Mexico Again Sues United States in ICJ; ICJ Directs United States to Block Medellín Execution; U.S. Supreme Court Again Denies Relief; Texas Executes Medellín
Published by: American Society of International Law
Stable URL: http://www.jstor.org/stable/20456687
Accessed: 11/01/2010 15:21
CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

EDITED BY JOHN R. CROOK

GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

Mexico Again Sues United States in ICJ; ICJ Directs United States to Block Medellin Execution; U.S. Supreme Court Again Denies Relief; Texas Executes Medellin

The legal struggle over the fate of convicted murderer José Ernesto Medellín continued in the International Court of Justice (ICJ), the U.S. executive branch, Congress, Texas courts, and the U.S. Supreme Court during the summer of 2008. Efforts to defer Medellín’s execution pending further review of his Vienna Convention claim were unavailing. He was executed by the State of Texas in early August.\(^1\)

Medellín was one of about fifty Mexican nationals cited in Avena (Mexico v. United States)\(^2\) before the ICJ as having been sentenced to death by U.S. courts without receiving timely notice of the right to notify Mexican consular officials pursuant to the Vienna Convention on Consular Relations. In its 2004 judgment, the ICJ ordered that the United States “provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation” of consular notification. President George W. Bush sought to give effect to this judgment through a February 2005 memorandum calling for state courts to review past convictions “in accordance with general principles of comity.”\(^3\) In March 2008, however, the U.S. Supreme Court ruled in Medellin v. Texas that this directive did not have domestic legal force and that Texas was not obligated to honor it.\(^4\)

In early July, following the Supreme Court’s decision, Mexico brought a new ICJ case against the United States based on Article 60 of the ICJ Statute, which authorizes “requests for interpretation” of the Court’s judgments. Mexico contended that there was a “fundamental dispute” regarding the 2004 Avena judgment, maintaining that the United States interpreted it as requiring “means,” whereas Mexico interpreted it to require “results.” Mexico noted that Texas had scheduled the execution of Medellín, the unsuccessful petitioner in Medellin v. Mexico Again Sues United States in ICJ; ICJ Directs United States to Block Medellin Execution; U.S. Supreme Court Again Denies Relief; Texas Executes Medellin


\(^2\) 2004 ICJ REP. 128 (Mar. 31).

\(^3\) John R. Crook, Contemporary Practice of the United States, 99 AJIL 489 (2005).

Texas, for early August and that four other Mexicans soon could be scheduled for execution. It asked the ICJ to indicate provisional measures to stay these executions.\(^5\)

At the ICJ’s June hearing on Mexico’s provisional measures request, the United States maintained that there was no dispute regarding the meaning of the Avena judgment within the scope of Article 60. In mid-July, a sharply divided ICJ indicated provisional measures, directing the United States to take “all measures necessary” to ensure that, pending the Court’s final judgment, the five Mexican nationals not be executed unless they received review and reconsideration as required by Avena.\(^6\) In finding jurisdiction, the Court emphasized the French text of Article 60 of the Statute, which utilizes the term contestation, which the Court understood to entail greater scope and flexibility in assessing whether a dispute existed.\(^7\) The Court accepted Mexico’s argument that there was a dispute for purposes Article 60, in that Texas did not see itself as legally bound by the Avena judgment, even though the United States maintained that the U.S. federal government was responsible for compliance with U.S. international obligations.\(^8\)

The Court was sharply divided regarding the decision to find prima facie jurisdiction and to order provisional measures. Seven judges voted in favor (President Higgins and Judges Al-Khasawneh, Ranjeva, Koroma, Abraham, Supúlveda-Amor, and Bennouna), whereas five voted against (Judges Buergenthal, Owada, Tomka, Keith, and Skotnikov). Three judges did not participate (Judges Shi, Parra-Aranguren, and Simma).

In a vigorous dissent, Judge Buergenthal rejected the majority’s conclusion that Texas’s position created a dispute for purposes of Article 60. Judge Buergenthal reiterated his support for the Avena judgment and stressed the U.S. obligation to comply with it. He did not believe, however, that the Court had jurisdiction to entertain Mexico’s new case and to enter its provisional measures order.

True, the Texas courts have failed to comply with the Avena Judgment because they do not believe that they are required to do so. But Texas does not speak for the United States on the international plane. . . . It follows that the position of Texas regarding the meaning, scope or nature of the obligations of the United States under the Avena Judgment is not imputable to the United States. . . .

. . . .

The various arguments advanced by Mexico thus do not permit the conclusion, even on a preliminary basis, that there is a dispute between the Parties, as that term is understood by Article 60, regarding the meaning or scope of the Avena Judgment. Mexico has failed to present the minimal evidence required to show that the United States has denied or acted in a manner inconsistent with its obligation under the Avena Judgment to provide


\(^8\) Id., paras. 55–56.
the review and reconsideration to which the Mexicans named in that Judgment are entitled. Accordingly, Mexico’s Request for the interpretation it seeks under Article 60 of the Court’s Statute is manifestly unfounded and should be dismissed as inadmissible.9

In a joint dissent, Judges Owada, Tomka, and Keith likewise concluded that there was no dispute between the parties within the meaning of Article 60 of the Statute. In a separate dissent, Judge Skotnikov also saw no dispute for purposes of Article 60 but urged that the Court use its inherent powers to request the United States to take all measures necessary to ensure compliance with Avena.

Prior to the June ICJ hearing, Secretary of State Condoleezza Rice and Attorney General Michael Mukasey jointly wrote to Governor Rick Perry of Texas, recalling the United States’ legal obligations and requesting “that Texas take the steps necessary to give full effect to the Avena decision with respect to the convictions and sentences addressed therein.” Governor Perry’s reply recalled the Supreme Court’s decision that Texas is not bound by the Avena decision, and maintained that “this issue is an international obligation and . . . is a matter best dealt with by our federal executive branch and Congress.”10 The governor’s spokesman was less diplomatic after the ICJ ruling. After noting that the “world court has no standing in Texas and Texas is not bound by a ruling or edict from a foreign court,” he continued, “It is easy to get caught up in discussions of international law and justice and treaties. It’s very important to remember that these individuals are on death row for killing our citizens.”11

Following the ICJ’s decision, the chairman of the House Foreign Affairs Committee introduced legislation to authorize review of convictions where consular notification has not been given, but no further action was taken in Congress.12 In the closing days of July, Medellín filed unsuccessful attempts to secure delay of the execution in Texas courts and again sought review by the U.S. Supreme Court.13 By a vote of 5 to 4, the Court refused further review; Justices Stevens, Souter, Ginsburg, and Breyer filed separate dissents. A substantial excerpt from the Court’s order denying relief follows:

Petitioner seeks a stay of execution on the theory that either Congress or the Legislature of the State of Texas might determine that actions of the International Court of Justice (ICJ) should be given controlling weight in determining that a violation of the Vienna Convention on Consular Relations is grounds for vacating the sentence imposed in this suit. Under settled principles, these possibilities are too remote to justify an order from this Court staying the sentence imposed by the Texas courts. And neither the President nor the Governor of the State of Texas has represented to us that there is any likelihood of congressional or state legislative action.

It is up to Congress whether to implement obligations undertaken under a treaty which (like this one) does not itself have the force and effect of domestic law sufficient to set aside the judgment or the ensuing sentence, and Congress has not progressed beyond the bare introduction of a bill in the four years since the ICJ ruling and the four months since our

9 Id., diss. op., Buergenthal, J., paras. 13, 17.
10 On file with Editor.
ruling in *Medellin v. Texas*, 552 U.S. ___ (2008). This inaction is consistent with the President’s decision in 2005 to withdraw the United States’ accession to jurisdiction of the ICJ with regard to matters arising under the Convention.

The beginning premise for any stay, and indeed for the assumption that Congress or the legislature might seek to intervene in this suit, must be that petitioner’s confession was obtained unlawfully. This is highly unlikely as a matter of domestic or international law. Other arguments seeking to establish that a violation of the Convention constitutes grounds for showing the invalidity of the state court judgment, for instance because counsel was inadequate, are also insubstantial, for the reasons noted in our previous opinion.

The Department of Justice of the United States is well aware of these proceedings and has not chosen to seek our intervention. Its silence is no surprise: The United States has not wavered in its position that petitioner was not prejudiced by his lack of consular access.14

Texas proceeded to execute Medellin, but it also agreed, in briefs filed with the Supreme Court, to support future federal court review of claims of prejudice by persons subject to *Avena* resulting from failure of consular notification.15

[T]he State of Texas acknowledges the international sensitivities presented by the *Avena* ruling, as well as the observation of Justice Stevens in his concurring option that “[t]he cost to Texas of complying with *Avena* would be minimal.” *Medellin*, 128 S. Ct., at 1374–75 (Stevens, J., concurring).

For this reason, the State of Texas will take certain measures in future proceedings. Medellin has already received review and reconsideration of his claims under the Vienna Convention. However, some defendants currently incarcerated in Texas and subject to *Avena* may not have received “review and reconsideration” of their claims of prejudice under the Vienna Convention on the merits. Accordingly, and as an act of comity, if any such individual should seek such review in a future federal habeas proceeding, the State of Texas will not only refrain from objecting, but will join the defense in asking the reviewing court to address the claim of prejudice on the merits, as courts have done for Medellin.16

**Supreme Court Affirms Habeas Corpus for Guantánamo Detainees**

In June 2008, the U.S. Supreme Court ruled by a vote of 5 to 4 in *Boumediene v. Bush*1 that alien detainees held at the U.S. naval base at Guantánamo Bay, Cuba, are entitled to the right of habeas corpus under the U.S. Constitution and that the procedures established by the

14 Medellin v. Texas, Nos. 06-984 (08A98), 08-5573 (08A99), & 08-5574 (08A99), slip op. at 1–2 (U.S. Aug. 5, 2008) (citation omitted).


16 Texas’s Brief in Opposition to Medellin’s Petition for Writ of Certiorari and Application for Stay of Execution at 17–18, Medellin v. Texas, Nos. 06-984 (08A98), 08-5573 (08A99), & 08-5574 (08A99), at <http://www.scorusblog.com/wp/texas-asks-no-delay-of-execution/>.