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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 3 p.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 15 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

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

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

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comme conseils.

The PRESIDENT: Please be seated. The sitting is now open. The Court meets this afternoon to hear the first round of oral observations of the United States of America on the request for the indication of provisional measures submitted by Mexico.

I now call upon Mr. John B. Bellinger, III, Agent of the United States.

Mr. BELLINGER: Thank you, Madam President, Members of the Court, learned counsel. Let me start with an apology that I was not here this morning to hear directly the arguments of Mexico. I have just flown in this morning and had wanted to be here, both to be with the Court and to hear those arguments. But I have read them in written format already.

Introduction

1. It is of course a great honour for me to be here before the Court on behalf of the United States. As many of you know, I have been in The Hague a number of times over the last three and half years as Legal Adviser to the Secretary of State to discuss my Government's commitment to international law, but this is my first opportunity to appear before this distinguished Court. Although it is unfortunate that we are here in a dispute with our neighbours and good friends Mexico, nevertheless it is a great privilege for me to be here, to appear before the Court. I am joined today by representatives of the United States Department of State, several of whom will assist me in our presentation in response to Mexico's request. In addition, Vaughan Lowe, Q.C., who is of course well known to the Court, will be addressing you today in connection with our presentation.

2. The United States strongly opposes Mexico's request for provisional measures in this case. We recognize, of course, that an execution date has been set for Mr. José Ernesto Medellín, and that this lends immediacy to this matter. But despite the gravity of Mr. Medellín's sentence, the Court, and the Parties before it, must be guided above all by respect for international law, including appropriate limits on the jurisdiction of this Court. For several reasons, we do not believe that the Court can entertain Mexico's Application or its request for provisional measures based on that Application.

3. *First*, Mexico has failed to demonstrate that there is any dispute whatsoever between the United States and Mexico regarding the meaning or scope of the Court's decision in *Avena*. The unbroken jurisprudence of this Court and the plain language of Article 60 of this Court's Statute require a dispute for the Court to proceed. Here, Mexico asks the Court for an interpretation that *Avena* imposes an international legal obligation of "result" not merely of "means" that requires the United States to provide the "review and reconsideration mandated by the *Avena* Judgment" (*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)*, para. 59). The United States does not contest this interpretation; in fact, it entirely agrees with that interpretation. There simply is no "dispute as to the meaning or scope" of *Avena* for the Court to hear.

4. *Second*, provisional measures are wholly inappropriate in this case. Given the obvious absence of a dispute, the Court lacks prima facie jurisdiction to proceed. In addition, the Court should be especially wary of imposing provisional measures in an interpretation case where the Parties clearly accept their existing obligation to comply with the Court's *Avena* decision.

5. *Third*, Mexico's meritless assertion of a "dispute" amounts to an abuse of process, and the Court is fully empowered to dismiss this Application. The clear purpose of Mexico's Application is simply to bring pressure to bear on the United States by again initiating this action before the Court. There is no legal dispute underlying Mexico's Application. The inherent powers of the Court allow the Court to dismiss applications that constitute an abuse of its process.

6. Now, contrary to Mexico's assertion that there is a "dispute" for the Court to hear, we have consistently interpreted *Avena* to impose an obligation on the United States to provide review and reconsideration of the convictions and sentences of the individuals included in the *Avena* decision. Moreover, the President has consistently sought, and continues to seek, ways to implement *Avena*. I have personally witnessed and been involved in these efforts both as Legal Adviser to the Secretary of State and in my previous capacity as Legal Adviser to the National Security Council. Since the *Avena* decision, the United States has undertaken a series of actions — actions that continue to this day, up until moments before I appeared before the Court in which I was talking to officials in the Government of Texas — to implement the Court's decision. These

actions have included: the issuance by the President of a memorandum directing state courts to give effect to *Avena*; letters from the United States Attorney General to relevant state attorneys general regarding the President's determination; three filings by the United States in support of the Presidential determination requiring review and reconsideration for the *Avena* defendants in the United States Supreme Court; and an extraordinary appearance by our Justice Department on behalf of Mr. Medellín in Texas state courts. This is in addition to the numerous informal consultations the federal government has held with officials from the various United States states implicated by the *Avena* decision. It is important for the Court to understand what we have done, not because the United States believes its actions thus far have fully implemented *Avena*, but because these actions reflect the seriousness with which we regard our obligation to comply with the Court's decision. We did not agree with that decision, of course — no losing litigant ever does — but we take our international legal obligations extremely seriously and therefore we respect the Court's decision. We have gone to great lengths to implement the Court's Judgment, and we will continue to do so.

7. First, to appreciate how far the United States has gone in attempting to implement *Avena*, the Court needs to understand the domestic law constraints we faced. In the immediate aftermath of the *Avena* decision, my Government engaged in high-level internal deliberations to determine how to implement the Court's Judgment. Two aspects of the United States political system limited options that were available to the President. The first is our federal structure, in which the constituent states of the United States retain a substantial degree of autonomy, particularly in matters relating to criminal justice. The Court is certainly aware of this feature of the United States system of government, as this fundamentally is what was at issue in the initial *Avena* proceeding itself. The second aspect is our constitutional structure of a divided executive, legislative, and judicial functions of government at the federal level. This division constrains the President's ability to act without the concurrence or acquiescence of our legislative and judicial branches of government. The President's consistent efforts to implement the *Avena* decision in the face of these constraints signal the importance that the United States attaches to its obligation under international law to comply with this Court's decision.

8. So let me explain to you the approach that we took to implement *Avena*. In early 2005, upon the recommendation of Secretary of State Condoleezza Rice, the President issued an extraordinary Memorandum to the Attorney General of the United States directing that the state courts give effect to *Avena*. The Memorandum, which you have in your package at tab 1, is dated 28 February 2005, and I would like to read it because it is significant in what it says:

> "The United States is a party to the Vienna Convention on Consular Relations (the 'Convention') and the Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (ICJ) jurisdiction to decide disputes concerning the 'interpretation and application' of the Convention.
>
> I [the President of the United States] have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its inter-national obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico* v. *United States of America) (Avena)*, 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."

9. The President's determination was designed to provide the Mexican nationals named in the *Avena* Judgment with review and reconsideration of their Vienna Convention claims in state courts. State courts were to determine whether the violations of the Convention identified by this Court caused actual prejudice to the defendant at trial or sentencing. In addition, state law procedural default rules were to be deemed inapplicable. The President's memorandum was an extraordinary attempt to implement *Avena*, for several reasons. *First*, given the traditional deference by the national government to state law in the matters of criminal justice, the President's effort to require our states to ignore their own criminal state procedural rules was highly unusual. *Second*, the President is a former Governor of Texas, and that made it politically difficult for him to order his former state to ignore their own laws, especially to give additional legal process to a confessed murderer and rapist of two young girls. The President's decision was highly unpopular and widely condemned in Texas. Nevertheless, he made the decision to comply with this Court's Judgment, recognizing our international law obligation.

10. The President's efforts went beyond issuing just this Memorandum though. In addition, beginning in 2005, the Justice Department filed amicus briefs in litigation involving one of the named *Avena* defendants seeking to obtain review and reconsideration of his Vienna Convention

claims in state courts. At the time of the President's determination, Mr. Medellín's case seeking post-conviction review of his sentence and conviction in federal court was pending before the United States Supreme Court. One of the issues before the Supreme Court was whether the *Avena* Judgment entitled Mr. Medellín to review and reconsideration of his conviction and sentence despite the state law procedural bar. The United States filed an amicus brief in the court stating that under the President's determination, the individuals named in *Avena* could file individual petitions in state courts, and state courts were to recognize the *Avena* decision. In addition, the brief stated that where the President's determination was applicable, "a state court is *required* to review and reconsider the conviction and sentence of the affected individual to determine whether the violations identified by the ICJ caused actual prejudice to the defence at trial or at sentence"[1]. The state courts were required to provide this review and reconsideration.

11. In order to publicize the President's decision, the Attorney General of the United States sent a letter to each of the relevant state attorneys general notifying them of the President's actions, and enclosing the President's Memorandum and a copy of the amicus brief filed in 2005 by the United States in the Supreme Court case of Mr. Medellín. And that is in tab E of your materials.

12. As a result of these efforts, in 2005, the Supreme Court held off deciding Mr. Medellín's case, allowing it instead to proceed in our Texas state courts. Mr. Medellín had filed a second application for post-conviction relief in Texas state courts. The application relied on the *Avena* decision and on the President's memorandum. In deciding not to rule on Mr. Medellín's case the first time, the Supreme Court concluded that the new Texas post-conviction proceeding "may provide Medellín with the review and reconsideration of his Vienna Convention claim that the ICJ required"[2].

13. Thereafter, in Texas courts, the United States went to extraordinary lengths to support Mr. Medellín's post-conviction application. Our Federal Department of Justice filed an amicus brief and the Justice Department appeared before the Texas Court of Criminal Appeals to support Mr. Medellín's argument that the President's Memorandum entitled him to the review and

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[1]Brief for the United States as *Amicus Curiae* in *Medellín* v. *Dretke*, 544 U.S. 660 (2005), at 47 (emphasis added) (available at http://www.usdoj.gov/osg/briefs/2004/3mer/1ami/2004-5928.mer.ami.pdf).

[2]*Medellín* v. *Dretke*, 544 U.S. 660, 664 (2005) (available at www.supremecourtus.gov/opinions/04pdf/04-5928.pdf).

reconsideration required by the *Avena* Judgment[3]. Now the Court needs to understand just how unusual this is in the United States. It almost *never* happens that the federal Government enters an appearance in state court proceedings. Unfortunately, despite these unprecedented efforts, the Texas Court of Criminal Appeals still declined to treat the President's determination as binding, and it refused to provide Mr. Medellín the review and reconsideration required by *Avena*. Indeed, the Texas court concluded that the President, their former-Governor, had acted unconstitutionally in seeking to pre-empt Texas state law, even in order to comply with an international law obligation.

14. So last year, Mr. Medellín again appealed to the United States Supreme Court. This time he sought to reverse the decision of the Texas state courts not to give effect to *Avena* in his post-conviction petition. And again, the United States weighed in on behalf of Mr. Medellín. First, the Federal Department of Justice urged the Supreme Court to decide to hear the case, to accept the case for review. Review was warranted, our Justice Department argued in its brief, because

> "[t]he decision of the Texas Court of Criminal Appeals to invalidate the President's action frustrates the Executive's determinations in this sensitive area, and thwarts the intent of the Optional Protocol [to the Vienna Convention] and U.N. Charter to confer upon the President adequate authority and responsibility to carry out the Nation's treaty obligations"[4].

Second, once the Supreme Court agreed to hear the merits of Mr. Medellín's case, the Department of Justice *again* filed an amicus brief on behalf of Mr. Medellín. I personally joined the brief on behalf of Secretary of State Rice. And once again — just as it had in Texas state court and in Mr. Medellín's earlier case before the Supreme Court — the United States argued that the President's determination required Texas courts to recognize the *Avena* Judgment consistent with principles of comity and to provide the review and reconsideration required by *Avena*[5]. Our Solicitor General, the most senior litigator in our Government, personally argued the case before the Supreme Court.

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[3]Brief for United States as *Amicus Curiae* in *Ex parte Medellín*, 223 S.W. 3d 315 (Tex. Crim. App. 2006) (available at http://www.debevoise.com/publications/pdf/CCA%20US%20Amicus.PDF).

[4]Brief for United States as *Amicus Curiae* in Support of Pet. for Cert. in *Medellin* v. *Texas*, 128 S. Ct. 1346 (2008), p. 8 (available at http://www.usdoj.gov/osg/briefs/2006/2pet/5ami/2006-0984.pet.ami.pdf).

[5]Brief for United States as *Amicus Curiae* in *Medellin* v. *Texas*, 128 S. Ct. 1346 (2008) (available at http://www.usdoj.gov/osg/briefs/2006/3mer/1ami/2006-0984.mer.ami.pdf).

15. Now regrettably, as the Court knows, less than three months ago, the Supreme Court issued a decision in Mr. Medellín's case that rejected the United States arguments and refused to treat the President's determination as binding on state courts. And this is a major setback for the President's efforts to implement *Avena*. The court ultimately concluded that the President lacked the inherent authority under our Constitution, and that our Congress had not given him the requisite additional authority to order states to comply with the decision of this Court. The opinion stated that "the responsibility for transforming an international obligation [such as *Avena*] into the domestic law falls to Congress"[6].

16. Now, I want to draw this Court's attention to several critical points about our Supreme Court's decision. I suspect many of you have read it, or have seen press coverage of it but I wanted to walk you through a couple of the more salient aspects.

17. Now, *first* and perhaps most important, the *Medellín* decision did nothing to change the United States basic obligation under international law to comply with the *Avena* decision. To the contrary, the Supreme Court *reaffirmed* that obligation — it was the starting-point of the court's analysis. The Supreme Court stated plainly:

> "No one disputes that the *Avena* decision — a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes — constitutes an international law obligation on the part of the United States."[7]

So the Supreme Court reaffirmed this Court's decision as an international law obligation of the United States. Rather, the court's holding entirely concerned the status of that obligation in United States *domestic* law — that is, whether the *Avena* decision was automatically enforceable in United States courts, or whether the President had the authority to direct state courts to comply with the decision. The Supreme Court concluded that this Court's decisions are not automatically and directly enforceable in United States courts, but it reiterated that those decisions are entitled to "respectful consideration" by our courts: and in this, the United States does not stand apart. It is in fact not unusual for domestic legal systems not to provide for the direct enforcement of judgments of this Court.

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[6] *Medellin* v. *Texas*, 128 S. Ct. 1346 (2008), slip op. at 30 (available at http://www.supremecourtus.gov/opinions/07pdf/06-984.pdf).

[7] *Id*., 8.

18. *Second*, the opinion in *Medellín* itself shows the lengths to which the President went to implement *Avena*. In rejecting the President's contention that Congress had acquiesced in his authority to require state courts to recognize *Avena*, the court — our Supreme Court — observed: "The President's Memorandum is not supported by a 'particularly longstanding practice' of congressional acquiescence, but rather is what the United States itself has described as 'unprecedented action'."[8] The court effectively ruled that the President's actions to give effect to *Avena* were *unconstitutional* under United States domestic law.

19. *Third*, as a result of the Supreme Court's decision, a further decision by *this* Court regarding the United States obligation to comply with *Avena* would not be directly enforceable in United States courts, and could not provide the President any additional authority to implement *Avena*. The Supreme Court's decision was grounded in its understanding of the United Nations Charter and the ICJ Statute. According to the court, neither of these instruments contemplated that ICJ judgments would be automatically enforceable in domestic courts. Nor did they provide the President with authority to direct state courts to give effect to ICJ judgments. Any decision by this Court on Mexico's *present* Application will confront these same limits of United States domestic law. So any *new* decision of this Court could not enlarge the power that the President has given what the Supreme Court has said. As a domestic legal matter, a new decision therefore would add nothing to the original *Avena* Judgment. And as a practical matter, it could significantly complicate our United States domestic efforts to implement the *Avena* decision.

20. The *Medellín* decision by our Supreme Court is still fresh; it is not even three months old. For three years the United States pursued a consistent strategy for implementing this Court's decision in *Avena*. Having fallen short in that initial effort, the United States is now urgently considering its alternatives. The *Medellín* decision was not the end of the process. We do not believe our obligation is discharged by the efforts we have undertaken to this point. Indeed, since the *Medellín* decision, there have been numerous high-level discussions regarding alternative approaches. Mexico is well aware of these discussions; indeed, they have been part of them, for we have tried to work together with our Mexican friends to find an acceptable solution.

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[8] *Id.*, 36.

21. Just this week, just two days ago, as a result of these continuing efforts, Secretary of State Rice and Attorney General Mukasey jointly sent a letter to the Governor of Texas — which you have in your materials at tab 3 — calling attention to the United States continuing international law obligation and formally asking him to work with the federal government to provide the named *Avena* defendants the review and reconsideration required by the *Avena* decision. The letter requests "the assistance of the State of Texas in carrying out an international legal obligation of the United States". It notes the importance that the United States attaches to that obligation, and states:

> "The United States has held intensive discussions with the Government of Mexico after the Supreme Court's decision. On June 5 Mexico nonetheless made a new filing in the International Court of Justice regarding the *Avena* decision. We continue to seek a practical and timely way to carry out our nation's international legal obligation, a goal that the United States needs the assistance of Texas to achieve. In this connection [and this is the Secretary of State of the United States and the Attorney General of the United States speaking] we respectfully request that Texas take the steps necessary to give effect to the *Avena* decision with respect to the convictions and sentences addressed therein. We would appreciate the opportunity to discuss possible mechanisms for compliance with the *Avena* decision with you or your representatives."

And I can assure you that the discussions between the federal government and the state of Texas have already begun.

22. These efforts on the part of the federal government to reach out to Texas and other involved states are not to be dismissed lightly. Persuasion may bring about what compulsion could not. Since *Avena*, in connection with efforts by our federal government to persuade states to give effect to the *Avena* Judgment, several Mexican nationals named in *Avena* have already received review and reconsideration of their convictions and sentences.

23. One such case is that of Osvaldo Torres (No. 53). In *Avena*, this Court indicated that Mr. Torres's clemency proceeding could be an appropriate forum for providing review and reconsideration (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004*, p. 66, para. 143). On 23 April 2004 — before the President's Memorandum — my predecessor, Legal Adviser of the Department of State, William Howard Taft, IV, sent letters to the Oklahoma Pardon and Parole Board and the Governor of Oklahoma in connection with Mr. Torres's 7 May 2004 clemency hearing — and you have those letters at tabs 4 and 5. The letters provided a copy of this Court's Judgment in *Avena*, noted the

Court's conclusion that the United States had breached its Vienna Convention obligations with respect to Mr. Torres, and explained the Court's holdings with respect to providing review and reconsideration. Mr. Taft requested that the Board and Governor give careful consideration to Mr. Torres's request for clemency, and he asked each to consider whether the failure to provide Mr. Torres with consular information and notification pursuant to Article 36 of the Vienna Convention should be regarded as having ultimately led to his conviction and sentence.

24. The Governor, acting on a favourable recommendation by the Board, ultimately commuted Mr. Torres's sentence to life without parole. In his grant of clemency, the Governor — Governor of Oklahoma — specifically noted that he had taken into account the Vienna Convention violations in Mr. Torres's case and the requests of the Department of State.

25. Several individuals covered by the *Avena* decision have been provided review and reconsideration of their conviction and sentence in state or federal courts. Many other cases are still pending, some on direct appeal, and there will be further opportunities for courts to provide the necessary review and reconsideration. In still other cases covered by the *Avena* decision, the death sentences have been commuted on other grounds, and in one case the individual was deported to Mexico.

26. So contrary to Mexico's suggestion, we do not believe that we need make no further effort to implement this Court's *Avena* Judgment, and we continue to work to give that Judgment full effect, including in the case of Mr. Medellín. Given the short legislative calendar for our Congress this year, it would not be possible for both houses of our Congress to pass legislation to give the President authority to implement the *Avena* decision. There is simply not enough time.

27. Our efforts have focused therefore on finding the most practical and effective way to implement the *Avena* decision, including the letter to the Governor of the State of Texas from the Secretary of State and the Attorney General. We continue to pursue these efforts in order to bring about review and reconsideration of the convictions and sentences as required by the *Avena* decision. Indeed, intervention by this Court at *this* stage could significantly complicate and even undermine these efforts in our dialogue between our national and state governments. But whatever the Court's decision at this stage of the case, the United States will continue to work to that end,

exploring every practically available way to give effect to the *Avena* Judgment. I think our actions since *Avena* speak to the seriousness of that commitment.

28. Madam President, Members of the Court, let me introduce the counsel for the United States and summarize briefly the remaining presentations in our first round today.

29. I will ask you first to call upon Mr. Stephen Mathias of the United States Department of State, who will present the law regarding Article 60 and explain why this case presents no "dispute as to the meaning or scope" of the *Avena* Judgment.

30. We will then ask the Court to hear from Mr. James Thessin, also of the Department of State. Mr. Thessin will demonstrate that the Court lacks prima facie jurisdiction to issue provisional measures in this case. He will additionally explain why the Court should proceed with especial caution before issuing provisional measures in a case such as this, involving interpretation.

31. Following Mr. Thessin, we will ask you to hear from Mr. Michael Mattler of the Department of State, who will explain that Mexico's request for provisional measures improperly goes beyond the scope of its *Request for interpretation*.

32. We will then ask you to hear from Mr. Vaughan Lowe, Q.C., who will explain why the Court should dismiss Mexico's Application as an abuse of process.

33. Finally, I will make a closing presentation on behalf of the United States, in which I will explain that the provisional measures requested by Mexico go beyond the scope of the rights asserted by Mexico in its *Request for interpretation*.

34. I would now ask that the Court call upon Mr. Mathias. Thank you, Madam President and Members of the Court.

The PRESIDENT: Thank you, Mr. Bellinger. I now call upon Mr. Mathias.

Mr. MATHIAS:

There is no dispute regarding the interpretation Mexico seeks

1. Thank you, Madam President. Madam President, Members of the Court, it is an honour to appear again before the Court on behalf of the United States.

2. My task this afternoon is to examine the *Request for interpretation* filed by the Government of Mexico and to consider whether, as a threshold matter, it identifies a dispute within the meaning of Article 60 of the Statute and of the Court's jurisprudence appropriate for resolution by the Court.

3. The existence of a dispute is a fundamental requirement. The Court made this point most clearly in the *Nuclear Tests* cases, where it said that "the existence of a dispute is the primary condition for the Court to exercise its judicial function" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 270, para. 55; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58)[9]. Where, as in those cases, the dispute disappeared, or, as in this case, there is no dispute from the outset, "all the necessary consequences must be drawn from this finding" *(id.)*[10].

4. This must be so. Article 38 of the Statute states that the function of the Court "is to decide in accordance with international law such disputes as are submitted to it". Article 60, invoked as the basis of jurisdiction by Mexico in this case, provides that "[i]n the event of a dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party". If there is no dispute, or no dispute of the type identified in Article 60, there is no basis for the Court to exercise its judicial function in this matter. If there is no dispute, there exists no basis for prima facie jurisdiction, and no basis for the indication of provisional measures. And indeed, the case should be removed from the List, as without object, and because of a manifest lack of jurisdiction.

5. Let us then consider what is a dispute, since that question is dispositive in this case.

A. The nature of a "dispute" in the Court's jurisprudence

6. As this Court is well aware, the Permanent Court provided what has become the accepted definition of "dispute" in the *Mavrommatis* case, defining that term to mean "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11)[11]. That definition,

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[9]French text: "L'existence d'un différend est donc la condition première de l'exercice de sa fonction judiciaire."

[10]French text: "il faut en tirer les conséquences qui s'imposent".

[11]French text: "Un différend est un disaccord sur un point de droit ou de fait, une contradiction, une opposition de thesès juridiques ou d'intérêts entre deux personnes."

with little variation, has been repeatedly reaffirmed in a long line of cases. In its 2005 Judgment in the *Certain Property* case involving Liechtenstein and Germany, the Court referred to those many cases as constituting "the consistent jurisprudence of the Court" on this matter (*Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 18, para. 24). Only eight months ago, in its Judgment in the boundary case involving Nicaragua and Honduras, the Court again quoted this "well-established definition" from the *Mavrommatis* case with approval (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, Judgment of 8 October 2007, para. 130).

7. In applying this simple definition as it has so many times, the Court has had occasion to articulate several related principles that are of critical importance to this case. First, the Court has made it very clear that a party's own characterization of whether a dispute exists is not dispositive. In its 1962 Judgment in the *South West Africa* cases, the Court stated this principle in the following terms:

> "[I]t is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other." (*South West Africa Cases (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment I.C.J. Reports 1962*, p. 328.)[12]

As with other fundamental principles, this one too has been repeatedly reaffirmed by the Court, most recently in its Judgment six months ago in the preliminary objections phase of the boundary case involving Nicaragua and Colombia (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections*, Judgment of 13 December 2007, para. 138).

8. Closely associated with this principle is another. The Court has often reiterated that whether a "dispute" exists is "a matter for objective determination", as the Court put it in its 1950 *Peace Treaties* Judgment (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania,*

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[12]French text:

"il ne suffit pas que l'une des parties à une affaire contentieuse affirme l'existence d'un différend avec l'autre partie. La simple affirmation ne suffit pas pour prouver l'existence d'un différend, tout comme le simple fait que l'existence d'un différend est contestée ne prouve pas que ce différend n'existe pas. Il n'est pas suffisant non plus de démontrer que les intérêts des deux parties à une telle affaire sont en conflit. Il faut démontrer que la réclamation de l'une des parties se heurte à l'opposition manifeste de l'autre."

First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74). In short, it is not for one party to determine the existence of a dispute, but rather "it falls to the Court to determine whether 'the claim of one party is positively opposed by the other'" (*Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 18, para. 24; French text: "la Cour doit rechercher si 'la réclamation de l'une des parties se heurte à l'opposition manifeste de l'autre.'")[13].

B. "Dispute as to the meaning or scope of the judgment"

9. In an interpretation case, the character of the "dispute" required to establish the Court's jurisdiction is even narrower. Only a dispute "as to the meaning or scope of the judgment" can satisfy the conditions of Article 60 of the Statute.

10. In the *Continental Shelf* case between Libya and Tunisia, the parties had requested the Court to indicate "the principles and rules of international law applicable to the delimitation" of the area of the continental shelf (*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. 218, para. 47; French text: "les principes et règles du droit international applicables à la delimitation"). A dispute then arose between the parties as to what, in the *Continental Shelf* Judgment, the Court had intended to accord binding force (*id*., p. 217, para. 45). In particular, Tunisia disputed whether the Court had intended to bind the parties to the particular boundary line and co-ordinates that the Court had specified in the Judgment (*id*., pp. 217-227, paras. 45-63). In the *Continental Shelf* (interpretation) case, the Court cited the *Chorzów Factory* case for the proposition that the Court would entertain a dispute entailing

> "'a difference of opinion between the Parties as to those points in the judgment in question which have been decided with binding force', including 'A difference of opinion as to whether a particular point has or has not been decided with binding force.'" (*Continental Shelf, supra*, p. 218, para. 46 (quoting *Factory at Chorzów, supra,* pp. 11-12); French text: "'divergence entre les *Parties* sur ce qui, dans l'arrêt en question, a été tranché avec force obligatoire'**,** y compris une 'divergence de vues, si tel ou tel point a été decide avec force obligatoire'").

[13]In *Certain Property*, the Court cited as evidence of a dispute its finding "that in the present proceedings complaints of fact and law formulated by Liechtenstein against Germany are denied by the latter" (*id.*, p. 19, para. 25).

11. In rendering its Judgment in the *Continental Shelf* (interpretation) case, the Court clarified which points in the original Judgment it had intended to be binding on the parties, and which were intended to be "general indication[s]" (*id*., p. 230, para. 69). In doing so, the Court resolved a real dispute between those parties as to the nature of the Judgment in question, and it paved the way for fruitful negotiations between Libya and Tunisia, which eventually resulted in the establishment of the Libyan-Tunisian Joint Oil Company[14].

12. Let us consider whether there is a dispute in this case, having freshly in mind the *Continental Shelf* case as an example of a very real dispute.

C. There is no dispute between Mexico and the United States in this case

13. Under the Rules of Court, Article 98, paragraph 2, it is for Mexico to indicate "the precise point or points in dispute as to the meaning or scope of the judgment"[15]. Mexico addresses this requirement in paragraph 52 of its *Request for interpretation*.

14. Mexico's Request states: "The present dispute between Mexico and the United States concerns the scope and meaning of the remedial obligation established in paragraph 153 (9) of the *Avena* Judgment." (*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)*, 5 June 2008, para. 52.) Paragraph 153 (9) of the 2004 *Avena* Judgment reads as follows:

> "(9) By fourteen votes to one,
>
> *Finds* that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) above, by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment." (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004*, p. 72, para. 153(9). French text: "(9) Par quatorze voix contre une: *Dit* que, pour fournir la réparation appropriée en l'espèce, les Etats-Unis d'Amérique sont tenus d'assurer, par les moyens de leur choix, le réexamen et la revision des verdicts de culpabilité rendus et des peines prononceés contre *les*

[14]Shabtai Rosenne, *Interpretation, Revision and Other Recourse from International Judgments and Awards*, 108 (2007).

[15]French text: "elle indique avec précision le point ou les points contestés quant au sens ou à la portée de l'arrêt."

> ressortissants mexicains visés aux points (4), (5), (6) et (7) ci-dessus, en tenant compte à la fois de la violation des droits prévus par l'article 36 de la convention et des paragraphes 138 à 141 du présent arrêt.")

15. Now the question becomes "what is the nature of the dispute between Mexico and the United States about the meaning of the paragraph that I just read?" Mexico in paragraph 52 of its *Request for interpretation* sets forth its view: "Mexico understands the language in question to establish an obligation of result, that is, to attain the precise result of review and reconsideration of the convictions and sentences in accord 'with paragraphs 138 to 141 of [the *Avena*] Judgment'." (*Request for Interpretation*, *supra*, para. 52.) I will discuss this concept regarding an "obligation of result" in a few moments, but the basic point of that sentence is that Mexico is of the view that the United States is subject to a binding obligation to secure the "precise result" of review and reconsideration consistent with paragraphs 138 to 141 of the *Avena* Judgment.

16. Paragraph 59 of Mexico's *Request for interpretation*, headed "The Interpretation Requested", is consistent with this understanding (*id.*, para. 59). This paragraph is in two parts. The first part seeks a declaration by the Court that the obligation under paragraph 153 (9) of the *Avena* Judgment is an "obligation of result" and that the United States must provide review and reconsideration *(id.)*. This repeats the point it made in paragraph 52. The following part simply states that the United States is under an obligation, first, to provide review and reconsideration and second, to ensure that no covered Mexican national is executed unless and until review and reconsideration is completed *(id.)*.

17. If, as we understand from the foregoing, Mexico's interpretation is that the United States is subject to a binding obligation to provide review and reconsideration, what is the position of the United States?

18. The United States fully agrees. What the Agent of the United States has just informed the Court on this subject is definitive. It is fully consistent with previous pronouncements and conduct of the United States relating to the *Avena* Judgment.

19. In fact, Mexico has acknowledged that the United States agrees with its position and it stated as follows in its *Request for Interpretation*:

> "All competent authorities of the United States government at both the state and federal levels acknowledge that the United States is under an international law

> obligation under Article 94 (1) of the U.N. Charter to comply with the terms of the Judgment." (*Id*., para. 13.)

20. The President of the United States, the Supreme Court of the United States, have both affirmed that understanding: they have consistently referred to compliance with the *Avena* Judgment as an "international obligation"[16]. And there can be no confusion about the scope and meaning of that obligation. In its June 2007 brief to the United States Supreme Court in *Medellin* v. *Texas*, the United States affirmed — clearly, simply, straightforwardly — that "the ICJ decision in *Avena* has 'binding force', and the United States has an international law obligation to 'comply with the decision' by providing judicial review and reconsideration to 51 Mexican nationals"[17].

21. Let us return now to Mexico's contention that there is a dispute between the United States and Mexico over whether the relevant paragraph of the *Avena* Judgment creates an "obligation of result" or merely one of "means".

22. We look to Mexico's *Request for Interpretation* for precisely what it means by "result" and "means" in this context. Mexico defines the United States "obligation of result" as a requirement that the United States provide "review and reconsideration of the convictions and sentences" through a "means of its own choosing" (para. 59). It elaborates on this "obligation of result" as follows:

> "While the United States may use 'means of its own choosing', the obligation to provide review and reconsideration is not contingent on the success of any one means. Mexico understands that in the absence of full compliance with the obligation to provide review and reconsideration, the United States must be considered to be in breach." (*Id.*, para. 5.)

By use of the phrase "obligation of means", Mexico appears to suggest that the United States believes that it is obliged only to *attempt* to comply with the Judgment, rather than to actually provide the required review and reconsideration.

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[16]The State of Texas has also affirmed this obligation in its briefing before the Supreme Court, stating: "To be sure, Texas recognizes the existence of an international obligation to comply with the United States's [sic] treaty commitments" and more specifically, "[n]obody disputes that the United States has an international law obligation to satisfy *Avena*". Brief for Resp. in *Medellin* v. *Texas*, 128 S. Ct. 1346 (2008), pp. 12, 46 (available at http://www.debevoise.com/publications/pdf/TexasrespondentsbriefMedellin2007.PDF).

[17]Brief for United States as *Amicus Curiae* in *Medellin* v. *Texas*, 128 S. Ct. 1346 (2008), p. 8 (available at http://www.usdoj.gov/osg/briefs/2006/3mer/1ami/2006-0984.mer.ami.pdf).

23. Let us be quite clear. What Mexico calls an "obligation of result" — that the United States is subject to a binding obligation to provide review and reconsideration of the convictions and sentences of the relevant persons — is *precisely* the interpretation that the United States holds concerning the paragraph in question. Madam President, Members of the Court, when the Court examines whether the Parties' interpretations of paragraph 153 (9) are "positively opposed", we submit that the answer *must be* "no".

24. Mexico suggests, however, that "[t]he conduct of the United States . . . confirms the understanding that paragraph 153 (9) imposes only an obligation of means", and it makes the point that "[h]aving chosen to issue the President's 2005 determination directing state courts to comply, the United States to date has taken no further action" (*id.*, para. 57).

25. With due respect to Mexico, as the Agent of the United States has just set forth in considerable detail, Mexico's characterization of the United States actions since the President's 2005 Memorandum is profoundly in error. The United States continues in its efforts to comply with the *Avena* Judgment. Moreover, I must note that it is the nature of an interpretation case that the dispute be over that, *interpretation*, and not the conduct of one of the parties. It is the position of the Parties concerning interpretation of the Judgment that the Court must find to be in dispute. And the United States has made its position on the obligations under the *Avena* Judgment clear at every turn. How can it be said that the United States does not accept the obligation to provide review and reconsideration when numerous and consistent authoritative statements of the United States position, including positions taken outside these proceedings, as well as explicit statements made before this Court today, clearly establish the contrary?

26. While it is true that the United States — because of the structure of its Government and its domestic law — faces substantial obstacles in implementing its obligation under the *Avena* Judgment, it has clearly accepted that the obligation to provide review and reconsideration is an obligation of result and it has sought to achieve that result.

D. Mexico itself has recognized that issue is enforcement, not interpretation

27. In fact, as the Agent of the United States just described, the United States is continuing its efforts to implement the Court's Judgment. The United States has sought to keep Mexico

informed as to the efforts it has been making in this regard. The United States has informed Mexican officials of its view that further litigation in this Court would hinder, rather than help, those efforts. Now that is part of the political background of the case, but it is right that the Court should be aware of it because it is an important element of the approach of the United States to the implementation of its obligations under the *Avena* Judgment.

28. In the correspondence between the United States and Mexico relating to the *Avena* Judgment, there is no suggestion of any dispute over the interpretation of the Judgment. The entirety of communications from Mexico relating to the *Avena* Judgment, communications which include a diplomatic Note, letters, and court filings, confirms that the issue between the two countries has been — not one of a difference over interpretation — but rather the question of enforcement of the Judgment. These communications demonstrate a disappointment on the part of Mexico with the difficulties that the United States has faced in implementing the *Avena* Judgment, but there is no indication of a disagreement between the Parties as to the interpretation of that Judgment. In its diplomatic Note of 28 March 2008, for example — and this appears at tab 6 in the judges' folder — the Government of Mexico expressed concern that the Supreme Court's holding in *Medellin* would render this Court's mandate in *Avena* "ineffective"[18]. The Mexican Ambassador to the United States wrote a 7 May 2008 article — and this appears at tab 8 in the judges' folder — stating that "Mexico acknowledges President Bush's efforts to ensure that the United States 'will discharge its international obligations'" under the *Avena* Judgment, but that Mexico was disappointed with the *Medellin* decision and that "the ruling has produced the destabilizing paradox of a decision that is binding under international law but that . . . is unenforceable without congressional action"[19]. As Ambassador Hernández García, Legal Adviser to the Mexican Ministry of Foreign Affairs and Agent in these proceedings, stated in a 24 April 2008 declaration to the United States District Court in Texas — this appears at tab 9 of your folder:

> "enforcement of the *Avena* Judgment has been and continues to be a top priority of the Mexican government in its bilateral relations with the United States. Both the executive and legislative branches in Mexico have confirmed Mexico's commitment

[18]Diplomatic Note from the Embassy of Mexico to the United States Department of State, 28 March 2008.

[19]Arturo Sarukhan, "Why enforcing the Vienna Convention makes sense", *Dallas Morning News*, 7 May 2008.

> to achieving full compliance with the International Court of Justice's decision by any and all means necessary."[20]

Ambassador Hernández García attached to this declaration resolutions from the Senate and the Chamber of Deputies in Mexico, both calling on the Mexican Government to undertake all measures to ensure enforcement of *Avena*. The Senate resolution, dated 26 March 2008, "requests the Ministry of Foreign Affairs to urgently carry out all diplomatic actions and to exhaust all legal remedies before US authorities and international bodies, in order to enforce the ruling of the International Court of Justice . . ."[21].

29. As recently as 3 June 2008, two days before Mexico filed this Request, Ambassador Hernández García sent a letter to the United States Department of State Legal Adviser — this is at tab 10 of the judges' folder — noting that "the Government of Mexico appreciates the good-faith and constructive efforts undertaken by the Administration to meet our concerns" and — more importantly for the purposes of our proceeding — noting the United States "recognition of the ICJ's decision as an indisputable legal obligation"[22]. The letter from Ambassador Hernández García highlighted, however, the "additional ways and means" that the Government of Mexico believed the United States should undertake in order "to achieve full compliance with the *Avena* Judgment", setting forth a particular course of conduct that Mexico wanted the United States to follow[23]. The letter further stated that a commitment by the United States to undertake the actions as described "would forestall Mexico's return to the ICJ at this juncture"[24].

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[20]Declaration of Ambassador Joel Antonio Hernández García, Legal Adviser of the Mexican Ministry of Foreign Affairs, 24 April 2008, filed with Motion to Reopen and Extend Stay in *Medellín* v. *Quarterman*, Civil Action No. H-06-3688, United States District Court for the Southern District of Texas.

[21]Resolution from the Mexican Senate, 26 March 2008, attached to declaration of Ambassador Hernández García.

[22]Letter of Ambassador Joel Antonio Hernández García, Legal Adviser to the Mexican Ministry of Foreign Affairs, to John Bellinger, III, Legal Adviser to the United States Department of State, 3 June 2008. *See also* Press Release, *Mexican Ministry of Foreign Affairs*, "United States Supreme Court Issues Ruling in the Case of Mexican National Jose Ernesto Medellin Rojas, Sentenced to Death in the State of Texas," 25 March 2008 (stating that "Mexico will continue to pursue all available means to ensure that the rights of the 51 Mexican nationals included in the *Avena* judgment are fully respected."); Press Release, *Mexican Ministry of Foreign Affairs*, "Mexico Seeks Implementation of the International Court of Justice's *Avena* Judgment Before a Texas Court", 5 May 2008.

[23]*Id.* In particular, the Government of Mexico requested that letters be sent to both the Governor of Texas and the Texas Board of Pardons and Paroles, specifically requesting "a reprieve of at least 300 days of Mr. Medellin's execution date in order to explore the full feasibility of advancing implementing legislation in the United States Congress and/or State Legislature", *id*.

[24]*Id.*

30. None of these communications address questions involving interpretation of the *Avena* Judgment. Rather they centre on what Mexico has called a "top priority", what might be regarded as the "real purpose" of Mexico's Request here today, namely enforcement of the *Avena* Judgment. The communications between the United States and Mexico are about implementation, not interpretation. They lend no support to the proposition that there is a dispute between Mexico and the United States concerning the interpretation of the Judgment. Quite the contrary.

E. Mexico cannot request relief outside the scope of *Avena*

31. Thus, Mexico has failed to identify a dispute between itself and the United States over the interpretation of paragraph 153 (9).

32. Now it may be that Mexico has a preference as to the particular means that the United States might employ in complying with *Avena*. It may be, as just noted, that Mexico is disappointed with the fact that the United States has, until this time, been unable to achieve full enforcement of the Judgment. It may be that Mexico is disappointed that a judgment of this Court is not — under United States domestic law — directly enforceable in United States courts. But that does not mean that there is a dispute between Mexico and the United States as to the international legal obligation under *Avena*. The manner in which the international law obligation created by the *Avena* Judgment is implemented by the United States in its domestic law does not — and cannot — create a dispute as to the nature of our international law obligation, an obligation that the United States has accepted.

33. This Court has made clear that the "real purpose" of a request for interpretation under Article 60 of the Statute "must be solely to obtain clarification of the meaning and the scope of what the Court has decided with binding force, and not to obtain an answer to questions not so decided" (*Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia* v. *Peru), Judgment, I.C.J. Reports 1950*, p. 402)[25]. From this it follows that the request must be bounded by that Judgment itself. In the *Asylum* (interpretation) case, the Court plainly recognized that "[i]nterpretation can in no way go beyond the limits of the Judgment" and it

[25]French text: "ce qui signifie qu'elle doit viser uniquement à faire éclaircir le sens et la portée de ce qui a été décidé avec force obligatoire par l'arrêt, et non à obtenir la solution de points qui n'ont pas été ainsi décidés". See also *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, pp. 10-11.

rejected Colombia's request for interpretation in that case because "[i]n reality, the object of the questions submitted by the Colombian Government [was] to obtain, by the indirect means of interpretation, a decision on questions which the Court was not called upon by the Parties to answer" (*Asylum* case, *supra*, p. 403)[26]. In its 1985 Judgment in the *Continental Shelf* (interpretation) case, the Court confirmed that an Article 60 request must be limited to a clarification of the underlying Judgment's meaning and scope, and stated that "[s]o far as the Tunisian request for interpretation may go further, and seek 'to obtain an answer to questions not so decided', or to achieve a revision of the Judgment, no effect can be given to it" (*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. 223, para. 56)[27].

34. As Professors Zimmerman and Thienel have written in their commentary concerning Article 60, "[s]ince the Court is . . . bound by the limits of its previous judgment, it cannot take into account facts not discussed in the original proceedings nor any development that took place after the original judgment"[28].

35. Finally, as the Court noted in the *Haya de la Torre* case, the Court is not in a position to determine how the parties before it must implement its judgments, as

> "these courses are conditioned by facts and by possibilities which, to a very large extent, the Parties are alone in a position to appreciate. A choice amongst them could not be based on legal considerations, but only on considerations of practicability or of political expediency; it is not part of the Court's judicial function to make such a choice." (*Haya de la Torre (Colombia/Peru), Judgment, I.C.J. Reports 1951*, p. 79.)[29]

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[26]French text: "L'interprétation ne saurait en aucun cas dépasser les limites de l'arrêt" . . . "En réalité, les questions posées par le Gouvernement de la Colombie tendent à obtenir, par la voie indirecte d'un arrêt interprétatif, la solution de questions dont la Cour n'a pas été saisie par les Parties en cause."

[27]French text: "Dans la mesure où la demande en interprétation tunisienne irait plus loin et chercherait 'à obtenir la solution de points qui n'ont pas été ainsi décidés' ou à aboutir à une revision de l'arrêt, aucune suite ne pourrait lui être donnée."

[28]Andreas Zimmerman and Tobias Thienel, Article 60, in *The Statute of the International Court of Justice: A Commentary*, 1283 (Andreas Zimmerman *et. al.*, eds., 2006); see also Manley O. Hudson, *The Permanent Court of International Justice 1920-1942: A Treatise*, at 591, §537 ("In giving an interpretation, the Court considers no facts other than those considered in the judgment under interpretation.").

[29]French text:

> "ces voies sont conditionnées par des éléments de fait et par des possibilités que, dans une très large mesure, les Parties sont seules en situation d'apprécier. Un choix entre elles ne pourrait être fondé sur des considérations juridiques, mais seulement sur des considérations de nature pratique ou d'opportunité politique ; il ne rentre pas dans la fonction judiciaire de la Cour d'effectuer ce choix."

F. Conclusion

36. Madam President, Members of the Court, I conclude with a brief summary.

37. The United States has affirmed its obligation to comply with paragraph 153 (9) of the Court's *Avena* Judgment by providing review and reconsideration of the convictions and sentences of the relevant individuals.

38. Thus, there is no dispute between the Parties as to the nature of the obligation set forth in that paragraph of the *Avena* Judgment.

39. To the extent that Mexico is seeking enforcement of the *Avena* Judgment, this is outside the meaning or scope of the *Avena* Judgment and is not an appropriate request for interpretation before the Court in these proceedings.

40. The question now before the Court is what are the consequences for this proceeding of the fact that Mexico has failed to identify a dispute within the meaning of the Court's jurisprudence and the requirements of Article 60?

41. Mr. Thessin will address that question and, Madam President, I ask that you call upon him at this time. I thank the Court for its attention.

The PRESIDENT: Thank you, Mr. Mathias, and I now call upon Mr. Thessin.

Mr. THESSIN:

The Court should not indicate provisional measures

1. Madam President, Members of this Court, good afternoon. I am honoured to appear again before this Court on behalf of the United States.

2. As Mr. Mathias has just explained, there is no dispute between the United States and Mexico on the issues raised by Mexico's Request for an interpretation of the Court's Judgment in *Avena*. The absence of a dispute has legal consequences for Mexico's Request for provisional measures at this stage of the proceedings, which I will address in my presentation. I will show that, because Mexico has not shown that there exists a dispute requiring interpretation, this Court has no basis to indicate provisional measures in support of that claim. This conclusion builds directly upon the Court's jurisprudence with respect to the indication of provisional measures, as well as upon broader doctrines in the Court's cases related to the concept of mootness.

3. The purpose of this Court — indeed, the purpose of any court — is to decide disputes. In the absence of a dispute, there is nothing for the Court to adjudicate and no consequence to its decisions. This Court's cases, both in respect of provisional measures and in addressing claims at the merits stage of proceedings, have emphasized the importance of this principle. The Court has consistently declined to entertain claims where there was no real issue in dispute or where it otherwise believed that acting on such claims would be without object or purpose.

4. I will use my presentation to discuss the application of these principles in the Court's case law and to demonstrate that they compel the conclusion that the Court should deny Mexico's Request for provisional measures. In setting out this argument, my presentation will address three main points. First, as the Court's cases on provisional measures show, in the absence of a dispute about Mexico's claim on the merits, no prima facie jurisdiction exists for Mexico's Request for provisional measures. Accordingly the Court should not indicate provisional measures in connection with the claim. Second, under principles applicable more broadly under the Court's jurisprudence, the absence of a dispute renders Mexico's claim on the merits moot and without object. Third, the absence of a dispute about Mexico's claim on the merits distinguishes *this case* from the Court's previous cases involving the Vienna Convention on Consular Relations. The factors that persuaded the Court to indicate provisional measures in those cases are not present here.

5. We submit that these points should compel the conclusion that Mexico's Request for provisional measures should be denied.

6. Before proceeding to these three points, I have one initial observation. This Court has characterized its authority to indicate provisional measures as an "exceptional power" (*Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976*, *I.C.J. Reports 1976*, p. 11, para. 32). Parties before the Court are not entitled as a matter of right to the indication of provisional measures. Rather, the Court indicates such measures only as a matter of discretion and only when it is persuaded that they are necessary and appropriate in support of its ability to carry out its judicial function. As I will demonstrate, Mexico's Request does not present such a case.

7. Instead, Mexico has made an unprecedented request for provisional measures. This Court has never before indicated provisional measures in connection with proceedings requesting the

interpretation of a prior judgment. Unlike the situation in cases involving other types of claims on the merits, the parties before the Court in a case for interpretation are already bound by a final judgment of the Court from a prior proceeding. In addressing the admissibility of requests for interpretation, the Court has stressed the need for it to proceed cautiously "to avoid impairing the finality, and delaying the implementation" of the Court's judgments (*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. 36, para. 12). Accordingly, when the Court considers whether to grant provisional measures in connection with the current *Request for interpretation*, the Court enters new territory and must ensure that Mexico has shown a clear jurisdictional basis for its Request.

A. Because there is no dispute in Mexico's claim on the merits, there is no jurisdiction, prima facie, for the indication of provisional measures

8. I will now address the first of my points, and consider Mexico's Request through the prism of the Court's jurisdiction on the indication of provisional measures. I will show that, in the absence of a genuine dispute on the issues raised by Mexico's claim on the merits, this Court lacks prima facie jurisdiction to indicate provisional measures in support of that claim.

9. It is well established in the Court's case law that it may indicate provisional measures only where jurisdiction exists, prima facie, over the applicant's claim on the merits. As the Court has stated on a number of occasions:

> "[I]n dealing with a request for provisional measures, the Court need not finally satisfy itself that it has jurisdiction on the merits of the case, but [it] will not indicate such measures unless the provisions invoked by the applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be established." (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Request for Provisional Measures, Order of 13 July 2006, I.C.J. Reports*, p. 158, para. 57.)[30]

[30] French text:

"lorsqu'elle est saisie d'une demande en indication de mesures conservatoires, la Cour n'est pas tenue de s'assurer de manière définitive qu'elle a competence quant au fond de l'affaire, mais qu'elle ne peut indiquer ces mesures que si les dispositions invoquées par le demandeur semblent *prima facie* constituer une base sur laquelle [s]a compétence . . . pourrait être fondée".

10. This doctrine serves to ensure that the Court does not exercise its "extraordinary powers" to indicate provisional measures in cases that are ultimately likely to be dismissed on other grounds.

11. To establish prima facie jurisdiction when the case on the merits arises under Article 60, Mexico must do more than identify a prior judgment of the Court and make a questionable claim that some disagreement exists over it. Were mere allegations of dispute sufficient in an interpretation case to establish jurisdiction to support an indication of provisional measures, the prima facie jurisdiction test would be a hollow form that any party could satisfy merely through artful pleading[31].

12. Instead, the Court has required that a party seeking provisional measures must also demonstrate that its claim on the merits is capable of falling within the provisions of the instrument that it invokes as the basis for the Court's jurisdiction over that claim. In this regard, the Court has declined to indicate provisional measures where the parties have failed to establish a nexus between the instrument they invoke to engage the Court's jurisdiction and the rights that are subject to their claims on the merits. In this case seeking an interpretation under Article 60, Mexico must make an affirmative showing that there is a nexus with Article 60, that a genuine dispute exists about the meaning or scope of the *Avena* Judgment.

13. This requirement is illustrated by the Court's disposition of provisional measures requests in the case concerning the *Legality of Use of Force* between Yugoslavia and Belgium and in the case concerning *Armed Activities on the Territory of the Congo* between the Congo and Rwanda.

14. In the case concerning *Legality of Use of Force*, the Court dismissed Yugoslavia's request for provisional measures against Belgium. It did so even though it found that Yugoslavia's

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See also *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, Order of 8 December 2000, I.C.J. Reports 2000*, p. 250, para. 67; *Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 21, para. 30; *United States Diplomatic and Consular Staff in Tehran (United States* v. *Iran) Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 13, para. 15; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 33, para. 15.

[31] A proceeding on interpretation under Article 60 is potentially the only jurisdictional basis for Mexico to come before this Court on a matter involving the Vienna Convention on Consular Relations. The United States, on 7 March 2005, withdrew from the optional protocol to the Vienna Convention on Consular Relations.

claim on the merits under the Genocide Convention appeared to provide at least a potential basis of jurisdiction for Yugoslavia's claim on the merits.

15. The Court began its analysis by observing that both Yugoslavia and Belgium were parties to the Genocide Convention without reservation, and thus concluded that the Genocide Convention

> "appear[ed] to constitute a basis on which the jurisdiction of the Court might be founded to the extent that the subject-matter of the dispute relates to 'the interpretation, application or fulfilment' of the Convention" (*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I),* p. 137, para. 37)[32].

16. But the conclusion that the Genocide Convention might provide a basis for this Court to consider the merits of Yugoslavia's claim did not end this Court's analysis as to whether prima facie jurisdiction existed to support the indication of provisional measures. Instead, the Court looked further. It considered

> "whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain . . ." (*id*. p. 137, para. 38)[33].

The Court observed in this regard that "in order to determine, even prima facie, whether a dispute . . . exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies while the other denies it" *(id.)*[34].

17. The Court then reviewed Yugoslavia's specific claims with respect to Belgium's conduct against the relevant provisions of the Genocide Convention. On the basis of this review, the Court concluded that it was "not in a position to find, at this stage of the proceedings, that the acts imputed to [Belgium] are capable of coming within the provisions of the Genocide Convention" and that the Convention "cannot accordingly constitute a basis on which the jurisdiction of the

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[32]French Text: "semble ainsi constituer une base sur laquelle la compétence de la Cour pourrait être fondée, pour autant que l'objet du différend ait trait à "l'interprétation, l'application ou l'exécution" de la convention".

[33]French Text: "si les violations de la convention alléguées par la Yougoslavie sont susceptibles d'entrer dans les prévisions de cet instrument et si, par suite, le différend est de ceux dont la Cour pourrait avoir competence pour connaître *ratione materiae* par application . . .".

[34]French Text: "Considérant que, a l'effet d'établir, même *prima facie*, si un différend . . . existe, la Cour ne peut se borner à constater que l'une des parties soutient que la convention s'applique alors que l'autre le nie".

Court could prima facie be founded" (*id*., para. 41)[35]. Accordingly, the Court declined to indicate provisional measures.

18. The Court followed a similar approach in the case concerning *Armed Activities on the Territory of the Congo.* In that case, the Congo asserted claims against Rwanda under a number of multilateral conventions and asked the Court to issue provisional measures in support of its claims.

19. In addressing the Congo's request for provisional measures, the Court considered each of its claims against the various instruments invoked by the Congo and in each case assessed whether the instrument provided a basis on which the Court could indicate provisional measures. In some cases the Court concluded that the instruments invoked by the Congo could not provide a basis for the Court's jurisdiction, even at the merits stage, because Rwanda was not a party to the relevant instrument, or that preconditions to the Court's seisin had not been satisfied (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Provisiona1 Measures, Order of 10 July 2002, I.C.J. Reports 2002,* pp. 241-248, paras. 57-82).

20. However, in a case of another instrument, the Unesco Constitution, the Court concluded that jurisdiction appeared to exist to address appropriate disputes between the parties arising under that instrument. But, as in the *Yugoslavia* v. *Belgium* case, the Court did not view this conclusion by itself as a sufficient basis to indicate provisional measures. Instead, the Court looked further and proceeded to consider whether the Congo's claim under the Unesco Constitution bore sufficient relationship to rights provided in that Constitution so as to serve as a basis on which to indicate provisional measures.

21. On this point, the Court observed that the Unesco Constitution provided jurisdiction only for the Court to address disputes "in respect to the interpretation of that Constitution" and that such a dispute "[did] not appear to be the object of Congo's Application" (*id*., para. 85). Accordingly, the Court concluded that it could not indicate provisional measures in connection with the Congo's claim under that instrument *(id.).*

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[35]French Text: "n'est dès lors pas en mesure de conclure, à ce stade de la procédure, que les actes que la [Belgium] seraient susceptibles d'entrer dans les prévisions de la convention sur le génocide . . . ne constitue partant pas une base sur laquelle la competence de la Cour pourrait *prima facie* être fondée dans le cas d'espèce".

22. As in the *Legality of Use of Force (Yugoslavia* v. *Belgium)* case and the *Congo* v. *Rwanda* case, Mexico's Request must fail because its claim on the merits falls, in essence, outside the subject-matter afforded by the instrument on which it is based. Mexico's claim is founded on Article 60 of the ICJ Statute, which requires the existence of a dispute before the Court can render an interpretation. As Mr. Mathias explained in detail, the United States does not dispute the interpretation of the *Avena* Judgment that Mexico asks this Court to render. The United States fully accepts that the *Avena* Judgment imposes a binding obligation of result on the United States to provide review and reconsideration of the convictions and sentences of the individuals addressed in that Judgment.

23. In the absence of a dispute with respect to issues raised by Mexico's *Request for interpretation*, that claim is not capable of falling within the provisions of Article 60. Accordingly, as the Court put it in the *Legality of Use of Force (Yugoslavia* v. *Belgium)* case, the Court lacks jurisdiction *ratione materiae* to entertain Mexico's *Request for interpretation*; Mexico's Request does not state a claim on which the Court will be able to grant relief at the merits stage. Under these circumstances, the Court lacks the prima facie jurisdiction required for the indication of provisional measures, and the Court should therefore dismiss Mexico's Request.

B. Because there is no dispute in Mexico's claim on the merits, the claim is moot and any relief granted would be without object

24. To this point, I have addressed Mexico's claim in the context of the Court's cases relating to the indication of provisional measures. Let me now turn to my second main point and discuss the Court's more general jurisprudence that also has relevance to the appropriate treatment of Mexico's Request. In this connection, a general principle runs throughout the Court's cases that the Court should abstain from addressing matters in the absence of a judicial purpose for its actions. As Shabtai Rosenne has observed in his treatise on the practice of law, the Court has abstained from rendering decisions where its actions would have no practical significance or where the case has been made abstract or purely academic[36]. This general principle is illustrated in cases, such as the *Nuclear Tests* cases and in the *Northern Cameroons* case, where the disputes became

[36]Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005*, 534 n.73 (2006).

essentially moot or where the Court's decision would have had no practical effect. These cases provide further support for the proposition that, in the absence of a dispute to be resolved by the Court with respect to Mexico's claim on the merits, it would be inappropriate for the Court to grant relief, including provisional measures, in respect to that claim.

25. On the *Nuclear Tests* cases, Australia and New Zealand asserted that the continued conduct by France of atmospheric nuclear tests would violate international law. The Court observed that, subsequent to the filing of these applications, France made a public declaration that it would cease further atmospheric nuclear testing, and concluded that, in doing so, France undertook a binding international legal obligation to comply with its pledge. The Court stated that, "having found that the Respondent has assumed an obligation as to conduct . . . no further judicial action is required" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 252, para. 56)[37]. The Court thus declined to adjudicate the merits, stating, "the present case is one in which 'circumstances that have . . . arisen render any adjudication devoid of purpose' . . . The Court therefore sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless." (*Id*., para. 58.).[38]

26. The principle that the Court should not issue orders that would be without object is firmly rooted in the Court's understanding of its role as a judicial institution, as demonstrated by the *Northern Cameroons* case. In that case, Cameroon asked the Court for a declaration that the United Kingdom had violated the Trusteeship Agreement for the Territory of the Cameroons in connection with its administration of that territory as trustee. The Court noted, however, that subsequent to the filing of the *Cameroons* case, the Trusteeship Agreement had been validly terminated by the United Nations General Assembly and that the United Kingdom had no further role under authority under that agreement. Because Cameroon's request sought only declaratory relief, the Court concluded that a proceeding to consider Cameroon's claim would serve no purpose.

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[37]French text: "ayant conclu que le défendeur a assumé une obligation de comportement . aucune autre action judiciaire n'est nécessaire".

[38]French text: "La présente affaire est l'une de celles dans lesquelles 'les circonstances qui se sont produites . . . rendent toute decision judiciaire sans objet. La Cour ne voit donc pas de raison de laisser se poursuivre une procédure qu'elle sait condamnée à rester stérile."

27. The Court grounded its decision in its basic role and purpose as a judicial institution. The Court wrote that:

> "The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case could satisfy these essentials of the judicial function." (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, pp. 33-34.)[39]

28. Later in the decision, the Court summed up its holding in the following terms:

> "The Court must discharge the duty to which it has already called attention — the duty to safeguard the judicial function. Whether or not at the moment the Application was filed there was jurisdiction in the Court to adjudicate upon the dispute submitted to it, circumstances that have since arisen render any adjudication devoid of purpose. Under these conditions, for the Court to proceed further in the case would not, in its opinion, be a proper discharge of its duties." (*Id.*, p. 38.)[40]

29. In addition, in the interpretation context, this Court has declined to entertain requests for interpretation of its prior judgments where it believed that it had already ruled on the precise issues raised by the request. In the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria,* the Court dismissed Nigeria's request for interpretation of the preliminary objections Judgment (*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 (I)*, p. 49, para. 19). The Court first emphasized the need to avoid impairing the finality of the Judgment as well as the primacy of the principle of *res judicata* (*id*., para. 12). The Court then explained that, in its prior Judgment on preliminary objections, it had clearly disposed of the questions on which Nigeria was seeking

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[39]French text:

> "La fonction de la Cour est de dire le droit, mais elle ne peut rendre des arrêts qu'à l'occasion de cas concrets dans lesquels il existe, au moment du jugement, un litige réel impliquant un conflit d'intérêts juridiques entre les parties. L'arrêt de la Cour doit avoir des conséquences pratiques en ce sens qu'il doit pouvoir affecter les droits ou obligations juridiques existants des parties, dissipant ainsi toute incertitude dans leurs relations juridiques. En l'espèce, aucun arrêt rendu au fond ne pourrait répondre à ces conditions essentielles de la fonction judiciaire."

[40]French text:

> "La Cour doit s'acquitter du devoir sur lequel elle a déjà appelé l'attention et qui consiste à sauvegarder sa fonction judiciaire. Qu'au moment où la requête a été déposée la Cour ait eu ou non compétence pour trancher le différend qui lui était soumis, il reste que les circonstances qui se sont produites depuis lors rendent toute décision judiciaire sans objet. La Cour estime dans ces conditions que, si elle examinait l'affaire plus avant, elle ne s'acquitterait pas des devoirs qui sont les siens."

interpretation (*id.*, para. 16). As there was nothing for the Court to clarify beyond what it had previously stated on these issues, the Court found that it was unable to entertain Nigeria's request.

30. Similar to the claims in the *Nuclear Tests* and the *Northern Cameroons* cases on which this Court declined to grant relief, Mexico's Request for an interpretation asks the Court for relief that serves no purpose. As Mr. Bellinger and Mr. Mathias have made clear, the United States agrees with Mexico that the Judgment in *Avena* imposes an obligation of result. And the United States has acknowledged its obligation to provide review and reconsideration. Relief in connection with this Request, including the indication of provisional measures, would serve only to reaffirm an obligation already accepted, something which the Court explicitly declined to do in the *Nuclear Tests* case. While the *Nuclear Tests* and *Northern Cameroons* cases were rendered moot by developments subsequent to the filing of the claimant's application, the principles of mootness articulated in those cases apply equally in this case where Mexico's claim is moot from its inception.

31. And similar to the *Cameroon* v. *Nigeria* case, this Court has already answered the questions Mexico seeks to have the Court address. There is nothing further for the Court to say in these proceedings about the meaning and scope of the *Avena* Judgment that it did not already say in the text of that Judgment. A further order of the Court that reiterated the *Avena* Judgment would not provide any greater clarity to the Parties about their rights and obligations. Nor would it have any additional legal effect, since the United States already has a binding obligation under international law to comply with the *Avena* Judgment; an additional provisional measures order on the same points as the *Avena* Judgment would not strengthen or expand the force of that obligation.

32. As the Court stated in the *Armed Activities on the Territory of the Congo* case, it "should not . . . indicate measures for the protection of any disputed rights other than those which might ultimately form the basis of a judgment in the exercise of" the Court's jurisdiction over the claim on the merits (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*, p. 241, para. 58)[41]. Given that a judgment on the merits of Mexico's Request

[41]French text: "ne saurait toutefois indiquer des mesures tendant à protéger des-droits contestés autres que ceux qui pourraient en définitive constituer la base d'un arrêt rendu dans l'exercice de . . .".

for interpretation would be moot and without object, there are no rights under that request that can form the basis for a judgment at the merits stage, and thus no rights that may properly be protected through the indication of provisional measures.

C. Mexico's request for provisional measures differs sharply from requests in previous cases under the Vienna Convention

33. I have now shown that, under both the Court's provisional measures cases and in more general case law, Mexico's request for provisional measures must fail. In the absence of a genuine dispute on the issues raised by Mexico's Request for an interpretation, there is no prima facie jurisdiction over that Request to provide a basis for an indication of provisional measures. To similar effect, the absence of a dispute renders Mexico's claim on the merits moot and without object, and thereby fails to place in issue rights that require protection through the indication of provisional measures.

34. Having discussed these reasons for dismissing Mexico's request for provisional measures, I would like briefly to turn to my third point and address Mexico's suggestions that support for its Request may be found in this Court's indication of provisional measures in previous cases involving the Vienna Convention on Consular Relations. In this regard, the absence of a genuine dispute over the issues raised by Mexico's claims on the merits renders its request for provisional measures before the Court today substantially different from the *Breard*, *LaGrand* and *Avena* provisional measures cases.

35. In each of the three earlier consular notification cases, there was in fact a genuine dispute between the parties about the obligations of the respondent. In particular, in each of these cases, the parties disagreed about the remedy requested for the underlying claim for the violation of the Vienna Convention on Consular Relations (*Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 256, para. 31; *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 482, para. 42; *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 88, para. 46). In *Breard* (*Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 256, para. 31), the parties

disagreed about whether the Vienna Convention provided remedies for breaches. In *LaGrand* (*LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 14, para. 17), the parties disagreed about whether the Court could provide remedies in a party's domestic processes for violations of the Vienna Convention. In the earlier *Avena* provisional measures case (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 88, para. 46), the parties disagreed about whether the United States was required to retry individuals who had not received consular notification.

36. In the present *Avena* case, on the other hand, there is no dispute between the Parties on the issues raised by Mexico's claim on the merits. Both Parties agree that paragraph 153 (9) of the *Avena* Judgment, the Article that Mexico has put in issue, imposes an international law obligation of result upon the United States. In the current *Avena* case, unlike in the prior Vienna Convention cases, there are no disputed rights at issue in Mexico's claim on the merits that could be prejudiced by actions of the United States during the pendency of this litigation, and thus no rights that can appropriately form the basis of a provisional measures order.

D. The Court should consider dismissing Mexico's claims on the merits for manifest lack of jurisdiction

37. Madam President, I am nearing the conclusion of my presentation. Before summing up, I would like to make one additional observation. As I have shown, the absence of any genuine dispute about the issues on which Mexico seeks an interpretation of the *Avena* Judgment compels the conclusion that this Court should not grant the provisional measures that Mexico seeks. These considerations also have implications for the appropriate disposition on the merits of Mexico's Request for interpretation.

38. With no issues in dispute in connection with that Request, the Request for interpretation is fatally flawed and manifestly without jurisdiction. Any order on the merits of the Request would be without object; it would only confirm points on which both Parties already agree. In the *Legality of Use of Force (Yugoslavia* v. *United States of America)* case, the Court dismissed Yugoslavia's claim in its entirety with respect to the United States at the provisional measures stage. The Court concluded that "the Court manifestly lacks jurisdiction to entertain Yugoslavia's

Application" and that "to maintain on the General List a case upon which it appears certain that the Court will not be able to adjudicate on the merits would most assuredly not contribute to the sound administration of justice" (*Legality, of Use of Force (Yugoslavia* v. *United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II),* p. 925, para. 29)[42]. These same considerations clearly apply in this case and, accordingly, the Court should give serious consideration to dismissing Mexico's Request for interpretation in its entirety at this stage of the proceedings.

E. Conclusion

39. Let me summarize the main points. No dispute exists in relationship to Mexico's claim on the merits. Therefore, no prima facie jurisdiction exists to grant Mexico's Request for interpretation of the *Avena* Judgment under Article 60 of the Court's Statute. Indeed, the absence of a dispute within the meaning of Article 60 renders Mexico's Request moot and would involve the Court in a process outside its judicial function. Accordingly, the Court should deny Mexico's request for provisional measures. And, because Mexico's Request for interpretation raises no issues that could properly be resolved by this Court, the Court should simply dismiss that Application as well.

40. Mexico has asked this Court to embark on a road that leads nowhere, a judicial dead end that leads the Court directly to a conclusion that it lacks jurisdiction and competence. Now is the time for the Court to see clearly that this case lacks legal substance.

41. Thank you, Madam President, Members of the Court. I ask that you next call on Mr. Mattler.

The PRESIDENT: Thank you, Mr. Thessin. The Court will at this juncture take a short pause. The Court briefly rises.

The Court adjourned from 4.30 to 4.50 p.m.

The PRESIDENT: Please be seated. Mr. Mattler it is your turn to address the Court.

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[42]French text: "la Cour n'a manifestement pas compétence pour connaître de la requête de la Yougoslavie . . . maintenir au rôle général une affaire sur laquelle il apparaît certain que la Cour ne pourra se prononcer au fond ne participerait assurément pas d'une bonne administration de la justice".

Mr. MATTLER:

Mexico's request for provisional measures goes beyond the relief sought in its request for interpretation

1. Thank you, Madam President, Members of the Court. It is an honour for me again to appear before this Court and to represent the United States of America.

2. I will briefly address the form of the provisional measures requested by Mexico.

3. In considering Mexico's request, the Court should have due regard for the appropriate character and scope of any provisional measures it might consider indicating. Under Article 41 of the Court's Statute, the Court may indicate provisional measures "to preserve the respective rights of either party". As the Court has recognized, this means that any provisional measures indicated must be designed to preserve rights at issue in the merits phase of the dispute. In the case concerning the *Arbitral Award of 31 July 1989*, the Court refused to indicate provisional measures on the ground that "the alleged rights sought to be made the subject of provisional measures are not the subject of the proceedings before the Court on the merits of the case", and therefore "any such measures could not be subsumed by the Court's judgment on the merits" *(Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Provisional Measures, Order of 2 March 1990, I.C.J. Reports 1990*, p. 70, para. 26)[43].

4. The provisional measures requested by Mexico do not satisfy the Court's test. They go beyond "the subject of the proceedings before the Court on the merits of the case". In paragraph 15 *(a)* of its request for provisional measures, Mexico asks the Court to order:

> "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 this day . . ."

5. Mexico's proposed order purports to prohibit the United States from carrying out sentences for these individuals prior to the conclusion of this Court's proceedings on Mexico's interpretation request.

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[43]French text: "les droits allégués dont il est demandé qu'ils fassent l'objet de mesures conservatoires ne sont pas l'objet de l'instance pendante devant la Cour sur le fond de l'affaire; et qu'aucune mesure de ce genre ne saurait être incorporée dans l'arrêt de la Cour sur le fond".

6. These requested measures go beyond what is needed to protect the rights Mexico asserts in its interpretation request. Mexico's Application does *not* request an interpretation of *Avena* that would absolutely prohibit the United States from carrying out sentences in any of the individual cases at issue in *Avena*. Rather, Mexico asks the Court to interpret *Avena* to mean precisely what *Avena* says: that the United States is obligated not to carry out sentences in any of these cases unless the individual affected has received review and reconsideration and it is determined that no prejudice resulted from the violation of the Vienna Convention.

7. The specific interpretation Mexico seeks has three components. First, the chapeau of the proposed order 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" — that is, requires the "result" that the United States provide review and reconsideration in the affected cases.

8. Second, subparagraph (1) of the proposed order asks the Court to declare that pursuant to this obligation of result, the United States must take any and all steps necessary to provide the reparation of review and reconsideration mandated by the *Avena* judgment.

9. Third, subparagraph (2) of the proposed order asks the Court to declare that this obligation of result also means that the United States must take any and all steps necessary to ensure that no Mexican national included in the *Avena* judgment is executed unless and until the review and reconsideration required by *Avena* is completed and it is determined that no prejudice resulted from the Vienna Convention violation.

10. No part of the interpretation sought by Mexico at the merits stage of these proceedings would prohibit the United States from carrying out a sentence after providing the review and reconsideration and appropriate determination regarding prejudice required by the *Avena* Judgment. Yet, Mexico's request for provisional measures focuses not on the provision of review and reconsideration, but on the carrying out of the sentence itself, without regard to whether review and reconsideration has been provided. In other words, Mexico seeks to protect rights that are not protected even by its *own* interpretation of the *Avena* Judgment. Any provisional measures order this Court might consider issuing in this case would need to be appropriately limited to addressing the specific rights Mexico seeks at the merits stage.

11. Thank you, Madam President, Members of the Court. I would ask that the Court now call upon Mr. Vaughan Lowe.

The PRESIDENT: Thank you, Mr. Mattler. Mr. Lowe.

Mr. LOWE:

Abuse of process

1. Madame le président, Membres de la Cour, c'est un privilège de me trouver à nouveau devant cette Cour, et de m'être vu confié la défense de cette partie des plaidoiries faite au nom des Etats-Unis.

2. Il est courant, pour les affaires plaidées devant cette Cour, que les parties en cause soient représentées par une combinaison d'avocats anglophones et francophones. Malheureusement, dans le peu de temps qui nous a été imparti, il n'a pas été possible de rassembler une équipe qui puisse refléter avec satisfaction les deux langues officielles de travail de cette Cour.

3. Je vais donc continuer l'argumentation de ma plaidoirie en anglais, la langue dans laquelle j'espère pouvoir développer le plus clairement possible les points importants que je me dois de vous présenter.

4. My colleagues have demonstrated that as a matter of law there is no dispute between Mexico and the United States in relation to the interpretation of the *Avena* Judgment. They have submitted that the consequence as a matter of law is that the case is moot, and that the Court lacks jurisdiction over it. Put in other words, there is no prima facie jurisdiction over the Mexican Application for an interpretation of the Judgment. In fact the position is even clearer than that. It is evident that the Court does *not* have jurisdiction. And in these circumstances, there is no basis upon which the incidental request for provisional measures can stand, and it must be dismissed. My submissions take a slightly different approach. In his separate opinion in the *Northern Cameroons* case, Sir Gerald Fitzmaurice made a trenchant observation in relation to preliminary objections. He said that there are

> "objections, not in the nature of objections to the competence of the Court, which can and strictly should be taken in advance of any question of competence. Thus a plea that the Application did not disclose the existence, properly speaking, of any legal dispute between the parties, must precede competence, for if there is no dispute, there

> is nothing in relation to which the Court can consider whether it is competent or not. It is for this reason that such a plea would be rather one of admissibility or receivability than of competence." (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 105)[44].

And Sir Gerald went on to make a point which goes to the heart of the issue in this hearing. He referred to the position which arises

> "where the objection touches not so much the substance of the claim, as the character of what the Court is requested to do about it, having regard to the surrounding circumstances — as for instance if the Court is asked to do something which does not appear to lie within, or engage, its judicial function as a court of law. In cases of this kind, the question of competence or jurisdiction becomes irrelevant, for it would be inappropriate, and even misleading, for the Court to avoid the issues by simply finding itself to lack jurisdiction, even if it did lack it; or alternatively, to find itself to be competent when it was manifest that it could not in any event exercise that competence for *a priori* reasons touching the whole nature of its function as an international tribunal and judicial institution." *(Id.)*[45]

5. Well this, in our submission, is precisely the situation here. The absence of any real dispute certainly goes to the question of the Court's jurisdiction, and as my colleagues have shown the Application can be dismissed on that ground. But there is another way to approach these proceedings. And it is to say that the leading objection is that Mexico has manufactured an alleged dispute over the interpretation of the *Avena* Judgment, and has compounded the artifice because what it has requested the Court to do in relation to that fictitious dispute is in fact something quite different from the issue of a clarification — a wholly unnecessary clarification — of its earlier Judgment.

6. No one is in any doubt as to the seriousness of the question of the death penalty. But there is also a serious question concerning the propriety of attempting in this way to involve the

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[44]French text:

"d'autres exceptions n'ayant pas le caractère d'exceptions à la compétence de la Cour qui peuvent et, à strictement parler, doivent être examinées *préalablement* à toute question de compétence. Ainsi, une exception d'après laquelle la requête n'a pas révélé qu'il existait véritablement un différend entre les parties doit être discutée avant la compétence, car, s'il n'y a pas de différend, il n'y a rien à propos de quoi la Cour puisse envisager sa compétence ou son incompétence. C'est pour cette raison qu'une telle exception concernerait plutôt la recevabilité que la compétence."

[45]French text:

"lorsque l'exception porte moins sur le fond de la demande que sur le caractère de ce que la Cour est priée de faire à ce sujet eu égard aux circonstances — cela se produit par exemple si la Cour est invitée à faire quelque chose qui n'implique pas ou ne met pas en jeu la fonction judiciaire qui est la sienne comme tribunal. Dans des cas de ce genre, la question de compétence ou de juridiction devient sans pertinence, car il serait inapproprié et même fallacieux que la Cour élimine la question simplement en constatant qu'elle n'a pas compétence, même si c'est bien le cas; ou que la Cour s'estime compétente alors qu'il est manifeste qu'elle ne peut en toute hypothèse exercer cette compétence pour des raisons générales a priori touchant à la nature de sa fonction comme tribunal international et institution judiciaire."

International Court in the matter. The Application for interpretation is in reality no more than a vehicle for a request that the Court issues orders which will not *interpret* the Judgment — as to whose meaning there is no dispute or doubt whatsoever — but will be directed solely to increasing pressure on the United States to comply with the *Avena* Judgment. The Court is requested by Mexico to engage in what is in substance the enforcement of its earlier judgments and the supervision of compliance with them. And that, in our submission, is an abuse of process, and Mexico's Application should be dismissed for that reason.

7. In developing this submission, Madam President, I have six propositions to put before you. They are these:

1. That the Court has an inherent power to regulate its own proceedings in the interests of justice and in order to safeguard the integrity of the Court.
2. That that power includes the power to dismiss applications where they amount to an abuse of process.
3. That the Court is not bound by the party's characterization of its application.
4. That where a party asserts that it is making an Application to the Court for a judgment or order for a specific purpose and the Court considers that the party is in reality pursuing some different purpose which takes the application outside the scope of the provision on which it is purportedly based, then the Court is entitled to dismiss that application.
5. And specifically, that where it appears to the Court that a party is making an application for a judgment or order solely for the purpose of bringing pressure upon the other party to comply with an earlier Judgment or Order of the Court, the Court is entitled to reject the application on the ground that it amounts to an abuse of process.
6. And finally, that the Court may dismiss an application in the circumstances that I have described at any stage in the proceedings, because the dismissal is an exercise of the Court's inherent power to regulate its own proceedings in the interests of justice and in order to safeguard the integrity of the Court.

8. In our submission, those are all sound propositions of international law, and their application in this case should lead to the dismissal of Mexico's Application for interpretation and of this request for provisional measures.

9. I shall deal with the six propositions one by one.

Proposition 1: The Court has an inherent power to regulate its own proceedings in the interests of justice and in order to safeguard the integrity of the Court

10. There is no specific provision in the Court's Statute which would entitle it to dismiss Mexico's Application on the grounds that I have briefly outlined. And we rely upon the existence of an inherent power in the Court to regulate its own proceedings.

11. There is no doubt that tribunals have inherent powers and I think that our Mexican friends accept this. The existence of those powers is a necessary and obvious corollary of the responsibility of the tribunal for the proper and orderly discharge of its responsibilities. As was observed in the separate opinion of a Member, now President, of this Court in the case of the *Legality of the Use of Force*, "[t]he Court's inherent jurisdiction derives from its judicial character and the need for powers to regulate matters connected with the administration of justice, not every aspect of which may have been foreseen in the Rules" *(Legality of Use of Force (Serbia and Montenegro* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 1359, para. 10.)[46]

12. That separate opinion refers to occasions on which this Court has recognized and exercised that inherent power. And so too, does the separate opinion of Judge Koojimans in the same case, where he spoke of the use of the power "as an instrument of judicial policy to safeguard the integrity of the Court's procedure" (*id.*, para. 22)[47]. Both of those opinions refer to the power of the Court to reject applications in *limine litis*, and to the appropriateness of doing so in cases where it is necessary to do so for "the sound administration of justice" (to borrow the language used by the Court in 1999 when it ordered the removal from the List of the case brought by Yugoslavia against Spain) (*Legality of Use of Force (Yugoslavia* v. *Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 761, para. 35).

13. I will not detain the Court by adding to the list of authorities bearing on the question of the existence of inherent powers of tribunals, though I would respectfully commend to the Court

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[46]French text: "Les pouvoirs inhérents de la Cour découlent de son caractère judiciaire et du fait qu'elle doit disposer de moyens pour réglementer des questions liées à l'administration de la justice, dont tous les aspects peuvent ne pas être prévus par le Règlement."

[47]French text: "comme un instrument de politique judiciaire afin de préserver l'intégrité de sa procédure".

the analyses of the question by Professor Paola Gaeta, published in the *Festschrift* for Judge Antonio Cassese, and by Dr. Chester Brown, published in the *2005 British Year Book of International Law*, copies of which we can make available to the Court and have passed or will pass to our friends on the other side.

14. I will turn instead to the second proposition, that the Court has an inherent power to dismiss applications where they amount to an abuse of process.

Proposition 2: That power includes the power to dismiss applications where they amount to an abuse of process

15. It is almost tautological to say that a tribunal has the power to dismiss an application which is an abuse of its process. Sometimes that power is spelled out explicitly. For example, Article 294, paragraph 1, of the 1982 United Nations Law of the Sea Convention stipulates that any of the courts or tribunals to which an application is made in respect of certain disputes under that Convention

> "shall determine at the request of a party, or may determine *proprio motu*, whether the claim constitutes an abuse of legal process or whether prima facie it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is prima facie unfounded, it shall take no further action in the case."

16. Similarly, Article 35 of the European Convention on Human Rights stipulates that the European Court of Human Rights "shall declare inadmissible any individual application . . . which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application", and that it may do so "at any stage of the proceedings".

17. Now the power to dismiss applications for abuse of process, even if it is not expressly conferred by the tribunal's constituent instrument, we believe exists as an inherent power. Professor Zimmerman's Commentary on the Statute of this Court says:

> "Abuse of procedure is a special application of the prohibition of abuse of rights, which is a general principle of international law as well as in municipal law. It consists of the use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights were established."[48]

[48] Andreas Zimmermann and Tobias Thienel, Article 60, in *The Statute of the International Court of Justice: A Commentary*, 831 (Andreas Zimmermann *et al*. dds., 2006).

18. The principle of abuse of rights is itself well established in international law, and may be regarded as one of the general principles of law recognized by civilized nations, which the Court is directed to apply by Article 38 of its Statute. Again, time constraints preclude what is probably an unnecessary recitation of the practice and case law which establishes the status of abuse of rights as a general principle of law. Again, we can make available to the Court and will pass to our friends on the other side the relevant pages of the classic studies by Professor Bin Cheng[49], Professor Elisabeth Zoller[50], and a recent study by Professor Byers[51], in which references to a good deal of this practice are assembled.

19. The power to dismiss on the ground of abuse of legal process has, in our submission, two distinct bases. One is that the power is a corollary of the responsibility of the Court which it has to safeguard the integrity of its procedure. To put the point plainly, Madam President, and with all due respect, if the Court does not preserve the international judicial process against abuse, who else will? There is no system of appeal. One can scarcely address issues of this kind by amending the Statute of the Court. And if the Court does not defend itself, and also the States parties to its Statute, from attempts to abuse its processes and distort its role, who else can do so? The Court *must* have the power to dismiss applications which amount to abuses of its process.

20. The second basis for the power to dismiss is that it is an aspect of the general duty of loyalty between the parties. And that latter point is well described in Professor Zimmerman's Commentary on the Court's Statute, where it is said that

> "The most fundamental principle of substantive law applicable to judicial proceedings in general is the proposition that, by engaging in proceedings before an international tribunal, the parties enter into a legal relationship characterized by mutual trust and confidence. Thus, the parties are bound by a general commitment of loyalty among themselves and towards the Court. This duty flows from the principle of good faith recognized in general international law and stipulated also in Article 2, paragraph 2, of the United Nations Charter as a general duty of the Member States. The principle of good faith has a series of 'concretizations' in the field of procedural law . . . First [says Professor Zimmerman], it requires the parties not to undertake any action which could frustrate or substantially adversely affect the proper functioning of the procedure chosen, the point being to protect the object and purpose of the proceedings."[52]

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[49]Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals*, 121-136 (1953).

[50]Elizabeth Zoller, *La Bonne Foi en Droit International Public*, 24-42, 140-156 (1977).

[51]Michael Byers, *Abuse of Rights: An Old Principle, a New Age*, 47 McGill L.J. 389-431 (2002).

[52]Zimmerman, *supra*, 830.

21. To put the point bluntly, litigation is not a game. Parties are not free to turn the words of the Court's Statute or Rules to serve purposes that they were never intended to serve. There is no compulsory jurisdiction in international law. If States are to become bound to settle their disputes before international tribunals, they must choose to do so; and their choice must be declared; and the tribunal's jurisdiction is circumscribed by the terms of that declaration.

22. There is no room for the suggestion that having "signed up" to the jurisdiction of a tribunal over a particular dispute — whether this Court or any other tribunal — a State must be taken to have agreed to give the tribunal the right to play any role, and make any order whatsoever in relation to that dispute.

23. Madam President, there are two aspects to the acceptance of international jurisdiction by a State. There is the acceptance that a particular dispute or disputes in a particular category can go to a specific tribunal. But, equally important, there is also the acceptance that the powers of that tribunal are no more and no less than those that are created by the instruments which define its powers and those that are inherent in its role as a judicial tribunal. No tribunal has unfettered powers. States do not — and I make this submission with proper respect, knowing that it touches the core of the Court's discretion and responsibilities but confident that the Court will hear it as a respectful reminder of the limits of a court's power — States do not give tribunals whose jurisdiction they accept a carte blanche to make any and every contribution to the handling of the dispute that the tribunal might be urged to make. There comes a point where any international tribunal must say "we cannot do what we are requested to do. It lies outside our powers. We are neither obliged, nor entitled, to allow the tribunal to be used in this way."

24. Well, the question of what amounts to an abuse of process is a large one, which cannot possibly be comprehensively addressed in these proceedings, and we confine ourselves to the submission that within the indisputable core of that concept is the principle that tribunals, and procedural devices within judicial processes, may not be used for purposes that are alien to those for which they were established. I shall return to this point shortly; but for now it is enough to say that this is a particular application of the broader application of *détournement de pouvoir*, or misuse of powers. Such abuses damage not only the integrity and reputation of the tribunal which is the

target of the attempt to enlist it in inappropriate activities, but also the rights of the other party, which suffers as a result of the abuse of right.

25. We submit that the Court has now reached the point where it must say, "we cannot allow the tribunal to be used in this way".

Proposition 3: The Court is not bound by a party's characterization of its application

26. I turn now and briefly to proposition 3, that the Court is not bound by a party's characterization of its application. My colleagues Mr. Matthias and Mr. Thessin have already addressed this point. And they explained, first, that there is no dispute, and second, that it is well established in the Court's jurisprudence in *Peace Treaties*, *South West Africa* and other cases that the assertion of one by the parties that there is a dispute cannot bind the Court. The existence of the dispute is an objective question, to be determined by the Court.

27. It may be helpful to draw the Court's attention to the kind of question that might be put to Mexico in order to elicit some sort of an answer to this point. Article 59 of the Rules of Procedure of the Inter-American Court on Human Rights sets out the rules governing applications for the interpretation of judgments of that court, and it stipulates that:

> "The request for interpretation, referred to in Article 67 of the Convention [that is the 1969 American Convention on Human Rights], may be made in connection with judgments on the merits or reparations and shall be filed with the Secretariat. *It shall state with precision the issues relating to the meaning or scope of the judgment of which the interpretation is requested*." (http://www.corteidh.or.cr/reglamento.cfm) (Emphasis added.)

It is that kind of provision that is helpful in determining whether there really is a dispute, and if so, what it is. It is, of course, very similar to the terms of Article 98 of the Rules of this Court. Mexico refers to "differences" between obligations of result and obligations of means. But the United States accepts that it is under an obligation of result. Mexico's counsel *themselves* drew your attention to this. Ms Babcock told you that every member of the United States Supreme Court acknowledged that the United States was under an international law obligation to comply with the *Avena* Judgment (Mexican pleadings, p. 16). Ms Amirfar referred to the recognition by the Supreme Court of "the existence of the undisputed, unequivocal obligation to comply with *Avena*" (Mexican pleadings, p. 25) — perhaps a slip, but a telling one. She said that Mexico was here to

"seek confirmation" of the *Avena* Judgment. Exactly so. You have said it once and Mexico now wishes you to say it again.

One might ask Mexico, what precisely are the issues relating to the meaning or scope of the Judgment of which the interpretation is requested? What precisely is the dispute between Mexico and the United States?

28. And unless Mexico gives clear answers to such questions, its Application cannot even get off the ground. But even if it does offer answers to those questions, it is for the Court to decide whether or not there is a real dispute between the Parties. The fact that Mexico's Application is based on the premise that there is a dispute does not make that premise correct. And that is the point that my colleagues have made.

29. I shall now turn swiftly to my next point.

Proposition 4: Where a party asserts that it is making an application to the Court for an order for a specific purpose and the Court considers that the party is in reality pursuing some different purpose which takes the application outside the scope of the provision on which it is purportedly based, the Court is entitled to dismiss the application

30. My fourth proposition is that where a party asserts that it is making an application to the Court for a judgment or order for a specific purpose and the Court considers that the party is in truth pursuing some different purpose which takes the application outside the scope of the provision on which it is purportedly based, the Court is entitled to reject the application on that ground.

31. More than half a century ago this Court clearly defined its role in interpretation proceedings. As Mr. Mathias recalled, in the Judgment concerning the interpretation of the *Asylum* case it said:

> "The real purpose of the request must be to obtain an interpretation of the judgment. This signifies that its object must be solely to obtain clarification of the meaning and the scope of what the Court has decided with binding force, and not to obtain an answer to questions not so decided. Any other construction of Article 60 of

> the Statute would nullify the provision of the article that the judgment is final and without appeal." (Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v. Peru), Judgment, I.C.J. Reports 1950, p. 402.)[53]

The Court has consistently based itself on that principle. The passage that I have just read out was, for example, quoted by this Court in the *Nigeria* v. *Cameroon* interpretation case in 1999 (*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 (I)*, pp. 36-37, para. 12).

32. The principle is important. Here Mexico is, no doubt, seeking to use the *Request for interpretation* in order to advance the aim of the full implementation of the earlier Judgment. But the sword that Mexico is wielding has two edges, and it could equally well be used to delay implementation. As the Court itself said, again in *Nigeria* v. *Cameroon*:

> "The question of the admissibility of requests for interpretation of the Court's judgments needs particular attention because of the need to avoid impairing the finality, and delaying the implementation, of these judgments. It is not without reason that Article 60 of the Statute lays down, in the first place, that judgments are 'final and without appeal'." *(Id.)*[54]

33. The central issue here is how the Court will regard its power to interpret its own judgments and in considering that question the Court will have to consider again the question of the implications of acceding to requests for interpretations which has led it in the past to base itself upon a carefully balanced understanding of the role of interpretative judgments within the international judicial process.

34. The Court recently acted upon precisely this basis, in its Judgment of 3 February 2006 in the case of *Armed Activities on the Territory of the Congo*. And as the Court will recall, in paragraph 107 of that Judgment, the Court said this:

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[53]French text:

> "Il faut que la demande ait réellement pour objet une interprétation de l'arrêt, ce qui signifie qu'elle doit viser uniquement à faire éclaircir le sens et la portée de ce qui a été décidé avec force obligatoire par l'arrêt, et non à obtenir la solution de points qui n'ont pas été ainsi décidés. Toute autre façon d'interpréter l'article 60 du Statut aurait pour conséquence d'annulera disposition de ce même article selon laquelle l'arrêt est définitif et sans recours."

[54]French text:

> "La question de la recevabilité des demandes en interprétation des arrêts de la Cour appelle une attention particulière en raison de la nécessité de ne pas porter atteinte au caractère définitif de ces arrêts et de ne pas en retarder l'exécution. Ce n'est pas sans raison que l'article 60 du Statut énonce en premier lieu que les arrêts sont 'définitive[s] et sans recours'."

> "Article XIV, paragraph 2, of the Unesco Constitution provides for the referral, under the conditions established therein, of questions or disputes concerning the Constitution, but only in respect of its interpretation. The Court considers that such is not the object of the DRC's [of the Congo's] Application. It finds that the DRC has in this case invoked the Unesco Constitution and Article I thereof for the sole purpose of maintaining that '[o]wing to the war', it 'today is unable to fulfil its missions within Unesco'. The Court is of the opinion that this is not a question or dispute concerning the interpretation of the Unesco Constitution. Thus the DRC's Application does not fall within the scope of Article XIV of the Constitution."[55]

Accordingly, the Court rejected the application which the DRC had made on the basis of the Unesco Constitution.

35. The passage that I have quoted makes clear two points, beyond any need for further interpretation or explanation.

36. The first is that the Court can and will exercise a power to determine, on the basis of the application and the evidence before the Court, what the purpose of the application is and whether that purpose falls within the ambit of the provision upon which the Applicant relies to establish the jurisdiction of the Court or outside the ambit of that provision. In the *Congo* case it was evident from the Application that the DRC's real point was that it was unable to fulfil its "missions within Unesco"[56] — the complaint was, in essence, that the implementation of the provisions of the Unesco Constitution was being impeded. The DRC asked the Court to exercise its jurisdiction on the basis of a provision in the Unesco Convention which gave the Court the power to interpret the Unesco Constitution[57]. The DRC presented its Application as a matter falling within the power to interpret the Unesco Constitution: but the Court took a different view.

37. The second point is that once the Court had decided that the DRC was not in reality seeking an interpretation of the Unesco Convention, it decided that the Court could not proceed on

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[55] French text:

> "paragraphe 2 de l'article XIV de l'acte constitutif de l'Unesco n'envisage la soumission de questions ou différends relatifs à cet instrument, aux conditions prévues par cette disposition, qu'en matière d'interprétation dudit instrument. La Cour considère que tel n'est pas l'objet de la requête de la RDC. En effet, elle constate qu'en l'espèce la RDC n'a invoqué l'acte constitutif de l'Unesco et son article premier qu'aux seules fins de soutenir que, du 'fait de la guerre', elle 'est aujourd'hui incapable de remplir ses missions au sein de l'Unesco'. De l'avis de la Cour, il ne s'agit pas là d'une question ou d'un différend relatif à l'interprétation de l'acte constitutif de l'Unesco. La requête de la RDC n'entre ainsi pas dans les prévisions de l'article XIV de cet instrument."

[56] "Par le fait de la guerre, la République Démocratique du Congo est aujourd'hui incapable de remplir ses missions au sein de l'Unesco notamment le droit à la liberté de pensée, de conscience et de religion, le droit de chercher, de recevoir et de répandre, sans considération de frontière, les informations et les idées par quelque moyen que ce soit." (Application, p. 25.)

[57] Art. XIV.2: "Any question or dispute concerning the interpretation of this Constitution shall be referred for determination to the International Court of Justice or to an arbitral tribunal, as the General Conference may determine under its Rules of Procedure."

the basis of a provision which gave the Court jurisdiction only over questions of interpretation. There was no suggestion that the Court might try to delve into the case and discover some dispute over interpretation upon which it might say something to the parties. The Application was simply misconceived; and it was dismissed.

38. Madam President, Members of the Court, the closeness of the parallels with the present case is inescapable. Mexico's real point is that the *Avena* Judgment is not being implemented. It is asking the Court to deal with its Application on the basis of the Court's competence to interpret the *Avena* Judgment. But there is no real dispute over the interpretation of that Judgment. The United States submits that, just as the Court dismissed the DRC Application, it should dismiss the Mexican Application in this case.

Proposition 5: Specifically, where it appears to the Court that a party is making an application for a judgment or an order solely for the purpose of bringing pressure upon the other party to comply with an earlier judgment or order of the Court, the Court is entitled to reject the application on the ground that it amounts to an abuse of process

39. I turn to my fifth proposition, which is that where it appears to the Court that a party is making an application for a judgment or order *solely* for the purpose of bringing pressure upon the other party to comply with an earlier judgment or order of the Court, the Court is entitled to reject the application on the grounds that it amounts to an abuse of process.

40. Mexico has attempted to manufacture a dispute in order to provide a basis for a provisional measures application whose sole aim — as is explicit in the Application itself — is to induce the Court to reiterate the obligation on the United States to comply with the clear and unequivocal terms of the *Avena* Judgment. That is misconceived, as was the Democratic Republic of the Congo claim to which I have just referred. But there is a further aspect to the Mexican Application which should not be ignored.

41. Common sense — which is always a good friend of the lawyer — makes it clear that the purpose of Mexico's Application is to bring pressure on the United States to comply with its obligations under the *Avena* Judgment. I should perhaps say, to comply with what the United States has explicitly and repeatedly admitted are its obligations under the *Avena* Judgment. The Application is not concerned with interpretation, but with enforcement. It is trying to draw the Court into the role of monitor and enforcer of its own judgments: and that, in our submission, is

itself a clear abuse of process, because, to use again the words of the Zimmerman Commentary on the Court's Statute, it is a "use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights were established".

42. The enforcement of this Court's judgment is provided for, not in the Court Statute but in Article 94 of the United Nations Charter. Article 94, paragraph 2, provides that:

> "If any party to a dispute fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."[58]

In the constitutional order of the United Nations, of which this Court is the principal judicial organ, it is the Security Council, and not the Court, which has responsibility for the enforcement of the Court's judgments. As the late Professor Mosler put it in Judge Simma's Commentary on the United Nations Charter, "[t]he enforcement of decisions is not a matter for the ICJ"[59]. It is as simple as that.

43. The rationale for this position is explained by Ambassador Rosenne in his study of the Court. He wrote that:

> "in international law the separation of the adjudication from the post-adjudication phase is a fundamental postulate of the whole theory of the judicial settlement of disputes, and . . . this leads to the consequence that if the post-adjudication phase gives rise to new political tensions, that situation or dispute will not be identical with the case terminated by the judgment in question. Therefore the relevant provisions are found in the Charter (as in the League Covenant before it), and not in the Statute of the Court. Those stipulations relate exclusively to the powers of the Security Council (and indirectly to those of other organs of the United Nations, and in particular the Secretary-General as head of the Secretariat) but not to the functioning of the Court."[60]

44. We respectfully submit that the Court should continue to observe that fundamental separation between the adjudication and the post-adjudication enforcement phase, and should not permit itself to be drawn into the monitoring and enforcement of its own decisions. Certainly, to attempt to pull the Court into these post-adjudication functions on the back of the Court's

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[58]French text: "Si une partie à un litige ne satisfait pas aux obligations qui lui incombent en vertu d'un arrêt rendu par la Cour, l'autre partie peut recourir au Conseil de sécurité et celui-ci, s'il le juge nécessaire, peut faire des recommandations ou décider des mesures à prendre pour faire exécuter l'arrêt."

[59]The Charter of the United Nations, 1175 (Bruno Simma ed., 2002).

[60]Shabtai Rosenne, *The Law and Practice of the International Court of Justice 1920-2005*, pp. 239-240 (2006).

jurisdiction to interpret its judgment is as plain an example of an abuse of process as one could wish to find.

Proposition 6: The Court may dismiss an application in the circumstances I have described at any stage in the proceedings, because the dismissal is an exercise of the Court's inherent power to regulate its own proceedings in the interests of justice and in order to safeguard the integrity of the Court

45. I turn to my final proposition, that the Court may dismiss an application in the circumstances I have described at any stage in the proceedings, because the dismissal is an exercise of the Court's inherent power to regulate its own proceedings in the interests of justice and in order to safeguard the integrity of the Court.

46. This hearing is on a request for provisional measures, and it might be said that all of the points that I have made so far are points that can be discussed at leisure in a hearing on the substance of the Application for interpretation. But that would, we submit, be a wholly misconceived conclusion and one which could only be reached if all of our submissions — mine and those of my colleagues — are rejected by the Court.

47. The Court can only receive an application under Article 60 of its Statute if there is a dispute. That is what Article 60 says. If, as we submit, there is no dispute, the Court cannot be seised of a valid request for interpretation, and there is no case before the Court to which this provisional measures Application can be incidental.

48. If the alleged dispute has been manufactured by Mexico, as we submit, and there is no real dispute, the Court should dismiss the Application as an abuse of process.

49. And I should perhaps say here that even to speak of a claim "manufactured" by Mexico is to overstate the case. Mexico could, perhaps, have tried to find, through diplomatic exchanges, some point of interpretation, no matter how minor, on which the Parties disagreed. But it did not. This is a dispute with only one party — Mexico — which is trying to persuade the Court that the United States really is embroiled in an argument. But it is not. There is no dispute.

50. If there is no dispute, and Mexico is simply trying to use the Court to put pressure on the United States to comply with the *Avena* Judgment, that is an abuse of process, and the Court should dismiss the Application.

51. If Mexico is trying to draw the Court into the role of monitor and enforcer of its own judgments, that too is an abuse of process.

52. My point is that all of these propositions have in common one thing, the fact that they are as true today as they would be in six, 12, 18 months' time when any hearing on the substance of Mexico's claim might be held. There is no rational reason for the Court to delay a decision on these submissions. An abuse of process is an abuse of process, from its inception until the moment when the tribunal asserts its authority and imposes order: and if this Application is, as we submit, misconceived, it should be dismissed forthwith, together with the request for the indication of provisional measures which is the immediate focus of our attention.

53. Madam President, Members of the Court, I thank you for your attention and I would ask you now to call upon the Agent of the United States to make our closing submissions in this round.

The PRESIDENT: Thank you, Mr. Lowe, and I now call upon the Agent of the United States.

Mr. BELLINGER:

Conclusion

1. Thank you again, Madam President, Members of the Court. I have only a few very short comments at this point to conclude the presentation of the United States today.

2. *First*, as my colleagues have explained, it simply would not be appropriate for the Court to indicate provisional measures in this case. There is no dispute between Mexico and the United States "as to the meaning or scope" of the *Avena* Judgment. Article 60 requires such a dispute, and without one, there is no basis for the Court to proceed with Mexico's Application. Under these circumstances, the Court lacks the prima facie jurisdiction required for the indication of provisional measures, and the Court should therefore dismiss Mexico's request.

3. *Second*, the United States understands the gravity of the issue here — we are not blind to it. A man is scheduled to be executed. The issue of capital punishment arouses deep feelings. But this case is not about the death penalty. Although a pending execution date lends to the case an obvious immediacy, it is not at the heart of the legal issue before you. Rather, what *is* at the heart

of this case is the need to preserve the proper role of this Court to hear and decide *real* legal disputes. Mexico's Application simply does not present such a dispute.

4. *Third*, I want to again impress on the Court that the United States takes its international law obligation to comply with the *Avena* Judgment seriously. And not just to comply, not just to try to comply but to achieve the result of compliance. We have consistently sought practical and effective ways to implement that obligation. A three-year effort in this regard has only recently been frustrated by the Supreme Court's decision in the *Medellín* case. Accordingly, we have now initiated a new effort with the request by Secretary of State Rice and Attorney General Mukasey to the Governor of Texas. We are asking the state of Texas to take the steps necessary to give full effect to the *Avena* Judgment and have already initiated discussions with Texas officials about how to accomplish that objective.

5. *Finally*, I would urge the Court to consider the practical consequences of Mexico's Application. Mexico has come to the Court not with a genuine legal dispute, but seeking to force a particular result. In my opening, I tried to explain how seriously the United States takes its obligation to comply with *Avena*, and how substantial our efforts to find a practical and effective way to fulfil that obligation have been. We agree with Mexico that our international law objection is one of result, not just efforts. But to achieve this result, we are making numerous efforts. And these efforts require no further encouragement from the Court, Indeed, I worry that fresh intervention by the Court could pose significant complications. Under United States domestic law, a decision by this Court reaffirming the obligation established in *Avena*, or ordering provisional measures pending resolution of Mexico's Application, will not be automatically enforceable in United States courts, and — more importantly — will not give the President any greater authority to direct United States courts to comply with *Avena*. In other words, as a legal matter, a new decision will leave us *exactly* where we are now, trying to find a practical and effective solution to a difficult legal problem. A new decision could, however, inject fresh controversy into an issue that has already had more than its fair share of it. In a case where there is no real legal dispute, and where the Court's intervention would not legally change anything, that would be unfortunate indeed. I strongly urge the Court — above all because the law demands it — not to indicate

provisional measures in this case and ultimately to deem Mexico's request for interpretation inadmissible.

6. The submission of the United States is as follows: that the Court reject the request of Mexico for the indication of provisional measures of protection and not indicate any such measures, and that the Court dismiss Mexico's Application for interpretation on grounds of manifest lack of jurisdiction.

7. Thank you for your attention and consideration, Madam President, Members of the Court. The United States concludes its presentation for today.

The PRESIDENT: Thank you, Mr. Bellinger. Judge Bennouna has a question for the United States. Judge Bennouna.

M. le juge BENNOUNA : Je vous remercie Madame le président.

Comme vous venez de le dire Madame le président, cette question s'adresse aux Etats-Unis d'Amérique. Elle est comme suit : les Etats-Unis ont déclaré qu'ils interprétaient, comme le Mexique, l'arrêt de la Cour dans l'affaire *Avena* (paragraphe 153, point 9) comme leur imposant une obligation de résultat et que par conséquent il n'existait pas de différend sur le sens et la portée de cet arrêt, ainsi que cela est requis par l'article 60 du Statut de la Cour. Ma question commence là : cette interprétation concerne-t-elle l'administration des Etats-Unis ou bien est-elle également partagée par le Congrès de ce pays ? Je vous remercie Madame le président.

The PRESIDENT: Thank you, Judge Bennouna. The text of this question will be passed to the Parties as soon as possible. Should it be convenient for the United States to do so, the Court would appreciate a reply being given during the reply tomorrow of the United States.

That ends the first round of oral observations of the United States of America. The Court will meet again at 10 o'clock tomorrow morning to hear the second round of oral observations of Mexico. The Court now rises.

The Court rose at 5.45 p.m.