

COMMENTARY

***Avena* as a Challenge to the Federal American Legal System**

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1. INTRODUCTION: *AVENA* 2004

In January 2003, Mexico instituted proceedings before the International Court of Justice (ICJ) regarding violations of the 1963 Vienna Convention on Consular Relations allegedly committed by the USA.¹ The application stated that the USA in the case of the arrest and sentencing of 52 Mexican nationals had violated its international legal obligations to Mexico:

in its own right and in the exercise of its right to diplomatic protection of its nationals, by failing to inform, without delay, the 52 Mexican nationals after their arrest of their right to consular notification and access under Article 36 (1) (b) of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) (a) and (c) of the Convention.²

After an Order for provisional measures of February 2003, stating that the USA 'shall take all measures necessary to ensure that ... [three of the Mexicans being the most urgent cases on death row] are not executed pending final judgment in these proceedings',³ in its March 2004 Judgment the ICJ found, that the USA had violated several articles of the Vienna Convention on Consular Relations. It also found:

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¹ *Case concerning Avena and other Mexican Nationals (Mexico v. United States of America)*, International Court of Justice. See *Avena* case on the Hague Justice Portal: <http://www.haguejusticeportal.net>.

² International Court of Justice, *Avena and other Mexican nationals (Mexico v. United States of America)* (2003-2004): Judgment, 31 March 2004 (hereafter, Judgment of 31 March 2004), para. 14 (1).

³ International Court of Justice, *Avena and other Mexican nationals (Mexico v. United States of America)*, Order of 5 February 2003, Request for the Indication of Provisional Measures (hereafter Order of 5 February 2003), para. 59 (a).

[t]hat the appropriate reparation in this case consists in the obligation of the United States of America to provide, *by means of its own choosing*, review and reconsideration of the convictions and sentences of the Mexican nationals referred to [...].⁴

The judgment means that the Court recognizes ‘that the concrete modalities for such review and reconsideration should be left primarily to the United States,’⁵ as it already had done in the *LaGrand* case. However, the judgment also specifies that this freedom in the choice of means for such review is not without qualification. Indeed, the Court decided that it should be carried out ‘by taking account of the violation of the rights,’⁶ set forth in the Vienna Convention on Consular Relations.

The Court also makes abundantly clear in its 2004 Judgment, that ‘it is not the convictions and sentences of the Mexican nationals which are to be regarded as a violation of international law, but solely certain breaches of treaty obligations which preceded them.’⁷ In other words: it is not up to the ICJ to decide whether or not the states within the USA have the right to use the death penalty. In that respect, it is interesting to note that Mexico contended, *inter alia*, that the right to consular notification and consular communication under the Vienna Convention is a *human right* of such a fundamental nature that its infringement will *ipso facto* produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right. The ICJ observes that the question of whether or not the Vienna Convention rights are human rights ‘is not a matter that this Court need decide’.⁸ One can imagine that in 2004, the Mexican authorities were both glad – victory! – and disappointed – the Judgment is not going far enough! – at the same time.

2. ADDITIONAL ICJ STEPS IN 2008

It was not until 2008 before Mexico brought its dispute to the ICJ again. It did so with a Request for Interpretation of the March 2004 Judgment as well as (again) a Request for the indication of provisional measures. The latter related to the fact that for one Mexican citizen the date for his execution was set, while four more Mexican nationals were ‘in imminent danger of having execution dates set by the State of Texas.’⁹ In its Request for Interpretation, Mexico is seeking for ‘guidance as to the scope and meaning of the remedial obligations incumbent

⁴ Judgment of 31 March 2004, para. 153(9), emphasis added.

⁵ Judgment of 31 March 2004, para. 131.

⁶ *Ibid*, para. 131.

⁷ *Ibid*, para. 123.

⁸ *Ibid*, para. 124.

⁹ International Court of Justice, Application Instituting Proceedings, Request for Interpretation of Judgment in the Case Concerning Avena and Other Mexican Nationals (United Mexican States v. United States of America), 5 June 2008 (hereafter, Application Instituting Proceedings, 5 June 2008) para. 4.

upon the United States'.¹⁰ It is specifically asking the Court to clarify that the core obligation set forth in the *Avena* Judgment is an *obligation of result* and not merely an *obligation of means*, as Mexico contends the USA interprets it.

At the time of writing (October 2008), the Court is looking at the merits of the case. Before that stage is complete, however, it had to decide on the request for provisional measures asking not to execute the death penalty as long as there is no ICJ Judgment on the merits. On 16 July it rendered its decision on the request for provisional measures. In its Order for provisional measures, the Court deals amongst other things with the 'obligation of result' or 'obligation of means' argument. On that issue, the Court finds that:

While it seems *both Parties* regard [the core of] the *Avena* Judgment as an *international obligation of result*, the Parties nonetheless apparently hold different views as to the meaning and scope of that obligation of result, namely, *whether that understanding is shared by all United States federal and state authorities and whether that obligation falls upon those authorities*.¹¹

In other words, an 'obligation of result' exists, but to whom exactly does it apply given the composite way the USA is constructed and the division of authority and legislative powers between the federal US government and the separate States? In relation to this issue, the Court observes:

that the United States has recognized that "it is responsible under international law for the actions of its political subdivisions", including "federal, state, and local officials", and that its own international responsibility would be engaged if, as a result of acts or omissions by any of those political subdivisions, the United States was unable to respect its international obligations under the *Avena* Judgment.¹²

The Court also observes that 'in particular, the Agent of the United States acknowledged before the Court that "the United States would be responsible, clearly, under the principle of State responsibility for the internationally wrongful actions of [state] officials."¹³

After having observed Mexico's declaration that there "can be no question about the urgency of the need for provisional measures",¹⁴ the Court then comes to the conclusion that:

The United States of America shall take all measures necessary to ensure [...] that [the five Mexicans] are not executed pending judgment on the Request for interpretation submitted by the United Mexican States, unless and until these five Mexican nationals receive review and reconsideration consistent with [...] *Avena*.¹⁵

So far so good. But it is surprising to note that this Order was issued with only a seven to five majority. What were the arguments against? It comes as *no* surprise

¹⁰ Application Instituting Proceedings, 5 June 2008, Preamble.

¹¹ Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning *Avena* and Other Mexican Nationals (*Mexico v. USA*), Order of 16 July 2008 (hereafter Order of 16 July 2008), para. 55. Emphasis added.

¹² Order of 16 July 2008, para. 77.

¹³ *Ibid.*

¹⁴ *Ibid.*, para. 21.

¹⁵ *Ibid.*, para. 80 II (a).

that the core arguments against were tabled in a dissenting opinion of US Judge Buerghenthal. According to him there is no disagreement on the question of whether or not the *Avena* Judgment leads to an obligation of result, but rather the judge was concerned with the central issue that Mexico presented ‘no evidence whatsoever to support its contention that the Parties are in a disagreement regarding the meaning or scope of that paragraph of the *Avena* Judgment.’¹⁶ Judge Buerghenthal continues, stating that here there ‘is a claim by one of the Parties only regarding the existence of a dispute that is not supported by any relevant evidence before the Court.’¹⁷ In addition, the American Judge states that the Order adds nothing to the obligations the United States continues to have under the *Avena* Judgment, ‘namely, not to execute any of the Mexican nationals unless they have been provided the review and reconsideration pursuant to that Judgment.’¹⁸

Three other Judges – Owada, Tomka and Keith – said that they regretted that they were unable to support the Court’s Order, their argument being that ‘humanitarian considerations which clearly underlie the decision cannot override the legal requirements of the Statute of the Court.’¹⁹ In their view, Mexico has failed to make clear that there is a dispute between the USA and Mexico about the meaning or scope of *Avena*, that for that reason the Application for Interpretation should be dismissed, and therefore the request for provisional measures should also be dismissed since there would be no pending proceeding to which it would be related. Finally, according to dissenting Judge Skotnikov the Court has taken a wrong route. According to him there is no lack of clarity as to *Avena*, accordingly the real issue is not a matter of interpretation but of simply living up to *Avena*.

3. IN THE MEANTIME IN THE USA

While we await the ICJ Judgment on the Request for Interpretation, it is interesting to see how the USA reacted internally to the 2004 Judgment. There have been two milestones, one might say. The first is the publication of a Memorandum on the issue by President Bush, supporting the ICJ, the second is a Judgement by the US Supreme Court saying quite the contrary.

3.1. PRESIDENTIAL MEMORANDUM

The *first* is the 2005 Memorandum by US President George W. Bush to the US Attorney General, determining that the US will fulfill its international obligations following the ICJ Judgment ‘by having State courts *give effect* to the decision

¹⁶ ‘Dissenting opinion of Judge Buerghenthal’, Annex to the Summary of the Order, 16 July 2008, para. 4.

¹⁷ Order of 16 July 2008, Dissenting Opinion Judge Buerghenthal, para 25.

¹⁸ ‘Dissenting opinion of Judge Buerghenthal’, Annex to the Summary of the Order, 16 July 2008, para. 4.

¹⁹ Order of 16 July 2008, Dissenting Opinion Judges Owada, Tomka and Keith, para. 1.

in accordance with general principles of comity'.²⁰ The statement led to an extensive discussion on whether the Presidential Memorandum should be read as a command or a request.²¹

3.2. US SUPREME COURT JUDGEMENT

The *second* is the Supreme Court Judgment of March 2008 in the case *Medellín v. Texas*. Medellín – the Mexican national for whom the execution date had been set – argued that the President's Memorandum is a valid exercise of his "Take Care" power. The Supreme Court thought otherwise:

While a treaty may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty itself conveys an intention that it be 'self-executing' and is ratified on that basis. [...] The President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'²²

And even more tellingly, the Supreme Court decided that the President's authority allows him 'to execute the laws, not make them.'²³ This leads the Supreme Court to the overall decision that 'the *Avena* judgment is not domestic law', that 'accordingly, the President cannot rely on his Take Care powers here', and that 'the judgment of the Texas Court of Criminal Appeals is affirmed.'²⁴

3.3. DISSENTING OPINION OF JUSTICE BREYER

This is, no doubt, an understandable and defensible reasoning. Be that as it may, the truth it seems is never that easy; no truth without another truth accompanying it. How about the dissenting opinion, worded by Justice Breyer, joined by Justices Souter and Ginsburg? They claim that the US Constitution's Supremacy Clause provides that 'all Treaties [...] 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.'²⁵ The Clause means, according to the dissenting opinion, that courts must regard a treaty as equivalent to an act of the legislature, 'whenever it operates of itself without the aid of any legislative provision.'²⁶ Framing the problem this way, Justice Breyer comes up with an interesting argument: in the previously mentioned Memorandum 'President Bush has determined that domestic courts should enforce... [*Avena*] ... and that [...] Congress has done

²⁰ Memorandum 'Compliance with the Decision of the International Court of Justice in *Avena*', dated February 28, 2005, *International legal materials*, N° 4, 2005, pp. 964-965. Emphasis added.

²¹ See recently Jordan J. Paust, "Medellín, *Avena*, The Supremacy of Treaties, and Relevant Executive Authority", *Suffolk Transnational Law Review*, Vol. 31, nr. 2, 2008, p. 301-333. The article includes a wealth of literature.

²² US Supreme Court Decision - *Medellín v. Texas*, 25 March 2008, para. 1 (a).

²³ US Supreme Court Decision - *Medellín v. Texas*, 25 March 2008, Opinion of the Court, para. 3.

²⁴ *Ibid.*

²⁵ US Supreme Court Decision - *Medellín v. Texas*, 25 March 2008, Dissenting opinion Justice Breyer, p. 1.

²⁶ *Ibid.*

nothing to suggest the contrary.²⁷ And, under these circumstances, Justice Breyer continues by affirming: ‘I believe the treaty obligations, and hence the judgment, resting as it does upon the consent of the United States to the ICJ’s jurisdiction, bind the courts no less than would “an act of the [federal] legislature”.’²⁸ That ‘belief’ is followed by a range of arguments that go beyond the scope of this commentary. Let me select the most pertinent ones that give a clear insight into the debate for international lawyers as well:

- The dispute arises at the intersection of an individual right with ordinary rules of criminal procedure. Yet, Justice Breyer observes that the Supreme Court has found treaty provisions on similar procedural matters self-executing. Moreover, the provision language of the Vienna Convention is precise according to the Supreme Court judge. For these reasons, “it is consequently not surprising that, when Congress ratified the Convention, the State Department reported that the ‘Convention is considered entirely self-executive and does not require any implementing or complementing legislation.’”²⁹
- “(...) logic suggests that a treaty provision providing ‘final’ and ‘binding’ judgments that ‘settle’ treaty-based disputes is self-executing insofar as the judgment in question concerns the meaning of an underlying treaty provision that is itself self-executing.”³⁰ And: “What sense would it make (1) to make a self-executing promise and (2) to promise to accept as final an ICJ judgment interpreting that self-executing promise, yet (3) to insist that the judgment itself is not self-executing (*i.e.*, that Congress must enact specific legislation to enforce it)?”³¹
- “(...) the majority’s very different approach has seriously negative practical implications. The United States has entered into at least 70 treaties that contain provisions for ICJ dispute settlement similar to (...) the Protocol before us”,³² and “many of these treaties contain provisions similar to those this Court has previously found self-executing – provisions that involve, for example, property rights, contract and commercial rights, trademarks, civil liability for personal injury, rights of foreign diplomats, taxation, domestic-court jurisdiction, and so forth.”³³
- “(...) to find the United States’ treaty obligations self-executing as applied to the ICJ judgment (and consequently to find that judgment enforceable) does not threaten constitutional conflict with other branches; it does not require us to engage in non judicial activity; and it does not require us to create a new cause of action. The only question before us concerns the

²⁷ *Medellin v. Texas*, 25 March 2008, Dissenting opinion Justice Breyer, p. 2.

²⁸ *Ibid.*

²⁹ *Medellin v. Texas*, 25 March 2008, Dissenting opinion Justice Breyer, p. 20.

³⁰ *Ibid.*, pp. 20-21.

³¹ *Ibid.*, p. 21.

³² *Ibid.*, p. 23.

³³ *Ibid.*, pp. 23-24.

application of the ICJ judgment as binding law applicable to the parties in a particular criminal proceeding that Texas law creates independently of the treaty. I repeat that the question before us does not involve the creation of a private right of action (and the majority's reliance on authority regarding such a circumstance is misplaced)."³⁴

All this (and much more) leads Justice Breyer to the conclusion that the United States' obligation following from *Avena* is enforceable in court "without further congressional action beyond Senate ratification of the relevant treaties."³⁵ According to him, the majority comes to a different conclusion "because it looks for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language)."³⁶ And by doing so, the Supreme Court's majority, according to Justice Breyer, "threatens to deprive individuals, including businesses, property owners, testamentary beneficiaries, consular officials, and others, of the workable dispute resolution procedures that many treaties, including commercially oriented treaties, provide."³⁷ It is interesting to see that he does *not* play the card of human rights as *lex specialis* and the like, but on the contrary, that he links the present (at least human rights-related) case to cases in such fields as commerce and trade. I see the relevance and correctness of the majority's core arguments, but I personally favor Breyer's dissenting route. Let's see what the ICJ will do.

3.4. THE FATE OF JOSÉ ERNESTO MEDELLÍN ROJAS

José Ernesto Medellín Rojas was executed, as scheduled, on 5 August 2008. The Texan authorities felt that they could neglect the relevant ICJ Order, thereby supported by the US Supreme Court and hindered by the US Federal Administration. Medellín's case did lead to a range of intriguing questions on the relation between international law and US law and on the way the US President and the US Supreme Court disagree on a series of legal issues. It is hugely regrettable, however, that it did not save his life, or at least that the US Supreme Court and the authorities in Texas did not find grounds to wait with the execution until the ICJ will have decided on the merits.

³⁴ *Ibid*, pp. 25-26.

³⁵ *Ibid*, p. 26.

³⁶ *Ibid*.

³⁷ *Medellin v. Texas*, 25 March 2008, Dissenting opinion Justice Breyer, p. 26.