

2008

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Recommended Citation

Quintana, Juan J. "Consular Notification in Death Penalty Cases Returns to the World Court: A Note on Avena and Medellín." *Human Rights Brief* 16, no.1 (2008): 29-32.

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Consular Notification in Death Penalty Cases Returns to the World Court: A Note on *Avena* and *Medellín*

by Juan J. Quintana*

IN THE AFTERMATH OF WORLD WAR II, the United States played a crucial role in establishing the International Court of Justice (ICJ) as the principal judicial organ of the United Nations and was a true champion of international justice. In subsequent years, however, U.S. conduct concerning the ICJ's decisions that directly affect its interests has been far from exemplary. The most recent instance was the refusal of the U.S. Supreme Court to domestically enforce the ICJ's 2004 judgment in the *Avena and other Mexican Nationals (Mexico v. United States)*¹ case. The present note seeks to highlight recent international developments with regard to this case and to analyze the manner in which the ICJ dealt with the June 5, 2008 Mexican request for interpretation of the *Avena* judgment. The June 2008 request gave rise to fresh proceedings that are commonly known as the *Medellín* case.²

CONSULAR NOTIFICATION AND THE *AVENA* CASE: BACKGROUND

In *Avena*, the ICJ analyzed the situation of a group of Mexican citizens tried and sentenced to death in several U.S. states without access to the assistance of the competent Mexican consuls, as provided in Article 36 of the 1963 Vienna Convention on Consular Relations (VCCR).³ The Mexican government's claim was not directed at the penalty imposed on those individuals, but rather at the fact that U.S. authorities failed to inform them of their right to consular assistance when they were detained and prosecuted. Mexico's counsel argued that this information could have made a difference in the manner in which the trials were conducted before state courts. The ICJ, thus, had to resolve the issue of whether the U.S. government breached VCCR's Article 36, and if so, whether it was bound to provide a remedy to the Mexican government.

In a March 31, 2004 judgment, the ICJ found that the United States had effectively breached its obligations owed to the Mexican government under Article 36. The Court further held that:

[t]he 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 . . . by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment.⁴

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Courtesy of Grace Maral Burnett

The International Court of Justice, The Hague.

In this decision, the ICJ generally followed the *LaGrand* case (*Germany v. United States*), decided in 2001, where essentially the same questions were at issue.⁵ In particular, the Court reaffirmed its landmark ruling in *LaGrand*, holding that Article 36 creates individual rights that the detained person's country can invoke in the ICJ under the jurisdictional clause contained in the Optional Protocol to the Convention.⁶

THE *MEDELLÍN* CASE: MEXICO RETURNS TO THE ICJ

While in principle, the *Avena* case came to an end with the delivery of the 2004 judgment, the Mexican government filed a new application before the ICJ on June 5, 2008, prompted by the failure of U.S. courts to implement that decision. At this stage, the primary issue between Mexico and the United States was the practical execution of the March 31, 2004 judgment, a matter governed by Article 94 (2) of the United Nations Charter. Pursuant to this provision, a state party to a case is free to resort to the UN Security Council if the other party "[f]ails to perform the obligations incumbent upon it under a judgment rendered by the Court." This is the road that the Mexican government may have taken, like Nicaragua did in 1986 in the aftermath of the celebrated decision by the ICJ in the *Military and Paramilitary Activities in and against Nicaragua* case. A fundamental lesson from *Nicaragua*, however — one from which the Mexican government likely learned — is that the existence of the veto power may render this remedy largely ineffective when the defaulting party is a permanent member of the Security Council. With this in mind, it is understandable that the Mexican government decided to avoid taking the route of the Security Council and preferred to appeal once again to the ICJ. Mexico framed

its case as a request for interpretation of the 2004 judgment, a matter on which the ICJ possesses jurisdiction under Article 60 of its Statute.

On the other hand, these cases are highly illustrative of the interplay between international law and domestic law, which is particularly interesting in the case of federal states. Indeed, *Avena* and *Medellín* underscore some of the complex questions of compliance with rules of international law faced by a country like the United States, where state criminal law matters are handled in state courts and only reach federal courts in exceptional circumstances. In this context, a remarkable aspect of these cases is that, after the delivery of the ICJ's 2004 decision

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in *Avena*, the executive branch made a deliberate and unprecipitated attempt to give domestic legal effect to a decision by the ICJ, only to have that action later reversed by the judiciary.

On February 28, 2005, President George W. Bush issued a memorandum to the Attorney General in which he stated that the United States would discharge its international obligations under the ICJ's decision in *Avena* "[b]y having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."⁷ The U.S. Supreme Court determined on March 25, 2008, however, that the memorandum did not create legal rules whose enforcement could be imposed on Texas courts. The Supreme Court further held that the decisions of the ICJ do not constitute federal law and are, therefore, not enforceable by federal courts against a state.⁸ To be fair, the Supreme Court duly acknowledged that in the field of international law, the United States is bound by the decisions of the ICJ in cases to which it is a party. It also stressed, however, that the execution of those decisions *as a matter of federal law* requires a statute enacted by Congress and not executive action by the administration.

Facing this situation and having Texas authorities set the date for the execution of José Ernesto Medellín and four other Mexican nationals covered by the *Avena* decision, the Mexican government applied anew to the ICJ. In addition to its request for interpretation of the *Avena* decision, the Mexican government filed an urgent request for provisional measures under Article 41 of the ICJ Statute. While requests for this type of interim relief are a frequent feature of litigation before the ICJ, this is the first time in ICJ history that provisional measures have been requested in a case that has formally ended and in which the construction of one of the ICJ's judgments is being requested.

THE COURT'S RESPONSE (I): THE REQUEST FOR INTERPRETATION

The ICJ replied swiftly to the Mexican government's request, undoubtedly because the lives of several individuals on death row, whose executions were imminent, were at stake. After oral proceedings organized in a matter of weeks, on July 16, 2008, the ICJ issued an order which imposed on the United States the duty to "take all measures necessary" to ensure that the five Mexican nationals covered by the request for interpretation, including Medellín, were not executed pending judgment.⁹

The U.S. government contended that the request for interpretation should be dismissed *in limine* due to a "manifest lack of jurisdiction" because there was no "dispute as to the meaning or scope of the judgment," as stipulated in Article 60 of the ICJ Statute, between the United States and Mexico. According to the U.S. government, the real problem pertained to the implementation of the judgment in *Avena* and not to the judgment's construction. Moreover, counsel for the United States argued that the problem was rooted in the U.S. courts' adoption of the position that the ICJ's decisions are not directly enforceable as a matter of federal law.

From a procedural point of view, this preliminary question did not actually refer to the *jurisdiction* of the ICJ to interpret its own decisions, but rather, to the *admissibility* of the Mexican government's request for interpretation. The ICJ's jurisdiction in the matter of interpretation has a solid basis in Article 60 of the ICJ's Statute and, as the ICJ pointed out in its July 16, 2008 order, "[it] is not preconditioned by the existence of any other basis of jurisdiction as between the parties to the original case."¹⁰

As to the question of admissibility, the ICJ made a finding in favor of Mexico. The ICJ analyzed Article 60 of its Statute and discovered the existence of a discrepancy between the English and French versions of that provision. Specifically, the term "dispute" used in the English version is rendered in the French version as "*contestation*" rather than "*différend*." This distinction is significant because "*différend*" is the term used in other provisions of the Statute where reference is made to legal disputes, such as the well-known provisions of Article 36(2) or Article 38. The Court found that "[t]he term '*contestation*' is wider in scope than the term '*différend*' and does not require the same degree of opposition"; that "[c]ompared to the term '*différend*,' the concept underlying the term '*contestation*' is more flexible in its application to a particular situation"; and that "[a] dispute ('*contestation*' in the French text) under Article 60 of the Statute, understood as a difference of opinion between the parties as to the meaning and scope of a judgment rendered

by the Court...does not need to satisfy the same criteria as would a dispute (*'différend'* in the French text) as referred to in Article 36, paragraph 2, of the Statute."¹¹ On the basis of these general propositions, advanced for the first time in this order, the Court concluded that there was indeed a "difference of opinion" between the parties on the scope and meaning of the 2004 judgment and that, therefore, the request for interpretation was admissible.

It must be stressed, however, that the ICJ decided in favor of the admissibility of the request for interpretation by a tight majority (7 votes against 5). This demonstrates that several members of the Court share the opinion that this case does not refer to the interpretation of the 2004 judgment at all but rather to its implementation — a matter on which neither the UN Charter nor the ICJ Statute highlights any role for the Court itself.

THE COURT'S RESPONSE (II): INTERIM PROTECTION

As for the request for provisional measures, the case is of particular interest to those who follow the work and procedure of the ICJ because of the manner in which the Court approached the question of jurisdiction. In general, before the Court examines the conditions required for the exercise of its powers under Article 41 of its Statute, it considers whether it has "prima facie jurisdiction" with regard to the merits of the case in whose context the request for interim protection is made. This is a jurisdictional test that has no statutory basis but has been developed exclusively on the basis of the ICJ's jurisprudence since the mid-seventies. It is now firmly established that "[i]n dealing with a request for provisional measures the Court need not [have] jurisdiction on the merits of the case, but [the Court] will not indicate such measures unless there is prima facie basis on which the jurisdiction of the Court might be established."¹²

In the case at hand, because the request for interim relief related to the requested interpretation of the 2004 judgment rather than the merits of the case, the ICJ flatly ignored the prima facie test of jurisdiction. It concentrated instead on ascertaining whether the *conditions for the admissibility* of the request for interpretation were fulfilled, a question that is technically and conceptually different from that of jurisdiction.

After determining that the threshold of admissibility in Article 60 of the Statute was met, the ICJ inquired whether the remaining conditions necessary for the indication of provisional measures were satisfied in the case at hand. Put simply, these are the criteria developed through the Court's jurisprudence:

- (a) Whether a link exists "[b]etween the alleged rights the protection of which is the subject of the provisional measures being sought, and the subject of the principal request submitted to the Court."¹³
- (b) Whether there is a risk of an "[i]rreparable prejudice to be caused to rights which are the subject of a dispute in judicial proceedings";¹⁴ and
- (c) Whether there is "[u]rgency in the sense that action prejudicial to the rights of either party is likely to be taken before the Court has given its final decision."¹⁵

The majority of the ICJ concluded that the request submitted by the Mexican government fulfilled these criteria. Therefore, the ICJ found that "the circumstances require that it indicate provisional measures to preserve the rights of the Mexican government, as Article 41 of its Statute provides."¹⁶

THE QUESTION OF THE LEGAL EFFECTS OF ORDERS ON PROVISIONAL MEASURES

An altogether different matter is that of compliance with the provisional measures indicated by the Court. The *Breard* case (*Paraguay v. United States*) submitted in 1998 and later discontinued, and the *LaGrand* case, both concerned persons sentenced to death whose right to timely consular assistance had not been respected by U.S. authorities. In both, the ICJ indicated provisional measures which the United States openly ignored, resulting in the executions being carried out as planned.¹⁷ It is important to note, however, that at the time these cases were decided, the ICJ's law and practice was not entirely clear as to the legal effects of the orders on provisional measures. After all, provisional measures orders are not ICJ judgments and are, therefore, not expressly covered by the force of *res judicata* provided for in Article 94 of the United Nations Charter.

The Court erased all doubt about the legal effect of provisional measures with the *LaGrand* case. When this case reached the merits stage, Germany included in its final submissions a request that the ICJ declare that the United States violated not only the VCCR, but also its international obligation to comply with the ICJ's previous order on provisional measures. In its judgment of June 27, 2001, the ICJ found in favor of Germany on this aspect of the case and, in doing so, put to rest the long-standing doctrinal controversy about the legal effect of provisional measures.¹⁸ As a result, today there can be no doubt that under international law orders by the ICJ indicating provisional measures are legally binding and, consequently, lack of compliance by one of the states to which they are addressed is in violation of that state's international responsibility.

PROSPECTS

On August 5, 2008 Texas authorities executed Medellín, the first of the Mexican nationals covered by the ICJ's July 16, 2008 order on provisional measures. In light of this development, it is foreseeable that, in connection with its pending request for interpretation of the 2004 judgment, the Mexican government will request a formal finding on lack of compliance with its order and some form of remedy from the ICJ. It remains to be seen how the ICJ will approach this issue in its judgment on the interpretation of the *Avena* decision, which very likely will be delivered before the end of 2008.¹⁹

From the standpoint of international law, the ICJ has found that its orders on provisional measures have binding effect and create international legal obligations with which the parties to a case before it are required to comply. There is thus no escape from the conclusion that Medellín's execution represents an internationally wrongful act on the part of the United States, giving rise to its international responsibility *vis-à-vis* the state of Mexico.

It is certainly regrettable that U.S. authorities have not found a way to ensure compliance with the ICJ's orders on provisional measures as a matter of federal law. Furthermore, as this situation might recur in connection with any future case involving the United States that is brought before the ICJ, the U.S. government should push for Congress to pass implementing legislation to give domestic effect to ICJ decisions, including orders for provisional measures.

In the long run, one could argue that lack of compliance with the ICJ Statute is harmful for the United States itself, for it seriously weakens its commitment to the judicial settlement of disputes and, more generally, to the principles enshrined in the UN Charter. When the United States has appeared before the ICJ in the past it has made full use of the Court's procedures — including provisional measures — to vigorously demand from other States compliance with the rules of international law. The 1979–1981 *U.S. Hostages in Tehran* case provides a powerful

example.²⁰ In stark contrast, the next time the United States appears before the ICJ, either as an applicant or as a respondent, its attitude with regard to the *Avena* and *Medellín* cases will certainly loom large. If for instance, the United States finds it expedient to request from the Court the indication of provisional measures of protection, the opposite party will have a powerful argument to undermine the United States' standing before the Court and to question the authenticity of its commitment to the rule of law in international affairs. **HRB**

Endnotes: Consular Notification in Death Penalty Cases Returns to the World Court

¹ *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31).

² Request for Interpretation of the Judgment of 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Mex. v. U.S.) (June 5, 2008); Request for the Indication of Provisional Measures, Order of 16 July 2008 (Mex. v. U.S.) (July 11, 2008), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=musa&case=139&k=11>.

³ Article 36, paragraph 1, (b) of the Vienna Convention for Consular Relations provides:

“Article 36. *Communication and contact with nationals of the sending State.*

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 be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.”

⁴ *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 72 (Mar. 31). This finding by the ICJ matches one of the conclusions drawn by the Inter-American Court of Human Rights on the same subject, on which it had issued an advisory opinion in 1999 at the request of the Mexican government (I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16). It is true that, unlike the Inter-American Court, the ICJ stopped short of stating that the right to consular assistance is in the nature of a human right; but it is remarkable, nonetheless, that both tribunals arrived independently at the conclusion that a non-human rights treaty, like the 1963 Vienna Convention, creates individual rights.

⁵ *LaGrand Case (Ger. v. U.S.)*, 2001 I.C.J. 466 (June. 27).

⁶ *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 36 (Mar. 31).

⁷ M. E. McGuiness, *Medellín v. Texas: Supreme Court Holds ICJ Decisions under the Consular Convention Not Binding Federal Law, Rejects Presidential Enforcement of ICJ Judgments over State Proceedings*, ASIL Insight, Vol. 12, Issue 6, (Apr. 17, 2008).

⁸ *Medellín v. Texas*, 128 S. Ct. 1346 (2008).

⁹ Request for Interpretation of the Judgment of 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Mex. v. U.S.) (June 5, 2008); Request for the Indication of Provisional Measures, Order of 16 July 2008

(Mex. v. U.S.) (July 11, 2008) 19, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=musa&case=139&k=11>.

¹⁰ *Id.* at 11. In clear reference to the U.S. withdrawal from the 1963 Dispute Settlement Protocol, the Court added in this passage:

“[e]ven if the basis of jurisdiction in the original case lapses, the Court, nevertheless, by virtue of Article 60 of the Statute, may entertain a request for interpretation.” It will be recalled that on March 7, 2005, the United States withdrew from the Optional Protocol on Dispute Settlement to the 1963 Vienna Convention on Consular Relation, while remaining a party to the Convention.

¹¹ Request for Interpretation of the Judgment of 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Mex. v. U.S.) (June 5, 2008); Request for the Indication of Provisional Measures, Order of 16 July 2008 (Mex. v. U.S.) (July 11, 2008) 13-14, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=musa&case=139&k=11>.

¹² *Pulp Mills on the River Uruguay (Arg. v. Uru.) Request for the Indication of Provisional Measures, Order of 23 January 2007*, 7.

¹³ Request for Interpretation of the Judgment of 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Mex. v. U.S.) (June 5, 2008); Request for the Indication of Provisional Measures, Order of 16 July 2008 (Mex. v. U.S.) (July 11, 2008) 15, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=musa&case=139&k=11>

¹⁴ *Id.* at 16.

¹⁵ *Id.*

¹⁶ *Id.* at 18.

¹⁷ Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Provisional Measures, Order of Apr. 9); *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27) (Provisional Measures, Order Mar. 9, 1999, p. 19).

¹⁸ *LaGrand (F.R.G. v. U.S.)* 2001 I.C.J. 466, 506 (June 27); See also *Armed Activities on the Territory of the Congo, (Dem. Rep. Cong. v. Uganda)* 2005 I.C.J. 168, 258 (Dec. 19) (highlighting that orders on provisional measures do create “legal obligations which both Parties [a]re required to comply with”).

¹⁹ At the time of writing two rounds of written pleadings by the parties have been exchanged. On 8 October 2008 the Court announced that it felt no need to hold hearings and declared the case to be under deliberation (ICJ Press Release No. 2008/33).

²⁰ *United States Diplomatic and Consular Staff in Tehran, (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24) (Request for the Indication of Provisional Measures, Order of Dec. 15, 1979, p. 7); *United States Diplomatic and Consular Staff in Tehran, (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24).