COMMENTARY

ICJ Rejects Mexico's Request to Interpret *Avena*

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1. THE LONG ROAD OF *AVENA*

On 31 March, 2004, the International Court of Justice (ICJ) considered that the United States of America had violated several provisions of Article 36 of the 1963 Vienna Convention on Consular Relations[1] in the cases of 51 Mexican nationals on death row.[2] The Court held that the United States had to:

> provide, by means of its own choosing, review and reconsideration of the convictions and sentences…, by taking into account both the violations of the rights set forth in Article 36 of the Convention and of paragraphs 138-141 of this Judgment.[3]

At the time, the United States committed itself to implementing measures in order to comply with its international obligations resulting from the Vienna Convention and the ICJ's Judgment.[4] It seemed that the dispute between the two countries was on the right track in order to be resolved.

However, this commitment was undertaken without taking into account the nature of the US federal legal system. On 25 March, 2008 in the *Medellin v. Texas* case,[5] the US Supreme Court drew a major blow to the enforcement of the ICJ's Judgment. While recognising that *Avena* constitutes an international obligation that binds the US, the Court upheld that neither the ICJ's *Avena* Judgment nor a Presidential Memorandum issued by President Bush in 2005[6] was directly

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1 1963 Vienna Convention on Consular Relations of April 24, entered into force on March 19, 1967.

2 Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment of 31 March 2004.

3 *Id.* para. 153(9).

4 *Id.* para. 153(10).

5 *Medellin v. Texas*, 552 U. S. ____ (2008) (No. 06-984). The Court had already previously ruled in *Sanchez-Llamas v. Oregon* 548 US 331 (2006) that the Vienna Convention did not preclude the application of state default rules.

6 Memorandum to the Attorney General (Feb. 28,2005), App. to Pet. for Cert. 187a "I have determined, […]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

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enforceable federal law capable of precluding state limitations on the filing of successive habeas corpus petitions. Put differently, this meant that Texas was not bound to "review and reconsider" Mr. Medellin's conviction in the absence of a binding federal law, thereby undermining the *Avena* Judgment and possibly threatening the enforceability of ICJ judgments in general.[7]

2. NEW PROCEDURE BEFORE THE ICJ IN 2008

Observing that the 2004 Judgment had not been enforced in 48 cases and that several of its citizens, including Mr. Medellin, were facing imminent execution, Mexico brought the case to the ICJ again in June 2008,[8] basing its Application on Article 60 of the Statute of the Court.[9] In its submission, Mexico asked the Court to:

> adjudge and declare that the obligation incumbent upon the United States under paragraph 153(9) of the *Avena* Judgment constitutes an obligation of results… and that the United States must take any and all necessary steps to ensure that no Mexican national entitled to review and reconsideration under the *Avena* Judgment is executed.[10]

Even though the Court once again indicated provisional measures in July 2008,[11] Mr. Medellin's execution was carried out as scheduled on 5 August, 2008. It should be stressed that the Court's Order was accompanied by five dissenting opinions. The division between the Judges mainly stemmed from the controversy as to whether a "dispute" pursuant to Article 60 of the Statute really existed between the two countries, the United States having recognised that *Avena* constituted an "obligation of results".[12] The Court nonetheless considered that:

> the Parties…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.[13]

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accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."

7 *See* W. Van Genugten, Avena *as a Challenge to the Federal American Legal System*, 3(3) HJJ-JJH 51-57 (2008).

8 Request for Interpretation of Judgment of 31 March 2004 in the Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America), Application Instituting Proceedings, June 5, 2008.

9 "The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party." The French version differs slightly, requiring only a 'contestation' rather than a 'différend'.

10 Application Instituting Proceedings, para. 59.

11 Request for Interpretation of Judgment of 31 March 2004 in the Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America), Request for the indication of provisional measures, Order of July 16, 2008. Judge Skotnikov calls this renewed indication of provisional measures "redundant" in his dissenting opinion.

12 *Id.* para. 32.

13 *Id.* para. 55.

The Court thus concluded that, "it appears that the Court may, under Article 60 of the Statute, deal with the request for interpretation".[14]

3. THE JUDGMENT OF 19 JANUARY, 2008

In its recent Judgment of 19 January, the Court takes a very different path by firmly rejecting Mexico's request for interpretation, considering that the matters in issue, namely the direct effect of the Judgment on all state organs, including the judiciary, were not decided in *Avena* and thus cannot give rise to interpretation. What is the reasoning behind that rejection?

Even though the Court recognised that a "variety of factors suggest that there is a difference of perception that would constitute a dispute under Article 60 of the Statute",[15] it held that, if there should be a dispute, Mexico's position can only be discerned "by inference".[16] Article 98(2) of the Rules of Court, however, requires that "the precise point or points in dispute as to the meaning and scope of the judgment shall be indicated" in the request for interpretation of a judgment. Moreover, even if a dispute could be inferred, namely whether the "obligation of the United States under the *Avena* Judgment was directly binding upon its organs, subdivisions or officials",[17] the Court underlines that *Avena* neither "lays down or implies that the courts in the United States should give direct effect to paragraph 153 (9)",[18] nor that it prevents direct enforceability. Consequently, the Court concludes that the issue of the direct effect of the *Avena* Judgment is not addressed in the Judgment. Accordingly, the Court decides that:

> the matters claimed by the United Mexican States to be in issue between the Parties, …, are not matters which have been decided by the Court in its Judgment of 31 March 2004…, and thus cannot give rise to the interpretation requested by the United Mexican States.[19]

Furthermore, Mexico raised three additional claims during the proceedings, namely (1) that the United States breached the order indicating provisional measures of July 16, 2008 by executing Mr. Medellin without affording him review and reconsideration of his conviction; (2) that this very execution also constitutes a violation of the 2004 *Avena* Judgment itself; and (3) that the Court should order guarantees of non-repetition on behalf of the United States.[20] Regarding the first claim, the Court found, following Mexico's position, that the US did "not discharge its obligation under the Court's Order of July 16 2008, in

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14 *Id.* para 57.

15 *Id.* para. 31.

16 Request for Interpretation of Judgment of 31 March 2004 in the Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America), Judgment of January 19, 2009, para. 38.

17 *Id.* para. 41.

18 *Id*. para. 44.

19 *Id*. para. 61.

20 *See* L. Dubin, *Les garanties de non-répétition à l'aune des affaires LaGrand et Avena: la révolution n'aura pas lieu*, 4 R.G.D.I.P. 859-888 (2005).

the case of Mr. Medellin".[21] It adds that it can establish this violation even if it decided not to exercise its jurisdiction under Article 60 of the Statute.[22] Yet the Court does not address the question of the legal consequences of this breach with regard to State responsibility, an omission that is regretted by Judge Sepulveda-Amor in his dissenting opinion.[23] Conversely, with respect to the second claim, the Court affirms that Article 60 of the Statute does not allow consideration of "violations of the judgment it is called upon to interpret",[24] thus discarding the claim. Finally, as regards the third claim, the Court contents itself with asserting that its *Avena* Judgment, "remains binding and that the United States continues to be under an obligation to fully implement it".[25]

While swiftly rejecting Mexico's request for interpretation, the Court did not want to convey the wrong image on its stance regarding the United States' obligations under *Avena*. That might possibly explain several digressions in the Judgment. First of all, in paragraph 47, after having rejected Mexico's request of interpretation, the judges recall that, "considerations of domestic law" cannot relieve the United States of its obligation contained in paragraph 153 (9) and urges it to resort to, "alternative and effective means of attaining that result". This paragraph, almost an *obiter dictum*, has to be considered a direct response to the opinion held by the US Supreme court in the *Medellin v. Texas* case. Furthermore, the Court recalls that the obligation of the United States not to execute the other persons contained in its 16 July Order, "is fully intact by virtue…of the *Avena* Judgment itself".[26] Additionally, the Court stresses the fact that the United States must be considered to be in breach of its international obligations until all Mexican nationals named in *Avena* have received "review and reconsideration" of their individual cases.[27] Finally, and most notably, in point (3) of the operative Judgment, the Court reiterates the "continuing binding character of the obligations of the United States of America under paragraph 153 (9) of the *Avena* Judgment".[28] However, according to Judge Abraham, this point of the operative part "manifestly overrides the limits of the competence that the Court holds from Article 60 of the Statute"[29] since this competence cannot comprise "any question whatsoever related to the execution of the judgment, either for the past, or for the future".[30] This opinion explains the negative vote of Judge Abraham on point (3) of the operative part of the Judgment.

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21 Judgment of 19 January 2009, para 53.

22 *Id.* para. 51.

23 Request for Interpretation of Judgment of 31 March 2004 in the Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America), dissenting opinion of Judge Bernardo Sepulveda-Amor, para. 10.

24 Judgment of 19 January 2009, para. 56.

25 *Id.* para. 60.

26 *Id.* para. 54.

27 *Id*. para. 55.

28 *Id*. para. 61.

29 Request for Interpretation of Judgment of 31 March 2004 in the Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America), Declaration of Judge Ronny Abraham, p. 1 (unofficial translation).

30 *Id.*

So are the conclusions of the Court to be regretted? Hardly so. Indeed, however legitimate Mexico's claims may seem, one can easily subscribe to the reasoning of the Court as the *Avena* Judgment, and in particular paragraph 153 (9), is absolutely clear in its meaning and scope. The United States itself has repeatedly said so during both the written and oral proceedings. This is further demonstrated by the fact that the internal division of the judges in the Order on provisional measures is overcome here: the Court rules unanimously or by eleven votes to one.[31] Consequently, from a legal point of view, the ICJ's rejection to *interpret Avena* is almost flawless. Nonetheless, at the core remains the more general question of the enforceability and effect of ICJ judgments, as well as the interplay between domestic and international law,[32] which the Court has not addressed.

4. CONCLUSION

If for Justice Breyer the US Supreme Court looked for the "wrong thing (explicit textual expression about self-execution [of ICJ judgments]) using the wrong standard (clarity) in the wrong place (the treaty language)",[33] then Mexico equally sinned by looking for the wrong thing (enforcement of the *Avena* Judgment) using the wrong procedure (Article 60 of the Statute) in the wrong place (the International Court of Justice).

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[31] Judgment of 19 January 2009, para. 61.

[32] See M. Benlolo-Carabot, *L'arrêt de la Cour internationale de Justice dans l'affaire Avena et autres ressortissants mexicains (Mexique c. États-Unis d'Amérique) du 31 mars 2004*, Annuaire Français de Droit International, 259-291 (2004).

[33] *Medellin v. Texas*, 552 U. S. ____ (2008) (No. 06-984), Dissenting opinion of Justice Breyer, at 26.