No. AP-75,207

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

EX PARTE JOSE ERNESTO MEDELLIN

ON APPLICATION FOR WRIT OF HABEAS CORPUS
FROM CAUSE NO. 675430 IN THE
339TH DISTRICT COURT OF HARRIS COUNTY

BRIEF FOR PROFESSORS OF INTERNATIONAL LAW, FEDERAL JURISDICTION AND THE FOREIGN RELATIONS LAW OF THE UNITED STATES AS AMICI CURIAE IN SUPPORT OF RESPONDENT

David S. Coale
State Bar No. 00787255
Rebecca Kimmel
State Bar No. 24027113
Carrington, Coleman, Sloman
& Blumenthal, LLP
200 Crescent Court, Suite 1500
Dallas, Texas 75201
Telephone: 214/855-3000
Facsimile: 214-855-1333

Attorneys for Professors of International Law, Federal Jurisdiction and the Foreign Relations Law of the United States

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I. IDENTITY OF THE AMICI CURIAE

Amici, listed in the appendix, are professors and scholars of law with expertise in international law, federal jurisdiction, and the foreign relations law of the United States. No fees have been or will be paid for preparing this brief.

II. SUMMARY OF ARGUMENT

Decisions of the International Court of Justice are not directly enforceable in U.S. courts. A determination by a Texas court that it is compelled, as a matter of federal law, to implement a decision of the International Court of Justice, which can hear only disputes between sovereigns, would bring about an unprecedented upheaval in the relationship of international bodies to domestic law. In particular, the use of an international body's determination to invalidate the appropriate and neutral procedural default rules that Texas applies in post-conviction cases may very well violate fundamental principles of federalism of the United States Constitution. Considerations of comity and uniform treaty interpretation do not support this outcome. To the contrary, other countries' legal systems, as well as the European Court of Justice, generally do not recognize such a delegation of lawmaking power to an international body.

III. ARGUMENT

A. The Optional Protocol to the Vienna Convention on Consular Relations, the United Nations Charter and the Statute of the International Court of Justice do not obligate Texas courts to implement the *Avena* decision of the International Court of Justice, and any interpretation of these treaties to the contrary would raise substantial constitutional concerns.

In its order of June 22, 2005, this Court ordered José Ernesto Medellín, Applicant in this case, to submit a brief addressing the question of whether he meets the requirements of Article 11.071(5) of the Texas Code of Criminal Procedure for a subsequent application for a writ of habeas corpus. In his brief, Applicant appears to argue that the decision of the International Court of Justice ("ICJ") in *Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 1 (hereinafter *Avena*), constitutes "a legal basis of a claim" within the meaning of Article 11.071(5)(d). Applicant asserts that this Court must give effect to the *Avena* ruling because federal law requires it to do so. This assertion is clearly wrong.

Article 11.071(5) requires Applicant to establish that "the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." Applicant's argument, boiled down to its essence, is that the *Avena* decision, which occurred subsequent to Applicant's prior submission, provides him with a legal basis for relief. This Court must obey the command of the ICJ, Applicant argues, because, as a matter of federal law, the decisions of that body are binding on the courts of the United States. We take issue with every aspect of that argument.

First, we note that Applicant does not argue, and cannot, that a legal claim based simply on the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (hereinafter "Vienna Convention") was unavailable to him at the time of his prior habeas application. The Convention has been in force since 1969, and prior to Applicant's 1998 application for state habeas, numerous claims based on alleged Vienna Convention violations had been asserted in various American courts. As the U.S. Court of Appeals for the Fourth Circuit determined in a decision published before Applicant's prior submission:

> Treaties are one of the first sources that would be consulted by a reasonably diligent counsel representing a foreign national. Counsel in other cases, both before and since [petitioner]'s state proceedings, apparently had and have had no difficulty whatsoever learning of the Convention.

Murphy v. Netherland, 116 F.3d 97, 100 (4th Cir.) (1997).

Although that decision interpreted federal habeas law, rather than Article 11.071(5), its basic point remains clear: Applicant has no ground to maintain that the claim he was prejudiced by a violation of the Vienna Convention was unavailable to him as of the time of his trial or prior application for post-conviction relief.

Rather, Applicant argues that the *Avena* ruling constitutes an independent legal basis, as a matter of federal law, for a claim to post-conviction relief. In *Avena*, the ICJ ruled that the United States could not base its decision not to provide a new hearing to determine whether a Vienna Convention violation had prejudiced a criminal proceeding on the

claimant's procedural default. The ICJ found that once a violation had occurred, a criminal accused had an ongoing right, derived from the government's failure to inform him of his rights, to obtain a hearing on the question of whether the violation caused him some prejudice, even if he had not raised the issue in a timely fashion during his criminal trial. In particular, the ICJ stated:

> It thus remains the case that the procedural default rule may continue to prevent courts from attaching legal significance to the fact, *inter alia,* that the violation of the rights set forth in Article 36, paragraph 1 [of the Vienna Convention], prevented Mexico, in a timely fashion, from retaining private counsel for certain nationals and otherwise assisting in their defence. In such cases, application of the procedural default rule would have the effect of preventing "full effect [from being] given to the purposes for which the rights accorded under this article are intended," and thus violate paragraph 2 of Article 36.

Avena, 2004 I.C.J. at 45-46.

In effect, the ICJ has insisted that a criminal accused must be able to raise a Vienna Convention issue at least once during a criminal proceeding, and if the accused forgoes the opportunity to do so at trial, he must be allowed to raise the issue in a post-conviction proceeding. This determination provided the grounds for the ICJ's order, addressed to the United States, that Applicant receive a hearing on the question of whether he had been prejudiced by the Vienna Convention violation. Thus it is the *Avena* decision, and not the Vienna Convention, that provides whatever basis there is for Applicant's case in this court.

But treating a decision of the ICJ as "a legal basis" within the meaning of Article 11.071(5) is neither plausible nor desirable. A decision of an international tribunal can have

an effect on the domestic law in this country, and thus be "a legal basis" within the meaning of Article 11.071(5)(d), only if the U.S. Constitution, a treaty, an Act of Congress, or state law authority requires that result. We are unaware of any basis under Texas law for such a result, and no such authority under federal law exists.

By not distinguishing the legal interests at stake in this case, Applicant attempts to bootstrap a remarkable, unprecedented and disturbing new rule of law onto several well established and uncontroversial principles. The issue here is not whether Applicant enjoys rights established by the Vienna Convention that he may assert in a court in the United States (an issue addressed in Part B of this brief). Nor does it involve the willingness of U.S courts, state and federal alike, to regard decisions of the ICJ as evidence of the content of international law in cases that depend on international law for their resolution. *See, e.g.*, *United States v. Maine*, 475 U.S. 89 (1986) (looking to 1951 ICJ decision as evidence of rule of decision to be applied in dispute over seabed ownership); *United States v. Louisiana*, 470 U.S. 93 (1985) (same).[1] Rather, Applicant maintains that, as a result of an order of the ICJ, courts within the United States have lost the authority to apply neutral procedural rules in a criminal proceeding to ensure that a competently represented criminal accused will assert

[1] On occasion the U.S. Supreme Court also has indicated a willingness to disregard or narrow the scope of arguments based on ICJ judgments when ascertaining the content of international law. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739, 2768 & n.27 (2004) (finding that the ICJ decision in Iranian embassy case did not establish a rule of law cognizable under 28 U.S.C. § 1350 prohibiting arbitrary detentions).

claims based on treaties in a timely manner, and in particular, cannot apply those rules codified in Article 11.071(5).

To be specific, Applicant, citing the ICJ's *Avena* decision as authority, maintains that procedural rules upheld by the Supreme Court of the United States as consistent with Texas's obligation to safeguard rights guaranteed by the Constitution of the United States are insufficient to protect his interests under the Vienna Convention. To reach this result, Applicant imputes to several instruments of international law – the United Nations Charter, June 26, 1945, 59 Stat. 1031(hereinafter "UN Charter"), the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055 (hereinafter "Statute of the ICJ"), and the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 (hereinafter "Optional Protocol") – a meaning that is unprecedented in this country and which, if accepted, would raise substantial constitutional issues.

We note some of the practical implications of accepting Applicant's argument:

- First, the *Avena* decision seems to require that an accused receive a post-conviction hearing to consider claims based on the Vienna Convention, even if a well counseled accused were deliberately to bypass an opportunity to raise the claim during the course of trial. Such an outcome would endow criminal defendants eligible to invoke the Vienna Convention with a strategic weapon, unavailable to all others accused of a crime, that the U.S. Supreme Court long has recognized as inconsistent with general standards of equity and administrability.

E.g., *Fay v. Noia*, 372 U.S. 391, 433, 438 (1963). It also is flatly inconsistent with Article 11.071(5)'s requirement that a legal claim must have been unavailable at the time of the prior habeas application.

- Second, the *Avena* decision applies to all persons with a Vienna Convention claim, not just to those sentenced to death, and thus potentially opens the way for many thousands of demands for post-conviction review.

- Third, a holding that a mere decision by the United States to submit to international adjudication, without more, creates rights that individuals can assert in domestic courts likely would inhibit the United States from submitting to international adjudication in the future. The possibility of such a holding already has induced the United States to denounce the Optional Protocol, and could lead to renunciation of other existing commitments to international adjudication.

None of these unwanted outcomes would arise if this Court accepts the only plausible interpretation of U.S. obligations under these treaties. Under U.S. law, as traditionally understood, none of the international treaties at issue in this case provides a basis for application of the *Avena* order by our country's domestic courts.

United States law on the role of international obligations in the domestic legal order is clear. On the one hand, the United States intends that some of its treaties be self-executing and have direct effect, in the sense that they will supply a rule of decision that courts must apply in a lawsuit. On the other hand, the Supreme Court of the United States and other

authorities often have recognized that the United States may intend for a treaty to create obligations only on the plane of international law, in the anticipation of later implementation by the political branches.

To ascertain whether a treaty is self-executing and has direct effect in domestic law, or instead requires further implementing enactments, a court must consider the treaty's text, the background assumptions of the parties as illustrated by past practice, the general context, and other means generally used for determining the intention of a legal instrument's authors. Compare *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829) (holding that a treaty between United States and Spain obligating the United States to respect prior land titles had no legal effect until implemented by legislation), and *United States v. de la Maza Arredondo*, 31 U.S. (6 Pet.) 691 (1832) (holding that a treaty between United States and Spain is relevant to determination of land title only because subsequent legislation requires this result), with *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) (holding that a treaty between United States and France serves as source of rule of law to be applied in admiralty cases), and *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833) (holding that a treaty between United States and Spain intended to give direct effect to land titles created under Spanish sovereignty). *See also Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442-43 (1989) (finding that the Geneva Convention on the High Seas and Pan American Maritime Neutrality Convention do not create rights that are enforceable in domestic courts); *Head Money Cases*, 112 U.S. 580, 598-99 (1884) (holding that treaties barring certain kinds of

discrimination in commerce cannot prevent Congress from enacting taxes inconsistent with their obligations; and that courts have no power to enforce those treaties in the face of subsequent legislation).

When one applies these general principles to the treaties on which Applicant relies, the conclusion is irresistible that the United States in each instance intended not to create obligations with direct effect in the U.S. domestic legal order. We discuss each in turn.

First, the Vienna Convention and the Optional Protocol are distinct international instruments with independent legal significance. Even if one were to assume that the United States intended for the Convention to have direct effect in U.S. law (a proposition that, as we discussed in Part B of this brief, is incorrect and which this Court in *Rocha v. State*, 16 S.W.3d 1 (Tex. Crim. App 2000), apparently rejected), there is no evidence that the United States or any other country that is a party to the Optional Protocol regards that treaty as either self-executing or having a direct effect. It would have been remarkable if any party had so believed, given the normal understanding of the relationship between the decisions of international bodies and domestic law.

Article I of the Optional Protocol provides:

> Disputes arising out of the interpretation or application of the Convention shall lie within the *compulsory jurisdiction* of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute *being a Party to the present Protocol*.

(emphasis added).

Applicant argues in effect that the term "compulsory jurisdiction" establishes not only the capacity of the ICJ to render an authoritative determination of the questions in dispute, but also the authority to enforce its decisions through the automatic enlistment of national and state judiciaries to carry out its orders. Yet Article I contains limitations that are clearly inconsistent with such enforcement powers. By its terms, Article I permits only a "Party" to appear before the ICJ. The Optional Protocol thus reflects the general structure of ICJ dispute resolution, which extends only to controversies between and among sovereign nations. Individuals have no standing to appear on their own behalf before the ICJ, and can derive no rights or interests directly from ICJ decisions. The same is true of Texas, which is a subordinate jurisdiction of the United States and cannot itself be a party to an ICJ proceeding. Neither can the ICJ hold anyone other than a sovereign nation responsible for violation of any rights determined through its proceedings. Accordingly, the determination of the ICJ that a victim of a Vienna Convention violation may assert his claim in a post-conviction proceeding even if he had no valid reason for not asserting the claim at trial simply has no legal effect in U.S. law, and cannot be "a legal basis" under Article 11.071(5)(d).[2]

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[2] To the extent the legislative history of the Optional Protocol is relevant, notably a representative of the State Department explained in testimony before the Senate regarding the legal effect of the Optional Protocol, "[i]f problems should arise regarding the interpretation or application of the convention, such problems would probably be resolved through diplomatic channels." Vienna Convention on Consular Relations, Sen. Exec. Rpt. 91-9, 19 (1969) (Statement of J. Edward Lyerly, Deputy Legal Adviser for Administration). Additionally, "*parties* to the optional protocol may agree to resort to . . . an arbitral tribunal" or conciliation. *Id* (emphasis added). Nothing in this testimony suggests that the United States anticipated that accession to the Optional Protocol would open up literally thousands of future criminal convictions to post-conviction review in state and federal courts.

Significantly, no court of the United States ever has treated *any* treaty as self-executing or having direct effect pursuant to which the United States has acceded to the compulsory jurisdiction of the ICJ. The U.S. Supreme Court never has addressed the issue. The leading lower court decision is *Committee of U.S. Citizens Living in Nicaragua v Reagan*, 859 F.2d 929 (D.C. Cir. 1988). The plaintiffs there argued that the United States' ongoing disregard of an order of the ICJ, arising out of a matter within the ICJ's compulsory jurisdiction, had caused them direct injuries for which a federal court could grant relief. The ICJ had based its jurisdiction on Article 36(2) of the Statute of the International Court of Justice, pursuant to which the United States has accepted the compulsory jurisdiction of the ICJ with respect to most international law disputes concerning other states.[3] Article 36(2) entailed an even greater and more comprehensive derogation of sovereignty in favor of the ICJ than does the Optional Protocol, yet the District of Columbia Circuit found that the ICJ order had no effect on the domestic law of the United States.[4]

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[3] Midway through the proceedings in the *Nicaragua* case, the United States withdrew its consent to ICJ jurisdiction. The ICJ ruled that, as to that dispute, this withdrawal was ineffective. *Case Concerning Military & Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. 14, 23-25. The ICJ proceeded to reach the merits of the case and issued an order requiring the United States to end its intervention in Nicaraguan affairs.

[4] In *Torres v. State*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004) (unpublished decision), a majority of the court ordered the lower court to conduct a hearing on the issue of whether Torres had been prejudiced by Oklahoma's failure to inform him of his rights under the Vienna Convention at the time he was detained. The majority did not, however, issue an opinion explaining the legal basis for its decision, and in particular did not state whether it still would have ordered such a hearing if it had not also determined that Torres had a right to a hearing on the issue of ineffective assistance of counsel. One member of the court wrote a special concurrence arguing that the Optional Protocol did have direct effect in U.S. law, while two dissenting members took strong exception to that proposition.

A review of the other international treaties on which Applicant relies buttresses the conclusion that he cannot invoke the order of the ICJ in a domestic court. Article 94(1) of the UN Charter, a treaty to which the United States is a party, imposes on sovereign states an obligation "to comply with the decision of the International Court of Justice in any case to which it is a party." Article 94(2), however, specifies that enforcement of that obligation rests with the UN Security Council. No nation ever has inferred from Article 94(1) an obligation on the part of a sovereign state's judiciary independently to compel compliance, and the court in *Committee of U.S. Citizens Living in Nicaragua* squarely rejected that interpretation.[5]

The Statute of the International Court of Justice, also a treaty to which the United States is a party, reinforces this conclusion. Article 59 of the Statute states expressly that: "The decision of the Court has no binding force except between the parties and in respect of that particular case." The court in *Committee of U.S. Citizens Living in Nicaragua*, after quoting this language, observed:

> Taken together, these Charter clauses make clear that the purpose of establishing the ICJ was to resolve disputes *between national governments*. We

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[5]The Brief of *Amici Curiae* International Law Experts in Support of Applicant José Ernesto Medellín, at 26 n.27, dismisses as "dicta" the holding of the *Committee of U.S. Citizens Living in Nicaragua* court that private persons have no standing under these treaties to enforce an ICJ decision through domestic litigation. It is clear from a reading of the decision, however, that the court reached this conclusion as an alternate holding:

> Finally, we note that even if Congress' breach of a treaty [through a subsequent legislative enactment] were cognizable in domestic court, appellants would lack standing to rectify the particular breach that they allege here. Article 94 of the U.N. Charter simply does not confer rights on private individuals. Treaty clauses must confer such rights in order for individuals to assert a claim "arising under" them.

Committee of U.S. Citizens Living in Nicaragua, 859 F.2d at 937.

> find in these clauses no intent to vest citizens who reside in a U.N. member nation with authority to enforce an ICJ decision against their own government.

Id. at 938 (citations omitted).

It is immaterial that here Applicant seeks to assert rights under the Vienna Convention against a state of which he is not a subject, rather than rights under general and customary international law against his own government, or that the ICJ order in *Avena* referred to Applicant, while the order in the *Nicaragua* dispute did not expressly incorporate the plaintiffs. Nor does it matter that the purported international law violation stems from Texas legislation, namely Article 11.071(5), rather than a federal statute. None of these aspects of the case affects the holding of the District of Columbia Circuit court: Pursuant to the UN Charter and the ICJ's Statute, the ICJ can bind only parties to a dispute. The Optional Protocol does not alter, but rather confirms, this result. Under the Optional Protocol, Texas and Applicant were not, and could not be, parties to an ICJ proceeding.

The fundamental character of ICJ dispute resolution as an exclusively international proceeding does not mean that individuals may derive nothing of significance from the outcome of an ICJ decision, or that compliance with a sovereign state's obligations, as determined by the ICJ, has nothing to do with how that country treats particular individuals. Rather, Article I of the Optional Protocol, like Article 94 of the UN Charter and Article 59 of the Statute of the International Court of Justice, reflects the traditional and widely recognized distinction between the rights and obligations of sovereign states in relation to each other, the

traditional subject of international law, and the legal mechanisms through which those states act in response to their international obligations, which is ultimately a question of domestic law. The ICJ has jurisdiction to determine that the United States is responsible under international law for the treatment of Applicant. It is up to the United States, however, to determine which level and branch of its government has the authority to take steps to bring it into compliance with its obligations to Mexico. And the clearly settled practice in United States is to look to legislation, not judicial intervention, to bring about compliance.

The limited scope of ICJ orders in the domestic legal order of the United States is standard practice, dating back more than two centuries. We are unaware of any international instrument establishing a tribunal's compulsory jurisdiction that ever has sufficed in and of itself to make that tribunal's orders binding on U.S. courts. Rather, some additional act of the political branches, typically a separate statutory enactment, always has been a prerequisite to giving an international tribunal the authority to determine rights and duties in a manner that can bind courts in the United States.

Consider the case of investment disputes covered by Chapter 11 of the North American Free Trade Agreement, Dec. 17, 1992, H.R. Doc. 103-159 (1993), 32 I.L.M. 605 (1992) (hereinafter "NAFTA"). That agreement expressly incorporates the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (hereinafter "ICSID Convention"), a treaty to which the United States is a party. *See* NAFTA arts. 1120, 1136,

1139. With respect to the ICSID Convention, Congress enacted 22 U.S.C. §§ 1650 and 1650a to enable U.S. courts to enforce arbitral awards against sovereign states, including the United States. It is these statutory provisions that enable a U.S. court to order enforcement of an arbitral award based on NAFTA's investor protection obligations, and not any provision in NAFTA or the ICSID Convention itself.[6] Also noteworthy is 19 U.S.C. § 1516a, which recognizes the authority of the international tribunals stipulated by NAFTA to hear appeals from certain customs determinations by U.S. administrative authorities. Each of these instances illustrates the well entrenched pattern of U.S. law: Additional legislation is a prerequisite to judicial enforcement of the orders of an international tribunal, even after the United States has consented to that tribunal's jurisdiction.

This pattern is, if anything, even clearer with respect to dispute resolution under the auspices of the World Trade Organization ("WTO"). In approving the Uruguay Round Trade Agreements, April 15, 1994, 1868 U.N.T.S. 3, H.R. Doc. 103-316 (1994), Congress provided for the exclusive authority of the Executive Branch to enforce WTO rules, including the decisions of the WTO's dispute resolution body. This legislation used identical language to that approving NAFTA. In both instances, Congress explicitly forbade the judiciary from

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[6] It also is worth noting that the legislation providing for domestic enforcement of ICSID arbitral awards does not compel the U.S. courts simply to carry out the orders of the international arbiter. States subject to an award still have available other defenses under U.S. law. For example, one leading court decision makes clear than a state's agreement to submit to arbitration pursuant to the ICSID Convention does not constitute a waiver of sovereign immunity in a subsequent lawsuit to enforce the award. *Maritime Intern. Nominees Establishment v. Rep. of Guinea*, 693 F.2d 1094 (D.C. Cir. 1982).

invalidating any federal or state law on the basis of the international agreement in question, except in a lawsuit brought by the United States. North American Free Trade Agreement Implementation Act of 1993, § 102(b)(2) (codified at 19 U.S.C. § 3312(b)(2)); Uruguay Round Agreements Act of 1994, § 102(b)(2) (codified at 19 U.S.C. § 3512(b)(2)).

The dispute resolution under these trade agreements is not *sui generis*. Whenever it has submitted to international adjudication of its claims, the United States consistently has implemented the determinations of international tribunals by adopting separate legislation authorizing domestic judicial enforcement. For example, on numerous occasions throughout our history, the United States entered into international agreements to settle disputes over injuries suffered by individuals. Frequently, the agreement established a tribunal of some sort to determine liability and damages, after which one country would make a payment to the other. Since 1863, federal statutory law has made the preexisting practice of separate legislative authority for domestic judicial enforcement explicit by forbidding the U.S. courts from issuing money judgments against the United States based solely on an international tribunal's decision:

> Except as otherwise provided by Act of Congress, the United States Court of Federal Claims shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations.

28 U.S.C. § 1502.

The Supreme Court of the United States consistently has adhered to § 1502 while reaffirming the general principle that, as to the federal judiciary, the decisions of international tribunals affect only sovereign rights and not the legally enforceable interests of individuals. *See, e.g., La Abra Silver Mining Co. v. U.S.*, 175 U.S. 423 (1899) (finding that claim derived from Convention Between Mexico and the United States of 1868 was subject to judicial consideration only pursuant to 1892 statute); *United States* v. *Blaine*, 139 U. S. 306, 323 (1891) ("The government assumed the responsibility of presenting [an individual's] claim [under the Mexico/U.S. 1968 Convention] and made it its own in seeking redress in respect to it."); *Frelinghuysen* v. *Key*, 110 U. S. 63, 74 (1884) (finding in relation to the 1868 Mexico-United States Convention that "[n]o nation treats with a citizen of another nation except through his government."); *see also United States v. Weld*, 127 U.S. 51 (1888) (1871 Treaty of Washington); *Alling v. U.S.*, 114 U.S. 562 (1885) (1868 Mexico-United States Convention); *Great Western Insur. Co. v. U.S.*, 112 U.S. 193 (1884) (1871 Treaty of Washington).[7]

Contemporary cases confirm this understanding of the relationship between international claims settlement and domestic law. For example, in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the U.S. Supreme Court recognized that the legal basis for establishing

[7] The Brief *Amicus Curiae* of the United Mexican States in Support of José Ernesto Medellín, at 7-11, refers to NAFTA and the 1868 U.S.-Mexico Convention as examples of binding dispute resolution. It fails to note, however, that none of the cited instances involves an international agreement that of its own force produced direct effects in the domestic legal order of the United States, as the above cited decisions of the Supreme Court of the United States makes clear.

the Iranian claims settlement process, which extinguished the right to bring lawsuits in the United States and relegated claimants to an international tribunal, rested exclusively on Treasury Regulations issued pursuant to both statutory authority and the President's Article II powers to settle financial disputes with foreign states, and not the agreement between the two nations itself. 453 U.S. at 689-90 (indicating that any subsequent takings claims for losses caused by extinction of lawsuits would not be derived from the international agreement). Subsequent cases have confirmed that the Treasury Regulations, and not the terms of the international agreement, provide the legal basis under U.S. law for claims related to the Iranian dispute. *Islamic Rep. of Iran v. Boeing Co.*, 771 F.2d 1279 (9th Cir. 1985); *Elec. Data Sys. Corp. Iran v. Social Sec. Org.*, 651 F.2d 1007 (5th Cir. Unit A 1981); *see also Fed. Reserve Bank v. Williams*, 708 F. Supp. 48 (S.D.N.Y. 1989) (refusing to enforce award of U.S.-Iran Claims Tribunal against Iran because claimant had fraudulently asserted U.S. citizenship).[8]

Were this Court, by interpreting the Optional Protocol as self-executing and therefore compelling Texas to discard its procedural default rule, to depart from two centuries of consistent practice and widely held assumptions about the relationship of domestic law to international tribunals, it then would face substantial constitutional questions. In the context

[8] Similarly, U.S. judicial enforcement of international arbitral awards pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, a treaty to which the United States is a party, rests on separate legislation, specifically 9 U.S.C. §§ 201-07. This legislation limits the scope of the U.S. obligations to arbitrations of a commercial nature and provides expressly that only parties to an arbitration to

of this case, involving Texas's administration of its criminal justice process, the interposition of an international tribunal's authority would raise novel issues about the limits of our federalism. The Supreme Court of the United States consistently has recognized and safeguarded the primacy of the states' role in the administration of criminal justice. *E.g.*, *United States v. Morrison*, 529 U.S. 598, 618 (2000); *United States v. Lopez*, 514 U.S. 549, 561 (1995). Transgression of these constitutional principles would be problematic, even if brought about by a treaty rather than a statute adopted by both Houses of Congress. *Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality opinion) ("The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.").

Due to the unprecedented nature of Applicant's argument, no court has had to confront these constitutional questions. The scholarly literature, although necessarily speculative, suggests that the issues are grave and significant. *See, e.g.*, Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1567-80 (2003) (discussing constitutional problems raised by self-executing ICJ judgments); Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 510-521 (2004) (discussing federalism problems with self-executing ICJ judgments); A. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT'L L. 877, 891-900 (2000) (discussing

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which the Convention applies can invoke the courts' enforcement power. *Id.* §§ 202, 207.

constitutional problems with self-executing ICJ judgments). The general policy of avoidance of difficult and significant constitutional questions should provide this Court with a further reason for not giving the Optional Protocol a gloss that neither the plain language of the treaties nor the longstanding understanding of their meaning supports.

B. Neither comity nor the need for uniformity in treaty interpretation provides a basis for the Texas courts to override the clear meaning of Article 11.071(5) by requiring a hearing on Applicant's Vienna Convention claim. No other country has understood the Vienna Convention as obligating its courts to implement the ICJ's interpretation of the Vienna Convention. It is not generally the practice of other countries to interpret their treaty commitments as delegating to international bodies the authority to render judgments in particular disputes that will have direct effect in domestic law, especially as to persons who do not have standing to participate in such bodies' proceedings.

Applicant argues that even if the orders of the ICJ do not have direct effect in domestic law so that a Texas court must enforce them, the Texas judiciary nonetheless should enforce them in a spirit of "comity" with the ICJ and support for uniform treaty interpretation. (Applicant Br. at 43-44; *see also* Int'l Law Experts Br. at 15-16.) These arguments are misconceived at several levels.

Applicant appears to be arguing that comity and the desirability of uniform treaty interpretation can provide a previously unavailable "legal basis" for a subsequent habeas application, within the meaning of Article 11.071(5)(d), even if these policies relate to a legal instrument that *was* available to the Applicant at the time of an earlier submission. If we understand Applicant and his supporters correctly, changing opinions about what a treaty requires may generate a new legal basis, even if those opinions are not directly binding on a

Texas court. As a result, even if the opinions of the ICJ or the Oklahoma Court of Criminal Appeals do not constitute binding precedent in Texas (and Article 11.071(5)(d) certainly makes no mention of them), their decisions nonetheless can provide a new legal basis for a habeas application. This argument is flawed.

First, the doctrine of comity, which has its origins in the Treaty of Westphalia and the concepts of sovereign power that the settlement of the Thirty Years War established, applies to sovereigns, not to international bodies that themselves are the product of international agreements. *Hilton v. Guyot*, 159 U.S. 113, 164 (1895), clearly states that comity constitutes "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another *nation*." (emphasis added). This distinction is not a mere formality: international law rests on the choices and behavior of sovereign states. An international organization is the creature of international law, and has only so much authority as the instrument that establishes it specifies. Extending the authority of an international body through common law doctrines such as comity circumvents, rather than reinforces, the choices made in the body's foundational instrument.

Second, even if the comity doctrine were applicable here, the policy judgments on which it rests must give way in the face of well-established and widely accepted domestic policy. The Supreme Court of the United States has reaffirmed the necessity of neutral procedural rules to ensure the timely consideration of all legal rights of a criminal accused. It has observed on many occasions that its upholding of state procedural-default rules reflects a

respect for "finality, comity, and the orderly administration of justice." *Dretke v. Haley*, 541 U.S. 386, 393 (2004); *see also Coleman* v. *Thompson,* 501 U.S. 722, 726 (1991); *McCleskey* v. *Zant,* 499 U.S. 467, 493 (1991). Allowing the desire to show proper respect to the ICJ to outweigh the authority of Texas to develop and apply neutral procedural rules would constitute an unprecedented sacrifice of crucial state interests to an inchoate and ultimately unfounded international concern. As we noted above, the implications of such a decision would include requiring courts in Texas and nationwide to review many thousands of criminal convictions based on claims of Vienna Convention violations, providing persons from Vienna Convention countries accused of a crime with a remarkable weapon for strategic use of these claims.

Furthermore, this case does not present any issue about uniform treaty interpretation. As an initial matter, we note that no published opinion of any U.S. court, state or federal, has interpreted the Vienna Convention or the Optional Protocol as barring the application of a procedural default rule to preclude a hearing of a Vienna Convention claim. As we noted above, the Oklahoma Court of Criminal Appeals in *Torres v. Oklahoma* did not deliver a court opinion explaining the basis for its decision, and in particular did not explain how Oklahoma's own procedural default rules permitted it to take account of the *Avena* decision. While one member of that court did argue for an interpretation of the Optional Protocol that would have required that court to order a hearing, two others strongly dissented, and the

remaining members of the court did not address the issue. In sum, there is no decision of the Oklahoma court to follow, much less an act of treaty interpretation that promotes uniformity.

Moreover, this Court, along with other domestic courts in the United States, has ruled that the Vienna Convention itself, as distinguished from the Optional Protocol, does not create rights that a victim of a violation can assert in a criminal proceeding. In *Rocha v. State*, 16 S.W.3d 1 (Tex. Crim. App 2000), this Court determined that the failure of law enforcement officials to provide the notice required under the Vienna Convention did not require suppression of inculpatory statements made to those officials. In reaching this conclusion, it noted that the Supreme Court in Virginia had held that "that the treaty creates no 'legally enforceable individual rights' but 'merely deals with notice to be furnished to the consular post of a foreign state.'" *Id.* at 40 (quoting *Kasi v. Commonwealth*, 508 S.E.2d 57, 64 (Va. 1998)). It also cited the concurring opinion of Judges Seyla and Boudin in *Li v. United States*, 206 F.3d 56, 68 (1st Cir. 2000):

> There is an elaborate regime of practices and institutions by which the United States and other nations enforce commitments *inter sese* or decide that, in the national interest, promises given by or to another sovereign should not be enforced in a specific case. Sometimes this is done purely for reasons of prudence, sometimes for convenience, or sometimes to secure advantage in unrelated matters. Incalculable mischief can be wrought by gratuitously introducing into this often delicate process court enforcement at the instigation of private parties. We believe that such a course is to be avoided unless it can be said that private enforcement was clearly agreed to and envisioned by the contracting States in the treaties themselves. That is plainly not the case here [with the Vienna Convention].

16 S.W.3d at 43-44. Finally, this Court cited *United States v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 1999), which noted the State Department's longstanding position that the Vienna Convention did not confer legally enforceable rights on individuals, as a ground for excluding statements made by a person in custody who had not been notified of his rights under that Convention.

Were this Court to regard the *Avena* decision as obligating the judiciary within the United States, and not the political branches, to implement the Vienna Convention, it would do more than break with the clear weight of authority in the United States, as represented by the decisions of the First and Ninth Circuits and the Virginia Supreme Court. Such a holding also would depart from, rather than reinforce, generally accepted international understandings about the relationship between international obligations and domestic law. Other countries do not normally interpret a treaty acceding to the jurisdiction of an international tribunal as imposing on domestic courts the responsibility for enforcing the orders of such tribunals. The only significant exception to this principle is the case of the judicial bodies of the European Community. But the European Community constitutes a *sui generis* attempt to create an extensive legal regime embracing the member states, not a template for general international law. And even the European Court of Justice, the principal judicial body of the European Community, has rejected the possibility that it could act as an enforcing agent for any other international tribunal.

Considering first the ICJ, there appears to be no instance where a nation has clearly embraced the principle of direct enforcement of ICJ orders. The universal practice is to regard ICJ decisions as important evidence of the content of international law in cases where such law is relevant to a matter otherwise before a national court, but not as independent grounds for a national court's authority. Nations understand that their legislatures and governments, not their judiciaries, have the primary responsibility for bringing themselves into compliance with ICJ orders. We are unaware of any instance, and Applicant and the various *amici* in support of Applicant cite to none, where another state through a court decision has mandated the direct enforcement of an ICJ order.[9]

European practice regarding the European Court of Human Rights also is instructive. This international tribunal oversees compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, a treaty with forty-five parties that protects basic human rights in the covered countries. Since 1998, individuals have had the right to bring a case directly to the European Court of Human Rights. But enforcement of its judgments, including orders for compensation, depends entirely on local law, not the Convention itself. In the United Kingdom, for example, it is the Human Rights Act 1998, ch. 42 (Eng.), that provides the legal basis for domestic enforcement of the Convention.[10] Even European nations whose constitutions subordinate

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[9] For a comprehensive review of foreign judicial decisions rejecting direct enforcement of ICJ decisions, see A. Mark Weisburd, *International Courts and American Courts*, *supra*, at 886-87.

[10] For a recent discussion of the relationship between the Convention and British law, see *A v*

domestic legislation to international law, such as Germany, Italy, and the Netherlands, do not give direct effect to the judgments of the European Court of Human Rights.[11]

The European Union ("EU") and the European Community ("EC"), the EU's principal institutional structure, were established by treaties that, in the case of the European Community, create judicial bodies. The parties to these treaties do regard the decisions of the judicial bodies of the European Community, namely the European Court of Justice ("ECJ") and the ECJ's Court of First Instance, as generally having direct effect in their domestic legal order. *See, e.g., Regina v. Sec'y of State for Transport ex parte Factortame Ltd.*, [1991] 1 All E.R. 70 (H.L.). *But cf. Brunner v. The European Union Treaty*, [1994] 1 C.M.L.R. 57 (German Federal Constitutional Court) (reserving right to review decisions of ECJ for compliance with German constitutional order). This outcome, however, results not from an abstract sense of obligation to comply with the orders of international tribunals, but rather because of explicit provisions in the treaty constituting the EC. Consolidated Version of the Treaty Establishing the European Community, Dec. 24, 2002, O.J. (C 325) 33, Articles 228, 244, 256. These articles expressly impose on domestic courts the obligation to carry out the orders of the ECJ.

Secretary of State, 2004 UKHL ¶ 42 (H.L. 2004).

[11] For a thorough discussion of practice in these countries, see THE EXECUTION OF STRASBOURG AND GERMAN HUMAN RIGHTS DECISIONS IN THE NATIONAL LEGAL ORDER (Tom Barkhuysen et al. eds. 1999).

The direct enforcement of ECJ decisions by its member countries does not represent a new approach generally to the domestic incorporation of international law. The EC involves a distinctive, if not unique, level of extensive and intensive cooperation among its members. Direct enforcement of the ECJ's decisions facilitates that cooperation, much like the decisions of this Court streamline the smooth workings of this state's government. Rather than serving as a new model of international adjudication, the ECJ operates in relation to the legal system of the member states much as this Court does with respect to the several Texas Courts of Appeals.

Moreover, the ECJ's approach to international law (the foundational treaties of the EU and the EC aside) closely resembles the traditional posture of the Supreme Court of the United States. Like that Court, the ECJ recognizes that the decisions of international tribunals are informative, but that treaty provisions obligating the EC to submit disputes to a tribunal do not mean that the decisions of those tribunals become part of EC law. In particular, the ECJ considers the decisions of the ICJ as evidence of the content of international law in cases where it must look to international law for a rule of decision, but it reserves solely for itself the authority to make a conclusive determination of what is international law. *See, e.g.*, *A.Racke GmbH & Co. v. Hauptzollamt Mainz (Case C-162/96)*, 1998 E.C.R.I-3655; *Anklagemyndigheden v. Poulsen (Case C-286/90)*, 1992 E.C.R. I-6019. One member of the ICJ has captured exactly the relationship between the two tribunals as follows:

> The European Court, as we have seen, regards the provisions of customary international law as part of the legal order of the European Communities, and

> the International Court of Justice's findings as a useful short-route to identifying what customary international law on a given topic may be.

Rosalyn Higgins, *The ICJ, the ECJ, and the Integrity of International Law*, 52 INT'L & COMP. L.Q. 1, 10 (2003).

That the decisions of other international tribunals, when interpreting treaty obligations that bind the EC, cannot directly become part of EC law is illustrated by several decisions. In *Chiquita Brands International v. Commission of the European Communities (No. T-19/01*, 2005 ECJ CELEX LEXIS 54 (Court of First Instance of the European Communities Feb. 3, 2005), the court ruled that a U.S. firm injured by the EC's barriers to the importation of bananas, a legal regime that the WTO dispute settlement body deemed in violation of the Uruguay Round Agreements, had no rights under EC law.

In another case, *Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms (Opinion 2/94)*, 1996 E.C.R. I-1759, the ECJ ruled that the Treaty Establishing the European Community barred the EC from becoming a party to the European Convention on Human Rights, because such a step would transform both the Convention itself and the rulings of the European Court of Human Rights into EC law. The clear implication of this somewhat terse opinion is that the Treaty as presently constituted would not permit another international tribunal, namely the European Court of Human Rights, to assume the ECJ's function of having the final say about all aspects of EC law.

In sum, there is no general international practice of regarding the orders of international tribunals, particularly those of the ICJ, as having direct effect in domestic law. A decision by this Court that employed the *Avena* order to circumvent the limitations of Article 11.071(5) would depart from, rather than follow, international practice. It also would advance an interpretation of the Vienna Convention that conflicts with that of several U.S. courts as well as *Rocha* from this Court. To the extent uniform treaty consideration is relevant under Article 11.071(5), this Court should reject Applicant's claim.

IV. PRAYER

No treaty to which the United States is a party itself requires the state or federal courts of the United States to enforce the orders of the International Court of Justice, and any treaty that did so require would present serious constitutional questions. The course urged on this Court by Applicant, far from bringing domestic practice into conformity with that of other nations, would give international law and the decisions of international tribunals a role in the U.S. and Texas legal systems that other nations do not permit in their own legal systems. Accordingly, the application for a hearing under Article 11.071 of the Texas Code of Criminal Procedure should be dismissed.

Respectfully submitted,

David S. Coale
State Bar No. 00787255
Rebecca Kimmel
State Bar No. 24027113
Carrington, Coleman, Sloman
& Blumenthal, L.L.P.
200 Crescent Court, Suite 1500
Dallas, Texas 75201
Telephone: 214/855-3000
Facsimile: 214-855-1333

Attorneys for Professors of International Law, Federal Jurisdiction and the Foreign Relations Law of the United States

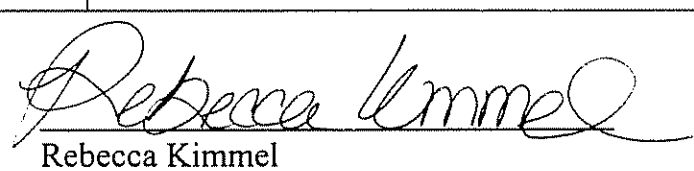
CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Texas Rule of Appellate Procedure 9.5, on this 31st day of August, 2005, an original and eleven copies of the foregoing *Brief for Professors of International Law, Federal Jurisdiction and the Foreign Relations Law of the United States as Amici Curiae in Support of Respondent* were hand delivered to:

Troy C. Bennett, Jr. Clerk
Court of Criminal Appeals of Texas
201 West 14th Street, Room 1066
Austin, Texas 78701

In addition, one copy was sent via Certified Mail, Return Receipt Requested to each of the following:

Roe Wilson, Esq. Harris County District Attorney's Office 1201 Franklin Street Houston, Texas 77002-1923 *Counsel for Respondent*	Donald Francis Donovan, Esq. Debevoise & Plimpton LLP 919 Third Avenue New York, New York 10022 *Counsel for Applicant*
State Prosecuting Attorney Post Office Box 12405 Austin, Texas 78711	Sandra L. Babcock 1516 West Lake Street, Suite 400 Minneapolis, Minnesota 55408 *Counsel for Applicant*
Gena Bunn Assistant Attorney General 209 West 14th Street, 7th Floor Austin, Texas 78701 *Counsel for Repondent*	Michael B. Charlton, Esq. Post Office Box 1964 El Prado, New Mexico 87529 *Counsel for Applicant*



Rebecca Kimmel

APPENDIX – LIST OF AMICI

Julian G. Ku is Associate Professor of Law, Hofstra University School of Law. He has been on the faculty of Hofstra since 2002.

John C. Harrison is the D. Lurton Massie, Jr. Professor of Law and the Horace W. Goldsmith Research Professor at the University of Virginia School of Law. He has been on the faculty of the University of Virginia since 1993 and served in the Justice Department from 1983 to 1993, from 1990 to 1993 as Deputy Assistant Attorney General, Office of Legal Counsel.

John O. McGinnis is Professor of Law, Northwestern University School of Law. He has been on the faculty of Northwestern University since 2002, from 1991 to 2002 on the faculty of Benjamin N. Cardozo School of Law, Yeshiva University, and from 1985 to 1991, was an attorney-advisor, then Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice.

Paul B. Stephan is the Lewis F. Powell, Jr. Professor of Law and the Hunton & Williams Research Professor at the University of Virginia School of Law. He has been on the faculty of the University of Virginia since 1979.

Ann Woolhandler is the William Minor Lile Professor of Law and the Class of 1948 Professor in Scholarly Research in Law at the University of Virginia School of Law. She has been on the faculty of the University of Virginia since 2002 and from 1990 to 2002 was on the faculty of Tulane University School of Law.