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A TALE OF INTERNATIONAL LAW IN THE HEARTLAND: 
TORRES AND THE ROLE OF STATE COURTS IN TRANSNATIONAL LEGAL CONVERSATION

Janet Koven Levit

I. INTRODUCTION

I have come to view international law as an exercise in the art of storytelling. These stories involve clusters of transnational actors - public and private, federal, state and local - in complex plots with undulating twists and turns. We have heard some on this panel discuss one increasingly important dimension of these stories - the U.S. Supreme Court as a participant in transnational legal conversation, or transnational judicial dialogue. With the Court's citations of foreign and international law, the Court's treatment of international law during the 2003 Term.

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law in high profile cases such as *Grutter v. Bollinger*\(^2\) and *Lawrence v. Texas*\(^3\) in the 2002 Term, and the Court's anticipated use of foreign and international law in *Roper v. Simmons*\(^4\) this Term, the Supreme Court has begun more actively engaging its foreign counterparts in an international legal constitutive process. Within the judiciary, however, the Supreme Court is not the sole, or even the leading, transnational actor - lower federal courts certainly play an important role.\(^5\) Even less appreciated is the role of state courts. During this past Term, one of the more significant international-law-related decisions involved a case that the Supreme Court passed on, thereby leaving the Oklahoma Court of Criminal Appeals, particularly Judge Charles Chapel, as a lead participant. This is the story that I will focus on here.

II. THE TORRES STORY AND THE VIENNA CONVENTION ON CONSULAR RELATIONS

A. Plot 1: Torres and the State of Oklahoma

The story I would like to tell involves two plots that unfolded concurrently. The first plot begins on the ground, in the state courts of Oklahoma. The case is *Torres v. State of Oklahoma*.\(^6\) In 1993, Oklahoma law enforcement authorities arrested Mr. Torres, a Mexican national, charging him with murder.\(^7\) An Oklahoma court convicted Torres and sentenced him to death.\(^8\) On appeal, the Oklahoma Court of Criminal Appeals affirmed Torres' conviction\(^9\) and denied several claims for post-conviction relief, none of which included any international law-related

\(^3\) 123 S. Ct. 2472 (2003).
\(^5\) See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
\(^7\) Id.

8. Torres was tried with Jorge Ochoa for first degree murder with malice aforethought, OKLA. STAT. tit. 21, § 701.7(A) (1976), and first degree burglary, OKLA. STAT. tit. 21, § 1431 (1979). The first trial resulted in a hung jury. Oklahoma retried the case, and each defendant was found guilty of two counts of murder with malice aforethought and one count of first-degree burglary. See Torres v. Mullin, 317 F.3d 1145, 1149 (10th Cir. 2003). The jury found that there were two aggravating circumstances in Torres' case and thus sentenced Torres to death. Id. at 1150. The two aggravating circumstances were: 1) the probability that Torres would again commit a crime and thus be a "continuing threat to society," and 2) "Mr. Torres knowingly created a great risk of death to more than one person." Id.

Soon thereafter, Torres filed a habeas petition in federal court, requesting relief for, among other things, the Oklahoma authorities' failure to accord him protections under the Vienna Convention on Consular Relations (Vienna Convention), namely their failure to inform him of his right to have the detaining officials contact the Mexican consulate if he so wished. The federal courts denied habeas relief on the Vienna Convention issues, applying Oklahoma's procedural default rules and the Antiterrorism and Effective Death Penalty Act's admonition not to grant habeas relief unless the claimant proves prejudice. The Supreme Court denied certiorari on November 17, 2003, but two Justices, as I will discuss in a few minutes, wrote separately on the Vienna Convention issues in the shadow of a concurrent plot unfolding in the Hague.

   1. With a view to facilitating the exercise of consular functions relating to nationals 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 is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

Id.
14. 28 U.S.C. § 2254(d) & (e) (amendments effective Apr. 24, 1996). "With respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence." Id at § 2254(d)(2).
16. See Torres, 124 S. Ct. 919 (mem.) (Stevens, J., opinion respecting the denial of the petition for writ of certiorari); Torres v. Mullin, 124 S. Ct. 562 (2003) (mem.) (Breyer, J., dissenting from the denial of the petition for writ of certiorari). See infra notes 61-66 and accompanying text for further discussion of Justice Stevens' opinion regarding the denial of the petition for a writ of certiorari and Justice Breyer's dissent from the denial of the petition for a writ of certiorari.
B. Plot 2: The International Court of Justice

Far away from the Oklahoma Court of Criminal Appeals, in the International Court of Justice (ICJ) in the Hague, Netherlands, a second plot was unfolding that would have consequences for the Torres case. This plot opened with heady questions of international law and diplomacy, rather than the intricate, fact-specific questions of a first-degree murder trial. Yet, just as in Torres’ story, the Vienna Convention provides the landscape.

At issue in a series of ICJ cases was the United States’ failure to grant detained foreign nationals their Vienna Convention rights. The pertinent Vienna Convention provisions may be divided into three categories: rights, obligations, and dispute resolution mechanisms. Under the Vienna Convention, detaining officials must inform a detained foreign national “without delay” of his right to request that his consulate be informed of his detention, and foreign consulates must be free to communicate with, visit, and/or arrange legal representation for foreign nationals.18 State parties to the Convention are obligated to give “full effect” to the aforementioned rights. Most significantly for Torres, an Optional Protocol to the Vienna Convention (Optional Protocol), which the United States not only ratified but also drafted (and championed),21 appoints the ICJ as the venue to

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18. Vienna Convention, supra note 11, art. 36(1)(b).

19. Id. at art. 36(1)(a) & (c).

20. Id. at art. 36(2).

consider all "[d]isputes arising out of the interpretation or application" of the Convention.\footnote{Id. at \textsection 3; see also Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998).}

1. Breard (Paraguay v. United States)

With this background, the first chapter in the ICJ’s Vienna Convention story involves a 1998 case that Paraguay filed against the United States. In 1993, the State of Virginia convicted Mr. Breard, a Paraguayan national, of attempted rape and capital murder and soon thereafter sentenced him to death.\footnote{22} Paraguay argued in its April 3, 1998 ICJ petition that the United States violated the Vienna Convention on account of the Virginia authorities’ failure to notify Breard of his right to contact the Paraguayan consulate; consequently, Virginia should, among other things, stay the scheduled April 14, 1998 execution pending an ICJ decision on the merits of Paraguay’s case.\footnote{Id. at \textsection 3; see also Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998).} Like Torres, Breard had been procedurally barred from raising the Vienna Convention issues in his habeas proceedings.\footnote{24} On April 9, just five days before the scheduled execution, the ICJ issued a provisional order, asking the United States to “take all measures at its disposal” to prevent Breard from being executed pending an ICJ decision on the substantive Vienna Convention claims.\footnote{26}

In response to a subsequent habeas petition and application for a stay of execution, the U.S. Supreme Court held per curiam that the ICJ’s provisional order would not trump either state or federal procedural default rules; the Court also found that even if Virginia’s procedural


\footnote{22. Optional Protocol, \textit{ supra} note 21, art. I.}


\footnote{24. In fact, Paraguay asked for the following relief on the merits:

“(1) any criminal liability imposed on Angel Francisco Breard in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;

(2) the United States should restore the \textit{status quo ante}, that is, re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of Paraguay’s national in violation of the United States’ international legal obligations took place; and

(3) the United States should provide Paraguay a guarantee of the non-repetition of the illegal acts.”


\footnote{25. \textit{Id.} at \textsection 3; \textit{see also} Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998).}

\footnote{26. Request for the Indication of Provisional Measures, \textit{ supra} note 24.}
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default rules had permitted the Vienna Convention claim to proceed, Breard was not prejudiced by the Vienna Convention breach and thus would not have been granted relief.\textsuperscript{27} Virginia executed Breard on April 14, 1998, and Paraguay thereafter requested that the case be removed from the ICJ’s docket.\textsuperscript{28}

2. LaGrand (Germany v. United States)

The second chapter of this plot begins on March 2, 1999, when Germany instituted ICJ proceedings against the United States on behalf of Walter and Karl LaGrand.\textsuperscript{29} The LaGrands were German nationals convicted in Arizona of first degree murder, attempted armed robbery and kidnapping. As in Breard’s case, law enforcement officials did not inform the LaGrands of their rights under the Vienna Convention until ten years following their arrest, long after their direct appeals and petitions for post-conviction relief had run their course in the Arizona state courts.\textsuperscript{30} When the LaGrands raised their Vienna Convention rights in their habeas corpus proceedings, the federal courts concluded that the LaGrands were procedurally barred from doing so.\textsuperscript{31} Karl LaGrand was executed on February 24, 1999, prompting Germany to file its ICJ petition on March 2, 1999. Nonetheless, Walter LaGrand was executed on March 3, 1999 despite the ICJ issuing a provisional order asking the United States to “take all measures at its disposal to ensure that Walter LaGrand is not executed” pending a final ICJ decision,\textsuperscript{32} despite efforts on the part German and U.S. diplomats to intervene,\textsuperscript{33} and despite the Arizona Parole Board’s recommendation that the execution be stayed for 60 days in light of the ICJ case.\textsuperscript{34}

Unlike Paraguay, Germany decided to proceed with its ICJ case on the merits. The ICJ ultimately concluded that Arizona’s procedural default rules violated the Vienna Convention because their application

\textsuperscript{28} Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 99 (Discontinuance Order of Nov. 10).
\textsuperscript{30} Id. at ¶¶ 19-22.
\textsuperscript{31} LaGrand v. Stewart, 133 F.3d 1253 (9th Cir. 1998), cert. denied, 525 U.S. 971 (1998).
\textsuperscript{33} LaGrand Case, supra note 29, at ¶ 26.
\textsuperscript{34} Id. at ¶ 31.
precluded defendants from challenging their sentences even though the state officers had not informed them of their consular protections. Because the ICJ decision followed the LaGrand executions, the U.S. Supreme Court had no direct opportunity to rebuke or accept this holding in a habeas petition or a petition to stay an execution.

C. Avena and the Convergence of the Plots

Thus, we come to the next chapter and the place where our disparate plot lines begin to converge. On January 9, 2003, Mexico, on behalf of some 50 Mexican nationals on death row in various U.S. states, filed a Vienna Convention case against the United States in the ICJ. Torres was one of these Mexican nationals. The ICJ, relying heavily on LaGrand, concluded that the United States, in its arrest, detention, trial and sentencing of the Mexican nationals, had violated its obligations under the Vienna Convention, most egregiously in its failure to notify these foreign nationals of their right to contact the Mexican consulate.

35. Id. at ¶¶ 74, 90-91. This was the case regardless of whether the detainee "would have sought consular assistance . . . whether Germany would have rendered such assistance, or whether a different verdict would have been rendered." Id. at ¶ 74.

36. Application Instituting Proceedings, Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2003 I.C.J. 128, available at http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_iapplication_20030109.PDF (last visited on Dec. 11, 2004). The original claim related to 54 Mexican nations, but as a result of Mexico making subsequent adjustments to its claim, the ICJ's decision only deal with the cases of 52 Mexican nationals, with criminal proceedings taking place in the following states between 1979 and the present: California (twenty-eight cases), Texas (fifteen cases), Illinois (three cases), Arizona (one case), Arkansas (one case), Nevada (one case), Ohio (one case), Oklahoma (one case) and Oregon (one case). Case Concerning Avena and Other Nationals (Mex. v. U.S.) 2004 I.C.J. 128, available at http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm (last visited Dec. 11, 2004) [hereinafter Case Concerning Avena]. For an excellent summary of the Avena decision, see Dinah Shelton, Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 98 AM. J. INT'L L. 559 (2004).

37. The Court noted that the rights in Article 36(1) are intertwined - when a receiving state does not notify detainees of their Vienna Convention rights, it is hard to imagine how these detainees would then request that the consulate be informed, Vienna Convention, art. 36(1)(b), and how the consulate would then communicate with nationals, Vienna Convention, art. 36(1)(a) or visit nationals and arrange for representation, Vienna Convention, art. 36(1)(c). The Court actually examined facts specific to each of the fifty-two cases and determined that in one case, the United States had not breached its obligations under art. 36(1)(b) to inform the detainee of his Vienna Convention rights, (case no. 22 - Mr. Salcido); and that in three cases the United States had not breached its obligations under 36(1)(b) to notify the consulate of the detention if the detainee so requests (case no. 22 - Mr. Salcido; case no. 10 - Mr. Juárez; case no. 34 - Mr. Hernández). Case Concerning Avena, supra note 36, at para. 60. The ICJ also concluded that the
What, according to the ICJ, was the appropriate remedy for such violations? While Mexico argued that the conviction and sentences in all of the cases should be annulled, the ICJ determined, as it had in *LaGrand*, that the U.S. need only afford “review and reconsideration” to determine the extent to which each particular defendant had been prejudiced by the respective Vienna Convention violations. The ICJ further concluded that procedural default rules, virtually the same rules that were under scrutiny in *LaGrand*, violate the Vienna Convention to the extent that they preclude such “review and reconsideration.” The clemency process, according to the ICJ, is an inadequate “review and reconsideration” remedy. Thus, in the case of Torres, the ICJ ordered

United States had violated Article 36(1)(a) in denying Mexican consular officials meaningful opportunity “to communicate with and have access to their nationals,” as well as its obligation in Article 36(1)(c) regarding the right of consular officers to visit their detained nationals and arrange for legal representation (although the ICJ only found violations of the right to arrange for legal representation in 34 of the 54 cases). *Id* at para. 106.


39. *Id.* at para. 139. “[W]hat is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.” *Id.*

40. *Id.* Specifically, the ICJ stated that procedural default rules “may continue to prevent courts from attaching legal significance to the fact, *inter alia*, that the violation of rights set forth in Article 36, paragraph 1, prevented Mexico, in a timely fashion, from retaining private counsel for certain nationals and otherwise assisting in their defence.” *Id.* at para. 113. To the extent that procedural default rules preclude “review and reconsideration” when a receiving state, in this case the United States, denies detainees Vienna Convention protections, such procedural default rules violate Article 36(2) of the Vienna Convention, which requires that states, through local law, give “full effect” to the “purposes for which the rights accorded under this Article [Article 36] are intended.” Vienna Convention, art. 36(2).

41. Case Concerning Avena, *supra* note 36. This is a particularly relevant conclusion in the context of Torres’ case. Oklahoma confronted a similar case in 2001 – the case of Gerardo Valdez, a Mexican national who was convicted of murder in 1989 and sentenced to death without having been informed of his consular rights. While Mr. Valdez was on death row, the ICJ decided the *LaGrand* case, and the Mexican government took up the cause of Mr. Valdez’s case and conviction. In Valdez’s case, the Oklahoma courts applied the procedural default rules to preclude review for prejudice flowing from the State of Oklahoma’s failure to notify Mr. Valdez of his rights under article 36(1) of the Vienna Convention. Valdez v. Oklahoma, 46 P.3d 703, 709 (Okla. Crim. App. 2002). While the Oklahoma Parole Board voted 3 to 1 to commute the death sentence, see Brooke A. Masters, *U.S. Deprived Mexican of Fair Trial, Appeal Says*, WASH. POST, Aug. 23, 2001, at A8, Governor Keating nonetheless denied clemency, after staying the execution three times. Press Release, Governor Denies Clemency for Convicted Killer (July 20, 2001) (on file with author). In a letter that the Governor sent to Mexico’s President, Vicente Fox, the
the U.S. to "find an appropriate remedy having the nature of review and reconsideration."

On March 2, 2004, while Avena was pending and with full knowledge that Torres' case was one of the cases that Mexico challenged in its ICJ petition, the Oklahoma Court of Criminal Appeals set Torres' execution date for May 18, 2004. The ICJ issued the Avena decision on March 31, 2004, with obvious implications for Torres, sparking a flurry of high-profile, high-intensity legal activity surrounding his particular case. On May 7, 2004, the Parole Board recommended clemency for Torres, with a vote of 3-2. On May 13, 2004, just five days before Torres' scheduled Governor supports his decision, and reconciles it with the LaGrand decision, arguing that he actually conducted the requisite "review and reconsideration" during the clemency proceedings:

While it is true that Mr. Valdez was not notified of his right to contact the Mexican Consulate in clear violation of Article 36 of the Vienna Convention on Consular Relations, that violation, while regretful and inexcusable, does not, in and of itself, establish clearly discernible prejudice or that a different conclusion would have been reached at trial or on appeal of Mr. Valdez's conviction or sentence. I must, therefore, look to the specific materials and arguments to judge whether justice was done in this case. . . . I find that the failure to comply with Article 36 did not have a prejudicial effect on either the final determination of guilt or the sentence imposed in this case.

Id. The Oklahoma Court of Criminal Appeals ultimately remanded Mr. Valdez's case, not for Vienna Convention violations but rather for "ineffective assistance of counsel" that led to a "miscarriage of justice." See Valdez, 46 P.3d at 710-12. While the Vienna Convention claim did not prevail, the Court of Criminal Appeals importantly effected the same result by remanding for resentencing on other grounds.

42. Case Concerning Avena, supra note 36, at para. 152. The ICJ nonetheless recognized that in most of the cases before it there were still open avenues of appeal that could, potentially, create opportunities for the type of "review and reconsideration" that the Vienna Convention demands. It also noted that these "review and reconsideration" opportunities had been foreclosed in three cases and that, in those cases, the U.S. had not only breached its article 36(1) notification obligations but also article 36(2)'s mandate that state parties use local law to "give effect" to the Convention's rights and underlying purposes. One of these three cases was that of Torres.

43. See Torres, 58 P.3d 214. The Court of Criminal Appeals set the execution date despite a recommendation on the part of the Attorney General that the Court of Criminal Appeals defer pending the ICJ's decision.

44. See infra notes 74-78 and accompanying text.

45. See, e.g., Julie E. Bisbee, Okla. Panel Backs Clemency for Mexican Inmate: State Feels Heat of Court Ruling, COM. APPEAL, May 8, 2004, at A4 ("Susan B. Loving, chairwoman of the board, said Torres's rights under the Vienna Convention were violated. She said that the board will let a higher authority determine what bearing the world court ruling has on Torres's case. 'We'll let the governor make this decision.'"). See also Sean Murphy, Implementation of Avena Decision by Oklahoma Court, 98 AM. J. INT'L L. 581 (2004).
execution, the Oklahoma Court of Criminal Appeals, by a 3-2 decision, stayed the execution and remanded the case for an evidentiary hearing to determine, in part, whether Torres was "prejudiced by the State's violation of his Vienna Convention rights." Acting under the cover of the Court of Criminal Appeals decision, as well as the decision of the Parole Board, the Governor commuted Torres' sentence to life in prison without parole later that day.

In a special, unpublished concurrence, Judge Chapel offered his view of the Oklahoma Court of Criminal Appeals' legal obligations in the wake of the Avena decision. Judge Chapel reasoned that the United States freely and consensually signed and ratified the Vienna Convention, including the Optional Protocol, creating binding, contract-like legal obligations between the United States and other State Parties. By virtue of the Supremacy Clause, the Court of Criminal Appeals "is bound by the Vienna Convention and Optional Protocol" and is obligated "to give effect" to both. The Avena decision, as a "product of the process set forth in the Optional Protocol" likewise deserves the Court of Criminal Appeals' "full faith and credit." Judge Chapel thereby concludes that his court should "review and reconsider" Torres' case "in light of the Vienna Convention violation, without recourse to procedural bar."

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47. Press Release, State of Oklahoma Office of Governor Brad Henry, Gov. Henry Grants Clemency to Death Row Inmate Torres (May 13, 2004), at http://www.governor.state.ok.us/display_article.php?article_id=301&article_type=1 (last visited on Dec. 11, 2004) [hereinafter Henry Grants Clemency to Death Row Inmate Torres]: The International Court of Justice ruled on March 31 that Torres' rights were violated because he had not been told about his rights guaranteed by the 1963 Vienna Convention. Under agreements entered into by the United States, the ruling of the ICJ is binding on U.S. courts. "I took into account the fact that the U.S. signed the 1963 Vienna Convention and is part of that treaty," the Governor said. "In addition, the U.S. State Department contacted my office and urged us to give 'careful consideration' to that fact."

Id.
49. The Supremacy Clause explicitly states that "[t]reaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2.
50. Torres, No. PCD-442 at 3, 5 (Chapel, J., concurring).
51. Id. at 5.
52. Id. at 8. The "review and reconsider[ation]" will evaluate Torres' case for prejudice, asking: 1) did Torres know that he had a right to contact the Mexican consulate?; 2) would
In response to those who believe that deference to the *Avena* decision is tantamount to granting the ICJ jurisdiction and diminishing autonomy of the Oklahoma courts, Judge Chapel noted:

I am not suggesting that the International Court of Justice has jurisdiction over this Court – far from it. However, in these unusual circumstances the issue of whether this Court must abide by that court's opinion in Torres's case is not ours to determine. The United States Senate and the President have made that decision for us. The Optional Protocol... provides that the International Court of Justice is the forum for resolution of disputes under the Vienna Convention.

Torres have availed himself of this right?; and 3) would the consulate have assisted Torres? *Id.* at 9. Judge Chapel thereby adopts the analysis that other lower courts have adopted in determining prejudice in the face of Vienna Convention violations. See People v. Preciado-Flores, 66 P.3d 155, 161 (Colo. App. 2002); Zavala v. State, 739 N.E.2d 135, 142 (Ind. Ct. App. 2000); State v. Cevallos-Bermeo, 754 A.2d 1224, 1227 (N.J. Super. Ct. App. Div. 2000); United States v. Chaparro-Alcantara, 37 F. Supp. 2d 1122, 1126 (C.D. Ill. 1999); United States v. Esparza-Ponce, 7 F. Supp. 2d 1084 (S.D. Cal. 1998); United States v. Villa-Fabela, 882 F.2d 434, 440 (9th Cir. 1989), *overruled on other grounds,* United States v. Proa-Tovar, 975 F.2d 592 (9th Cir. 1992). Judge Chapel concludes that Torres may have been prejudiced by the state's violation of the Vienna Convention and thus avidly supports the court in its decision to remand.

I have concluded that there is a possibility a significant miscarriage of justice occurred, as shown by Torres's claims, specifically: that the violation of his Vienna Convention rights contributed to trial counsel's ineffectiveness, that the jury did not hear significant evidence, and that the result of the trial is unreliable.

Torres, No. PCD-04-442 at 12 (Chapel, J., concurring).

53. Torres v. State of Oklahoma, No. PCD-04-442, at 2 (Lumpkin, J. dissenting) (“I also do not find *Avena*... binding on this Court.”). At the same time, the dissenters argue that Torres has been afforded rights under *Avena*, that the U.S. must provide review and reconsideration, implying that *Avena* is relevant to the Court of Criminal Appeals' analysis. *Id.* at 4. “Without a doubt Appellant has been afforded his rights under *Avena*” and quoting paragraph 152 of the *Avena* decision, where the ICJ delineates its holding, requiring the United States to provide “review and reconsideration,” but disagrees with the ICJ regarding the form that the review and reconsideration must take. *Id.* “He has been represented by competent lawyers at each stage of these proceedings and afforded all the rights guaranteed to citizens of the United States.” *Id.* *But see,* Kim Cobb, *Parole Board Votes to Spare Life of Mexican,* HOUS. CHRON., May 8, 2004, at 3:

Some officials in Texas, where 16 Mexican citizens sit on death row, have said the decision by the United Nations’ highest court would not be enforced in the state. “Obviously,” Robert Black, a spokesman for Gov. Rick Perry, said at the time of the ruling, “the governor respects the world court’s right to have an opinion, but the fact remains they have no standing and no jurisdiction in the state of Texas.”

In the first test to the *Avena* decision, the Oklahoma court accommodated the ICJ's legal conclusions.

### III. Transnational Legal Process, Judicial Conversation, and the Role of State Courts

The story recounted above has three broader implications for the way that scholars and practitioners conceive of international law and lawmaking: 1) it reminds that the Supreme Court is, at times, a cautious, hesitant, participant in an iterative transnational judicial conversation; 2) it illustrates the process-oriented nature of international lawmaking; and 3) it illuminates state courts as important transnational actors.

#### A. U.S. Supreme Court and Judicial Global Conversation

Particularly in the wake of the Supreme Court's citations of foreign and international law in the *Grutter v. Bollinger* and *Lawrence v. Texas* cases during the 2002 October Term, it has become rather fashionable to celebrate the Supreme Court's public emergence as a transnational actor on the international stage. Consequently, the concept of global judicial conversation and discourse, of Justices importing foreign ideas into their jurisprudence, has become rather vogue (or for some, most notably Justice Scalia, a lightning rod). The *Torres* case reminds us that the Supreme

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Court is sometimes a shy, reserved and tentative participant in this global conversation – it often does not assume a prominent and leading role, ceding the honor to other actors, in this case the Oklahoma Court of Criminal Appeals. Torres also reminds us that the Court’s role in this global judicial conversation may not always be showcased in banner headline cases, but will sometimes remain buried in obscure footnotes or commentary following a denial of a certiorari petition, as regularly had been the case prior to Grutter and Lawrence.57

While some Justices would have liked to engage the international issues that Torres presented, namely the relationship between domestic law and the ICJ’s interpretation of a binding treaty issued pursuant to a binding dispute resolution mechanism, the Court as a whole did not embrace the Torres case as an opportunity to engage in such global judicial conversation. On November 17, 2003, in the face of a provisional ICJ order in Avena requiring that “[t]he United States . . . take all measures necessary to ensure that Mr. Cesar Robert Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed,”58 the

(2003) (discussing transnational judicial conversation and dialogue and its impact on Supreme Court jurisprudence); see also Waters, Justice Scalia on the Use of Foreign Law, supra note 1 (discussing Justice Scalia’s strong opposition to the use of foreign and international interpretations and applications of rights similar to those provided for in the Constitution); see also Discussion between Justice Antonin Scalia and Justice Stephen Breyer, Constitutional Relevance of Foreign Court Decisions, American University Washington College of Law (Jan. 13, 2005), available at http://domino.american.edu/AU/media/mediarel.nsf (last visited on Jan. 24, 2005).

57. See, e.g., Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (“Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”); Thompson v. Oklahoma, 487 U.S. 815, 851 (1988) (O’Connor, J., concurring) (noting that capital punishment for those under eighteen years is, in many circumstances, inconsistent with U.S. treaty obligations); Knight v. Florida, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting from denial of certiorari) (arguing that the Court should consider the issue of whether a prolonged stay on death row implicates the Eighth Amendment, observing that “[a] growing number of courts outside the United States -- courts that accept or assume the lawfulness of the death penalty -- have held that lengthy delay in administering a lawful death penalty renders ultimate execution inhumane, degrading, or unusually cruel”); Printz v. United States, 521 U.S. 898, 976-77 (1997) (Breyer & Stevens, JJ., dissenting) (looking to federal systems in Germany, Switzerland, and the European Union to support position that “the United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control”); Printz, 521 U.S. 898, 976-77 (Breyer, J., dissenting) (arguing that foreign country practice provides empirical data of how other countries regulate handguns, in particular, balancing federal regulation against local control).

58. Request for the Indication of Provisional Measures, Case Concerning Avena and Other Mexican Nationals (Mex. v. U. S.), 2003 I.C.J. 128 (Feb. 5) (order), available at
U.S. Supreme Court nonetheless denied the petition for a writ of certiorari in Torres' habeas proceedings. Consequently, the Supreme Court chose not to assume affirmative authorship of the Vienna Convention stories that both Oklahoma and the ICJ were concurrently writing. It passed, gave up its place, at least during the 2003 Term, in the global conversation among international courts, federal courts, and state courts (and between those in the U.S. State Department concerned with the diplomatic integrity of treaty obligations and future credibility of the U.S. in treaty negotiations and those state and local officials fighting to maximize autonomy over law enforcement decisions). In so doing, the Court assumed a "nationalist" posture, as opposed to the "transnationalist" approach celebrated by many of this Symposium's participants.

Yet, this pass did not come without some resistance by Justices Stevens and Breyer. In a memorandum decision attached to the denial of certiorari, Justice Stevens notes that the LaGrand decision is the "authoritative interpretation" of the Vienna Convention's consular notification rights and obligations and argues that "[a]pplying the procedural default rule to Article 36 claims is not only in direct violation of the Vienna Convention, but it is also manifestly unfair." Justice Stevens adds that "when it [procedural default rules] permits state courts to disregard the Nation's treaty obligations," such rules are unfaithful to the Supremacy Clause.

Justice Breyer dissents from the denial of Torres' certiorari petition, offering the following analysis. The Supremacy Clause demands that states give full effect, without "additional congressional legislation" to the


59. Torres, 124 S. Ct. at 919. The Supreme Court certainly had other options at this point. It could have imposed a stay pending the outcome of the Avena case, or the Court could have granted the petition for certiorari and heard arguments on the nagging federalism and Supremacy Clause questions that hover around issues of treaty implementation, e.g., to what extent are the states bound to comply with the terms of a treaty even if implementation requires passing and enforcing laws that are contrary to longstanding state law and practice?


61. Torres, 124 S. Ct. at 919 (mem.) (Stevens, J., respecting the denial of the petition for certiorari).

62. Id. at 920.
rights granted in self-executing treaties, as the Vienna Convention. Given that the U.S. ratified the Optional Protocol, the U.S., and, by virtue of the Supremacy Clause, the several states, are bound by the ICJ's "authoritative" interpretation of the Vienna Convention offered in LaGrand, as well as the interpretation that would be forthcoming in Avena. And, in response to those who argue that deference to the ICJ is tantamount to ceding U.S. judicial power to a "foreign" court, Justice Breyer eloquently answers,

While this [contention that the U.S. Constitution vests judicial power exclusively in the federal courts and argument that a treaty cannot delegate Art. III judicial powers to the ICJ] is undeniably correct as a general matter, it fails to address the question whether the ICJ has been granted the authority, by means of treaties to which the United States is a party, to interpret the rights conferred by the Vienna Convention. The answer to Lord Ellenborough's famous rhetorical question, "Can the Island of Tobago pass a law to bind the rights of the whole world?" may well be yes, where the world has conferred such binding authority through treaty. It is this kind of authority that Torres and Mexico argue the United States has granted to the ICJ when it comes to interpreting the rights and obligations set forth in the Vienna Convention.

Justice Breyer thus believes that Torres' petition raises fundamental legal questions that demand the Court's keen engagement and attention.

Indeed, in the Term that just began in October 2004, the Court is poised to become a more engaged, public participant in an evolving judicial global conversation concerning Vienna Convention rights. In another Avena case, that of Mr. José Medellín, the Fifth Circuit Court of Appeals affirmed the application of a procedural default rule to bar Mr. Medellín from enjoying meaningful "review and reconsideration" of his Vienna Convention claims and thus did not follow the Oklahoma Court of Criminal Appeals' lead. The Fifth Circuit reasoned that it was bound by the Supreme Court's decision in Breard, and even though the ICJ decided

63. Torres, 124 S. Ct. at 564 (Breyer, J., dissenting).
64. Id. Thus, Justice Breyer would prefer to defer a decision on the petition pending a decision in the Avena case, as well as further briefing from the United States and "individuals expert in the subject of international law." Id. at 565.
65. The United States, in a brief in opposition to habeas petitions filed in two other Avena cases, notes, "the ICJ does not exercise any judicial power of the United States, which is vested exclusively by the Constitution in the United States federal courts." Id. at 565.
66. Id. at 565 (citations omitted).
68. See supra note 27 and accompanying text.
both *Avena* and *LaGrand* in the interim, it would not depart from Supreme Court precedent absent further Supreme Court guidance. Mr. Medellín filed a writ of certiorari, which the Court granted on December 10, 2004. The Court’s ultimate decision in the *Medellín* case will likely reveal much about how the Court envisions its role in this evolving transnational legal dialogue and may indicate whether the Court intends to assume a markedly “transnationalist” or “nationalist” posture in future decisions.

B. *International Lawmaking and Transnational Legal Process*

The Torres saga also offers insight into how international law is made in practice, as opposed to how it is purportedly made in the international law textbooks. International law is a process—it is often a complex story. Too often, international legal scholars gravitate to formal legal constructs—such as treaties—to find the law. In the instant example, the codification and entry into force of the Vienna Convention—a treaty—was certainly not the climax of the story involving consular protection rights. This is not to deny the existence of international law but rather to emphasize that it is an iterative process, distinct in many ways from domestic lawmaking processes.

Some scholars, most prominently Harold Hongju Koh, package this phenomenon as “transnational legal process.” Others, including one of

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69. *Medellín*, 371 F.3d at 280. Recall that *Breard* was the Supreme Court’s response, and rejection, of the ICJ’s *provisional order* requesting a stay of Mr. Breard’s execution; the ICJ’s decision in *Breard* was not a substantive interpretation of the Vienna Convention’s consular notification rights in light of U.S. procedural bar rules but rather a provisional order requesting that the U.S. Supreme Court stay an execution pending an ICJ decision on the merits of the Vienna Convention claims. Thus, one could reasonably argue that the Supreme Court’s decision in *Breard* is not a rebuke of the ICJ’s interpretation of Article 36 on the merits but rather a rejection of an ICJ provisional order. The ICJ did not issue the *LaGrand* decision, its first interpretation of the Vienna Convention claims on the merits, until June 2001, more than three years following the Supreme Court’s *Breard* decision.


73. The domestic and international process of defining an international rule, refining the international rule, incorporating international rules into domestic legal systems, and enforcing international rules as domestic laws, engages a multitude of transnational actors that repeatedly interact in various forums, coalesce in a type of epistemic community, and ultimately reconstitute state interests in support of the international rule. *See* Harold
the participants on this panel, Paul Schiff Berman, offer a distinct "law and globalization" view of international law and lawmaking.\textsuperscript{74} And still others view international lawmaking, especially in some of the more technical, regulatory areas, as a process of transnational networking, sometimes even creating networks of networks.\textsuperscript{75} Whatever the theoretical gloss and


[Transnational legal process] can be viewed as having three phases. One or more transnational actors provokes an interaction (or series of interactions) with another, which forces an interpretation or enunciation of the global norm applicable to the situation. By so doing, the moving party seeks not simply to coerce the other party, but to internalize the new interpretation of the international norm into the other party's internal normative system. The aim is to "bind" that other party to obey the interpretation as part of its internal value set. . . . The transaction generates a legal rule which will guide future transnational interactions between the parties; future transactions will further internalize those norms; and eventually, repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process.

\textit{Id} at 2646.

74. See Paul Schiff Berman, \textit{From International Law to Law and Globalization}, 43 COLUM. J. TRANSNAT'L L. (forthcoming 2005) (arguing that international law demands "interdisciplinary study of . . . processes of international, transnational, and subnational norm development and interpretation" and that the new scholarship should be "truly interdisciplinary, drawing on insights not only of international relations theorists, but also of anthropologists, sociologists, critical geographers, and cultural studies scholars.") (on file with author); see also generally Paul Schiff Berman, \textit{Globalization of Jurisdiction}, 151 U. PA. L. REV. 311 (2002).

packaging, these scholars and the present example importantly recognize that the notion of “international law as treaty” or “international law as intergovernmental organization born from a treaty” is a woefully static and underinclusive way to conceive of the international lawmaking process.

Torres’ Vienna Convention story involved a volley, of sorts, between the ICJ, Supreme Court and lower courts. From the ICJ (Breard) to the Supreme Court back to the ICJ (LaGrand) to the Arizona courts and back to the ICJ (Avena) with an intervening pass from the Supreme Court to the Oklahoma Court of Criminal Appeals, as well as the Texas courts; the ball is now literally in the Supreme Court. Yet judges and courts were not the sole, or even the primary, characters in this story. Clearly the parole boards and state governors played critical roles. The U.S. State Department issued practical guides to state and local law enforcement officials, addressing issues of consular notification and access, and cautioned domestic judges and state governors to be circumspect about the

diplomatic implications of their decisions. The Mexican government not only filed *Avena* with the ICJ, but also began a concerted public relations and advocacy blitz, orchestrated by high-profile Wall Street lawyers; it also implicitly threatened economic retaliation (a relatively credible threat in states like Oklahoma, which depend heavily on trade with Mexico). Nongovernmental organizations (NGOs) engaged politicians and business leaders, holding press conferences and initiating letter writing campaigns. Ivy League law professors and human rights advocates drafted an amicus brief on international law for the Oklahoma Court of Criminal Appeals and persuaded prominent Oklahomans, most notably former Oklahoma Congressman and U.S. Ambassador to Mexico, James Jones, to join.

With each additional chapter in the Torres/Vienna Convention story, the sanctity of the Vienna Convention’s consular protection rights became incrementally enmeshed in the domestic psyche. And, ultimately, the

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77. Henry Grants Clemency to Death Row Inmate Torres, *supra* note 47. ("[T]he U.S. State Department contacted my office and urged us to give ‘careful consideration’ to that fact,” that the United States was a party to the Vienna Convention). The State Department weighed in on *Breard*, as well ("[l]ast night the Secretary of State sent a letter to the Governor of Virginia requesting that he stay Breard’s execution."). *Breard v. Gilmore*, 523 U.S. 371, 378 (1998).


81. For example, in *Breard*, the Court is initially quite hostile to the ICJ’s provisional order, and Mr. Breard is executed. The State Department, acutely aware of the diplomatic friction that Vienna-Convention-related disputes cause and also quite concerned about reciprocal retaliation against Americans who might be detained abroad, begins a concerted effort to enhance compliance on-the-ground so as to obviate the need for any court intervention. *Instructions for Federal, State, and other Local Law Enforcement Regarding Foreign Nationals*, *supra* note 76. In *Valdez*, an Oklahoma case following *LaGrand* yet preceding *Torres* that was highly reminiscent of the Vienna Convention issues in *Torres’* case, the Oklahoma Court of Criminal Appeals, while grappling with the inequities of the Vienna-Convention-related violations, was not yet willing to bow to the ICJ’s legal interpretation of the Vienna Convention, as articulated in *LaGrand*; yet, the Oklahoma court nonetheless granted relief, not on the Vienna Convention issues but rather to prevent
disposition of Torres’ case is profoundly distinct from that of Breard’s.\textsuperscript{82} Will there be some stalling, or even a change in momentum? Mr. Medellin may soon find out that the answer is “yes.” But, Oklahoma, in breaking new ground – in redefining the relationship between a state’s highest criminal court and treaty-based dispute resolution mechanisms that, at times, reside in the Hague, may have provided some cover for subsequent states facing \textit{Avena}-like cases.\textsuperscript{83} For those states that do not want to be placed in the same conundrum – either “review and reconsider” criminal convictions or be in breach of the United States’ treaty obligations – Oklahoma’s experience should ultimately encourage state executives to collaborate with law enforcement officials to ensure that Vienna Convention rights are granted upon detention, obviating the need for post hoc vindication.\textsuperscript{84} And, the Oklahoma Court of Criminal Appeals’ decision in \textit{Torres} provided the foil to Texas’ approach in \textit{Medellín}, offering the seemingly requisite impetus for the Supreme Court’s granting of certiorari in the \textit{Medellín} case.

\textsuperscript{82} It is certainly important to mention the geo-political backdrop against which Torres’ case climaxed in April/May 2004, one year into the Iraq war. Whether warranted or not, the international community did not at that moment consider the U.S. to be an international-law-abiding member. It is no accident that the Oklahoma Parole Board, Court of Criminal Appeals and Governor made respective Torres-related decisions with the Abu Ghraib prison scandal unfolding in the background. \textit{See Victor Davis Hanson, \textit{Abu Ghraib}, WALL ST. J., May 3, 2004, at A2; Thom Shanker \& Jacques Steinberg, \textit{The Struggle for Iraq: Captives; Bush Voices ‘Disgust’ at Abuse of Iraqi Prisoners}, N.Y. TIMES, May 1, 2004, at A1.} At a moment when the international community saw certain members of the United States military violating Geneva Convention obligations, officials in Oklahoma City may have, consciously or subconsciously, attempted to re-sanctify the U.S. as a treaty-abiding nation – in this case the Vienna Convention rather than Geneva Convention – as an attempt to heal some of the domestic and international damage that Abu Ghraib created. \textit{See, e.g., Harold Honju Koh, \textit{The Ninth Annual John W. Hager Lecture, the 2004 Term: The Supreme Court Meets International Law}, 12 TULSA COMP. \& INT’L L. J. 1 (2004) (remarks in this issue).}

\textsuperscript{83} Kim Cobb, \textit{Parole Board Votes to Spare Life of Mexican}, Hous. CHRON., May 8, 2004, at 3 (“David Dow, who represents condemned Texas inmate Cesar Fierro, also a Mexican citizen, said he doubts the Oklahoma case will sway the decision-making process in Texas or other states. ‘At the same time, I think it will give them some cover,’ Dow said. ‘I think it’s useful for other boards not to have to be the first one to decide that this order from the International Court of Justice is binding.’”).

\textsuperscript{84} Criminal defense lawyers are revising practitioner guides to include Vienna Convention rights (and violations) on direct appeal checklists so that “procedural default” will no longer be an issue. \textit{See, e.g., Meghan H. Morgan, Case Note, \textit{Torres v. Mullin, 124 S.Ct. 562 (2003)}(mem.) (Breyer, J., Dissenting from a Denial of Certiorari), 16 CAP. DEF. J. 609, 613 (2004).}
C. State Courts as Transnational Actors

International law is a process involving a multitude of actors. While it is certainly interesting and important to reflect in forums such as these on the Supreme Court's role in this process, one should not underestimate the multidimensional, multifaceted role of other transnational actors in constituting international law. In particular, state courts are clearly transnational, not mere parochial, actors; yet their role in solidifying international norms and furthering compliance with international law is woefully underappreciated.\(^{85}\) When the Vienna Convention story has concluded – and it is far from over – I have no doubt that the Oklahoma Court of Criminal Appeals, Judge Chapel, in particular, will retain a prominent place as an innovator and leader in matters of international law.\(^ {86}\) Conceiving of state courts as transnational actors raises two derivative questions: 1) why have international scholars largely neglected the role of state courts? and 2) should the scholar-practitioner make any attendant changes in advocacy tactics?

One can only speculate on the first question. In part, scholars and practitioners' neglect of state courts may be a product of some intellectual myopia. The giants of international law typically reside in the political or economic power centers, often affiliated with the nation's most prestigious law schools, where the Supreme Court and federal appellate decisions dominate almost all casebooks, and where students learn that the most prestigious post-law-school jobs are federal court clerkships. That state courts are largely overlooked transnational legal actors is likely just a specific manifestation of a much broader reality – in elite legal circles, state courts are more generally neglected, or treated as an afterthought.

Furthermore, the role of state courts as transnational actors is regrettably caught in the cross-wind of several of the most contentious debates within the international legal academy, particularly those

\(^{85}\) There are admittedly some scholars who discuss the role of state courts in compliance with international law, but these scholars typically see state courts as placing limits on international law – as reigning it in – rather than being the progressive champions of international law and tend to argue that state law, as opposed to federal, treaty-based law, controls in certain situations. See, e.g., Julian G. Ku, The State of New York Does Exist: How the States Control Compliance with International Law, 82 N.C. L. REV. 457 (2004).

\(^{86}\) See Justice Higgins, Remarks at the Yale Law School Alumni Weekend (Oct. 8, 2004), at http://www.law.yale.edu/outside/html/Alumni_Affairs/alumniwkend_av04.htm (last visited on Nov. 26, 2004) (Yale Law School Alumni Weekend, Yale Law School, New Haven, CT) (noting that sometimes state courts, like the Court of Criminal Appeals, and offering other European examples, will step ahead of constitutional courts and make decisions that profoundly impact the evolution of international law).
regarding the domestic legal status of customary international law, federal pre-eminence in foreign affairs and international law, and substantive limitations on the Constitution's Article II treaty power. Those who view international law as a process engaging a multitude of transnational actors (state courts presumably included) also tend to defend a view of the U.S. Constitution whereby the federal government and federal courts remain importantly dominant in questions of international law and diplomacy, concomitantly emphasizing federal courts and federal law in scholarship and advocacy. State courts thereby recede in the analysis, often out of benign neglect.

On the other hand, one might expect scholars who argue that customary international law is not part of any "federal common law," or who favor substantive limitations on the executive branch's ability to bind the states through treaties, to also champion the role of states, state courts in particular, in furthering international law. Yet these same scholars tend to reject a win-win, process-oriented view of international law in favor of a zero-sum view, whereby fiercely "competing sovereigns"—states, the federal government, foreign states, and international bodies—vie for "the right to control America's judicial destiny." These scholars see states and state courts not as transnational actors but rather as

87. See, e.g., Harold Hongju Koh, Is International Law Really State Law?, 111 Harv. L. Rev. 1824, 1849 (1998) ("One need not denigrate the ability or impartiality of state court judges to recognize that the federal judges have structural attributes that make them more appropriate adjudicators to rule on international matters that may embroil the nation in foreign policy disputes.").


90. I attribute this observation to Koh, International Law as Part of Our Law, supra note 55, at 56:

In this transnational legal process, the several states, foreign governments, and international bodies do not represent competing sovereigns, all vying for the right to control America's judicial destiny. Rather, a transnationalist jurisprudence suggests, the United States expresses its national sovereignty not by blocking out all foreign influence but by vigorous "participation in the various regimes that regulate and order the international system."

Id.
transnational detractors. A court, like the Oklahoma Court of Criminal Appeals, that operates synergistically with international courts, the U.S. Department of State, foreign diplomats, and NGOs would not likely be among their favored examples.

If state courts are important transnational actors, what does this suggest about advocacy tactics? Judges, and not merely state judges for that matter, sometimes misstate even the most fundamental tenets of international law and simply must receive more training in international law. So it is crucial that lawyers, who advocate before such judges, understand their briefs not only as advocacy opportunities but also as opportunities to instruct courts in the legal dynamics of international law. Accordingly, all lawyers, not just those elite international law professors and those affiliated with certain NGOs, should become familiar with basic international law concepts (with strong implications, of course, for law school curricula). Similarly, while Supreme Court advocacy certainly has a "sizzle," NGOs and international law advocacy clinics should turn some energy from filing Supreme Court amicus briefs to filing amicus briefs before the state courts that will often be the first, or primary, judicial touch point with cutting edge issues of international law. Judge Chapel, and his

91. See, e.g., Ku, supra note 85, at 506-11 (noting state efforts to stymie implementation of the Vienna Convention rights, most notably those of Florida).

92. For example, some judges (or even Justices) do not understand the legal distinction between signing a treaty and ratifying a treaty. Torres, 124 S. Ct. at 564 (Breyer, J., dissenting opinion, denial of petition for writ of certiorari) (noting that the United States has "signed" the Optional Protocol and thereby must abide by the ICJ's decision); however, in reality, a mere signature would not necessarily lead to this conclusion, see Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 333 art. 18; Justice Breyer's argument would have been stronger had he correctly noted that the United States had ratified the Optional Protocol. In the Torres concurrence, Judge Chapel, in a footnote, distinguishes the ICJ's Nicaragua litigation from the Avena case because "plaintiffs were not parties to the International Court of Justice decision [in the Nicaragua case], and the treaties relied on were not self-executing. By contrast, Avena applies directly to Torres's case, and the Vienna Convention is self-executing through the Optional Protocol." Torres, No. PCD-04-442, at n.18 (Chapel, J., concurring). Of course, this quote shows limited understanding of which parties may legitimately bring cases before the ICJ -- namely states (Torres was not a party before the ICJ; Mexico was on his behalf) -- and the Optional Protocol does not, in and of itself, make the Vienna Convention self-executing; the Optional Protocol is a dispute resolution clause that binds states -- in this case the U.S. and Mexico. The self-executing question is relevant when determining whether a domestic court, for example the Oklahoma Court of Criminal Appeals, may entertain Vienna-Convention-based arguments without any underlying state or federal statute that codifies Vienna Convention rights.

93. The American Association of Law Schools will conduct a workshop entitled Integrating Transnational Perspectives into the First Year Curriculum in conjunction with its 2006 Annual Meeting.
law clerks, relied heavily on an amicus brief on behalf of experts in international law and former diplomats, as evidenced by Judge Chapel's echoing of many of the cases and arguments appearing in that brief. Regrettably, however, the Court of Criminal Appeals' receipt of an amicus brief in Torres was a stark aberration from standard practice, rather than the rule. Finally, federal judges and foreign judges must recognize state court judges as co-participants in the making and shaping of international legal norms and should open their cross-border judicial conversations – both formal (opinion-writing and cross-citing of foreign and international law) and informal (hobnobbing at conferences and foreign study abroad programs) – to include their state counterparts.

IV. CONCLUSION: A BOTTOM-UP APPROACH TO INTERNATIONAL LAWMAKING

Torres illustrates that state courts matter in the solidifying, interpreting, and application of international norms. Yet, the international lawmaking stories that gain scholarly and popular traction are of a different genre – international law is a treaty, like the Vienna Convention, and the crucial legal interpretive work flows from intergovernmental institutions, like the ICJ. In these stories, international law evolves from the “top-down,” from the vantage point of a formal legal instrument. Yet, often out of the limelight, international law unfolds from the “bottom-up,” on a more grass-roots, in-the-trenches level. Elsewhere, I have identified this phenomenon in the context of international trade finance practitioners, who constitute and interpret transnational norms that ultimately are appropriated by more formal legal regimes. Likewise, in the context of the Vienna Convention, state courts, as they grapple with the international legal issues that might arise in criminal prosecutions, as they manage the on-the-ground exigencies of the criminal justice system,

95. This dynamic – amicus brief argument finding its way into judicial opinions – was mentioned in Sean Murphy, Implementation of Avena Decision by Oklahoma Court, 98 AM. J. INT’L L. 581 n.13 (2004).
96. When asked whether their chambers receive many amicus briefs, Judge Chapel’s law clerk Lou Kohlman answered “rarely,” and further admitted how helpful the amicus brief was in researching the international law issues. Interview with Lou Kohlman, Law Clerk, Chambers of the Honorable Charles Chapel, in Tulsa, Okla. (October 21, 2004) (on file with author).
97. A Bottom-Up Approach to International Lawmaking, supra note 72.
and as they balance the relationship between local, state, and federal governments, significantly contribute to the international lawmaking process. These state decisions – state practices – percolate, at times inconsistently and at times at cross-purposes, to constitute, or refine, international norms.

In the instant example the intersection of bottom-up and top-down lawmaking processes becomes a particularly powerful, combustive moment for international law. The Vienna Convention was undoubtedly a great international law achievement, and certainly the ICJ’s interpretations, particularly in LaGrand and Avena, importantly add to the Vienna Convention’s texture and illuminate some of its contours. Yet, it was not until a little-known, little-appreciated court in Oklahoma, in the course of dealing with what initially appeared a run-of-the-mill capital case, collided head-on with the ICJ (by virtue of Torres being a member of the Avena group), and was thereby forced to tackle the relationship between state procedural bar laws, treaties and the Supremacy Clause, that Vienna Convention mandates became solidified and legitimated as actual, enforceable, on-the-ground rules of practice. Indeed, this Vienna Convention story, involves two plots – one beginning in Oklahoma criminal courts – the other beginning with Breard and continuing through Avena at the Hague. Their meeting – intertwining – is certainly a very significant moment. Whether this moment will be eclipsed by the Supreme Court’s forthcoming decision in Medellin is yet to be determined. Regardless, the Oklahoma Court of Criminal Appeals undoubtedly wrote a crucial, if not the critical, chapter in the unfolding Vienna Convention narrative.