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USA: Government must ensure meaningful judicial review of Mexican death row cases

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On 25 March 2008, in a case involving the USA's obligation to comply with judgments of the International Court of Justice (ICJ), the US Supreme Court ruled in favour of the State of Texas and against a Mexican national on death row there. The Supreme Court has effectively passed the buck to the other branches of government to act to ensure that the USA meets its international obligations. Amnesty International urges them to do so.

The 6-3 ruling, *Medellín v. Texas*, concerns the case of José Medellín, a Mexican national and one of five people sentenced to death for the murder of 14-year-old Jennifer Ertman and Elizabeth Pena, 16, in Houston in 1993. All five were teenagers at the time of the crime. Two of them who were 17, Raul Villareal and Efrain Perez, had their death sentences commuted to life imprisonment in 2005 following the Supreme Court's decision to exempt under 18-year-olds from the death penalty (the USA, led by Texas, was until then a world leader in executing child offenders). A third, Sean Derrick O'Brien, was executed on 11 July 2006. He was 18 at the time of the murders, as were Peter Cantu and José Medellín, who remain on death row.

Under article 36 of the 1963 Vienna Convention on Consular Relations (VCCR), the Texas authorities should have notified José Medellín "without delay" after his arrest of his right to have the Mexican consulate informed of his detention. They failed to do so. He subsequently became one of more than 50 Mexicans on death row in the USA named in a case brought against the USA by the government of Mexico in the ICJ, the principal judicial organ of the United Nations (UN). By ratifying the VCCR Optional Protocol on the compulsory settlement of disputes, the United States recognized the authority of the ICJ to order legally binding remedies for its Vienna Convention violations. On 31 March 2004, the ICJ handed down its judgment (the *Avena* decision) finding that the USA had violated article 36 of the VCCR by failing to notify the detainees of their right to contact their consulate after arrest.

The ICJ stated that "the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration" of the cases in the US courts, to determine any prejudicial impact of the VCCR violation on the defendant. The Court emphasised that this judicial review and reconsideration must be meaningful and effective, and must relate to both sentence and conviction. It added that the US doctrine of "procedural default" – whereby claims not raised earlier are generally not considered by appellate courts – was not a legitimate obstacle to such review. Moreover, review by executive clemency authorities alone would not be sufficient, the ICJ stated.

After the ICJ's decision, the US Court of Appeals for the Fifth Circuit dismissed Medellín's appeal on the grounds that the VCCR did not confer individually enforceable rights and that his claims were anyway procedurally defaulted. The Supreme Court agreed to take the case, but before it heard oral arguments, President George W. Bush issued a memorandum to the Attorney General stating that "the United States will discharge its international obligations" under the *Avena* ruling, "by having State courts give effect to the decision". The Supreme Court dropped the case, but after the Texas Court of Criminal Appeals dismissed Medellín's appeal, finding that neither the ICJ's opinion nor the President's memorandum overrode limitations on the filing of successive *habeas corpus* applications, the Supreme Court again agreed to consider the issue.

In its ruling on 25 March 2008, a majority of Justices stated: "No one disputes that the *Avena* decision… constitutes an *international* law obligation on the part of the United States. But not all international law obligations automatically constitute binding federal law enforceable in United States courts. The question we confront here is whether the *Avena* judgment has automatic *domestic* legal effect such that the judgment of its own force applies in state and federal courts." The majority found that it did not. The VCCR Optional Protocol, they concluded, was not self-executing (automatically enforceable as federal law upon ratification) and no implementing legislation to give it such domestic effect had been passed by Congress.

Having found that the *Avena* ruling did not constitute binding federal law "that pre-empts state restrictions on the filing of successive habeas petitions", the Justices moved on to consider whether the President's memorandum to the Attorney General altered their conclusion. They concluded that it did not. They said that although the President "seeks to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law", even such "plainly compelling" interests "do not allow us to set aside first principles". Under the US system of constitutional government, they continued, the President "has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them. The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress." Providing the effective judicial review mandated by the ICJ for José Medellín and the other affected Mexican nationals on death row would thus require the US administration to obtain implementing legislation from Congress.

In a separate opinion concurring in the judgment, Justice Stevens suggested that it was now up to Texas to ensure that the USA met its international obligations. The "costs of refusing to respect the ICJ's judgment are significant. The entire [US Supreme] Court and the President agree that breach will jeopardize the United States plainly compelling interests… When the honor of the Nation is balanced against the modest cost of compliance, Texas would do well to recognize that more is at stake than whether judgments of the ICJ, and the principled admonitions of the President of the United States, trump state procedural rules in the absence of implementing legislation".

Leaving it to Texas to protect the rights of death row inmates is akin to leaving the fox to guard the henhouse (a Harris County prosecutor in Houston has already been quoted as saying that her office will seek an execution date for José Medellín). But in any event, it is not just up to Texas. Under Article 27 of the Vienna Convention on the Law of Treaties, the USA as a whole is obliged to meet its treaty obligations, and may not invoke the provisions of its internal law as justification for failure to do so. How it meets these obligations is up to the US government, but meet them it must. The Supreme Court has effectively passed the buck. It is up to other branches of government to pick up the issue and ensure compliance with the *Avena* judgment.

Some 20 foreign nationals who were denied their consular rights after arrest have been executed in the USA since 1988. There is evidence that compliance with article 36 of the VCCR remains sporadic across the USA. This is a matter of concern not only for the individuals concerned, but also in relation to the damage that is done to the broader international legal principle of consular protection. Failure to comply with the *Avena* judgment will cause more such damage. Article 36 is an important protection for foreign nationals detained abroad, and provides states with the capacity to protect their nationals, including in cases where they may be at risk of human rights violations. The USA should do all it can to ensure that its officials adhere to article 36 across the country, and to ensure effective remedies in those cases where this obligation was not met.

Meanwhile, the USA should reflect on its resort to the death penalty in an increasingly abolitionist world, and resolve to end its use of this cruel, brutalizing and outdated punishment.