty instruments invoked did not themselves make Avena directly enforceable in state court, and the Presidential Memorandum did not independently preempt Texas law. Second, the record permits findings about whether the mechanisms identified in the litigation were present, applied to Medellín, and capable of delivering the promised function. Third, the IAJ determines that the record disclosed a domestic compliance gap. Fourth, the completed method and limiting language are proposed doctrinal developments, not statements of what the Supreme Court already held. Fifth, any remedy remains contingent on a lawful jurisdictional and remedial vehicle.

The analysis therefore holds what the record holds and concedes what candor requires. It does not assign subjective political motive to the Justices. A claim that the case was a politically motivated 'hatchet job' cannot be established from the opinion alone and is unnecessary to the institutional critique. The demonstrable criticism is architectural: the opinion decided domestic-force questions, mentioned three implementation possibilities, eliminated their availability on the record before it, and did not state the consequence of the resulting gap.

[161] *Medellín v. Texas*, 552 U.S. 491, 498–99, 504–06, 514, 523, 525–32 (2008).

B.02 The controversy the Court actually adjudicated

Avena required the United States, by means of its own choosing, to provide review and reconsideration of the convictions and sentences of the named Mexican nationals, giving full weight to the Vienna Convention violations and without allowing procedural default doctrine to prevent the required assessment.[162]

Article 94(1) of the Charter supplied the United States' international undertaking to comply with the ICJ decision. Article 94(2) supplied a possible interstate recourse after nonperformance; it did not state that Security Council recourse extinguished the undertaking or transformed the judgment into a claimant-accessible domestic remedy.[163]

In the Supreme Court, *Medellín* relied on the Optional Protocol, Article 94, the ICJ Statute, and the President's Memorandum. The Court held that the three treaty instruments did not, without implementing legislation, create directly enforceable federal law requiring Texas courts to give effect to *Avena*. It separately held that the President could not, through the Memorandum alone, convert that non-self-executing international commitment into binding domestic law.[164]

Those holdings did not resolve whether Article 36 of the Vienna Convention itself was self-executing or conferred an individually enforceable right; the petitioner had disclaimed reliance on that proposition and the Court assumed the individual-right question without deciding it.[165]

B.03 The three implementation possibilities and what the record established

The three possibilities discussed in *Medellín* were not legal conditions of the Court's holding. They nevertheless were the concrete implementation possibilities appearing in the record. A completed adjudication would have classified each by the test used in Part VIII: was the mechanism present in law, applied to this claimant and claim, and systemically capable of delivering the required function?

Security Council route. Article 94(2) permitted Mexico to have recourse to the Security Council. But recourse depended on a sovereign State, not *Medellín*; Council action was discretionary; and the United States retained an unqualified veto right. The record therefore did not establish an assured or claimant-accessible mechanism. This is not a claim that the United States cast a veto in *Medellín*'s case. It is the narrower point

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[162] *Avena and Other Mexican Nationals (Mexico v. United States)*, Judgment, 2004 I.C.J. Rep. 12, ¶¶ 121–22, 138–41, 153(9) (31 Mar.). The International Court of Justice required review and reconsideration by means of the United States' own choosing, with procedural default rules not permitted to prevent full weight being given to the treaty violation.

[163] U.N. Charter art. 94(1)–(2). Paragraph 1 states the undertaking to comply; paragraph 2 permits the other party, after nonperformance, to have recourse to the Security Council, which may act if it deems action necessary.

[164] *Medellín*, 552 U.S. at 498–99, 504–06, 514, 523, 525–32. The majority's holdings concerned the domestic force of the Avena judgment under three instruments and the independent force of the Presidential Memorandum; the Court expressly left the Vienna Convention question unresolved.

[165] *Medellín*, 552 U.S. at 506 n.4, 523 (the petitioner did not rely upon the Vienna Convention itself as the source of domestic law; the Court assumed without deciding that Article 36 granted an individual right).

that a route terminable by the respondent's veto could not be treated as proof that the required review and reconsideration was available to the individual.[166]

Congressional route. Congress possessed authority to enact implementing legislation. It had not enacted legislation furnishing the requested review and reconsideration, and *Medellín* had no procedure by which he could compel enactment before execution. Legislative capacity was therefore institutionally relevant but not a present remedy in the controversy.[167]

Presidential route. The President attempted to secure compliance through the Memorandum directing state courts to give effect to *Avena* according to principles of comity. The Court rejected the asserted independent domestic force of that act. Whatever executive measures might otherwise have remained possible, the mechanism actually tendered as the means of compliance was eliminated by the judgment itself.[168][169]

Texas route. Texas procedural law barred consideration of the successive application. The state court therefore did not provide the review and reconsideration required by Avena. That conclusion describes operation; it does not by itself answer whether federal law authorized the Supreme Court to displace the state bar.[170]

B.04 The finding the Court could safely have made

After deciding the direct-force and presidential-power questions, the Court could have stated a record-based finding: none of the implementation mechanisms before it supplied *Medellín* with the review and reconsideration the United States remained internationally obliged to provide. The Security Council route was neither assured nor claimant-accessible; Congress had supplied no implementing law; the asserted presidential route lacked the domestic force claimed for it; and Texas procedural law foreclosed review.

That finding would not have converted Avena into self-executing federal law. It would not have created jurisdiction, a cause of action, or a remedy. It would have identified a failure of domestic equivalence on the record and preserved the distinction between the continuing obligation and the absence of the particular judicial vehicle asserted. Justice Stevens's concurrence confirms the conceptual point: the domestic holding

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[166] *Medellín*, 552 U.S. at 508–11 & n.7 (reasoning that Article 94(2) supplies an expressly diplomatic remedy and noting the United States' unqualified veto right). The point here is availability and claimant access, not an assertion that the United States actually cast a veto in this controversy.

[167] *Id.* at 521–23 (holding that Congress had not enacted implementing legislation giving the Avena judgment domestic effect and recognizing Congress's capacity to implement non-self-executing treaty commitments).

[168] Memorandum for the Attorney General, Compliance with the Decision of the International Court of Justice in Avena (28 Feb. 2005), reprinted in *Medellín*, 552 U.S. at 503; *Medellín*, 552 U.S. at 523–32 (holding that the Memorandum did not independently preempt state law).

[169] *Medellín*, 552 U.S. at 525–32; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). A court may not solve an international-compliance failure by assigning lawmaking power to an institution that lacks it.

[170] *Ex parte Medellín*, 223 S.W.3d 315, 322–23 (Tex. Crim. App. 2006); Tex. Code Crim. Proc. art. 11.071, § 5 (successive-application restrictions). The Supreme Court described the Texas court's disposition and treated the state procedural bar as the obstacle to review and reconsideration. *Medellín*, 552 U.S. at 500–04.

did not absolve the United States of its international commitment or foreclose further appropriate action by Texas.[171]

B.05 The adjudicative sequence the Court should have followed

First—identify the obligation. The obligation was review and reconsideration by means of the United States' own choosing, not automatic reversal, suppression, or release. The ICJ left the means to the United States but specified the function to be delivered.[172]

Second—classify the asserted domestic source. The Court properly asked whether the instruments themselves supplied a rule of decision enforceable in state court and whether the President independently possessed authority to bind the States. Those are source and separation-of-powers questions.

Third—test every independent domestic ground. A non-self-execution conclusion concerning the instruments did not logically dispose of any distinct constitutional, statutory, state-law, comity, or interpretive ground. Each such ground had to be accepted or rejected under its own elements, jurisdictional limits, preservation rules, and remedial law. No canon could override clear text or manufacture authority; equally, no treaty label could substitute for adjudication of an otherwise cognizable domestic claim.[173]

Fourth—test the represented mechanisms in operation. The Court could then ask whether an identified route was present, applied to the claimant and claim, and was capable of delivering review and reconsideration within the time and institutional circumstances of the case. This is the domestic-equivalence inquiry developed in Part VIII, not a backdoor self-execution test.

Fifth—state the residual gap. If no lawful domestic vehicle authorized judicial relief, the Court could say so with precision while also stating that the international obligation remained undischarged. A domestic court's inability to order performance is not a holding that performance occurred or that the obligation ceased to exist.[174]

Sixth—route responsibility. The Court could identify the institutions competent to complete performance: Congress through implementing legislation; Texas through procedures affording the required review; and the Executive through lawful diplomatic, reporting, or legislative initiatives. Routing responsibility is not judicial legislation; it is an accurate statement of which institution can cure the gap.

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[171] *Id.* at 522–23, 536 (Stevens, J., concurring in the judgment) (emphasizing that non-self-execution did not absolve the United States of its international commitment and did not foreclose further appropriate action by Texas).

[172] *Avena*, 2004 I.C.J. Rep. 12, ¶¶ 138–41, 153(9); *Medellín*, 552 U.S. at 536 (Stevens, J., concurring in the judgment).

[173] U.S. Const. art. VI, cl. 2; *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (articulating the canon against construing an Act of Congress to violate the law of nations if another construction remains possible). The canon cannot overcome clear text, create jurisdiction, or supply a cause of action.

[174] U.N. Charter art. 94(1); Vienna Convention on the Law of Treaties arts. 26–27 (reflecting the principles that treaties in force must be performed in good faith and that internal law may not be invoked as justification for failure to perform). The United States is not a party to the Vienna Convention on the Law of Treaties; this Opinion invokes Articles 26 and 27 only as customary international law, consistently with the thesis's source-status rules.

B.06 A safe disposition

A 'safe' disposition is one that respects Article III, federalism, separation of powers, finality, and the limits of the claims presented, yet does not turn the absence of one domestic vehicle into normative erasure. On the record before the Court, the following disposition was defensible:

(a) Judgment. Affirm the rejection of the claim that the three instruments and the Presidential Memorandum, standing alone, compelled Texas to provide the requested review.

(b) Bounded holding. State expressly that the judgment concerns only the domestic force of those instruments and that executive act, not every provision of the Vienna Convention, every treaty-based argument, or every independent domestic ground.

(c) Compliance finding. Record that none of the mechanisms appearing in the case had delivered the review and reconsideration owed under Avena and that the international obligation remained outstanding.[175]

(d) Independent grounds. Confirm that any properly preserved, jurisdictionally sound independent ground must be adjudicated on its own terms. If no such ground remained in this record, say that the Court lacked authority to supply one rather than suggesting that non-self-execution answered every possible claim.

(e) Institutional notice. State that completion lay with the competent political and state institutions. The Court could invite prompt action without ordering an institution to exercise power the Constitution had not conferred on the judiciary.

Justice Breyer would have reached a different conclusion on self-execution. This Appendix does not depend on that position. The safe disposition preserves the majority's domestic-force result while adopting the more basic discipline that the obligation, the asserted source, the implementation mechanism, and the remedy are separate questions.[176]

B.07 Proposed precedent-containment language

The Court could have prevented generalized misuse by adding the following limiting paragraph:

This decision determines only that the instruments and executive act before the Court do not, standing alone, furnish the particular domestic judicial remedy sought in this case. It does not extinguish the international obligation; determine the domestic effect of other treaty provisions; foreclose independently existing constitutional, statutory, common-law, or state-law grounds; preclude lawful treaty-consistent interpretation;

[175] *Medellín*, 552 U.S. at 536–37 (Stevens, J., concurring in the judgment) (noting the continuing international obligation and the possibility of further action by Texas); *Avena*, 2004 I.C.J. Rep. 12, ¶ 153(9).

[176] *Id.* at 538–67 (Breyer, J., dissenting) (advocating a treaty-specific, multifactor inquiry and concluding that the relevant treaty provisions were self-executing as applied to the Avena judgment). Appendix B does not adopt the dissent's self-execution conclusion; it draws on the dissent only to demonstrate that the inquiry need not terminate at a label.

establish the equivalence of mechanisms not tested in operation; or authorize termination of a claim merely upon labeling the invoked treaty stipulation non-self-executing.[177]

That paragraph would not change the formal judgment. It would change the precedent's transmissibility. Later courts would be unable to cite *Medellín* as a universal disposal command without identifying the particular source, claim, jurisdiction, vehicle, and remedy before them.

B.08 Rules for later courts

A later court encountering *Medellín* should proceed proposition by proposition. It may rely on the decision for the domestic force of Article 94, the Optional Protocol, the ICJ Statute, and the President's Memorandum as adjudicated. It may not treat the decision as holding that all treaties, all international judgments, or all treaty-related uses are non-self-executing; the opinion itself recognized that other treaties may give international judgments domestic legal effect and that Congress may implement non-self-executing commitments.[178]

The court must then identify the rule that actually defeats the claim: lack of jurisdiction, absence of a cause of action, failure of an element, procedural default, immunity, limitation, remedial unavailability, or controlling contrary precedent. Naming that rule matters. It exposes the exact domestic consequence, preserves independent grounds, and makes the compliance gap capable of institutional response.[179]

This discipline prevents uncritical replication of an incomplete analytic formula detached from the instruments, record, institutional mechanisms, and bounded holding actually before the Court. It also prevents the opposite error: using international obligation as though it automatically supplied domestic judicial power.

B.09 Objections and answers

Objection: the Court decides cases, not compliance audits. Correct. The proposed inquiry is not a freestanding audit detached from a controversy. It is triggered only when a party or the court relies on a substitute domestic mechanism to explain why a binding obligation receives no direct judicial enforcement. Testing the asserted mechanism is part of evaluating the premise advanced in the case; the resulting finding does not enlarge remedial power.

Objection: Article 94(2) made Security Council recourse exclusive. The majority treated the express diplomatic remedy as evidence against direct domestic enforceability. Even accepting that reasoning,

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[177] *Medellín*, 552 U.S. at 506 n.4, 514, 522–23. The proposed limiting formulation is an IAJ recommendation, not language adopted by the Court.

[178] *Id.* at 513–14 (explaining that a treaty may make an international judgment domestically binding, but the instruments before the Court did not); *id.* at 522–23 (Congress may implement non-self-executing treaty obligations).

[179] *Sanchez-Llamas*, 548 U.S. at 350–60; *Medellín*, 552 U.S. at 498–99. A later court must separately identify the domestic rule that actually controls the claim and cannot use *Medellín* as a universal substitute for that analysis.

exclusivity of a route to enforcement does not prove that the route delivered compliance, was accessible to Medellín, or extinguished the Article 94(1) undertaking. Domestic-force and performance remain distinct.

Objection: a gap finding is advisory. The Court already had to characterize the instruments, the congressional position, the Memorandum, and the state procedure to decide the controversy. A carefully limited finding that the mechanisms in the record had not delivered review explains the disposition and prevents a false implication. It need not order relief beyond judicial authority.

Objection: the method defeats finality. No. Finality rules remain controlling unless displaced by valid higher law. The method requires the court to identify finality as the operative domestic barrier and then determine whether any lawful exception or independent ground applies. It does not invent an exception. It prevents finality from being mislabeled as performance.[180]

Objection: the method makes every treaty judicially enforceable. No. The Appendix repeatedly preserves the majority's direct-enforcement holding. International obligation, domestic source, cause of action, jurisdiction, immunity, and remedy remain separate. The method requires accurate classification, not automatic enforcement.[181]

B.10 Would the result have been different?

The reasoning and findings necessarily would have been different. The Court would have acknowledged an undischarged obligation, found that every concrete mechanism in the record failed to supply the required review, separated that failure from the existence of judicial power, and confined the precedential rule.

The formal judgment was not inevitably different. If no independently valid domestic ground authorized relief, the Court could still have affirmed. A different interim or ultimate disposition—remand, stay, or merits review—would have required authority in the record sufficient to overcome the state procedural bar and support the particular remedy. Candor therefore permits a strong conclusion about the required analysis and compliance finding, but only a conditional conclusion about the judgment.[182]

That distinction strengthens rather than undermines the IAJ corpus. The corpus does not depend on judicial invention. Its central claim is that non-self-execution addresses the source of direct domestic legal effect; it does not erase the obligation, adjudicate independent domestic grounds, or prove that represented substitute mechanisms work. Appendix B demonstrates the claim in the most difficult case while preserving constitutional limits.

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[180] *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 343, 350–60 (2006) (assuming without deciding an individual Article 36 right and holding that suppression was not an appropriate remedy and that state procedural-default rules could apply in the cases before the Court).

[181] The distinction between international obligation and domestic judicial enforceability is explicit in *Medellín*, 552 U.S. at 504–06, 522–23, and in Justice Stevens's concurrence, *id.* at 533–37. The domestic-equivalence consequences stated here are the IAJ's proposed doctrinal completion.

[182] *Avena*, 2004 I.C.J. Rep. 12, ¶¶ 138–41; *Medellín*, 552 U.S. at 536–37 (Stevens, J., concurring in the judgment).

B.11 Conclusion

Medellín is valid within the controversy it adjudicated. Its generalized use as a terminal disposal formula is invalid as an application because that use outruns the bounded holding and suppresses the mechanism-specific inquiry. The completed adjudication would have preserved the Court's authority to reject an unavailable domestic source while refusing to confuse non-enforceability through that source with performance, legality, or extinction of the obligation.

The safe rule is therefore exact: decide the domestic source; test every independent ground; identify the mechanism represented as performing the obligation; determine whether it is present, applicable, and capable in operation; state any residual gap; route responsibility to the competent institutions; and grant only relief authorized by domestic law. None of those steps makes a non-self-executing treaty self-executing. Together, they prevent a bounded precedent from becoming a universal instrument of nonperformance.[183]

[183] The IAJ's test is stated in Part VIII of this Opinion. Its safeguards are equally important: failed equivalence does not itself create jurisdiction, a cause of action, an immunity waiver, retroactive liability, or a remedy.

The Completion of the Non-Self-Execution Analysis: Medellín v. Texas, the Equivalence Representation, and the Test of Domestic Equivalence: An analytical inquiry into the bounded ratio of Medellín and the analysis its general use omits

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