**No. 04-5928**

IN THE

# Supreme Court of the United States

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JOSE ERNESTO MEDELLIN,
*Petitioner*,

v.

DOUG DRETKE, Director,
Texas Department of Criminal Justice Institutional Division
*Respondents*.

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**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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

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## INTEREST OF THE *AMICI CURIAE*

*Amici* are professors and scholars of law with expertise in international law, federal jurisdiction, and the foreign relations law of the United States. This case raises important questions concerning the authority of an international tribunal to make direct changes in a core area of U.S. domestic law, namely the procedural prerequisites for an individual's assertion of a legal right in the course of a criminal prosecution. Acceptance of the arguments put forward by petitioners would disregard the authority of Congress to determine the conditions under which federal courts can exercise habeas jurisdiction and bring about an unprecedented, profound, and, in our view, undesirable change in the relationship between international organizations and domestic lawmaking in the United States.

## SUMMARY OF ARGUMENT

Pursuant to 28 U.S.C. § 2253(c)(2), a habeas petitioner must make a "substantial showing of the denial of a constitutional right" in order to appeal a federal district court's refusal to issue a writ. The petitioner here alleges only the violation of a right based on a treaty, which presents no independent constitutional claim. Even if there were no statutory bar to the consideration of petitioner's claim at this stage of habeas review, decisions of the International Court of Justice are not directly enforceable in U.S. courts. Compelling the lower federal courts 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 our domestic law. In particular, the use of an international body's determination to invalidate a State's appropriate and neutral procedural default rule may very well violate fundamental principles of federalism, the separation

of powers, and Article III. 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.

## ARGUMENT

### I. The requirements of 28 U.S.C. § 2253, which governs federal appellate jurisdiction to hear this case, have not been met because applicant has not made a substantial showing of the denial of a constitutional right.

Both lower courts in this case denied petitioner a certificate of appealability pursuant to 28 U.S.C. § 2253, as amended by the Antiterrorism and Effective Death Penalty Act of 1996. Through this provision, Congress limited appeals of a federal district judge's habeas review of state criminal convictions to those instances where "the applicant has made a substantial showing of the denial of a constitutional right." On several occasions this Court has recognized that satisfaction of this standard is a jurisdictional prerequisite to appellate consideration of a habeas application and that § 2253 limits judicial review to consideration of claims based on constitutional rights. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Before this Court, petitioner alleges no violation of any constitutional right. Rather, his claims rest only on the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (Vienna Convention), 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

(Optional Protocol). Neither of these international treaties establishes a constitutional right, and a violation of their provisions does not constitute a "denial of a constitutional right" within the meaning of § 2253.

In *Murphy v. Netherland*, 116 F.3d 97 (4th Cir.), *cert. denied*, 521 U.S. 1144 (1997), the Fourth Circuit held that a Mexican national's allegation that Virginia had violated his rights under the Vienna Convention did not satisfy the requirements for issuance of a certificate of appealability under § 2253. In particular, the court rejected the argument that the term "constitutional right" in that statute encompassed claims derived from the Supremacy Clause:

> Although states may have an obligation under the Supremacy Clause to comply with the provisions of the Vienna Convention, the Supremacy Clause does not convert violations of treaty provisions (regardless whether those provisions can be said to create individual rights) into violations of constitutional rights.

*Murphy v. Netherland*, *supra*, at 99-100.

The *Murphy* court's argument clearly is correct. The Supremacy Clause expresses a fundamental principle about the relationship of federal and state law, but does not vest any rights or interests in people as such. This Court and Congress both appreciate the important distinction between constitutional rights, which exist independent of any legislative decisions, and other rights under federal law, which depend on the existence of duly authorized enactments. This Court and Congress also have recognized that treaty

rights, to the extent they exist, stand on the same footing as those based on a federal statute.[1]

For over two hundred years this Court has stated that treaties, to the extent they create any rights over which a court can take cognizance, have exactly the same status as legislation enacted by Congress. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion); *Breard v. Greene*, 523 U.S. 371, 376 (1998). This concept of the interchangeability of treaties and other federal legislation for the purposes of judicial decisionmaking extends to the construction of federal statutes. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 n.17 (1978) (same canons apply to Indian treaty and statutory construction). Cf. *Chickasaw Nation v. United States*, 534 U.S. 84, 99 (2001) (O'Connor, J., dissenting) (same canons of construction apply to treaties and statutes; form of enactment is irrelevant).

Especially instructive is Justice Harlan's discussion of the relationship of constitutional questions, the Supremacy Clause, and treaty interpretation. In *Zschernig v. Miller*, 389 U.S. 429, 443-45 (1968) (concurring opinion), he argued that the majority disregarded the prudential teaching of *Ashwander v. TVA*, 297 U.S. 298, 341 (1936) (Brandeis, J., concurring), which calls for the avoidance of deciding

[1] As we argue in Part II of this brief below, an interpretation of the Optional Protocol or other international instruments as binding the courts of the United States to fulfill the orders of the International Court of Justice would raise significant constitutional questions concerning federalism, the separation of powers, and Article III. These structural constitutional issues, however, do not entail the *denial* of any constitutional *right* belonging to petitioner. Moreover, the constitutional question would arise only if petitioner's treaty-based claim were accepted.

unnecessary constitutional questions, when it held that an Oregon statute unconstitutionally encroached on the federal power over foreign relations. In Harlan's view, a treaty with Germany provided a sufficient basis for invalidating the statute. In a footnote, he recognized that either approach entailed the invocation of a constitutional provision to nullify a State statute, but he explained that using the Supremacy Clause does not involve constitutional adjudication within the meaning of the *Ashwander* doctrine:

> It is true, of course, that the treaty would displace the Oregon statute only by virtue of the Supremacy Clause of the Constitution. Yet I think it plain that this fact does not render inapplicable the teachings of *Ashwander*. Disposition of the case pursuant to the treaty would involve no interpretation of the Constitution, and this is what the *Ashwander* rules seek to bring about.

389 U.S. at 445 n. 4.

This Court consistently has understood a statutory reference to constitutional issues as not extending to statutory or treaty questions in spite of the background role of the Supremacy Clause. For example, in *Swift & Co. v. Wickham*, 382 U.S. 111 (1965), the Court interpreted 28 U.S.C. § 2281, a statute requiring the use of a three-judge court to hear challenges to state statutes based "upon the ground of the unconstitutionality of such statute." The Court had no difficulty deciding that a claim that a State statute conflicted with federal legislation did not fall within this jurisdictional provision, notwithstanding the necessity of the Supremacy Clause to the plaintiffs' claim. *Id.* at 120-23. The Court noted that a consistent line of earlier decisions had taken for granted that arguments grounded on the Supremacy Clause did not

impugn the constitutionality of a statute within the meaning of § 2281. Similarly, in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 612-15 (1979), the Court interpreted 28 U.S.C. § 1343(3)'s reference to "any right, privilege or immunity secured . . . by the Constitution" as not extending to Supremacy Clause claims. Cf. *Maine v. Thiboutot*, 448 U.S. 1 (1980) (interpreting 42 U.S.C. § 1983 as extending to cases of conflicts between federal and state law because of statute's use of term "and laws," not because Supremacy Clause claims rest on Constitution).

Acts of Congress dealing with the jurisdiction of the federal courts consistently reflect an understanding that claims based on the constitution, within the meaning of these statutes, are distinct from those based on other sources of federal law, even when asserted against the States under the Supremacy Clause. Of direct relevance here is 28 U.S.C. § 2254(a), which authorizes federal courts to hear challenges to a State criminal conviction on the ground that the applicant's custody is "in violation of the Constitution or laws or treaties of the United States." See also, *e.g.*, 28 U.S. § 1254(2) (appellate jurisdiction of Supreme Court); § 1257(a) (certiorari jurisdiction of Supreme Court); § 1258 (Supreme Court jurisdiction as to judgments of Puerto Rican courts); § 1331 (federal question jurisdiction of federal courts). In each of these instances, the reference to the laws and treaties of the United States would be superfluous if Congress believed that a reference to constitutional claims incorporated treaty violations. *Swift & Co. v. Wickham*, *supra*, at 126; *Chapman v. Houston Welfare Rights Organization*, *supra*, at 614-15. The contrast between the language of § 2254(a) and the standards for appeal under § 2253(c)(2), in light of this longstanding and well established jurisprudence, leads to an irresistible inference that Congress did not authorize the federal courts to entertain claims based on violation of a treaty when hearing appeals from denials of habeas petitions.

The argument that § 2253 does not apply in this case because of conflicting and superior authority is not plausible. To the extent one can perceive any inconsistency between the Vienna Convention and the requirements of § 2253, the latter enacted statute, adopted in 1996, clearly would prevail over the Convention, which went into effect as to the United States in 1969. *Breard v. Greene*, *supra*, at 376. The decision of the International Court of Justice in *Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 1, is not an independent subsequent enactment, but rather one body's interpretation of the meaning of the earlier Convention. Thus neither the Optional Protocol nor the *Avena* decision can override the clear and later-in-time limitation on appellate court jurisdiction found in § 2253.

Finally, while U.S. courts historically have sought to interpret congressional enactments so as not to violate the nation's international obligations, see *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), that doctrine cannot apply here. First, this Court consistently has said that it will not apply the *Charming Betsy* doctrine to frustrate the clearly expressed intent of Congress. *United States v. Dion*, 476 U.S. 734 (1986); *Whitney v. Robertson*, 124 U.S. 190 (1888); *Cherokee Tobacco Case*, 78 U.S. 616 (1871). In light of the language of § 2253(c)(2), the intent of Congress to preclude nonconstitutional claims in federal habeas appeals is unmistakable. Second, even if one were to conclude that the *Avena* interpretation of the Vienna Convention constitutes an accurate statement of the international law obligations of the United States, nothing in the *Avena* decision compels *federal* judicial review of petitioner's claim. Cf. *Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. 2004). Thus, no conflict exists between the statute and international law.

## II. 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 the courts of the United States 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.

By not distinguishing the legal interests at stake in this case, petitioner 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 petitioner enjoys rights established by the Vienna Convention that he may assert in a court in the United States. Nor does it involve the willingness of this Court to regard decisions of the International Court of Justice (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).[2] Rather, petitioner maintains that, as a result of an order of the ICJ, the courts of 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 claims based on treaties in a timely manner. In particular, petitioner maintains that exactly the procedural rules that this Court regards as consistent with Texas's obligation to safeguard rights

[2] On occasion this 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. __, 124 S. Ct. 2739, 2768 (2004) (ICJ decision in Iranian embassy case did not establish a rule of law cognizable under 28 U.S.C. § 1350 prohibiting arbitrary detentions).

guaranteed by the Constitution of the United States are insufficient to protect his interests under the Vienna Convention. To reach this result, petitioner imputes to several instruments of international law – the United Nations Charter, June 26, 1945, 59 Stat. 1031(UN Charter), the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055 (Statute of the ICJ), and the Optional Protocol – a meaning that is unprecedented in U.S. practice and which, if accepted, would raise substantial constitutional issues.

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

- First, the *Avena* decision of the ICJ 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. *Avena*, *supra*, at 45-46, 51-52. 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 this 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).

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

- Third, a holding that the decision of 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, and may induce the United States to denounce the Optional Protocol and other existing commitments to international adjudication.

None of these unwanted outcomes is inevitable, because 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 domestic courts. U.S. law on the role of international obligations in the domestic legal order is clear, at least at the structural level. On the one hand, the United States intends that some of its treaties be self-executing, in the sense that they will supply a rule of decision that courts must apply in a lawsuit. On the other hand, this Court often has recognized that the United States may intend for a treaty to create obligations only on the plane of international law and in the anticipation of later implementation by the political branches. To ascertain whether a treaty is self-executing 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*, *supra*, and *United States v. de la Maza Arredondo*, 31 U.S. (6 Pet.) 691 (1832), with *Murray v. Schooner Peggy*, *supra*, and *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). See also *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442-43 (1989); *Head Money Cases*, 112 U.S. 580, 598-99 (1884).

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

First, one must recognize that the Vienna Convention and the Optional Protocol are distinct international instruments with independent legal significance. We assume for purposes of this dispute that the United States intended for the Convention to be self-executing and to have direct effect in U.S. law. There is no evidence, however, that the United States or any other state party regards the Optional Protocol as also self-executing or having direct effect. It would have been remarkable if any party had so believed this, 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)

Petitioner 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 other 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 states. 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, for that matter, is true of Texas, which is a subordinate jurisdiction of the United States and not capable of being a party to an ICJ proceeding. Neither can the ICJ hold anyone other than a sovereign state responsible for violation of any rights determined through its proceedings.[3]

Significantly, no court of the United States ever has understood as self-executing a treaty pursuant to which the United States has acceded to the compulsory jurisdiction of the International Court of Justice. This Court never has addressed the issue. The leading lower court decision is *Committee of United States 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.[4]

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[3] To the extent the legislative history of the Optional Protocol is relevant, one should note that 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 federal habeas review.

[4] Midway through the proceedings in the *Nicaragua* case, the United States withdrew its consent to ICJ jurisdiction. The ICJ ruled that, as to

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 court had no difficulty in finding that the ICJ order had no effect on the domestic law of the United States.

A review of the other international treaties on which petitioner relies buttresses the conclusion that he cannot invoke the order of the ICJ in a U.S. court. Article 94(1) of the UN Charter, a treaty to which the United States is a party, imposes on 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 state's judiciary independently to compel compliance, and the *Committee of United States Citizens Living in Nicaragua* court squarely rejected that interpretation. It ruled that Article 94 "simply does not confer rights on private individuals." *Committee of United States Citizens Living in Nicaragua v. Reagan*, *supra*, at 937.

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 United States Citizens Living in Nicaragua*, after quoting this language, observed:

> Taken together, these Charter clauses make clear that the purpose of establishing the

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that dispute, this withdrawal was ineffective. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. 14, 23-25. It proceeded to reach the merits of the case and issued an order requiring the United States to end its intervention in Nicaraguan affairs.

> ICJ was to resolve disputes *between national governments*. We 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 petitioner 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 petitioner, while the order in the *Nicaragua* dispute did not expressly incorporate the plaintiffs. Neither of these aspects of the case affects the holding of the District of Columbia Circuit court: Pursuant to 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 that treaty, Texas and petitioner were not, and could not be, parties to an ICJ proceeding.

The fundamental character of ICJ dispute resolution as an exclusively interstate proceeding does not mean that individuals may derive nothing of significance from the outcome of an ICJ decision, or that compliance with a state's obligations, as determined by the ICJ, has nothing to do with how that state 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 states in relation to each other, the traditional subject of international law, and the legal mechanisms through which a state acts in response to its

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 petitioner. It is up to U.S. law, however, to determine which level and branch of government has the authority to take steps to bring the United States into compliance with its obligations to Mexico. And nothing in U.S. law assigns that authority to the judiciary.

The limited scope of ICJ orders in the domestic legal order of the United States is far from atypical. 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 the courts of 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) (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 (ICSID Convention), a treaty to which the United States is a party. See NAFTA Articles 1120, 1136, 1139. With respect to the ICSID Convention, Congress enacted 22 U.S.C. §§ 1650, 1650a to enable U.S. courts to enforce arbitral awards against 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. 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 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 that organization's dispute resolution body. This legislation used identical language to that approving NAFTA. In both instances, Congress explicitly forbade the judiciary from 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)).

Nor is dispute resolution under these trade agreements *sui generis*. The United State consistently has adopted separate legislative authorization for any domestic judicial enforcement power resulting from acceptance of international adjudication. For example, on numerous occasions throughout our history, the United States entered into international agreements to settle disputes over injuries suffered by individuals. Often the agreement authorized a tribunal of some sort to determine liability and damages, after which one state would make a payment to the other. Since

1863, federal statutory law has made the 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.

This Court 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. United States*, 175 U.S. 423 (1899) (claim derived from Convention Between Mexico and the United States of 1868 subject to judicial consideration only pursuant to 1892 statute); *United States* v. *Blaine*, 139 U. S. 306, 323 (1891) (same Convention: "The government assumed the responsibility of presenting his claim, and made it its own in seeking redress in respect to it."); *United States v. Weld*, 127 U.S. 51 (1888) (1871 Treaty of Washington); *Alling v. United States*, 114 U.S. 562 (1885) (1868 Mexico-United States Convention); *Great Western Insurance Co. v. United States*, 112 U.S. 193 (1884) (1871 Treaty of Washington); *Frelinghuysen* v. *Key*, 110 U. S. 63, 74 (1884) (1868 Mexico-United States Convention: "No nation treats with a citizen of another nation except through his government.").[5]

[5] The Brief *Amicus Curiae* of the Government of the United Mexican States in Support of Petitioner, at 4-11, refers to NAFTA and the

Contemporary cases confirm this understanding of the relationship between international claims settlement and domestic law. In particular, *Dames & Moore v. Regan*, 453 U.S. 654 (1981), recognized that the legal basis for establishing the Iranian claims settlement process, which entailed extinguishing the right to bring lawsuits in the United States and instead relegating claimants to an international tribunal, comprised Treasury Regulations issued pursuant to statutory authority and the President's Article II powers to conduct foreign relations, and not the agreement between the two states itself. Cf. *Dames & Moore v. Regan* 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, determine the legal basis of claims related to the Iranian dispute. *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279 (9th Cir. 1985); *Electronic Datas Systems Corp. Iran v. Social Security Org.*, 651 F.2d 1007 (5th Cir. 1981).[6]

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Convention that was the subject of the Court's decisions in the above cases as examples of binding dispute resolution. It fails to note, however, that none of the cited instances involved an international agreement that of its own force produced direct effects in the domestic legal order of the United States.

[6] Similarly, U.S. judicial enforcement of international arbitral awards produced in accordance with 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 which the Convention applies can invoke this enforcement power. *Id.* §§ 202, 207.

Were this Court, by interpreting the Optional Protocol as self-executing, 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 of this case, involving a state'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 requirements of Article III, and the constitutional separation of powers. This Court 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). The Court also has understood Article III as protecting the judicial department from interference by the other departments. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). It would be remarkable, to say the least, to hold simultaneously that a particular legal instrument constituted federal law subject to adjudication, but that this Court lacked the ultimate authority to determine what it means. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). 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 petitioner'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 separation of powers and Article III problems raised by self-executing ICJ judgments); Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review under the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455 (1992); 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 of self-executing ICJ judgments); A. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT'L L. 877, 891-900 (2000) (discussing Article III 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.

## III. Neither comity nor the need for uniformity in treaty interpretation justifies a federal judicial order requiring Texas to provide a hearing on petitioner'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.

Petitioner argues that even if the orders of the ICJ do not have direct effect in U.S. law so that a U.S. court

must enforce them, the judiciary nonetheless should offer enforcement in a spirit of "comity" with the ICJ and support for uniform treaty interpretation. Brief for Petitioner at 45-50. These arguments are misconceived at several levels.

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 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. This Court 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, __, 124 S. Ct. 1847, 1849 (2004). See *Coleman* v. *Thompson*, 501 U.S. 722, 726 (1991); *McCleskey* v. *Zant*, 499 U.S. 467, 493 (1991). There has been no claim here that the rules applied by Texas to determine whether petitioner forfeited his claim

under the Vienna Convention represent any kind of hostility to, or subversion of, any federally protected interest, whether derived from the Constitution or other federal law. 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 local interests to an inchoate and ultimately unfounded international concern. As we noted above, the implications of such a decision would include requiring the federal courts to review many thousands of criminal convictions based on claims of Vienna Convention violations and providing persons from Vienna Convention countries accused of a crime with a remarkable weapon for strategic use of these claims.

Neither does this case present any issue about uniform treaty interpretation.[7] A conclusion that the political branches of the United States, and not the judiciary, have the

[7] The Brief of Former United States Diplomats as *Amici Curiae* in Support of Petitioner, at 26 n. 55, suggests the relevance of an analogy between the deference federal courts typically give to agency interpretations of their authorizing statutes, see *Chevron USA Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), and the interpretation that the International Court of Justice has given to a treaty. One should note first that the source cited in the footnote refers to deference given to the views of other signatories, not to the views of international tribunals established by such treaties. Second, *Amici*'s argument confuses the questions of, on the one hand, interpreting the meaning of a treaty and the international obligations it imposes, and, on the other hand, determining how, under its domestic law, a state should implement its international law obligation. This case involves only the latter question, and on this issue neither the views of the ICJ or those of signatories to the Vienna Convention deserve any deference. If any governmental actor merits *Chevron* deference on the question of how the United States should implement its international obligations, it is the President, who under Article II has responsibility for conducting the foreign relations of the United States. Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000).

responsibility of determining how the United States will meet its obligations under the Vienna Convention in no way conflicts with the ICJ's interpretation of that Convention. To the contrary, the *Avena* decision determined only the content of the obligations imposed by the Convention, and not the process by which the United States can choose to bring itself into compliance with those obligations. The affirmance by this Court of the decision of the court below will not interfere in any way with the power of the President and Congress to pursue measures to satisfy Mexico's interests, as determined by the *Avena* decision.

Were this Court to regard the *Avena* decision as obligating the judiciary of the United States, and not the political branches, to implement the Vienna Convention, it 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 International Court of Justice, our research has turned up 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 petitioner and the various *amici* in support of petitioner cite to no instance, where another state through a court decision has mandated the direct enforcement of an ICJ order.[8] 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.

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 45 parties that

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[8] The Brief of International Law Experts as *Amicus Curiae* in Support of Petitioner, at 25, cites the dismissal of an arrest warrant by a Belgian court as an instance of a national court enforcing an order of the ICJ. A review of the press account cited as the source of this claim, however, reveals that the Belgian judges did *not* base their decision on the order of the ICJ. According to the press account:

> They based their judgment on an article of the Code of Criminal Procedure of 1878, which stipulates that cases against foreigners relating to offences committed abroad can only be tried if the foreign national in question is on Belgian soil at the time the case is brought.

*War Crimes Case Against Former Foreign Minister "Inadmissible,"* AFRICA NEWS, Apr. 17, 2002, *available in* LEXIS, News Library, Allnws File. For independent confirmation of the accuracy of the press report, and of the inaccuracy of the Brief of International Law Experts, see Constanze Schulte, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 270 (2004).

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 national 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. For a recent discussion of the relationship between the Convention and British law, see *A v. Secretary of State*, 2004 UKHL ¶ 42 (H.L. 2004). Even European nations whose constitutions subordinate 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. 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 European Union (EU) and the European Community (EC), the EU's principal institutional structure, rest on treaties which, 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. Secretary 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.

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

In particular, the ECJ's approach to international law (the foundational treaties of the EU and the EC aside) closely resembles the traditional posture of this Court. Like this 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. 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:

> 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 (Case T-19/01)*, 2005 E.C.R. II-___, *available at http://curia.eu.int* (last visited February 21, 2005) (Court of First Instance), 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, 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. *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 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 any portion of the ECJ's function of having the final say about all aspects of EC law.

## CONCLUSION

The court below lacked jurisdiction to decide the questions presented by petitioner. Moreover, no treaty to which the United States is a party itself requires the 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 petitioner, far from bringing U.S. practice into conformity with that of other nations, would give international law and the decisions of international tribunals a role in the U.S. legal system that other nations do not permit in their own legal systems. Accordingly, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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