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The Diminishing Role of International Treaties and Decisions of The International Court of Justice in The Courts of The United States (MEDELLIN v. TEXAS)

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THE DIMINISHING ROLE OF INTERNATIONAL TREATIES AND DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE IN THE COURTS OF THE UNITED STATES (*MEDELLIN v. TEXAS*)

by

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The Supremacy Clause of the U.S. Constitution states that "…all Treaties made or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[1] Whether a treaty has been made under the authority of the United States, whether it must be enforced by individual states, and whether the president of the United States can compel a state court to enforce the decision of an international tribunal interpreting a treaty obligation of the United States were three issues that the U.S. Supreme Court addressed in the case of *Medellin v. Texas*.[2] The Court, in a six to three decision, concluded that a foreign national, who had been convicted of a capital offense in a state court, could not invoke a treaty, a decision of the International Court of Justice, and a presidential memorandum to preempt the state's limitations on the defendant's ability to file successive habeas corpus petitions. Although the decision involved a criminal appeal, it provided the U.S. Supreme Court with the opportunity to articulate a new, and narrow, bright line test for the interpretation of treaties that is now applicable to all kinds of public and private international law disputes.

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I.

Treaty Law

The three international treaties at the center of the *Medellin* case are the Vienna Convention on Consular Relations (hereinafter "Vienna Convention" or "Convention"),[3] the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes (hereinafter "Optional Protocol"),[4] and the United Nations Charter.

The Vienna Convention, whose express purpose is to "contribute to the development of friendly relations among nations,"[5] formalizes fairly uniform practices among nations regarding consular relations. Article 36 of the Convention specifically sets forth the circumstances under which a person, who has been detained in a foreign country, may have access to a consulate officer of the detainee's home country.[6] Article 36(1)(b) provides that the detaining authorities must, at the request of the detainee and without delay, notify the consular officers of the detention and promptly inform the detainee of his or her rights under the treaty. Article 36(2) further states that the detainee's rights should be exercised in conformity with the laws and regulations of the arresting county – provided that the rules and regulations "enable full effect to be given to the purposes for which [those] rights…are intended." The United States ratified the Vienna Convention, as an Article II treaty, with the unanimous advice and consent of the Senate. The treaty became binding on the United States on December 24, 1969. At the time of the ratification, the representatives of the executive branch assured the Senate that the Vienna Convention was entirely self-executing and would not require any implementing legislation.[7]

The Optional Protocol to the Vienna Convention, which was also ratified by the United States, establishes compulsory jurisdiction by the International Court of Justice (I.C.J.) in matters involving either the interpretation or application of the Vienna Convention.[8] It allows a complaining party to file a unilateral application with the I.C.J. in those instances where both countries are parties to the Convention and to the Optional Protocol. The United States was, in fact, the first signatory of the Vienna Convention and Optional Protocol to institute proceedings in the I.C.J. based on violations of the Convention.[9]

The final treaty at issue in the *Medellin* case is the Charter of the United Nations. Article 94(1) of the Charter specifies that a signatory of the Charter "undertakes to comply with the decision of the International Court of Justice in any case in which it is a party." The Statute of the International Court of Justice,[10] which is incorporated into the Charter, further states that while a judgment of the I.C.J. only "binding force…between parties and in respect of that particular case,"[11] it is considered to be final and without the right of appeal.[12]

I.C.J. Case Law

Within the past ten years, the International Court of Justice decided three cases – Case Concerning the Vienna Convention on Consular Relations *(Paraguay v. United States)*,[13] *LaGrand Case (The Federal Republic of Germany v. United States)*,[14] and *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*[15] – in which it concluded that the United States had violated Art. 36(1)(b) of the Vienna Convention when it failed to inform the consular officers of Paraguay, Germany and Mexico that their national had been detained in the United States.

In the *Case Concerning the Vienna Convention*, Paraguay alleged that one of its citizens, Angel Francisco Breard, had been arrested and convicted of attempted rape and capital murder in a Virginia state court without being informed of his rights under the Vienna Convention. Breard unsuccessfully appealed his case to the Virginia Supreme Court[16] and was denied certiorari by the U.S. Supreme Court.[17] He subsequently filed a motion for habeas corpus in federal court – asserting, for the first time, that his Vienna Convention rights had been violated. At the same time, the government of Paraguay filed its separate claim in the International Court of Justice against the United States. The I.C.J. responded by issuing a provisional order requesting that the United States stay Breard's execution until the I.C.J. could deliver a final decision. The U.S. Supreme Court denied Breard's writ of habeas corpus on the grounds that he had procedurally defaulted on his Vienna Convention claim when he failed to raise that claim in state court and declined to issue an order staying the execution.[18] The state of Virginia executed Breard without waiting for the I.C.J. to deliver a final judgment. At that point, the I.C.J. accepted Paraguay's request to discontinue the proceedings with prejudice.

The detainee's in the *LaGrand Case* were two German national, Karl and Walter LaGrand, who had been convicted of murder and sentenced to death by an Arizona state court. The German government's claim before the I.C.J. accused the United States of violating the Vienna Convention when it failed to inform the brothers of their right to contact a German consular officer. The I.C.J.'s judgment, which was delivered after the brothers were executed, was entered in favor of Germany. The Court held that: 1. Article 36 of the Convention conferred individual rights on detained foreign national; 2. the United States failed to comply with the treaty; and 3. the procedural default rules of the United States

prevented the rights under the treaty from being given full effect.[19] The Court added that the United States, "by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set for in that Convention.[20]

Mexico brought the *Aveno* case to the I.C.J. on behalf of 51 Mexican national who had been detained, tried, and convicted of capital crimes in the United States. The I.C.J. concluded that the United States had engaged in three categories of violations under the Vienna Convention. The first was that the United States, and its local authorities, failed to inform the Mexican nationals that they had a right to contact the Mexican consulate.[21] The second was that the United States failed to notify the Mexican consulate that its nationals were being detained in the United States.[22] The final violation related to the inability of the Mexican consuls to provide for legal representation for the detainees.[23] The I.C.J. held that the adequate reparation for these particular violations of Article 36 would involve the review and reconsideration of the convictions and sentences of the Mexican nationals by the United States courts. Although the I.C.J. allowed the United States to decide the means for the review and reconsideration, it specified that it had to involve a judicial, and not an executive clemency, process.[24]

The Presidential Memorandum

President George W. Bush reacted to the I.C.J.'s *Avena* judgment in two ways. The first was to issue an order ("President's Memorandum for the Attorney General, Subject: Compliance with the Decision of the International Court of Justice in *Avena*")(hereinafter "memorandum") stating Bush's intention to ensure that the United States discharge its international legal obligations under the *Avena* decision and

asserting his power as president to require state courts to comply with the decision of the I.C.J. in accordance with general principles of comity.[25] Bush's second action was to instruct the Secretary of State to inform the Secretary-General of the United Nations that the United States was invoking its rights to withdraw from the Optional Protocol.

II.

The Preliminary *Medellin* Cases

In 1993, Jose Ernest Medellin, a Mexican national who had spent most of his life in the United States, was arrested in connection with the gang rape and murder of two Houston female teenagers. It was alleged that Medellin, a member of the "Black and Whites" gang, had tried to talk to one of the young women. When she attempted to run away, he stopped her and threw her to the ground. Her friend was then grabbed by the other gang members. Both women were repeatedly raped over the course of an hour. In the end, the gang members murdered the girls and discarded their bodies in a wooded area.

When the Texas police arrested Medellin, they gave him his *Miranda* warnings – but failed to inform him of his right, under the Vienna Convention, to ask the government to notify the Mexican consulate of his detention. Within hours of his arrest, Medellin had signed a written waiver and given a detailed confession. He was eventually tried, convicted of capital murder, and sentenced to death. His conviction and sentence was affirmed on appeal.[26]

Medellin raised the claim that Texas had violated his Vienna Convention rights for the first time subsequent application for a writ of habeas corpus that was filed in the

Texas state court.[27] The district court denied his writ on the grounds that: 1. he was procedurally barred from a review since he had failed to raise the Vienna Convention claim at trial; 2. he lacked standing as a private individual to file claims based on the Vienna Convention; 3. he had failed to show any actual harm since he had received effective legal representation and his constitutional rights had been safeguarded; and 4. he had not been able to prove that his Fifth, Sixth, or Fourteenth Amendment rights had been violated or that the failure to notify the Mexican consulate had affected the validity of his conviction and sentence. On appeal, the Texas Criminal Appellate Court affirmed the lower court's decision to deny the writ.[28]

Medellin next turned to the federal courts for relief. After the U.S. District Court denied his application for a writ of habeas corpus that was based on his Vienna Convention claim,[29] he filed a certificate of appealability. Shortly thereafter the I.C.J. rendered its decision in the *Avena* case. (It should be noted that Medellin had been one of the 51 detainees named in the petition that was filed by Mexico with the I.C.J.). Despite the ruling by the I.C.J. that the United States had violated the Vienna Convention, that the Convention conferred individual rights, and that the convictions of the detainees had to be reviewed irregardless of procedural default rules, the Court of Appeals for the Fifth Circuit denied Medellin's request of appealability.[30] The Fifth Circuit's decision was primarily based on two cases – *Breard v. Greene*[31] and *United States v. Jimenez-Nava.*[32] (In *Breard*, the U.S. Supreme Court held that procedural default rules would trump claims based on violations of the Vienna Convention. In *Jimenez-Nava*, the Fifth Circuit ruled that the Vienna Convention did not create individually enforceable rights.)[33] Medellin then filed, and was granted, a writ of certiorari by the U.S. Supreme Court.[34]

Prior to the date scheduled for oral arguments in the U.S. Supreme Court, President Bush issued his memorandum instructing state courts to give effect to the *Avena* decision as a matter of comity. This encouraged Medellin to file a second state application for a writ of habeas corpus requesting the Court of Criminal Appeals of Texas to give full effect to both the *Avena* decision and the President's memorandum.[35] At that point, the U.S. Supreme Court dismissed Medellin's pending case as improvidently granted noting the possibility that "Texas courts will provide Medellin with the review he seeks pursuant to the *Avena* judgment and the President's memorandum."[36]

The Texas Court of Criminal Appeals dismissed Medellin's second application for a writ of habeas corpus on the grounds that it was an abuse of the writ.[37] It also rejected Medellin's two main assertions. The first was that the *Avena* decision the President's memorandum constituted binding federal law that would preempt the Texas procedural rule that prohibited successive habeas corpus petitions.[38] The second was that the original decision and memorandum did not consider previously unavailable factual and legal bases, which under §5(a)(1), would justify an exception to the prohibition against successive filing. The denial of the writ was based, in part, on the U.S. Supreme Court's holding in the consolidated cases of *Sanchez-Llamas v. Oregon* and *Bustillo v. Johnson.*[39] Although the Court, in the *Sanchez-Llamas* case, skirted the issue of whether the Convention granted individual rights that could be invoked in a judicial proceeding, it ruled that the exclusionary rule was not a remedy for an Article 36 violation and that Article 36 claims were subject "to the same procedural default rules that apply generally to other federal-law claims."[40] The Texas appellate court concluded that the Supremacy Clause of the U.S. Constitution did not allow the I.C.J.'s *Avena* decision and the President's memorandum to preempt the Texas Code of Criminal Procedure, Art.11.701 §5.

III.

Medellin and the U.S. Supreme Court

In 2007, the U.S. Supreme Court granted Medellin's second request for a writ of certiorari – this time to review the state court's denial of Medellin's most recent habeas corpus petition.[41] The grant of certiorari came after the I.C.J. had already held on three separate occasions that the United States had violated of its obligations under the Vienna Convention; the U.S. Supreme Court had rejected multiple requests by convicted foreign detainees to assert Art. 36 rights; President Bush had issued his memorandum instructing the state courts to comply with the I.C.J.'s *Avena* decision; and the Texas court had refused to follow the decision of the I.C.J. and the President's memorandum to grant a writ of habeas corpus to review and reconsider the conviction. The Supreme Court's 6-3 decision was significant because it established an important new bright-line test regarding treaty law at the same time that it limited President Bush's vision of presidential power.

Three opinions were issued in the *Medellin* case: Chief Justice John Roberts delivered the majority opinion, which was joined by Justices John Roberts delivered the majority opinion, which was joined by Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito; Justice John Paul Stevens presented a separate concurring opinion; and Justices David Souter and Ruth Bader Ginsburg joined a dissenting opinion that was written by Justice Stephen Breyer. Each opinion tacked the constitutional and presidential power questions from different perspectives.

The Majority Decision

For the majority, the first issue was not whether the *Avena* decision "constitutes an *international* law obligation on the part of the United States" – but rather "whether the *Avena* judgment has automatic *domestic* legal effect such that the judgment of its own force applies in state and federal courts."[42] In order to answer this question, the Court employed an interpretative approach to differentiate between self-executing treaties (those that have automatic domestic effect as federal law upon ratification) and non-self-executing treaties (those that only become domestically enforceable federal law when implementing legislation is passed by Congress). Under this interpretative approach, the Court parsed the actual text of the treaty to determine whether Congress had intended the treaty to be self-executing. A treaty could only become part of the domestic law if Congress enacted implementing statues or "the treaty itself convey[ed] an intention that it [was] "self-executing" and [was] ratified in these terms."[43] Roberts viewed the interpretative approach as a way to preserve that "Framers established [as] a careful set of procedures that must be followed before federal law can be created under the Constitution – vesting the decision in the political branches, subject to checks and balances."[44]

The majority, curiously enough, did not find it necessary to determine whether the Vienna Convention was a self-executing treaty.[45] While the *Avena* judgment was based on a violation of the Vienna Convention and created an international law obligation on the United States, the Court concluded that it did not necessarily create an obligation that was automatically binding on domestic law. According to the majority, the only treaties that were relevant to determine if *Avena* had created binding federal law were the Optional Protocol, the U.N. Charter, and the I.C.J. Statute.

The Court viewed the Optional Protocol as an agreement that established a "bare grant of jurisdiction" – and not a commitment by its signatories to comply with the resulting I.C.J. judgment. When the Senate ratified the Optional Protocol, it had not indicated, in its words of adopting or in implementing legislation, that an I.C.J. decision involving the United States would have immediate legal effect in domestic courts.[46] The majority concluded that the U.N. Charter, and not the Protocol, was the appropriate reference point to discover what obligations the United States had with regard to the International Court of Justice. Article 94(1) of the Charter states that "[e]ach Member of the United Nations *undertakes to comply* with the decisions of the I.C.J. in any case to which it is a party." (Emphasis added.) Even here the majority thought there was a significant different between "undertaking to comply" as opposed to "shall comply" or "must comply". For the majority, Article 94(1) was not a directive to domestic courts – but rather a "call upon governments to take certain action."[47] The sole remedy available when a member nation refused to comply with an I.C.J. decision was a diplomatic rather than a judicial one. Article 94(2) (which the majority referred to as "the enforcement provision") states that: "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." Of course, such a remedy would most likely be toothless if the noncomplying country was the United States – or any other permanent member of the Security Council in possession of veto power.[48] The majority noted that this was the outcome that the executive branch had originally envisioned, and the one that it had conveyed to the Senate, at the time the United States agreed to the U.N. Charter and the declaration accepting general

compulsory jurisdiction by the I.C.J.[49] If the Supreme Court allowed Medellin to enforce the *Avena* decision in a domestic court, it would not only eliminate the government's option of noncompliance that was available under Article 94(2) but it would also "undermin[e] the ability of the political branches to determine whether and how to comply with an I.C.J. decision."[50]

The majority opinion also pointed to the I.C.J. Statue to support its conclusion that a decision of the I.C.J. did not automatically become a part of judicially enforceable federal laws available to individual petitioners. The language of the Statue clearly stated that the I.C.J.'s principal purpose was to hear disputes between nations and not individuals[51] and that a decision of the I.C.J. had "no binding force except between the parties and in respect of that particular case."[52] Medellin, as an individual, could not claim to have been a party to the *Avena* case (even though Mexico filed its case with the I.C.J., at least in part, because Medellin had been denied access to one of its consulate officers at the time of his arrest.) The *Avena* decision was, therefore, binding only between Mexico and the United States – but not between Medellin and the United States.

The Court further cited a "postratification understanding" of the signatory countries to the Optional Protocol and the Vienna Convention in support of its conclusion that *Avena* did not constitute bending federal law. This "postratification understanding" was evidenced by the fact that none of the 47 signatories to the Optional Protocol and 171 signatories to the Vienna Convention had treated I.C.J. judgments as directly enforceable as a matter of domestic law.[53] The fact that the Supreme Court was unable to find any other signatory nation that treated an I.C.J. judgment as directly enforceable as a matter of domestic law strongly suggested to

the Court that the United States had no need to treat the judgments any differently.[54]

Another interpretation problem for the majority was the impact that an I.C.J. decision had on state procedural law. The Supreme Court had previously held, in both *Sanchez-Llamas* and *Breard*, that "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State."[55] The Court recognized that since the effect of the automatic enforcement, in a state court, of an I.C.J. judgment involving treaty obligations might interfere with state procedural rules, that domestic effect must clearly have been stated as the intention of the body that ratified the treaty. Since this was not done by the Senate when it ratified the Optional Protocol, the U.N. Charter, or the I.C.J. Statute, it could not be supposed that the Senate expected the state procedural rules to be ignored.[56]

At the same time that the Court denied Medellin's right to individually enforce the I.C.J. judgment in domestic courts, it also attempted to reassure litigants in private international law matters that this decision would have no impact on the ordinary enforcement of foreign judgments or international arbitral agreements in domestic courts.[57] The Court noted that the primary difference between those cases and *Medellin* was that Medellin had asked the Court to enjoin the operation of state law and require the state to take action to "review and reconside[r]" his case.[58] Such a result would be in opposition to the general rule that judgments of foreign courts awarding injunctive relief (against individuals or sovereign nations) "are generally not entitled to enforcement."[59]

The majority further concluded that while the I.C.J. decision created a binding obligation on the part of the United States, it did not, by itself, become binding federal law with the power to preempt state criminal procedural restrictions on the

filing of successive habeas petitions. This was because "nothing in the text, background, negotiating and drafting history, or proactive among signatory nations suggests that the President or Senate intended the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by "many of our most fundamental constitutional protections."[60]

The final issue that the Court considered was whether President Bush's memorandum transformed the *Avena* judgment into the law of the land through the exercise of executive power "to establish binding rules of decision that preempt contrary state law."[61] The majority agreed that "the President's constitutional role "uniquely qualifies" him to resolve the sensitive foreign policy decisions that bear on compliance with an I.C.J. decision and "to do so expeditiously."[62] At the same time, that did not mean that the President had the unqualified authority to act as he saw fit. Pointing to "first principles," the majority stated that "the President's authority to act must stem either from an act of Congress or from the Constitution itself."[63] To determine whether Presidential authority existed in this case, the Court relied on the tripartite scheme for evaluating executive action that was enunciated in Justice Robert Jackson's concurring opinion in the case of *Youngstown Sheet & Tube Co. v. Sawyer*.[64]

According to Jackson, "[when] a President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[65] On the other hand, when "the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his independent powers…[T]here is [however] a zone of twilight in which he and Congress may

have concurrent authority, or in which its distribution is uncertain."[66] As a result, congressional inertia, indifference, or quiescence might enable to invite the President to take on independent responsibility.[67] Finally, "[when] the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb" and the Court can sustain his action "only by disabling the Congress from acting upon the subject."[68]

The United States government and Medellin tried to convince the Court that President Bush had the authority to require states to review and consider the cases of the Mexican nationals named in *Avena* without regard to the states' own procedural default rules. The amicus curiae brief, which was submitted on behalf of the United States, presented two arguments to support its claim that the President's actions fell within the category that would give him the maximum authority under the *Youngstown* model. The first was that the Optional Protocol and the U.N. Charter gave the President the authority to implement the *Avena* decision and that Congress had acquiesced to the use of that authority. The second was that the President's foreign affairs authority provided him with " an independent" international dispute-resolution power. A third argument, which was proposed by Medellin, suggested that the President's memorandum was a valid exercise of his constitutional "Take Care" power. The Court rejected each of these arguments based on its conclusion that the Optional Protocol and the U.N. Charter were non-self-executing treaties.

The majority found no merit in the government's assertion that the treaties gave the President authority to implement the I.C.J. decision and that Congress had acquiesced. That was because only Congress had the responsibility, and authority, to transform any international obligations arising under those treaties into domestic law.[69]

The Court agreed that the President had the authority, under Article II, §2 of the U.S. Constitution, to "make a treaty." If, however, that treaty did not contain language plainly providing for domestic enforceability, it was non-self-executing and could only become domestic law "in the same way as any other law – through passage of legislation by both Houses of Congress, combined with either the President's signature or a congressional override of a Presidential veto."[70] Since Congress had not passed any legislation to implement either the Optional Protocol or the U.N. Charter, it "did not "express[ly] or implicit[ly]" vest the President with the unilateral authority to make them self-executing."[71] Consequently, the President had not acted within the first category of authority that was described in the *Youngstown* model. On the contrary, the fact that the President had attempted to "enforce" a non-self-executing treaty by unilaterally creating domestic law placed his actions squarely within Jackson's third category of unauthorized executive action.

The majority also rejected the government's claim that Congress had acquiesced to the President's actions thereby placing them within Jackson's second category of authorized actions. The Solicitor General had supported his argument by citing a number of instances in which presidents had resolved I.C.J. controversies with congressional acquiescence.[72] The Court differentiated the presidential action in those cases from the President's action in the *Medellin* case by noting that in the later that he was "transforming an international obligation into domestic law and thereby displacing state law."[73] While the President had "related" statutory responsibilities and an "established role" in litigating foreign policy concerns, that statutory role was to represent the United States before the U.N., the I.C.J., and the Security Council, but not to exercise unilateral authority to create domestic law.[74]

The Solicitor General had alternatively argued that the President's memorandum was binding on the states since it was based on the President's foreign affairs authority to resolve claim disputes with foreign nations.[75] The Court conceded that while it had upheld a narrow presidential authority to enter into executive agreements intended to settle civil claims between U.S. citizens and foreign governments or foreign nationals, that authority was not applicable in this case. That was because there was no precedent to extend that authority to "a Presidential directive issued to state court, much less one that reaches deep into the heart of the State's police powers and compel state courts to reopen final criminal judgments and set aside neutrally applicable state laws."[76]

The majority concluded by summarily rejecting the argument, submitted by Medellin and not supported by the Solicitor General, that the President's Memorandum was a valid exercise of his "Take Care" power. Under Article II, §3 of the U.S. Constitution, the President has the responsibility to "take Care that the Laws be faithfully executed." According to the Court, that authority is limited to executing laws – and not to making laws; Since the *Avena* judgment was not a domestic law, it could not be executed by the President.[77]

The Concurring Opinion

Justice John Paul Stevens voted with the majority – but did not sign on to the majority opinion. His main objection to the majority's legal rational stemmed from his conclusion that the text and history of the Supremacy Clause and the Court's precedents in earlier treaty cases did not support a presumption against self-execution.[78] That having been stated, Stevens devoted the rest of his concurring opinion to a discussion of whether the U.N. Charter and he Statute of the International

Court of Justice authorized the Court to enforce the I.C.J. decision in the *Avena* case.

According to Stevens, whatever obligation the United States had to comply with the *Avena* judgment was found in Article 94(1) of the U.N. Charter. The provision that a member of the U.N. "*undertakes to comply* [emphasis added] with the decision of the [I.C.J] in any case to which it is a party" was not seen as a model for either a self-executing commitment or non-self-executing commitment. Instead, it was "most naturally read as a promise to take additional steps to enforce I.C.J. judgments."[79] Some treaties, such as the U.N. Convention on the Law of the Sea,[80] have specifically provided for the incorporation of international judgments into domestic law. In others, Congress has had to pass implementing statutes to provide for the same result – even then the treaties themselves had included language far more mandatory than "undertakes to comply." The wording of Article 94(1) was not so unambiguous that it foreclosed the possibility of self-execution nor had the Senate issued a declaration of non-self-execution when it ratified the Charter. On the other hand, without a presumption in favor of self-execution or non-self-execution, Stevens preferred reading the phrase "undertakes to comply" as "contempl[ating] future action by the political branches."[81] This left decisions about whether to comply (and to what extent) with a particular I.C.J. judgment to the political, and not the judicial, branch of government.

Although Stevens applauded the President's memorandum as "a commendable attempt" to induce state governments to discharge the United States' international obligation, he still did not think it created binding law. Nonetheless, that did to stop him from urging Texas to "undertake to comply" with the *Avena* decision. Since it was Texas' failure to inform Medellin of his rights under the Convention that contributed to the United States having to

submit to the jurisdiction of the I.C.J., it was appropriate, in this case, for Texas to "shoulder the primary responsibility for protecting the honor and integrity of the Nation."[82]

Stevens concluded his concurring opinion with a practical evaluation of why the I.C.J.'s decision should not be ignored – the cost to Texas in complying with the *Avena* would be minimal. It was likely that the violation of the Vienna Convention actually prejudiced Medellin. On the other hand, the costs of refusing to comply were significant. Such a breach would endanger the nation's compelling interests in "ensuring the reciprocal observation of the Vienna Convention, protecting relations with the foreign governments, and demonstrating commitment to the role of international law."[83]

The Dissenting Opinion

Justice Stephen Breyer's dissenting opinion was highly critical of the majority's rigid formula for determining whether a treaty was self-executing or non-self-executing. To the question of whether the Supremacy Clause required Texas to follow the I.C.J. judgment in the *Avena* case, the minority opinion answered in the affirmative based on its belief that the majority ignored precedents that established a different view of treaties under the Supremacy Clause.

Breyer began by considering the intentions of the Founding Fathers when they wrote, in the Supremacy Clause, that "all Treaties…shall be the supreme Law of the Land." The early case of *Ware v. Hylton*[84] addressed the role of treaties in U.S. jurisprudence. In that instance, the U.S. Supreme Court had to decide whether a provision of the 1783 Paris Peace Treaty between the British and the United States had effectively nullified an earlier, and contradictory, state law – even though Congress had never enacted legislation to enforce

that particular treaty provision. The justices, who were unanimous in their conclusion that the state law was no longer valid, submitted separate opinions to explain their different legal rationales. Justice James Iredell's decision was particularly noteworthy, at least in part, because he had been a member of North Carolina's Ratifying Convention and because his legal reasoning was subsequently relied on by Justice Joseph Story, in his classic legal treatise on the Constitution,[85] to explain the intention of the Founders in drafting the Supremacy Clause.

Iredell noted that the terms of the Paris Peace Treaty could have been characterized as "executed" or "executory" – the former taking effect automatically upon ratification and later taking effect only when they are "carried into execution" by the signatory nation "in the manner which the Constitution of the nation prescribe[d]."[86] Prior to the adoption of the U.S. Constitution, in both the United States and Britain, the executory provisions only become part of domestic law if Congress (in the United States) or Parliament (in Britain) had written them into their domestic law. The adoption of the U.S. Constitution, however, eliminated the need for Congress to pass further legislation in order to enforce executory provisions such as the debt-collection provision that was at issue in the *Ware* case. That was because "under this Constitution, so far as a treaty constitutionally is binding, upon principles of *moral obligation,* it is also by the vigor of its own authority to be executed in fact. It would not otherwise be the *Supreme law* in the new sense provided for."[87] Other provisions of the Paris Peace Treaty that automatically bound the United States without further congressional action included those requiring the release of prisoners and those forbidding war-related "future confiscations."[88]

An examination of case law demonstrated that self-executing treaty provisions were not uncommon in the United States and that the Supremacy Clause (which handled the self-execution issue differently from the approach taken by many other countries) applied many, but not all, treaty provisions directly to the states. In *Foster v. Neilson*,[89] Chief Justice John Marshall held that in the United States, under the Supremacy Clause, a treaty was "the law of the land…to be regarded in Courts of justice as equivalent to an act of the legislature" and "operate[d] of itself without the aid of any legislative provision."[90] The only exception that Marshall could find this rule was if the treaty had specifically contemplated execution through legislation and, consequently, "addresse[d] itself to the political, not the judicial department."[91] By 1840, Justice Henry Baldwin had submitted a concurring opinion, in *Lessee of Pollard's Heirs v. Kibbe*, in which he stated that 'it would be a bold proposition: to claim "that an act of Congress must be first passed" for a treaty to become "a supreme law of the land."[92] In his review of Supreme Court precedents, Breyer was able to cite 29 cases (including 12 invalidating state or territorial law or policy) in which the Court had either held or assumed that particular treaty provisions were self-executing and automatically binding on the States.[93] On the other hand, he could not find two case in which the Court had taken the opposing view and held that specific congressional actions had indicated that Congress had thought that further legislation was necessary.[94]

Roberts' majority opinion created a presumption that the treaty obligations were non-self-executing unless the treaty contained specific language indicating otherwise. According to Breyer, that was "misguided" since it contradicted the many instances in which the Court had upheld treaty provisions as self-executing even though they contained no such textual language. His dissenting opinion also pointed to the majority's

failure to appreciate the significance of the fact that it was a signatory nation's domestic law that determined whether additional legislative action was necessary in order for a treaty provision to have domestic effect. The failure to include self-execution language in a treaty might simply have reflected the drafters' awareness that not all nations require implementing legislation before a treaty becomes domestic law.[95] Breyer was convinced that the presence or absence of "self-execution" language in a treaty proved nothing and was an example of the Court "hunting the snark."[96] For the minority, the unfortunate consequence of the majority's decision was that it "erect[ed] legalistic hurdles that can threaten the application of provisions in many existing commercial and other treaties and make it more difficult to negotiate new ones.[97]

Up until *Medellin*, the Court had relied on, what Breyer characterized as, practical, context-specific criteria" to decide if the provisions of a treaty were self-executing.[98] That approach required the Court to look to the text and history of a treaty as well as its subject matter and related characteristics to determine, as Chief Justice Marshall had suggested in Ware, whether a particular treaty provision addressed itself to the political departments for further action or to the judicial department for direct enforcement. Matters relating to peace or war should be the province of political departments – while matters relating to traditional private legal rights (property, business, or civil tort recovery) should be directed to the judicial department. In addition, if a treaty provision conferred specific and readily enforceable individual legal rights, it should also be a matter for the judiciary. While Breyer conceded that the Court in the past had "not create[d] a simple test, let alone a magic formula," it had developed a practical, context-specific judicial approach that sought to separate the more run-of-the-mill judicial matters from the more politically charged ones.[99]

When Breyer applied the practical, context-specific criteria to the relevant treaty provisions at issue in the *Medellin*, case, he concluded that the provisions were self-executing. His conclusion was based on seven factors: 1. The language of treaties strongly supported direct judicial enforcement;[100] 2. The Optional Protocol had been applied to a dispute arising under a provision of the Vienna Convention, which was itself self-executing and judicially enforceable;[101] 3. It would not be logical to make a self-executing promise under the Vienna Convention, to promise to accept as final an I.C.J. judgment interpreting that self-executing promise, and then to insist that that judgment was not self-executing;[102] 4. A presumption against self-execution would have "serious negative practical implications" (especially for seventy other treaties that include I.C.J. dispute provisions similar to those found in the Optional Protocol);[103] 5. The judgment in the I.C.J. case was well suited to direct judicial enforcement since it only called for the "review and reconsideration" of any "possible prejudice" to the detainees;[104] 6. A finding that the United State' obligations under the treaty are self-executing as applied to the I.C.J. judgment does not threaten constitutional conflict with the other branches of government, does not require the Court to engage in nonjudicial activity, and does not create a new cause of action;[105] and 7. Neither the President nor Congress had objected to the direct enforcement of the I.C.J. decision.[106]

Breyer criticized the majority for "look[ing] for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language)."[107] As a consequence, the majority's ruling has the potential of depriving individuals (including businesses, property owners, testamentary beneficiaries, and consular officers) of similar dispute resolution procedures that have

been provided for in many treaties. In a world in which commerce, trade, and travel have become ever more international, this would be the wrong approach.

After briefly considering what the Court should have done if it had decided that the I.C.J. judgment was enforceable,[108] Breyer turned to the majority's holding that the President did not have the constitutional authority to enforce the I.C.J. decision in state courts. According to the minority, the President had the constitutional authority to act in the area of foreign affairs. Consequently, when that power was exercised in this case, it fell "within the middle range of Presidential authority where Congress has neither specifically authorized nor specifically forbidden the Presidential action in question."[109] Whether that allowed the President to implement the treaty provisions that bound the United States to an I.C.J. judgment with regard to the Avena parties and to require the setting aside of state procedural law was an issue that the minority raised – but chose to leave unanswered.[110]

Breyer concluded by elaborating on some of the serious consequence of the majority's holdings. The first was that it "unnecessarily complicate[d] the President's foreign affairs task"[111] by increasing the possibility that the Avena case would be taken to the Security Council, by worsening the United States' relationship with Mexico, by increasing the risks to Americans who are arrested while traveling abroad, and by diminishing the reputation of the United States for failing to follow the very "rule of law" principles that it has advocated. The second was that it "encumbered Congress with a task (postratification legislation) that, in respect of many decisions of international tribunals, it may not want and which it may find difficult to execute."[112] Finally, it weaken[ed] the rule of law for which the Constitution stands since it ma[de] it more difficult to enforce judgments of international tribunals.[113]

The Final Resolution

The State of Texas executed Jose Medellin on August 5, 2008. Medellin had filed a request for a stay of execution with the U.S. Supreme Court. The petition was based on the possibility that Congress or the Texas state legislature "might determine that actions of the International Court..should be given controlling weight in determining that a violation of the Vienna Convention on Consular Relations is grounds for vacating the sentence imposed in this suit."[114] The Court's per curium decision, which was supported by five of the justices, denied Medellin's request based on its conclusion that the likelihood of any legislative action occurring was much too remote to justify a stay. The majority further noted that th only legislative and executive steps that had been taken in the four years since the I.C.J. ruling and in the four months since the Supreme Court's last ruling were the introduction of a Congressional bill to implement the obligations under the treaty[115] and the withdrawal of the United States' accession to the jurisdiction of the I.C.J. in matters relating to the Vienna Convention. The Court also found it significant that the U.S. Department of Justice has not sought to intervene in the matter.[116]

The four dissenting justices submitted separate opinions – each favoring the granting of the stay until there could be input by the Solicitor General. Justice Stevens reiterated his previous conclusion that neither the President nor the I.C.J. could require Texas to determine whether it had prejudiced Medellin when it violated the Vienna Convention. Nonetheless, he concluded that the fact that Texas had not exerted its authority (and duty under international law) to remedy the "potentially significant breach of the United States' treaty obligations" justified a request for the Solicitor General's

view on this matter of serious national security and foreign policy.[117] Justice Souter pointed to the bill pending in Congress and the government's representation to the I.C.J. that it would take further steps to enforce the *Avena* judgment as sufficient justification to grant the stay of execution and to hear the views of the Solicitor General.[118] Justice Ginsburg also supported granting Medellin's petition in order to seek the Solicitor General's clarification of a representation that the United States had made to the I.C.J. in response to Mexico's request for provisional measure in the *Avena* case.[119] Finally, Justice Breyer cited six reasons for granting the stay. In addition to pointing out that Mexico had returned to the I.C.J. seeking U.S. compliance with its international obligations and that legislation had been introduced in Congress to "provide the legislative approval necessary to transform [the United States'] international legal obligations into binding domestic law,"[120] Breyer also argued that Congress, prior to the Court's decision in *Medellin*, may have assumed that the relevant treaties were self-executing and did not require implementing legislation, that proceeding with the execution would constitute an irremediable violation of international law, that the views of the Executive were pertinent to this matter of foreign affairs, and that the Court had incorrectly focused on the narrow issue of whether the original confession of Medellin was unlawfully obtained rather than the more important issue of whether the United States would carry out its international obligation to enforce the decision of the I.C.J.[121]

IV.

The U.S. Supreme Court's decision in the Medellin case was a setback to the international law community and to the Bush administration. While Chief Justice Roberts' majority opinion attempted to create certitude in one area of treaty interpretation (by establishing the presumption that treaties are non-self-

executing unless they contain explicit language of intent), it failed to address the practical consequences of that decision. A wide variety of treaties (which lack the explicit language but which, nevertheless, had been thought to be self-executing) will need to be reviewed to see if implementing legislation is necessary. The treaty partners of the United States will have new grounds for wondering if the United States is really committed to honoring its international obligations. U.S. citizens who travel abroad for business or pleasure should be justifiably concerned that they might not continue to rely on the reciprocal protection of the Vienna Convention – especially in those countries with national who have been denied the same protections in the United States. The decision also place limits on the President's view of his power in matters of foreign policy. The executive branch's attempts to unilaterally trump the objections of the state court in this matter offended the Court's understanding of the role of separation of powers and federalism. It was somewhat ironic that President Bush, who had often appeared indifferent, if not hostile, to international law issues, found his power restricted by the Court in the one instance where he had directed state courts to "give effect" to a decision of the I.C.J.. As a result of its decision in *Medellin*, the Court appears to have concluded that the United States continues to have international law obligations – but not a commitment – to comply with the I.C.J.'s ruling in *Avena*.

ENDNOTES

[1] Art.II, §2.
[2] 552 U.S. 491 (2008); 128 S.Ct. 1346; 170 L.Ed. 2d 190.

[3] Apr.24, 1963, [1970] 21 U.S.T. 77, T.I.A.S. No. 6820
[4] Apr.24, 1963, [1970] 21 U.S.T. 325, T.I.A.S. No. 6820
[5] *Supra*, note 3, 21 U.S.T., at 79.
[6] Article 36(1) of the Vienna Convention, (supra, note 3) reads as follows: "With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or its detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall still have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action."

[7] S. Exec. Rep. No. 91-1 app. At 5 (1969) (statement of Deputy Legal Adviser J. Edward Lyery.)
[8] *Supra*, note 4, Art. 1, 21 U.S.T., at 326, "...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."
[9] *Tehran Hostages Case (U.S. v. Iran),* 1980 I.C.J. 3 (May 24).
[10] 59 Stat. 1055, T.S. No.993 (1945).
[11] Id., Art. 59, at 1062. Final decisions in contentious matters before the I.C.J. have always been held to be binding between the parties. It was not until the case of *LaGrand (F.R.G. v. U.S.),* 2001 I.C.J. 104, paras. 116-127

(June 27), that the I.C.J. ruled that provisional matters would also be binding.

[12] *Id.,* Art. 60, at 1063.

[13] 1998 I.C.J. 29 (Apr.9).

[14] *Supra, LaGrand,* note 11.

[15] 2004 I.C.J. 12 (Mar.31).

[16] *Breard v. Commonwealth*, 248 Va. 68, 445 S.E.2d 670 (1994).

[17] *Breard v. Commonwealth*, 513 U.S. 971 (1994).

[18] *Breard v. Greene*, 523 U.S. 371, 374; 118 S.Ct. 1352 (1998).

[19] *Supra, LaGrand*, note 11, at paras. 77, 90-91, 125.

[20] *Id.* at para. 128(7).

[21] *Supra*, note 15, at para. 153(4).

[22] *Id.* at para. 153(5).

[23] *Id.* at para. 153(6).

[24] *Id.* at paras. 153(9 and 11)(referencing paras. 138-141).

[25] The full text of the memorandum states: "I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." PRESIDENT'S MEMORANDUM FOR THE ATTORNEY GENERAL, SUBJECT: COMPLIANCE WITH THE DECISION OF THE INTERNATIONAL COURT OF JUSTICE IN AVENA (Feb. 28, 2005), *available at* http://whitehouse.gov/news/releases/2005/02/20050228-18.html.

[26] *Medellin v. State*, No. 71,997 (Tex.Crim.Appl, May 16, 1997).

[27] *Ex parte Medellin*, No. 675430-A (339th Dist.Ct., Jan.22, 2001).

[28] *Ex parte Medellin*, No. WR-50, 191-01 (Tex.Crim.App., Oct. 3, 2001)(not designated for publication)

[29] *Medellin v. Cockrell*, 2003 U.S. Dist. LEXIS 27339 (D.Tex. 2003).

[30] *Medellin v. Dretke*, 371 F. 3d 270 (5th Cir., 2004).

[31] *Supra,* note 18.

[32] 243 F.3d 192 (5th Cir., 2001).

[33] *Id.* at 198.

[34] *Medellin v. Dretke*, 543 U.S. 1032, 125 S.Ct. 686 (2004).

[35] *Ex parte Medellin*, Application No. AP-75,207.

[36] *Medellin v. Drekte,* 544 U.S. 660, 125 S.Ct. 2088, 2092 (2005) (per curiam).

[37] *Ex parte Medellin*, 223 S.W. 3d 315, 357 (2006).

[38] Texas Code of Criminal Procedure, Art. 11.071, § 5(a)(2003) provides that: "The Texas Court of Criminal Appeals may not consider the merits of any claims raised on a subsequent application for a write of habeas corpus or grant relief unless the applicant provides sufficient facts demonstrating that the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application by a preponderance of the evidence; but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the State's favor one or more of the special issues."

[39] 548 U.S. 331, 126 S.Ct. 2669 (2006). Sanchez-Llamas, a Mexican national, had been arrested following a shootout with the police in Oregon. At trial, he moved to strike the incriminating statements that he made during his interrogation on the grounds that he had not been informed of his rights under the Convention. The Supreme Court affirmed the decision of the Oregon trial court and the Oregon Supreme Court denying the suppression of the evidence on the grounds that neither the treaty nor U.S. laws require the states to exclude evidence that was given without the benefit of consular notification. The Supreme Court found the suggestion that the Convention might be used to apply the exclusionary rule, an "entirely American legal creation," which is still "universally rejected" by other countries, to be "startling." *Id.* at 2679.

Bustillo, a Honduran national, had been arrested and convicted of murder in Virginia. After his conviction was upheld on appeal, he filed a habeas corpus action in the Virginia state court where be raised, for the first time, the claim that he had been denied his rights under the Consular Convention. The Virginia Supreme Court affirmed the lower court's decision that his claim was untimely and, consequently, barred by a state procedural default law. The U.S. Supreme Court reaffirmed the lower courts and rejected Bustillo's assertion that application of the state's procedural default rule would result in a denial of the "full effect" of his Article 36 rights. The Court also rejected the argument that it needed to reconsider its decision in *Breard* as a result of the I.C.J.'s subsequent decisions in *LaGrand* and *Avena.*

[40] *Id.* at 2687.

[41] *Supra,* note 2.

[42] *Id.* at 1356.

[43] *Id.* at 1356 (citing *Igartua-Da La Rosa v. United States*, 417 F.3d 145, 150 (CA 1 2005)(en banc)(Boudin, C.J.)).
[44] *Id.* at 1362.
[45] The Court concluded that by narrowing the issue "whether the *Avena* judgment has binding effect in domestic courts under the Optional Protocol, I.C.J. Statute, and U.N. Charter" it did not have to resolve the issue of whether the Vienna Convention was self-executing or whether it granted individually enforceable rights to Medellin. Id., footnote 4, at 1357.
[46] *Id.* at 1358.
[47] *Id.* at 1358 (citing *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (CADA 1988) (quoting *Diggs v. Richardson*, 555 F. 2d 848, 851 (CADA 1976)).
[48] If Mexico had petitioned the Security Council for a remedy in the *Avena* case and if the Security Council had deemed it necessary to issue a recommendation, the United States would still have been able to use its veto power on the Security Council to nullify the recommendation.
[49] *Supra*, note 2, at 1359-1360.
[50] *Id.* at 1360.
[51] Art. 34(1).
[52] *Supra*, note 2, at 1362.
[53] *Id.* at 1363.
[54] *Id.* at 1363.
[55] *Id.* at 1363 (citing *Sanchez-Llamas, supra*, note 39, at 351, citing *Breard, supra*, note 18, at 375).
[56] *Id.* at 1363-1364.
[57] *Id.* at 1365.
[58] *Id.* at 1366.
[59] *Id.* at 1367.
[60] *Id.* at 1367.
[61] *Id.* at 1367 (citing the Brief of the United States as Amicus Curiae.)
[62] *Id.* at 1367.
[63] *Id.* at 1368 (citing *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 585 (1952) and *Dames & Moore v. Regan*, at 453 U.S. 654, 668 (1981)).
[64] *Id.*
[65] *Id.* at 1368, (citing *Youngstown*, supra, note 63, at 635).
[66] *Id.* at 1368, (citing *Youngstown*, at 637).
[67] *Id.* at 1368, (citing *Youngstown*, at 637).
[68] *Id.* at 1368, (citing *Youngstown*, at 637-638).
[69] *Id.* at 1368.
[70] *Id.* at 1369. See U.S. Constitution, Art. I, §7.
[71] *Id.* at 1369.

[72] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (Judgment of June 27); *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246 (Judgment of Oct. 12); *Case Concerning Rights of Nationals of the Unites States of America in Moroco (Fr. v. U.S.)*, 1952 I.C.J. 176 (Judgment of Aug. 27); *LaGrand Case, supra*, note 11; and *Case Concerning the Vienna Convention on Consular Relations, supra*, note 13.
[73] *Supra*, note 2, at 1370. While the State Department, in the 2001 *LaGrand Case*, sent letters to the states "encouraging" them to consider the Vienna Convention in the clemency process, it did not claim to give the I.C.J. decision direct effect as domestic law.
[74] Id. at 1371.
[75] Id. at 1371. The government relied on a number of cases in which the Supreme Court had upheld presidential authority to settle foreign claims pursuant to an executive agreement. See *American Ins. Assn. v. Garamendi*, 539 U.S. 396, 415, 123 S.Ct. 2374 (2003); *Dames & Moore v. Regan, supra* note 63, at 679-680; *United States v. Pink*, 315 U.S. 203, 229, 62 S.Ct. 552 (1942); and *United States v. Belmont*, 302 U.S. 324, 3330, 57 S.Ct. 758 (1937).
[76] *Id.* at 1372.
[77] *Id.* at 1372.
[78] *Id.* at 1372.
[79] *Id.* at 1373.
[80] Annex VI, Art. 39, Dec. 10, 1982, S. Treaty Doc. No. 103-39, 1833 U.N.T.S. 570.
[81] *Supra*, note 2, at 1373.
[82] *Id.* at 1374.
[83] *Id.* at 1375 (citing the majority opinion at 1367).
[84] 3 U.S. 199, 3 Dall. 199 (1796). In that case, a British creditor sought payment for an American Revolutionary War debt which the debtor had previously paid, as mandated under state law, to a Virginia state fund.
[85] *Commentaries on the Constitution of the United States*, 696-697 (1833).
[86] *Supra*, note 2, at 1378 (citing *Ware, supra*, note 84, at 272). Examples of the Treaty's executed provisions, which were automatically effective upon ratification, included the declaration that the United States as an independent nation or the acknowledgment that the United States had the right to navigate the Mississippi River.
[87] *Id.* at 1378 (citing *Ware*, at 277).
[88] *Id.* at 1379 (citing *Ware*, at 273, 277).

[89] 27 U.S. 253, 2 Pet. 253 (1829)(involving a provision of the 1819 treaty in which Spain ceded Florida to the United States.
[90] *Id.* at 314.
[91] *Id.* at 314. (It should be noted that while the Court concluded that the treaty provision at issue was not self-executing based on certain phrasing, it changed its mind four years later when it was presented with a less legislatively oriented and less tentative – but equally authentic Spanish language--version of the same treaty,) (See *United States v. Percheman*, 32 U.S. 51, 7 Pet. 51, 88-89 (1833).
[92] 39 U.S. 353, 14 Pet. 353, 388 (1840).
[93] *Supra*, note 2, at 1379-1480. The cited cases were: *Olympic Airways v. Husain*, 540 U.S. 644, 657 (2004); *El AL Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 161-163, 176 (1999); *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 221, 231 (1996); *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist. Of Iowa*, 482 U.S. 522, 524, 533 (1987); *Sumitomo Shojii America, Inc. v. Avagliano*, 457 U.S. 176, 181, 189-190 (1982); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 254, 252 (1984); *Kolovrat v. Oregon*, 366 U.S. 187, 191, n. 6, 198 (1961); *Clark v. Allen*, 331 U.S. 503, 507-508, 517-518 (1947); *Bacardi Corp. of America v. Domenech*, 311 U.S. 150, 160, and n. 9, 161 (1940; *Todok v. Union State Bank of Harvard*, 281 U.S. 499, 453, 455 (1930); *Nielsen v. Johnson*, 279 U.S. 47, 50, 58 (1929); *Jordan v. Tashiro*, 278 U.S. 123, 126-127, n. 1, 128-129 (1928); *Asakura v. Seattle*, 265 U.S. 332, 340, 343-344 (1924); *Maiorano v. Baltimore & Ohio R. Co.*, 213 U.S. 268, 273-274 (1909); *Johnson v. Browne*, 205 U.S. 309, 317-322 (1907); *Geofrey v. Riggs*, 133 U.S. 258, 267-268, 273 (1890); *Wildenhus's Case*, 120 U.S. 1, 11, 17-18 (1887); *United States v. Rauscher*, 119 U.S. 410-411, 429-430 (1886); *Hauenstein v. Lynham*, 100 U.S. 483, 485-486, 490-491 (1880); *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 542 (1828); *United States v. Perchman*, 7 Pet. 51, 88-89 (1833); *United States v. Arredondo*, 6 Pet. 691, 697, 749 (1832); *Orr v. Hodgson*, 4 Wheat. 453, 462-465 (1819); *Chirac v. Lessee of Chirac*, 2 Wheat. 259, 270-271, 274, 275 (1817); *Martin v. Hunter's Lessee*, 1 Wheat. 304, 356-357 (1816); *Hannay v. Eve*, 3 Cranch 242, 248 (1806); *Hopkirk v. Bell*, 3 Cranch 454, 457-458 (1806); *Ware v. Hylton*, 3 Dall. 199, 203-204, 285 (1796); and *Georgia v. Brailsford*, 3 Dall. 1, 4 (1794).
[94] Those two cases included *Foster, supra*, note 89, which was reversed by *United States v. Percheman, supra*, note 91, and *Cameron Septic Tank Co. v. Knoxville*, 227 U.S. 39 (1913), in which congressional actions indicated that Congress thought that further legislation was required.

[95] Some countries, such as Great Britain, require subsequent parliamentary legislation before a treaty becomes part of the domestic law. Others, such as the Netherlands, directly incorporate many treaties into their domestic law without explicit parliamentary action. *Surpa*, note 2, at 1381.
[96] *Id.* at 1381.
[97] *Id.* at 1380-1381, 1393-1396. Breyer cited 16 economic cooperation agreements (between the United States and Spain, Israel, Portugal, the United Kingdom, Turkey, Sweden, Norway, the Netherlands, the Grand Duchy of Luxemburg, Italy, Iceland, Greece, France, Denmark, Belgium and Austria), two bilateral consular conventions (between the United States and Belgium and the Republic of Korea), 16 friendship, commerce, and navigation treaties (between the United States and the Togolese Republic, Belgium, The Grand Duchy of Luxembourg, Denmark, Pakistan, France, the Republic of Korea, the Netherlands, Iran, Germany, Greece, Israel, Ethiopia, Japan, Ireland, and Italy), and 11 multinational conventions (the Patent Cooperation Treaty; the Universal Copyright Convention (1971); the Vienna Convention on Diplomatic Relations and Optional Protocol Concerning the Compulsory Settlement of Disputes; the Paris Convention for the Protection of Industrial Property; the Convention on the Privileges and Immunities of the United Nations; the Convention on Offenses and Certain Other Acts Committed on Board Aircraft; the Agreement for Facilitating the International Circulation of Visual and Auditory Material of an Educational, Scientific and Cultural Character; the Universal Copyright Convention (1952); the Treaty of Peace with Japan; the Convention on Road Traffic; and the Convention on International Civil Aviation), which contain provisions for the submission of treaty based disputes to the International Court of Justice that could be jeopardized by the Court's decision.
[98] *Id.* at 1382.
[99] *Id.* at 1382-1383.
[100] *Id.* at 1383-1385. The title of the Optional Protocol, "Compulsory Settlement of Disputes," emphasizes the fact that its procedures were mandatory and binding. Article 94(1) of the Charter of the U.N. requires" a member to "undertake to comply" with the I.C.J. decisions in cases in which it is a party. Article 59 of the I.C.J. Statutes, which states that a decision of the I.C.J. had "binding force" between the parties that have consented to compulsory jurisdiction, invokes quintessential judicial activity.
[101] *Id.* at 1385-1386. The fact that Article 36(1)(b) of the Convention involves individual "rights" and that dispute arose at the intersection of

individual rights with the ordinary rules of criminal procedure indicates that this is a matter with which judges are familiar.
[102] *Id.* at 1386-1387.
[103] *Id.* at 1387-1388.
[104] *Id.* at 1388.
[105] *Id.* at 1388-1389.
[106] *Id.* at 1389.
[107] *Id.* at 1389.
[108] *Id.* at 1389-1390. The judgment instructed the United States to provide for further judicial review of the 51 cases "by means of its own choosing." Since the judgment addresses itself to the Judicial Branch, Breyer suggested that the Court should have reversed the lower court and remanded the case to the Texas court to determine if the breach of the treaty had resulted in any actual prejudice to the defendant.
[109] *Id.* at 1390. (Applying Jackson's concurring opinion in *Youngstown Sheet and Tube, supra*, note 63, at 637.
[110] Breyer raised a number of hypothetical questions to suggest that it was incorrect to conclude that the President could never set aside a state law in exercising his Article II powers pursuant to a ratified treaty. (*Id.* at 1390.) he also noted the dearth of Supreme Court case law on the question. (*Id.* at 1390-1391.) Finally, he left unanswered (until some time in the future) the question of whether the Constitution implicitly prohibited or permitted such actions – given the Court's comparative lack of expertise in foreign affairs, the importance of foreign relations for the country, the difficulty of finding the proper constitutional balance between state and federal, executive and legislative, powers in such matters, and the likelihood that the Court would address this matter in the future. (*Id.* at 1391.)
[111] *Id.* at 1391.
[112] *Id.* at 1391.
[113] *Id.* at 1391.
[114] *Medellin v. Texas*; *Medellin v. Texas*; *In Re Medellin*, Nos. 06-984 (08A98), 08-5573 (08A99), and 08-5574 (08A99); 2008 U.S. LEXIS 5362; 77 U.S.L.W. 3073; 21 Fla.L. Weekly Fed. S 539 (August 5, 2008).
[115] Avena Case Implementation Act of 2008, H.R. 6481, 110th Cong., 3d Sess. (2008).
[116] *Supra,* note 114, at 2.
[117] *Id.* at 3-4.
[118] *Id.* at 5-6.
[119] *Id.* at 6. The United States had responded that "contrary to Mexico's suggestion, the United States [does] not believe that it need make no further effort to implement this Court's *Avena* Judgment, and … would continue to work to give that Judgment full effect, including in the case of Mr. Medellin." (Quoting from *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals* (*Mex. v. U.S.*), 2008 I.C.J. No. 139, P 37 (order of July 16).
[120] *Id.* at 8-9.
[121] *Id.* at 9-10.