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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2008

Public sitting

held on Thursday 19 June 2008, at 10 a.m., at the Peace Palace,

President Higgins presiding,

***in the case concerning the* 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)* (Mexico v. United States of America)**

VERBATIM RECORD

ANNÉE 2008

Audience publique

tenue le jeudi 19 juin 2008, à 10 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

***en l'affaire relative à la* Demande en interprétation de l'arrêt du 31 mars 2004 en l'affaire *Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique)* (Mexique c. Etats-Unis d'Amérique)**

COMPTE RENDU

Present:	President	Higgins
	Vice-President	Al-Khasawneh
	Judges	Ranjeva
		Koroma
		Buergenthal
		Owada
		Tomka
		Abraham
		Keith
		Sepúlveda-Amor
		Bennouna
		Skotnikov
	Registrar	Couvreur

Présents : Mme Higgins, président
M. Al-Khasawneh, vice-président
MM. Ranjeva
Koroma
Buergenthal
Owada
Tomka
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov, juges

M. Couvreur, greffier

The Government of the United Mexican States is represented by:

Mr. Juan Manuel Gómez-Robledo, Ambassador, Under-Secretary for Multilateral Affairs and Human Rights, Ministry of Foreign Affairs of Mexico,

Mr. Joel Antonio Hernández García, Ambassador, Legal Adviser, Ministry of Foreign Affairs of Mexico,

Mr. Jorge Lomónaco Tonda, Ambassador of Mexico to the Kingdom of the Netherlands,

as Agents;

Mr. Donald Francis Donovan, Debevoise & Plimpton LLP, New York,

Ms Sandra Babcock, Clinical Director, Center for International Human Rights, Northwestern University Law School, Chicago, Illinois,

Mr. Víctor Manuel Uribe Aviña, Deputy Legal Adviser, Ministry of Foreign Affairs of Mexico,

Ms Catherine M. Amirfar, Debevoise & Plimpton LLP, New York,

Mr. Gregory J. Kuykendall, Director of the Mexican Capital Legal Assistance Program,

Mr. Agustín Rodríguez de la Gala, Director for Foreign Litigation, Office of the Legal Adviser, Ministry of Foreign Affairs of Mexico,

Mr. Erasmo Lara Cabrera, Legal Counsel, Embassy of Mexico in the Kingdom of the Netherlands,

as Advocates-Counsellors;

Mr. Pablo Arrocha Olabuenaga, Office of the Legal Adviser, Ministry of Foreign Affairs of Mexico,

Ms Jill van Berg, Debevoise & Plimpton LLP, New York,

as Assistants.

The Government of the United States of America is represented by:

Mr. John B. Bellinger, III, Legal Adviser, United States Department of State,

as Agent;

Mr. James H. Thessin, Deputy Legal Adviser, United States Department of State,

as Co-Agent;

Mr. Stephen Mathias, Assistant Legal Adviser for the Office of Political Military Affairs, United States Department of State,

Le Gouvernement des Etats-Unis du Mexique est représenté par :

S. Exc. M. Juan Manuel Gómez-Robledo, ambassadeur, sous-secrétaire aux affaires multilatérales et aux droits de l'homme, ministère des affaires étrangères du Mexique,

S. Exc. M. Joel Antonio Hernández García, ambassadeur, conseiller juridique du ministère des affaires étrangères du Mexique,

S. Exc. M. Jorge Lomónaco Tonda, ambassadeur du Mexique auprès du Royaume des Pays-Bas,

comme agents ;

M. Donald Francis Donovan, cabinet Debevoise & Plimpton LLP, New York,

Mme Sandra L. Babcock, directrice de la Human Rights Clinic, Center for International Human Rights Northwestern University Law School, Chicago, Illinois,

M. Víctor Manuel Uribe Aviña, conseiller juridique adjoint du ministère des affaires étrangères du Mexique,

Mme Catherine Amirfar, cabinet Debevoise & Plimpton LLP, New York,

M. Gregory J. Kuykendall, directeur du programme d'assistance juridique du Mexique aux personnes encourant la peine de mort,

M. Agustín Rodríguez de la Gala, directeur chargé des contentieux à l'étranger au bureau du conseiller juridique du ministère des affaires étrangères du Mexique,

M. Erasmo A. Lara Cabrera, conseiller juridique à l'ambassade du Mexique aux Pays-Bas,

comme conseils et avocats ;

M. Pablo Arrocha Olabuenaga, bureau du conseiller juridique, ministère des affaires étrangères du Mexique,

Mme Jill Van Berg, cabinet Debevoise & Plimpton LLP, New York,

comme assistants.

Le Gouvernement des Etats-Unis d'Amérique est représenté par :

M. John B. Bellinger, III, conseiller juridique du département d'Etat des Etats-Unis d'Amérique,

comme agent ;

M. James H. Thessin, conseiller juridique adjoint du département d'Etat des Etats-Unis d'Amérique,

comme coagent ;

M. D. Stephen Mathias, conseiller juridique adjoint du bureau des affaires politico-militaires du département d'Etat des Etats-Unis d'Amérique,

Professor Vaughan Lowe, Q.C., Chichele Professor of International Law, University of Oxford, member of the English Bar, associate member of the Institut de droit international,

as Counsel and Advocates;

Mr. Todd F. Buchwald, Assistant Legal Adviser for the Office of United Nations Affairs, United States Department of State,

Ms Rebecca M. S. Ingber, Attorney-Adviser, United States Department of State,

Mr. Daniel P. Kearney, Jr., Special Assistant to the Legal Adviser, United States Department of State,

Ms Mary Catherine Malin, Assistant Legal Adviser for the Office of Consular Affairs, United States Department of State,

Ms Denise G. Manning, Deputy Legal Counsellor, Embassy of the United States of America, The Hague,

Ms Julie B. Martin, Attorney-Adviser, United States Department of State,

Mr. Michael J. Mattler, Attorney-Adviser, Office of United Nations Affairs, United States Department of State,

Ms Heather A. Schildge, Legal Counsellor, Embassy of the United States of America, The Hague,

Mr. Charles P. Trumbull, Attorney-Adviser, United States Department of State,

as Counsel.

M. Vaughan Lowe, Q.C., professeur titulaire de la chaire Chichele de droit international à l'Université d'Oxford, membre du barreau d'Angleterre, membre associé de l'Institut de droit international,

comme conseils et avocats ;

M. Todd F. Buchwald, conseiller juridique adjoint chargé des questions concernant les Nations Unies au département d'Etat des Etats-Unis d'Amérique,

Mme Rebecca M. S. Ingber, avocat-conseiller au département d'Etat des Etats-Unis d'Amérique,

M. Daniel P. Kearney, Jr., assistant spécial du conseiller juridique du département d'Etat des Etats-Unis d'Amérique,

Mme Mary Catherine Malin, conseiller juridique adjoint du bureau des affaires consulaires du département d'Etat des Etats-Unis d'Amérique,

Mme Denise G. Manning, conseiller juridique adjoint à l'ambassade des Etats-Unis d'Amérique à La Haye,

Mme Julie B. Martin, avocat-conseiller au département d'Etat des Etats-Unis d'Amérique,

M. Michael J. Mattler, avocat-conseiller chargé des questions concernant les Nations Unies au département d'Etat des Etats-Unis d'Amérique,

Mme Heather A. Schildge, conseiller juridique à l'ambassade des Etats-Unis d'Amérique à La Haye,

M. Charles P. Trumbull, avocat-conseiller au département d'Etat des Etats-Unis d'Amérique,

comme conseils.

The PRESIDENT: Please be seated. The sitting is open. The Court meets today under Article 74, paragraph 3, of the Rules of Court, to hear the observations of the Parties on the Request for the indication of provisional measures submitted by the United Mexican States in the case concerning the *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) *(Mexico* v. *United States of America)*..

Judge Shi, for reasons explained to the Court, will not sit in the present case. Acting under Article 24, paragraph 1, of the Statute, Judges Parra-Aranguren and Simma have informed the Court that they will not sit in the present case.

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* *

The proceedings in the present case were instituted on 5 June 2008 by the filing in the Registry of the Court of an Application by Mexico requesting the interpretation of paragraph 153 (9) of the Judgment delivered by the Court on 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*.

To found the jurisdiction of the Court, Mexico relies in its Application on Article 60 of the Statute of the Court, which provides that: "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."

In its Request for interpretation Mexico recalls that, in paragraph 153 (9) of the *Avena* Judgment, the Court found that the appropriate reparation in the *Avena* case consisted of "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" whose rights under the Vienna Convention on Consular Relations had been violated. Mexico explains that, on 25 March 2008, in the case of Mr. José Ernesto Medellín Rojas, one of the Mexican nationals referred to in the *Avena* Judgment, the Supreme Court of the United States acknowledged that the *Avena* Judgment constitutes an obligation under international law on the part of the United States.

However, it ruled that the *Avena* Judgment does not constitute "directly enforceable federal law that precluded Texas from applying state procedural rules that barred all review and reconsideration of Mr. Medellín's Vienna Convention claim". Mexico notes that the Supreme Court also indicated alternative means by which the United States could still comply with its obligations under the *Avena* Judgment, in particular, by the adoption of legislation by Congress or by "voluntary compliance by the state of Texas". Mexico points out that since the decision of the Supreme Court, a Texas court has scheduled Mr. Medellín's execution for 5 August 2008. Mexico further contends that at least four more Mexican nationals referred to in the *Avena* Judgment are also "in imminent danger of having execution dates set by the state of Texas".

Mexico asserts that it understands the language of paragraph 153 (9) of the *Avena* Judgment as establishing "an obligation of result" which is only complied with when review and reconsideration of the convictions and sentences in question has been completed. According to Mexico, the United States "[h]aving chosen to issue the President's 2005 determination directing state courts to comply" with the *Avena* Judgment, has to date not taken any further action. Thus, it is Mexico's position that the United States, by its conduct, has demonstrated its understanding that paragraph 153 (9) of the *Avena* Judgment constitutes merely an obligation of means. Mexico therefore believes that there is a dispute between the Parties as to the scope and meaning of paragraph 153 (9) of the *Avena* Judgment.

I shall now ask the Registrar to read out the decision requested of the Court, as formulated in paragraph 59 of the Application of Mexico:

The REGISTRAR:

> "The Government of Mexico asks 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 result as it is clearly stated in the Judgment by the indication that the United States must provide 'review and reconsideration of the convictions and sentences' but leaving it the 'means of its own choosing';
>
> and that, pursuant to the foregoing *obligation* of result,
>
> 1. the United States must take any and all steps necessary to provide the reparation of review and reconsideration mandated by the *Avena* Judgment; and
>
> 2. the United States must take any and all steps necessary to ensure that no Mexican national entitled to review and reconsideration under the *Avena* Judgment is

executed unless and until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation."

The PRESIDENT: On 5 June 2008, Mexico also filed in the Registry a Request for the indication of provisional measures, referring to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court. In its Request for the indication of provisional measures Mexico refers to the basis of jurisdiction of the Court invoked in its Application, and to the facts set out and the submissions made therein. Mexico requests provisional measures to preserve the rights of Mexico and its nationals, pending the Court's judgment in the proceedings on the interpretation of the *Avena* Judgment. Mexico explains in its Request that "provisional measures are clearly justified in order both to protect Mexico's paramount interest in the life of its nationals and to ensure the Court's ability to order the relief Mexico seeks".

In particular, Mexico states that José Ernesto Medellín Rojas, a Mexican national, will face execution on 5 August 2008; another Mexican national, César Roberto Fierro Reyna, could receive an execution date on 30 days' notice and three other Mexican nationals — Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos — could receive execution dates on 90 days' notice, in the state of Texas.

I shall now ask the Registrar to read out the passage from the Request specifying the provisional measures which the Government of Mexico is asking the Court to indicate.

The REGISTRAR:

The Government of Mexico, "acting on its own behalf and in the exercise of the diplomatic protection of its nationals . . . respectfully request[s] that, pending resolution of Mexico's Request for Interpretation, the Court indicate:

(a) that the Government of the United States take all measures necessary to ensure that José Ernesto Medellín, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending the conclusion of the proceedings instituted [on 5 June 2008];

(b) that the Government of the United States inform the Court of all measures taken in implementation of subparagraph *(a)*; and

(c) that the Government of the United States ensure that no action is taken that might prejudice the rights of Mexico or its nationals with respect to any interpretation this Court may render with respect to paragraph 153 (9) of its *Avena* Judgment."

The PRESIDENT: On 5 June 2008, the date on which the Application and Request for the indication of provisional measures were filed in the Registry, the Registrar advised the Government of the United States of the filing of those documents and forthwith provided to it a signed original of the Application, in accordance with Article 40, paragraph 2, of the Statute and Article 38, paragraph 4, of the Rules of Court, and a signed original of the Request for the indication of provisional measures, in accordance with Article 73, paragraph 2, of the Rules of Court. He also notified the Secretary-General of the United Nations of the filing of the Application and the Request.

According to Article 74 of the Rules of Court, a Request for the indication of provisional measures shall have priority over all other cases. The date of the hearing must be fixed in such a way as to afford the parties an opportunity of being represented at it. Consequently, on 5 June 2008, the Registrar also informed the Parties that the Court, in accordance with Article 74, paragraph 3, of the Rules of Court, had fixed 19 June 2008 as the date for the opening of the oral proceedings.

I note the presence before the Court of the Agents and counsel of Mexico and the Co-Agent and counsel of the United States, the Agent of the United States being unavoidably detained will arrive a little later. The Court will hear Mexico, which has submitted the Request for the indication of provisional measures, this morning until 1 o'clock — that is the time available. It will hear the United States this afternoon at 3 o'clock. For the purposes of this first round of oral arguments, each of the Parties has available to it a three-hour sitting. The Parties will then have the possibility to reply, if they deem it necessary; Mexico at 10 a.m. tomorrow and the United States at 4.30 p.m. tomorrow. Each of the Parties will have a maximum time of one-and-a-half hours in which to present its reply.

Before calling upon His Excellency Mr. Gómez-Robledo, Agent of Mexico, I shall draw the attention of the Parties to Practice Direction XI which states *inter alia*:

> "Parties should in their oral pleadings thereon limit themselves to what is relevant to the criteria for the indication of provisional measures as indicated in the Statute, Rules and jurisprudence of the Court. They should not enter into the merits of the case beyond what is strictly necessary for that purpose."

I now call upon the Agent of Mexico to open the proceedings.

M. GÓMEZ-ROBLEDO : Merci, Madame le président.

Introductory remarks, outline of argument, presentation of delegation

1. Madame le président, Messieurs les Membres de la Cour, le Mexique comparaît, une nouvelle fois, devant la Cour internationale de Justice, à la suite de sa requête de demande en interprétation du paragraphe 153, alinéa 9 du dispositif de l'arrêt rendu le 31 mars 2004, en l'affaire *Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique)*. La demande en interprétation, déposée auprès du Greffe le 5 juin 2008, est accompagnée d'une demande en indication de mesures conservatoires, cette dernière étant la raison essentielle et centrale de l'audience que vous avez bien voulu convoquer ce matin.

2. Permettez-moi, à présent, de replacer ce retour à la Cour dans le contexte qui a suivi l'arrêt *Avena*. Le Mexique a été, et reste, profondément reconnaissant à la Cour pour la façon dont elle a su traiter ses prétentions lors de ce procès : le résultat sert le droit international et est, par conséquent, conforme aux vœux exprimés par mon pays. L'arrêt *Avena* est un acquis sur lequel on ne saurait revenir.

3. Cependant, l'application des obligations découlant de cet arrêt, tout particulièrement celles qui ont trait au devoir de réparer, a suscité un différend fondamental entre les Etats-Unis et le Mexique quant à la portée et le sens de l'alinéa 9 du paragraphe 153 de l'arrêt *Avena*. Ce différend avec les Etats-Unis, en tant que sujet à part entière du droit international, entrave et empêche, au vu des omissions des Etats-Unis, la pleine réalisation des droits que la Cour a reconnus au Mexique dans son arrêt du 31 mars 2004.

4. La Cour aura l'occasion d'apprécier, le moment venu, que la question n'est pas celle de savoir dans quelle mesure le gouvernement du président George W. Bush s'est efforcé par tel ou tel moyen de s'acquitter des obligations qui sont les siennes conformément à l'arrêt *Avena*. Les faits sur lesquels nous nous pencherons au cours de cette audience sont incontournables et incontestables. Nous nous trouvons bien face à des actes qui, cumulativement, placent les Etats-Unis devant un manquement des obligations internationales qui découlent de l'alinéa 9 du paragraphe 153 de l'arrêt *Avena*.

5. Madame le président, Messieurs les Membres de la Cour, les quatre années écoulées depuis l'arrêt *Avena* fournissent un nombre important d'exemples des tentatives du Mexique de

persuader les Etats-Unis et ses subdivisions politiques, ainsi que les différents pouvoirs qui composent cet Etat, qu'un vaste éventail de moyens est à leur disposition pour atteindre le résultat précis que la Cour a exigé dans son arrêt, dans la liberté du choix que l'on sait, et que nous ne contestons pas. Liberté certes quant au choix des moyens, *effet utile* de ces moyens néanmoins. Rien de plus, mais rien de moins, Madame le président.

6. Les Etats-Unis vous diront, sans doute, qu'ils se sont efforcés de se conformer aux exigences de l'arrêt *Avena*. Le Mexique n'ignore pas que des efforts louables, ont été réalisés à un moment déterminé par le pouvoir exécutif des Etats-Unis. Il n'en demeure pas moins que quelle que fût l'intentionnalité que l'on eusse pu prêter à ces efforts, les Etats-Unis ont manqué à l'obligation de pourvoir au profit de l'immense majorité des Mexicains visés par l'arrêt *Avena*, le réexamen et la revision des verdicts de culpabilité et des peines prononcées à leur encontre, en tenant compte à la fois des violations des droits prévus par l'article 36 de la convention de Vienne et des paragraphes 138 à 141 de l'arrêt.

7. L'interprétation authentique que nous demandons à la Cour devra fournir aux Parties l'élément de droit qui permettra aux Etats-Unis de remplir ses obligations découlant de l'arrêt *Avena*, qui pour le Mexique, en l'occurrence, ne fait pas de doute mais qui est perçu de manière fondamentalement différente par les Etats-Unis.

8. Il convient de préciser que, si cette demande en interprétation est articulée sur l'arrêt *Avena* dont elle est l'objet, elle n'en constitue pas moins une nouvelle affaire, aux termes de l'article 60 du Statut de la Cour et de sa jurisprudence, sur laquelle se greffe notre demande en indication de mesures conservatoires.

9. Madame le président, Messieurs les Membres de la Cour, en attendant que la Cour veuille bien aborder le fond de cette affaire, les droits du Mexique et ceux de ses ressortissants visés par l'arrêt *Avena* sont en danger. En effet, cinq ressortissants mexicains visés par l'arrêt *Avena* pourraient être exécutés sans que leurs verdicts de culpabilité et leurs peines aient pu faire l'objet du réexamen et de la revision auxquels ils ont droit. L'un d'entre eux, José Ernesto Medellín Rojas, s'est vu fixer, déjà, sa date d'exécution pour le 5 août 2008 par une cour de district de Houston, au Texas.

10. Il est clair qu'en l'absence de mesures conservatoires ordonnées par la Cour internationale de Justice, José Ernesto Medellín Rojas et après lui, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García et Roberto Moreno Ramos, seront exécutés avant l'issue de la procédure engagée par la demande en interprétation du 5 juin.

11. Il s'ensuivrait alors un dommage irréparable aux droits du Mexique et à ceux de chacun des cinq ressortissants que je viens de citer.

12. Les conditions prescrites à l'article 41 du Statut de la Cour sont pleinement réunies en l'espèce. Les mesures conservatoires que nous cherchons à obtenir découlent de la jurisprudence constante de la Cour dans la trilogie des affaires *Breard*, *LaGrand* et *Avena*, dont notre demande en interprétation constitue le prolongement et, espérons-le, l'aboutissement définitif.

13. Le Mexique demande donc à la Cour qu'elle ordonne aux Etats-Unis les mesures conservatoires pour faire en sorte qu'aucun des cinq ressortissants mexicains susmentionnés ne soit exécuté en attendant l'issue de la procédure engagée quant au fond.

14. Comme c'est le cas d'habitude, nous attendons de la Cour qu'elle demande aux Etats-Unis de la tenir au courant des mesures prises pour respecter et faire respecter les mesures conservatoires.

15. Le Mexique est conscient des délais que la Cour a rappelé dans l'affaire *LaGrand* autant pour qu'elle ait le temps de pondérer le bien-fondé de sa requête, que pour donner aux Etats-Unis l'occasion de mettre en œuvre les mesures qu'elle dicterait.

16. Notre confiance de voir respecter les mesures que la Cour voudrait bien indiquer, est accrue du fait que les Etats-Unis se sont conformés aux mesures conservatoires en 2003 et qui furent ensuite remplacées par les obligations énoncées dans le dispositif de l'arrêt *Avena* au paragraphe 152 (*Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 2004*, p. 70, par. 152).

17. Madame le président, Messieurs les Membres de la Cour, croyez-bien que le Mexique regrette d'être contraint de demander à la Cour qu'elle éclaire le sens et la portée de son arrêt. Nous le regrettons d'autant plus que depuis la fin de la procédure engagée en 2003, maintes ont été les occasions où nous avons travaillé aux côtés du Gouvernement des Etats-Unis pour assurer la pleine réalisation de tous les aspects pertinents de l'arrêt *Avena*.

18. Nous reconnaissons, par exemple, une plus grande disposition des Etats-Unis de faire en sorte que les droits prévus à l'article 36 de la convention de Vienne soient mieux respectés au sein des juridictions fédérale et locale. Nous savons que les programmes de formation mis en place, et auxquels la Cour a fait allusion au paragraphe 150 de son arrêt, commencent à porter leurs fruits. Nous apprécions à sa juste valeur le dialogue engagé avec les autorités des Etats-Unis depuis l'arrêt de la Cour suprême dans l'affaire *Medellín*, même s'il n'a fait qu'accentuer et s'approfondir le différend qui nous oppose hélas aujourd'hui.

19. Or, tout cela ne va pas sans paradoxe. Le pouvoir des Etats-Unis sur la scène internationale est grand, exorbitant, voire écrasant, son rôle dans un environnement global est indispensable, et l'état de droit est la pierre sur laquelle sont bâtis les Etats-Unis. Que les Etats-Unis s'engagent, avec les autres membres de la communauté internationale, pour apporter des solutions fondées sur le droit international aux grandes questions de ce temps, voilà le souhait profond du Mexique et l'assurance d'un monde meilleur pour tous.

20. Madame le président, avec la permission de la Cour, nous allons structurer la plaidoirie du Mexique de la manière suivante.

21. S. Exc. M. l'ambassadeur Joel Hernández García, conseiller juridique du ministère des affaires étrangères, fera une présentation d'ordre général de l'affaire et établira le fondement de la juridiction de la Cour.

22. En deuxième lieu, M[e] Sandra Babcock traitera des faits qui sont à l'origine de notre demande en indication de mesures conservatoires.

23. Par la suite, M[e] Catherine Amirfar et M[e] Donald Donovan s'attacheront à démontrer le fondement juridique des mesures demandées et leur conformité avec l'article 41 du Statut de la Cour.

24. Enfin, S. Exc. M. Jorge Lomónaco, ambassadeur du Mexique auprès du Royaume des Pays-Bas, dressera les conclusions de notre argumentation et formulera les demandes finales à la Cour.

25. Je vous demande, Madame le président, de bien vouloir appeler à la barre S. Exc. M. l'ambassadeur Joel Hernández García. Je vous remercie de votre attention.

The PRESIDENT: Thank you very much, Your Excellency. I do now call His Excellency Ambassador Joel Hernández García.

Mr. HERNÁNDEZ GARCÍA:

Overview of the Application and Jurisdiction

1. Thank you, Madam President, distinguished Members of the Bench. It is an honour to appear before this Court for the first time representing Mexico. With your permission, I will first address the background of Mexico's request, and then this Court's jurisdiction.

Overview of the content of Mexico's Application

2. Before I turn to the basis for the Court's jurisdiction in this proceeding, I would like to pause to say a few words about the background and content of Mexico's Application to this Court. On 31 March 2004, this Court rendered a Judgment on the merits in the *Avena* case. The *Avena* case concerned violations of the Vienna Convention on Consular Relations[1] by competent authorities of the United States in the cases of certain Mexican nationals who had been sentenced to death in criminal proceedings in the United States. The Court found, by a vote of fourteen to one, that the United States had breached Article 36 of the Vienna Convention in the cases of 51 Mexican nationals by failing to inform them in a timely manner of their right to consular access and notification under Article 36 (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Merits, Judgment, I.C.J. Reports 2004*, p. 71, para. 153 (4)). The Court also found, again by a vote of fourteen to one, in paragraph 153 (9) of the *dispositif*, "that the appropriate reparation in this case consists in the obligation of the United States . . . to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals" whose Vienna Convention rights had been violated (*id.*, p. 72, para. 153 (9)).

3. As my colleague Sandra Babcock will elaborate, Mexico has made every single effort since the issuance of the *Avena* Judgment to obtain the mandated relief in the courts of the United States. Those efforts have met with little success. Most recently, the United States Supreme Court

[1]Vienna Convention on Consular Relations, 569 *UNTS* 261, done on 24 April 1963.

recognized in *Medellin* v. *Texas*[2] the undisputed international obligation of the United States to comply with the *Avena* Judgment[3], but deemed that an additional step by constituent parts of the United States was needed before the Judgment can be enforced[4].

4. Madam President, allow me now to elaborate on the extensive but unavailing diplomatic efforts carried out by Mexico arising from the *Medellín* decision of the United States Supreme Court.

5. On the same day that the United States Supreme Court rendered its decision in the *Medellín* case, Mexico issued a press communiqué regretting said decision, and stressing that it would continue resorting to all available means in order to obtain full respect of the rights granted to Mexican nationals under the *Avena* Judgment.

6. Later on, the Mexican Embassy in Washington D.C. filed a diplomatic Note dated 28 March 2008 before the United States Department of State. There, my Government expressed its disappointment with the terms of the decision and conveyed its view that the Judgment of this honourable Court in the *Avena* case establishes an obligation of result.

7. On that basis, Mexico embarked upon an intense dialogue for several weeks with top officials of the United States Government. This dialogue included meetings, conversations and correspondence with the objective of obtaining full respect for the *Avena* Judgment. At the end of these bilateral consultations, however, it was clear as it is now that our countries have fundamentally different views on the scope and interpretation of the obligations that this Court imposed upon the United States.

8. It is as a result of those contradictory views, Madam President, that we are here today on a request for interpretation of the operative language of the *Avena* Judgment. Mexico believes that a fundamental dispute has emerged between the Parties as to the scope and meaning of paragraph 153 (9) of the Judgment. Specifically, whereas Mexico understands that particular paragraph to establish an obligation of result incumbent upon the United States, the United States *evidently* understands that language to establish only an obligation of means. Indeed, one of its

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[2] *Medellin* v. *Texas*,128 S. Ct. 1346 (2008).

[3] *Id.,* 1356.

[4] *Id.,* 1361, 1371-1372.

political subdivisions, the state of Texas, has scheduled the execution of one of the Mexican nationals named in the Judgment who has yet to receive the review and reconsideration to which he is entitled.

9. Mexico believes that the scheduling of an execution date is fundamentally inconsistent with the obligation of result manifest in paragraph 153 (9) of the *Avena* Judgment. In light of this dispute, Mexico asks this Court to confirm that the operative language of the *Avena* Judgment establishes an obligation of result that obliges the United States to provide the requisite review and reconsideration irrespective of any domestic law impediment. Further, Mexico submits that the obligation imposed by the *Avena* Judgment requires the United States to prevent the execution of any Mexican national named in the Judgment unless and until that review and reconsideration has been completed and it has been determined whether any prejudice resulted from the Vienna Convention violations found by this Court.

Article 60 jurisdiction

10. Madam President, I turn now to this Court's jurisdiction. As the Court has indicated on many prior occasions, the Court does not need at this phase of the proceedings "[to] finally satisfy itself that it has jurisdiction on the merits of the case" (*Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998,* p. 255, para. 23; *LaGrand, Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999,* p. 13, para. 13). Rather, it simply must conclude that the provisions invoked by the Applicant, "appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded" *(id.)*[5].

11. There can be no question that this standard is easily met here. Article 60 of the Court's Statute provides an explicit jurisdictional basis for the proceedings Mexico has initiated. It provides that "[i]n the event of dispute as to the meaning or scope of [a] judgment, the Court shall construe it upon the request of any party"[6]. As a Party to the *Avena* Judgment, Mexico is well

[5]See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993,* pp. 11-12, para. 14; *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Provisional Measures, Order of 17 August 1972, I.C.J. Reports 1972,* p. 15, para. 15, and p. 16, para. 17.

[6]Statute of the International Court of Justice, Art. 60.

within its rights to seek such an interpretation and the Court has prima facie jurisdiction to resolve the dispute.

12. To be clear, the Court does not need to concern itself with the terms of the Parties' original consent to jurisdiction over the *Avena* case. Indeed, the Court has on several occasions confirmed that Article 60 jurisdiction operates independently of the basis for the Court's jurisdiction over the underlying case in which the judgment to be interpreted was rendered. For example, in the case concerning the *Continental Shelf (Tunisia* v. *Libya)*, the Court described its jurisdiction to provide an interpretation of one of its own judgments as "a special jurisdiction deriving directly from Article 60 of the Statute" (*Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment,, I.C.J. Reports 1985*, p. 216, para. 43). The parties' agreement to submit disputes to the Court only on mutual consent therefore did not operate to deprive the Court of its Article 60 jurisdiction to adjudicate a unilateral request for interpretation *(id.)*. Consistently, in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court echoed that "[b]y virtue of the second sentence of Article 60, the Court has jurisdiction to entertain requests for interpretation of any judgment rendered by it" (*Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary Objections *(Nigeria* v. *Cameroon), Judgment, I.C.J. Reports 1999*, p. 35, para. 10). Thus, this Court has never looked beyond Article 60 to establish its jurisdiction to entertain a request for interpretation like the one Mexico submitted on 5 June 2008[7].

13. With the Court's permission, I will now give the floor to my colleague, Ms Sandra Babcock, who will address the factual basis for the provisional measures that Mexico seeks. I thank you, Madam President.

The PRESIDENT: Thank you, Your Excellency. I now call Ms Babcock.

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[7]See, e.g., *Interpretation of Judgments No. 7 and 8 (Factory at Chorzów), (Germany v. Poland), Judgment of 16 December 1927, P.C.I.J. Series A No. 13, 1927*, pp. 9-11; *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (*Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, pp. 214-16, paras. 41-43.

Ms BABCOCK:

Factual basis for order of provisional measures

Post-*Avena* efforts to obtain review and reconsideration

1. Madam President, distinguished Members of the Court, good morning. It is an honour to appear before you once again on behalf of the Government of Mexico.

2. In *Avena*, this Court made clear that the review and reconsideration required by the Court's Judgment must take place as part of the "judicial process" (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Merits, Judgment, I.C.J. Reports 2004,* pp. 65-66, para. 140). Consequently, since March 2004, at least 33 of the 51 Mexican nationals named in the Court's Judgment have sought review and reconsideration in United States state and federal courts.

3. To date, only one of these nationals — Osbaldo Torres Aguilera — has received review and reconsideration consistent with this Court's mandate[8]. We should also mention, however, that the State of Arkansas agreed to reduce Mr. Rafael Camargo Ojeda's death sentence to life imprisonment in exchange for his agreement to waive his right to review and reconsideration under the *Avena* Judgment. All other efforts to enforce the *Avena* Judgment have failed.

4. In the time we have available today, it will not be possible for me to review all of the efforts undertaken on behalf of each of the Mexican nationals in question. Instead, I will focus my remarks on the jurisprudence of the United States Supreme Court, which has issued three separate opinions addressing the effect of the *Avena* Judgment in United States courts. One of these decisions involved two foreign nationals who were not part of the *Avena* Judgment, but who cited this Court's *Avena* and *LaGrand* Judgments as precedent. The other two decisions, which are most directly relevant to the proceedings here today, involved the case of José Ernesto Medellín Rojas, the Mexican national who is in the most immediate danger of execution. In particular, the Supreme Court's March 2008 decision in *Medellin* v. *Texas* will serve as binding precedent for all United States courts that are currently considering, or may in the future consider, petitions for review and reconsideration brought pursuant to the *Avena* Judgment.

[8] *Torres* v. *Oklahoma*, 120 P.3d 1184 (Okla. Crim. App. 2005).

The case of José Ernesto Medellín Rojas

5. Mr. Medellín is the only individual whose case has been reviewed by the United States Supreme Court. In fact, the Court agreed to hear his case on two separate occasions, once in 2004 and again in 2007, in order to resolve whether United States courts were required, as a matter of federal law, to give effect to the *Avena* Judgment.

6. In early 2005, when Mr. Medellín's case was first pending before the United States Supreme Court, President George W. Bush issued a signed memorandum that called upon state courts to give effect to the *Avena* Judgment in cases filed by the 51 Mexican nationals named therein, including Mr. Medellín[9]. You have a copy of the President's Memorandum in your folders at tab 2. The President declared, pursuant to his Executive authority, that the United States would discharge its international obligations under the *Avena* Judgment "by having state courts give effect to the decision in accordance with general principles of comity".

7. In a brief submitted in support of Texas on the very day the President signed his Memorandum, the United States argued that the *Avena* Judgment was not directly binding on United States courts[10]. The United States went on to say, however, that because the President had determined to comply with the Judgment, state courts were required to provide review and reconsideration to the 51 Mexican nationals without regard to state procedural default rules[11].

8. The Supreme Court subsequently dismissed Mr. Medellín's case so that the Texas courts could consider his claims in the first instance[12]. But in late 2006, the Texas Court of Criminal Appeals denied Mr. Medellín's application on procedural default grounds, concluding that neither the *Avena* Judgment nor the President's Memorandum constituted binding federal law[13].

9. The Texas court rested its decision in large part on the Supreme Court's 2006 decision in *Sanchez-Llamas* v. *Oregon*[14], a case that involved two foreign nationals not named in the *Avena* Judgment. You have a copy of the *Sanchez-Llamas* decision in your folders at tab 3. In

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[9]President George W. Bush, Memorandum for the Attorney General, "Compliance with the Decision of the International Court of Justice in *Avena*", 28 February 2005.

[10]Brief for United States as *Amicus Curiae* at 41-48, *Medellin* v. *Dretke*, No. 04-5928 (5th Cir. Feb. 2005).

[11]*Id.*, 52-60.

[12]*Medellín* v. *Dretke*, 544 U.S. 660 (2005).

[13]*Ex parte Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006).

[14]*Sanchez-Llamas* v. *Oregon*, 126 S. Ct 2669 (2006).

Sanchez-Llamas, the Supreme Court explained that while this Court's decisions were entitled to "respectful consideration", they did not constitute binding precedent[15]. The Supreme Court noted that while the United States had determined that state courts should give effect to the *Avena* Judgment, it had not taken the view that this Court's interpretation of Article 36 was binding on United States courts. The Supreme Court further observed that the United States had withdrawn from the optional protocol to the Vienna Convention on Consular Relations, and then stated (on page 15 of the *Sanchez-Llamas* decision in your folders):

> "Whatever the effect of *Avena* and *LaGrand* before this withdrawal, it is doubtful that our courts should give decisive weight to the interpretation of a tribunal whose jurisdiction in this area is no longer recognized by the United States."[16]

10. Consequently, the Supreme Court rejected this Court's interpretation of Article 36 (2), and concluded that Vienna Convention claims can — as a matter of domestic law — be foreclosed by state procedural default rules.

11. Following the decision of the Texas Court of Criminal Appeals, Mr. Medellín again petitioned the United States Supreme Court for review. The United States joined the proceedings as *amicus curiae* and argued that the Texas Court of Criminal Appeals had erred in failing to give effect to the *Avena* Judgment[17]. But the United States, even while acknowledging an "international law obligation to comply with the ICJ's decision in *Avena*", contended that the Judgment itself was not independently enforceable in domestic courts absent intervention by the President[18].

12. On 25 March 2008, the Supreme Court ruled in favour of Texas by a vote of 6 to 3, holding that neither the *Avena* Judgment on its own, nor the Judgment in conjunction with the President's Memorandum, constituted directly enforceable federal law[19]. Every member of the United States Supreme Court acknowledged that the United States has an international legal

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[15] *Id.*, 2683-2684 (citing *Breard* v. *Greene*, 523 U.S. 371, 375 (1998)).

[16] *Id.*, 2685.

[17] Brief for United States as *Amicus Curiae* Supporting Pet'r at 4, *Medellin* v. *Texas*, 128 S. Ct. 1346 (No. 06-984).

[18] *Id.*

[19] *Medellin* v. *Texas*, 128 S. Ct. 1346 (2008).

obligation to comply with the *Avena* Judgment[20]. Nonetheless, the Court held that the Judgment was not binding in the absence of implementing legislation[21].

13. The Supreme Court's majority decision turned in large part on its understanding of the United States obligations under Article 94 of the United Nations Charter. I would like to direct your attention to page 12 of the *Medellín* decision, which is in your folders at tab 4. There, you will see that the Supreme Court cited and agreed with the position taken by representatives of the Executive Branch of the United States that the language "undertakes to comply" in Article 94 (1) merely expressed "a *commitment* on the part of U. N. Members to take *future* action through their political branches to comply with an ICJ decision"[22]. Relying on this interpretation, the Supreme Court concluded that Article 94 (1) "does not provide that the United States 'shall' or 'must' comply with an ICJ decision, nor indicate that the Senate that ratified the U. N. Charter intended to vest ICJ decisions with immediate legal effect in domestic courts"[23].

14. Referring you to page 13, the Supreme Court further found, again consistent with the position taken by the Executive Branch, that Article 94 (2)'s provision of recourse to the Security Council constituted "an express diplomatic — that is, nonjudicial — remedy" and "is itself evidence that ICJ judgments were not meant to be enforceable in domestic courts"[24].

15. The Supreme Court also cited (on page 14) Article 34 (1) of this Court's Statute in support of its decision. The Supreme Court reasoned that since the 51 Mexican nationals could not themselves bring a case to this Court, the *Avena* Judgment cannot be judicially enforceable in their individual cases absent further action by the political branches[25].

16. The Supreme Court spent relatively few words on the President's direction to state courts to comply with the *Avena* Judgment. The Court determined that under the United States Constitution, the President's Memorandum was not capable of transforming the *Avena* Judgment

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[20] *Id.*, 1356.

[21] *Id.*, 1367-1372.

[22] *Id.*, 1358 (citation omitted).

[23] *Id.*

[24] *Id.*, 1359 (citation omitted).

[25] *Id.*, 1360.

into binding federal law[26]. Critically, however, the Supreme Court did confirm that there are alternative means available by which the United States still can come into compliance with its obligations under *Avena*. In particular, the Court emphasized that the United States Congress can do what the Executive, acting alone, could not: and that is, to enact legislation to make the *Avena* Judgment domestically enforceable[27].

17. One week after it denied Mr. Medellín's case, the Supreme Court denied similar petitions for review on behalf of seven other Mexican nationals who were entitled to review and reconsideration under the *Avena* Judgment.

It is highly likely that five Mexican nationals will be executed absent provisional measures

18. Madam President, with your permission, I will now turn to the likelihood that Mexican nationals will be executed unless this Court indicates provisional measures. Madam President, distinguished Members of this Court, one fact is absolutely certain: if this Court does not issue provisional measures, Mexican nationals will be executed while this Court considers the merits of Mexico's Request for interpretation. As Mexico explained in its Application, five of its nationals are in immediate danger of execution: José Ernesto Medellín Rojas, César Roberto Fierro Reyna, Humberto Leal García, Rubén Ramírez Cárdenas, and Roberto Moreno Ramos. The state of Texas has already scheduled one execution for 5 August 2008 and execution dates for the four other Mexican nationals, all of whom are in Texas, are sure to follow.

19. On 5 May 2008, less than two months after the Supreme Court issued its decision in *Medellín* v. *Texas*, a Texas trial court held a hearing to schedule an execution date for Mr. Medellín. Mr. Medellín's counsel asked the court not to set an execution date, explaining that he had not yet received the review and reconsideration that was mandated by the *Avena* Judgment. Mr. Medellín sought to present the testimony of two witnesses, one of whom was an expert in international law, to explain the significance to the trial court of the United States obligation to comply with the *Avena* Judgment. But the court refused to allow the witnesses to testify, stating: "I am not here to listen to evidence, I am here to set an execution date."

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[26] *Id.*, 1368.

[27] *Id.*, 1369.

Ambassador Joel Hernández, who is here today, had also travelled to Houston in order to provide the trial court with information regarding Mexico's ongoing efforts to promote compliance with this Court's Judgment. But the judge refused to allow him to speak.

20. Mr. Medellín's counsel then requested that the court at least defer the scheduling of an execution date so that the United States Congress could pass legislation implementing the United States treaty obligations, consistent with the United States Supreme Court's decision in *Medellín* v. *Texas*. But the court refused to issue the requested stay. The judge then scheduled Mr. Medellín's execution for the earliest date permissible under Texas law, and as a result, Mr. Medellín is now scheduled to die by lethal injection on 5 August 2008[28]. You have in your folders at tab 1 the execution order, which explains in graphic detail how the state of Texas plans to administer the lethal poison that will cause his death.

21. The other four Mexican nationals — Messrs. Fierro, Ramírez, Leal and Moreno — like Mr. Medellín, have unsuccessfully sought to obtain review and reconsideration of their convictions and sentences. Like Mr. Medellín, they presented petitions to the Texas Court of Criminal Appeals and to the United States Supreme Court. All of their requests for review were denied. As a result, they are in immediate danger of being scheduled for execution. Under applicable provisions of domestic law, Texas could schedule Mr. Fierro's execution on as little as 30 days' notice. And for the rest, Texas could schedule execution dates on 90 days' notice.

22. The likelihood that these nationals will receive stays of execution must be viewed against the backdrop of capital punishment in the state of Texas. Since 1982, Texas has executed 407 prisoners — more than the next six United States states combined. Texas has already executed one prisoner this year and plans to execute four more in July, five in August, three in September, and one in October, totalling 14 executions in five months.

23. The only recourse these individuals have left is executive clemency — which, as this Court may recall from earlier proceedings in the *Avena* case, leaves them with slim hope, indeed. Over the last 25 years, Texas has commuted just two death sentences. That translates into one commutation for every 200 executions. Based on these statistics, Mr. Medellín and the other

[28]Execution Order, *Ex parte Jose Ernesto Medellín*, No. 675430, 339th District Court of Harris County, Texas, 5 May 2008.

Mexican nationals have less than a 1 per cent chance that the Texas clemency board will commute their death sentences.

24. But even if the Texas clemency process were a model of fairness — and it is not — and even if the board extended mercy to condemned inmates as a routine matter — which it does not — this Court has made abundantly clear that clemency alone cannot satisfy the United States obligation to provide review and reconsideration to the Mexican nationals named in its Judgment (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Merits, Judgment, I.C.J. Reports 2004*, p. 66, paras. 142-143).

25. Madam President, the facts I have just described provide unequivocal proof that, today, Mexican nationals have no greater chance of receiving stays of execution and meaningful review and reconsideration than they did before this Court issued its historic Judgment in *Avena*.

26. Thank you, Madam President, Members of the Court. I now request that you call on my colleague, Catherine Amirfar.

The PRESIDENT: Thank you, Ms Babcock. The Court now calls Ms Amirfar.

Ms AMIRFAR:

Legal basis for order of provisional measures (Part 1)

1. Madam President, distinguished Members of the Court, good morning. It is a true privilege to address this Court for the first time on behalf of the Government of Mexico. With the Court's permission, I will address Mexico's entitlement to provisional measures under the standards enunciated by this Court pursuant to Article 41 of the Statute.

2. Article 41 (1) of the Statute of the Court vests the Court with "power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party". And as first Paraguay and then Germany argued in their respective cases, and as this Court found in the *LaGrand* case, orders of provisional measures pursuant to Article 41 establish binding obligations (*LaGrand (Germany* v. *United States of America), Merits, Judgment, I.C.J. Reports 2001*, p. 506, para. 109).

3. As a threshold matter, there should be no question of this Court's authority to issue provisional measures in the context of a request for interpretation to prevent executions of Mexican nationals pending this Court's resolution of the rights of the parties in the proceedings before it. Article 41 (1) vests the Court with power to indicate "any" provisional measures that it deems appropriate "to preserve the respective rights of either party". That grant of authority is broad. It must apply where, as here, a State comes before the Court to seek confirmation that a judgment issued in a case to which it was a party establishes certain rights and those rights are on the verge of irreparable breach. There is no basis in either the language or the purpose of Article 41 to doubt that it applies when the requirements for provisional measures are met in the context of a request for interpretation.

4. In addition to that specific grant of authority in Article 41, the Court's competence to issue provisional measures is grounded in its inherent jurisdiction to take any action it deems necessary to support its basic function as a judicial organ. Indeed, as Judge Fitzmaurice explained in *Northern Cameroons (Cameroon* v. *United Kingdom)*:

> "[T]here is the Court's *preliminary* or 'incidental' jurisdiction (e.g., to decree interim measures of protection . . .) which it can exercise even in advance of any determination of its basic jurisdiction as to its ultimate merits . . . Although much (though not all) of this incidental jurisdiction is specifically provided for in the Court's Statute, or in Rules of Court which the Statute empowers the Court to make, it is really an inherent jurisdiction, the power to exercise which is a necessary condition of the Court -- or of any court of law — being able to function at all." (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*; separate opinion of Judge Fitzmaurice, p. 103.)[29]

5. It is thus also within the Court's inherent jurisdiction to order provisional measures to ensure that its interpretation pursuant to Article 60 is not rendered meaningless.

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[29]See also *Nuclear Tests Case (Australia* v. *France), Merits, Judgment, I.C.J. Reports 1974*, pp. 259-60, para. 23: "[Inherent jurisdiction] derives from [its] mere existence . . . as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded"; *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*; dissenting opinion of Judge Weeramantry, p. 197: "When Article 41 of the Statute gave the Court power to indicate provisional measures it did not do so to the exclusion of universal principles relating to powers which are inherent in judicial proceedings"; 2 Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005* 582-583 (4th ed. 2006):

> "When a State becomes a party to the Statute or otherwise accepts the Statute ad hoc for the purposes of a particular case, that State gives its consent to the exercise of the incidental jurisdiction. In that respect, cases of interpretation of a judgment and the revision of a judgment are certainly akin to other instances of the exercise of incidental jurisdiction, in that they do not require the *ad litem* consent of both parties, the Court's jurisdiction to deal with these matters deriving from the Statute and from its jurisdiction in the case that led to the judgment for which interpretation or revision is being requested."

C. F. Amerasinghe, *Jurisdiction of International Tribunals* 348 (2003); Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* 542 (1986).

6. I turn now to the standards for the indication of provisional measures. Those standards are well established. To qualify for provisional measures, the Applicant must meet three requirements. *First*, the measures sought must be intended to preserve the respective rights of the parties. *Second*, the measures must be intended to prevent irreparable prejudice to the disputed rights. In other words, the relief sought must be a matter of urgency in the sense that, if the relief is not granted before the disposition of the dispute on its merits, the Court will be deprived of its capacity to vindicate fully the rights of the parties. *Finally*, the indication of provisional measures should not anticipate the Court's judgment on the merits (see generally case concerning *Fisheries Jurisdiction (United Kingdom v. Iceland), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 16, para. 21).

7. The provisional measures that Mexico seeks are straightforward, extremely urgent, and at this juncture, familiar. Mexico asks this Court to order the United States not to execute Mr. Medellín on 5 August nor set any execution dates for the four Mexican nationals whose executions are imminent pending the conclusion of these proceedings.

8. Madam President, Members of the Court, this is now the fourth time this Court has been asked to consider such a request. Particularly in light of the *Breard* Order of provisional measures, the *LaGrand* Order of provisional measures, and the previous indication of provisional measures in *Avena*, we submit that Mexico's request here easily meets this Court's standards. I will be addressing the first prong of the test, that is, that the measures sought must be intended to preserve the respective rights of the parties, and my colleague, Mr. Donovan, will be addressing the remaining two, as well as the form of the order requested.

9. *First*, Mexico's request is plainly intended to preserve the rights that it asserts in its Request for interpretation of paragraph 153 (9) of the *dispositif* of the *Avena* Judgment. Of course, the Court does not determine the merits of the parties' respective claims and defences on a request for provisional measures. In the *Avena* Order, this Court confirmed that the purpose of provisional measures is not to resolve the ultimate dispute on the merits. Rather, the provisional measures "must be concerned" with the need "to preserve . . . the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent" (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Provisional Measures, Order of 5 February 2003,*

I.C.J. Reports 2003, p. 89, para. 48; quoting *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996*, p. 22, para. 35).

10. Madam President, the rights to be adjudged in Mexico's Request require the indication of provisional measures if they are to be preserved during the pendency of the proceedings. For present purposes, of course, the only thing that is relevant is that in executing Mr. Medellín or others, the United States *will forever* deprive these nationals of the correct interpretation of the Judgment. And in Mexico's view, the correct interpretation reads the remedial language of paragraph 153 (9) to establish an obligation of result incumbent upon the United States — that is, to require the United States to deliver the precise result of review and reconsideration of the convictions and sentences of the 51 Mexican nationals in accordance with the operative terms of the Judgment. While the United States plainly may use "means of its own choosing" to discharge that obligation, the fundamental obligation to provide review and reconsideration is not contingent upon the success of any one means, and the United States cannot rest on a single means chosen. It must not execute any Mexican national named in the Judgment unless and until review and reconsideration is completed and either no prejudice as a result of the treaty violation is found or any prejudice is remedied. That is Mexico's view.

11. In contrast, by its actions thus far, the United States understands the Judgment to constitute merely an obligation of means, not an obligation of result. The President of the United States did in 2005 direct state courts to provide review and reconsideration consistent with the Judgment, but as Ms Babcock has already explained, petitions by Mexican nationals for the review and reconsideration mandated in their cases have repeatedly been denied by domestic courts. Further, the 25 March 2008 decision by the Supreme Court of the United States in Mr. Medellín's case has rendered the President's Memorandum without force in state courts[30]. While the Supreme Court recognized the existence of the undisputed, unequivocal international legal obligation to comply with *Avena*[31], it also denied the direct enforcement of either the Judgment or the President's Memorandum absent further action — either legislation by the United States Congress

[30] *Medellin* v. *Texas*, 128 S. Ct. 1346 (2008).

[31] *Id.*, 1356.

or actions by individual states[32]. Notwithstanding this declaration of the competence of Congress to do what the President, acting alone, could not, the state of Texas has made clear that unless restrained, it will go forward with the execution without providing Mr. Medellín the requisite review and reconsideration. Apart from having issued the President's 2005 Memorandum, a means that fell short of achieving its intended result, the United States to date has *not* taken the steps necessary to prevent the executions of Mexican nationals until the obligation of review and reconsideration is met.

12. Under well-settled principles of international law, there simply can be no question that the actions of Texas engage the international responsibility of the United States. The International Law Commission made this explicit in its Articles on State Responsibility[33]. This Court confirmed the very same principle in its Order of provisional measures in *LaGrand* when it observed that "the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State" and therefore that a state governor "is under the obligation to act in conformity with the international undertakings of the United States"[34]. At the same time, it is equally well settled that the United States cannot invoke its municipal law as justification for failure to perform its international legal obligations. The Vienna Convention on the Law of Treaties provides expressly that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty" (*LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 16, para. 28)[35]. This Court again has confirmed the basic principle, including when it held, in the case of the *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, that "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force" (*Treatment of Polish*

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[32]*Id*, 1361, 1371-1372.

[33]Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its Fifty-third session (2001), *Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10* (A/56/10), Art. 4.

[34]See also *LaGrand (Germany* v. *United States of America), Merits, Judgment, I.C.J. Reports 2001*, pp. 507-508, para. 113.

[35]Vienna Convention on the Law of Treaties, 23 May 1963, Art. 27, 1155 *UNTS* 331.

Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion of 4 February 1932, P.C.I.J., Series A/B, No. 44, 1933, p. 24)[36].

13. In short, Mexico submits that anything short of the review and reconsideration ordered by this Court in the cases of the Mexican nationals subject to the Judgment would violate the obligation of result imposed by paragraph 153 (9). If Mexico is correct, then it is incumbent on the United States to provide review and reconsideration of the conviction and sentence in each case and to remedy any prejudice resulting from the undisputed treaty violation before it can proceed with an execution. Given this dispute, there can be no doubt that the provisional relief requested arises from the rights that Mexico seeks to protect and preserve until this Court clarifies the obligation imposed by paragraph 153 (9) of the *Avena* Judgment.

14. I now request that you call on my colleague, Mr. Donovan, who will address the remaining requirements for Mexico's Request for provisional measures, as well as the form of the order requested. Thank you, Madam President.

The PRESIDENT: Thank you, Ms Amirfar. I now call upon Mr. Donovan.

Mr. DONOVAN:

LEGAL BASIS FOR ORDER OF PROVISIONAL MEASURES (PART 2)

1. Madam President, Members of the Court, while I expect that every person in this room would have preferred that there have been no need for these proceedings, it remains an honour to appear again before this Court.

2. My colleague Ms Amirfar has set out the first requirement for provisional measures — that they be designed to preserve the rights of the parties at issue in the proceeding before the Court.

3. The second requirement is the threat of "irreparable prejudice . . . to rights which are the subject of dispute . . ." (*LaGrand (Germany* v. *United States of America), Provisional Measures,*

[36]See also *Free Zones of Upper Savoy and the District of Gex (France* v. *Switzerland), Order of 6 December 1930, P.C.I.J., Series A, No. 24, 1930*, p. 12: a State "cannot rely on [its] own legislation to limit the scope of [its] international obligations"); *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 180: where a "claim is based on the breach of an international obligation on the part of [a] Member [State] . . . the Member [State] cannot contend that this obligation is governed by municipal law".

Order of 3 March 1999, I.C.J. Reports 1999 (I), p. 15, para. 23). It follows from that requirement that provisional measures indicated pursuant to Article 41 are "only justified if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before such final decision is given" (*Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 17, para. 23). Regrettably, this Court has been here before, and its treatment of identical applications on earlier occasions can leave no doubt, first that Mexico faces a real danger of irreparable prejudice and second, that the circumstances here are sufficiently urgent as to justify the issuance of provisional measures.

4. This Court's Orders in the *Breard* and *LaGrand* cases, as well as its Order on Mexico's Application prior to the Court's Judgment in *Avena*, all confirm that irreparable prejudice to the rights of Mexico would be caused by the execution of any national subject to that Judgment pending this Court's resolution of the present Request for interpretation (see *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 257, para. 37; *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 15, para. 24; *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 91, para. 55). As the Court first held in the *Breard* case and then reiterated in *LaGrand* and *Avena*, the execution of a national who might be spared execution by virtue of the relief sought by the applicant State "would render it impossible for the Court to order the relief that [that State] seeks and thus cause irreparable harm to the rights it claims" (*Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 257, para. 37). To put the matter plainly, it is impossible to identify an act more irreparable than the execution of a human being.

5. The Court's reasoning in resolving the three earlier applications applies squarely here. Were the Court to decline to order the provisional measures sought, irreparable prejudice in the form of the execution of a Mexican national entitled to a correct interpretation of the Judgment will result. The execution of a Mexican national subject to the *Avena* Judgment and hence entitled to review and reconsideration before the Court has had the opportunity to resolve the present Request

for interpretation would forever deprive Mexico of the opportunity to vindicate its rights and those of its nationals. Surely the same considerations of irreparable harm that made an apology or other restitution in any material form patently inadequate at the time of Mexico's earlier application for provisional measures apply with equal force now. And surely the same considerations that caused this Court to find that any delay in the executions pending the resolution of the relevant dispute could not suffice to dispel or outweigh the prejudice to Mexico also apply with equal force now.

6. There can also be no question as to urgency. In granting Mexico's earlier request for provisional measures, the Court found that there was a "risk of execution in the coming months, or possibly even weeks", for certain of the nationals, and concluded that "their execution would cause irreparable prejudice to any rights that may subsequently be adjudged by the Court to belong to Mexico" (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 91, para. 55). At that time, none of the Mexican nationals for whom Mexico sought relief had had an execution date set, but the Court made clear that that circumstance was not a prerequisite. Specifically, the Court held that "the fact that no such dates have been fixed in any of the cases before the Court is not *per se* a circumstance that should preclude the Court from indicating provisional measures" (*id.*, p. 91, para. 54).

7. As Ms Babcock has explained, as we stand here today, Texas officials are preparing to carry out Mr. Medellín's execution on 5 August. As she has also explained, another national subject to the *Avena* Judgment could receive an execution date on as little as 30 days' notice. And three more could receive execution dates on 90 days' notice. The situation is indisputably urgent.

8. I would like to make two additional points as to urgency. A litigant considering an application for provisional measures must always balance, on the one hand, the risk of unnecessarily or prematurely invoking the judicial process and, on the other, the importance of giving the court or tribunal sufficient time fully to assess the application. In filing its request two months before the date Texas has stated it will execute Mr. Medellín, Mexico has sought to respect the Court's observation earlier that "the [Court's] sound administration of justice requires that a request for the indication of provisional measures founded on Article 73 of the Rules of Court be submitted in good time" (*LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 14, para. 19; *Avena and Other Mexican*

Nationals (Mexico v. *United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 90, para. 54). In full agreement with that observation, Mexico has submitted its Request at a time that will allow the Court to give it full and adequate consideration notwithstanding the undoubted urgency.

9. Moving to my second point as to urgency: Mexico recognizes that provisional measures should be sought with restraint, and it wishes to respect the approach adopted by this Court on its earlier application for provisional measures. Hence, Mexico asks the Court to indicate provisional measures only in respect of those of its nationals who have exhausted all available remedies and face an imminent threat of execution. In its Order of 5 February 2003 on Mexico's first Application, the Court indicated provisional measures in respect of three Mexican nationals who risked execution within a period of six months (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 81, para. 11). Here, Mexico has sought protection for five individuals, two of whom were covered by the Court's prior Order *(id.)*. As I have just said, one of those nationals, Mr. Medellín, is scheduled to be executed on 5 August, and the other four are subject to the setting of execution dates in 90 days or less. Of course, Mexico will return to this Court for protection for additional individuals if changing circumstances make that necessary (*Request for Indication of Provisional Measures*, 5 June 2008, p. 2, n. 1).

10. I therefore move to the third prong, as to which I can be brief.

11. Mexico's Request for provisional measures in no way anticipates the Court's judgment on its Request for interpretation. Again, the Court has confirmed by each of its three earlier Orders in *identical* circumstances that an order requiring that an execution be halted does not prejudge the merits of the dispute (see *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998*, pp. 257-258, para. 40; *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999*, p. 15, para. 27; *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 91, para. 58). To the contrary, Mexico's request for provisional measures seeks precisely the kind of relief that provisional measures are designed to afford — the maintenance of the status quo so that the Court, once ready

to resolve the dispute, will have the capacity to provide fully effective relief to the prevailing party. Indeed, as Mexico pointed out on its earlier Application, only the *denial* of provisional measures would anticipate the merits, because, as to any Mexican national executed in the interim, the Court would have thereby rendered itself incapable of vindicating Mexico's position should it prevail on its Request for interpretation.

12. Madam President, Members of the Court, we submit that, in accord with the *Paraguay*, *LaGrand*, and *Avena* Orders, Mexico has clearly demonstrated its entitlement to the provisional measures it seeks.

13. With the Court's permission, then, I will turn to the form of the provisional order that Mexico requests from this Court. In *Breard* and *LaGrand*, the Court ordered that the United States "*should* take all measures *at its disposal*" to ensure that the foreign nationals were not executed pending the final decision in those proceedings (*LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999*, p. 16, para. 29 *(a)*: emphasis added); *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998*, p. 258, para. 41 (I); emphasis added). In both cases, the nationals who were the subject of the provisional measures were executed shortly thereafter, and in *LaGrand*, when Germany sought a declaration that the United States had thereby breached an international obligation, the United States suggested that the relevant Order had been less unequivocal than some might have read it — an argument, of course, that this Court rejected.

14. Still, with those events in mind, Mexico urged by its first Request for provisional measures that the Court frame its order in a manner that could allow no doubt that the measures imposed an obligation of result, not of best efforts — that made clear that any impediments posed by domestic law could not justify failure to comply — that made clear, in other words, that the United States must, put simply, prevent the executions. Granting that Request, the Court issued an Order of provisional measures in *Avena* that departed materially from the Orders in *Breard* and *LaGrand* by stating that the United States "shall take all measures necessary" to ensure that the three Mexican nationals covered were not executed pending the conclusion of the proceedings (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Provisional Measures,*

Order of 5 February 2003, I.C.J. Reports 2003, p. 91, para. 59 (I) *(a)*). The terms were unequivocal, and we ask the Court to use those same terms here.

15. Here, however, we ask the Court, yet again, to make the order even more explicit than its predecessors. In light of the confusion we have identified as to the character of the obligation imposed by *Avena*, we request that the Court specify that the obligation to take all steps necessary to ensure that the execution *not* go forward applies to all competent organs of the United States and all its constituent subdivisions, including all branches of government and any official, state or federal, exercizing government authority. That, of course, is a basic principle of international law. But in these circumstances we believe it warrants express reiteration by the Court here.

16. Also, consistent with the *Avena* Order, Mexico requests the Court to order that the United States inform the Court of all measures taken to prevent the execution of Messrs. Medellín, Fierro, Ramírez, Leal and Moreno.

17. Madam President, if the Court will permit me a final observation: the United States stands for the rule of law. Both the President of the United States and the Supreme Court of the United States have confirmed that the United States has a legal obligation, arising from treaties into which the United States voluntarily entered, to comply with the *Avena* Judgment. Yet Mr. Medellín, a Mexican national entitled under that Judgment to review and reconsideration of his conviction and sentence in light of the violation of the Vienna Convention on Consular Relations in his case, stands perilously close to execution without having received that review and reconsideration.

18. In these circumstances, we return to the Court in the hope — indeed, in the belief — that this Court's intervention in the form of an indication of the requested provisional measures, which would represent an initial step toward clarifying the character of the obligation imposed by the *Avena* Judgment, will assist in vindicating the authority of international law in the relations between States and, further, the United States commitment to the rule of law.

19. Thank you, Madam President. I now request that you call on my colleague, Ambassador Jorge Lomónaco Tonda, Ambassador of Mexico to the Kingdom of the Netherlands.

The PRESIDENT: Thank you, Mr. Donovan. I now call Ambassador Lomónaco Tonda.

Mr. LOMÓNACO:

CONCLUDING REMARKS AND SUBMISSIONS

1. Thank you, Madam President. It is a true honour and a privilege to appear before Your Excellencies today. With the Court's permission, I will offer brief concluding remarks regarding Mexico's Request for provisional measures.

2. Madam President, distinguished Members of the Court, Mexico returns to the International Court of Justice to preserve its rights but also as an act of consistency: consistency with its commitment to uphold international law and consistency in support of this Court's role as the highest judicial body for the peaceful settlement of disputes among States. In this context, Mexico duly acknowledges the work done by this honourable Court in its Judgment in the *Avena* case. Mexico's decision to file its Request for interpretation on 5 June 2008 reflects its commitment to the full implementation of that Judgment.

3. The Government of Mexico recognizes and welcomes the efforts undertaken by the Government of the United States to enforce the *Avena* Judgment in state courts. Those efforts have fallen short, however, of what is required by the Judgment. After exhausting diplomatic overtures with top officials of the United States Government and conducting a thorough analysis of all legal options, Mexico came to the conclusion that the Governments of Mexico and the United States have divergent views as to the meaning and scope of paragraph 153 (9) of the *Avena* Judgment, and that a clarification by this Court is necessary. Irrespective of the current proceedings, Mexico is strongly committed to continue working co-operatively with the United States on the many issues that arise in the context of a very close bilateral relationship such as ours, including the effort to achieve full respect for the *Avena* Judgment.

4. As is clear from Mexico's presentation today, its Request for provisional measures meets all of the criteria established under Article 41 of the Statute of the Court and set forth in the Court's jurisprudence. Mexico has lodged what it believes to be a narrow request for provisional measures limited to what is strictly necessary to preserve Mexico's rights pending the Court's final judgment on its Request for interpretation. At this stage, Mexico has asked the Court to indicate provisional

measures only in respect of those of its nationals who have exhausted all appeals available under applicable state law and who face an imminent threat of execution.

5. Mexico has endeavoured to seek this Court's involvement at a juncture that allows the Court sufficient time to offer its full and unhurried consideration and, at the same time, will permit the United States ample opportunity to implement any order issued by the Court. Mexico thanks the Court for convening this hearing as expediently as possible, and trusts that the United States will take any and all steps necessary, should an order be issued, to prevent the executions at which the provisional measures would be aimed.

6. Finally, Madam President, distinguished Members of the Court, in the name of the Government of the United Mexican States, acting on its own behalf and in the exercise of its right to afford diplomatic protection to its nationals, allow me to request that this honourable Court issue an order indicating:

(a) that the United States, acting through all its competent organs and all its constituent subdivisions, including all branches of government and any official, state or federal, exercizing government authority, take all measures necessary to ensure that José Ernesto Medellín, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending the conclusion of the proceedings instituted by Mexico on 5 June 2008; and

(b) that the Government of the United States inform the Court of all measures taken in implementation of subparagraph *(a)*.

7. In light of the extreme gravity of the situation and the overwhelming risk that authorities of the United States imminently will act to execute Mexican nationals subject to this Request in violation of obligations incumbent upon the United States under the *Avena* Judgment, my Government respectfully requests that the Court consider this petition as a matter of utmost urgency.

8. This concludes Mexico's oral arguments today. Thank you, Madam President.

The PRESIDENT: Thank you, Your Excellency. This ends the first round of oral observations of Mexico. The Court will meet again at 3 p.m. today to hear the first round of oral observations of the United States. The Court now rises.

The Court rose at 11.25 a.m.