Non-Corrigé
Uncorrected

CR 2008/16

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2008

Public sitting

held on Friday 20 June 2008, at 10 a.m., at the Peace Palace,

President Higgins presiding,

***in the case concerning the* Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Mexico v. United States of America)**

VERBATIM RECORD

ANNÉE 2008

Audience publique

tenue le vendredi 20 juin 2008, à 10 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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comme conseils.

The PRESIDENT: Please be seated. The sitting is now open. The Court meets to hear the second round of the oral observations of Mexico on the request for provisional measures. And I call upon Ambassador Hernández García.

Mr. HERNÁNDEZ: Madam President, honourable Members of the Court, good morning.

The dispute between Mexico and the United States

1. In its oral interventions yesterday, the Government of Mexico was careful to respect this Court's precise instructions to limit its comments to the content of its request for provisional measures. After all, the Court did not convene this hearing to entertain arguments regarding the merits of Mexico's Request for interpretation. Mexico's intent, therefore, was to present its arguments on the merits at the appropriate phase of the proceedings. Nonetheless, because the United States devoted the great majority of its arguments to the merits, today Mexico is compelled to respond. Needless to say, Mexico does not in this manner wish to prejudice its right to present further arguments on the merits at the proper time.

2. Yesterday afternoon, the United States repeatedly affirmed its commitment to the full implementation of the *Avena* Judgment[1]. Mr. Bellinger indicated that the United States is still attempting to "persuade" the state of Texas to provide review and reconsideration[2], and he cautioned this Court that the issuance of provisional measures could compromise the ability of the United States to achieve its goal of full compliance[3]. He and other members of the United States delegation claimed that the United States agrees with Mexico that the *Avena* Judgment imposes an obligation of result, not an obligation of means[4]. To be clear, Mexico welcomes any good faith attempt to ensure that its nationals are provided with effective review and reconsideration that is fully consistent with this Court's mandate. But it is not apparent to Mexico that all of the constituent parts of the United States share the Administration's stated view regarding the interpretation and scope of the *Avena* Judgment.

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[1]CR 2008/15, p. 9, para. 6 (Bellinger); *ibid.*, p. 60, para. 4 (Bellinger); *ibid.*, p. 36, para. 22 (Thessin); *ibid.*,, para. 27 (Lowe).

[2]CR 2008/15, p. 36, para. 22 (Bellinger).

[3]*Id.*, p. 38, para. 27.

[4]*Id.*, p. 31, para. 3; p. 23, para. 15, p. 25, para. 23 (Mathias); p. 41, para. 36 (Thessin).

3. It is a basic principle of international law, as my colleague Catherine Amirfar stated yesterday[5], that the actions of Texas engage the international responsibility of the United States. As this Court is well aware, Article 4.1 of the Articles on State Responsibility establishes that:

> "[T]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial, or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State."[6]

Indeed, this Court recognized in its Judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* that Article 4.1 serves to codify customary international law (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment of 26 February 2007, para. 385).

4. Texas is the United States. And by scheduling Mr. Medellín's execution before he has received the remedy mandated by this Court in *Avena*, Texas has unmistakably communicated its disagreement with Mexico's interpretation of the Judgment. Texas clearly does not believe that it has an obligation of result — and nothing that the United States told you yesterday disproves the existence of *that* dispute between Mexico and the competent organs and authorities in the state of Texas. And while the United States Supreme Court, the executive branch of the United States, and the state of Texas may proclaim that the United States has an international legal obligation to comply with the *Avena* Judgment, this does not signify that each of those actors considers the international obligation to be one of result, rather than one of means. It goes without saying that if the constituent parts of the United States do not understand the *Avena* Judgment as an obligation of result, they do not share Mexico's view regarding the meaning and scope of the Judgment. This is precisely why Mexico's submissions ask this Court to issue provisional measures indicating that *all* competent organs and *all* of the constituent subdivisions of the United States, including *all* branches of government and any official, state or federal, exercising government authority, take all

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[5]CR 2008/14, p. 30, para. 12 (Amirfar).

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

measures necessary to ensure that its nationals are not executed pending the conclusion of these proceedings.

5. Madam President, Members of the Court, the United States has provided you with a series of diplomatic correspondence and other documents that, in Mr. Mathias's words, illustrate that the dispute between Mexico and the United States is over enforcement, not interpretation[7]. Because the United States relied so heavily on these documents, and because I was the author of some of them, I would like to take a few moments of your time to explain the context of those diplomatic exchanges.

6. Mexico freely admits that it has made every effort to promote full compliance with the *Avena* Judgment. But these efforts should not be confused with the dispute that brings us to this Court. Mexico is committed to ensuring that the rights of its nationals are vindicated, and it will continue to seek compliance with the *Avena* Judgment at every turn. For example, since the United States Supreme Court issued its decision in *Medellin* v. *Texas*[8], Mexico has repeatedly asked the United States Government to support legislation in the United States Congress that would fully implement the right to review and reconsideration under *Avena*. But in the three months since the Supreme Court issued its decision, the executive branch has neither proposed legislation, nor engaged in a dialogue with Members of Congress to explore legislative options.

7. Several weeks ago, as a courtesy to the United States, Mexico informed the executive branch that it was considering the presentation of a request for interpretation to this Court. This news provoked a series of diplomatic correspondence, conversations, and meetings. The United States urged Mexico not to file its Request. It claimed that it was engaging Texas officials in a dialogue about means of implementing the *Avena* Judgment. Specifically, it referred to a suggestion already made by the state of Texas that the Texas executive branch might be willing to create a panel of retired judges to review the cases of the Mexican nationals named in the Judgment. The United States explains that this panel could make recommendations to the Texas clemency board as to whether or not each national was prejudiced by the violation of Article 36 in his case.

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[7]CR 2008/15, p. 26, para. 28 (Mathias).

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

8. Mexico responded that this would not achieve the result required by the *Avena* Judgment: namely, judicial review and reconsideration (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004*, pp. 65-66, para. 140). An administrative panel, regardless of the biographies of its members, is not a court. It cannot provide a judicially binding decision, it is not subject to appeal, and ultimately, its recommendations would not be binding on the Texas clemency board. In the end, the United States proposal would have led to the result rejected by this Court in *Avena*: that is, entrusting the Texas clemency board with the ultimate power to accept or reject evidence regarding the violation of each national's Article 36 rights, with no judicial oversight *(id.*, p. 66, para. 143*)*.

9. The United States next proposed sending a letter to Texas Governor Perry that would seek Texas's support in implementing the *Avena* Judgment. Mexico informed the United States that in its view, the proposed letter did not go far enough. First, the Texas executive branch has no power to create a court that will be able to provide judicial review and reconsideration of the convictions and sentences of the Mexican nationals affected by the Judgment. Only the Texas legislature can create such a court, and the Texas legislature is in recess until January 2009.

10. Second, Mexico advised the United States that according to the Supreme Court's opinion in *Medellín*, Congress would need to pass legislation to implement the *Avena* Judgment nationwide. For this reason, Mexico asked the United States to seek a reprieve for Mr. Medellín that would give Congress the necessary time to enact such legislation. And because Mexico believed that the Texas Governor and clemency board might heed such a request to stay Mr. Medellín's execution, Mexico stated that it would defer filing its Request for interpretation if the United States agreed to make the request. This proposal was made in diplomatic correspondence, the purpose of which was not to express Mexico's legal position regarding its Request for interpretation. This letter was sent to Mr. Bellinger on 3 June 2008.

11. Before this Court, the United States argues that Mexico's diplomatic overtures evince an *exclusive* concern with compliance, rather than a dispute over the meaning or scope of the *Avena* Judgment. But the two are not mutually exclusive. Mexico *is* concerned about compliance with the Judgment, it is firmly committed to obtaining meaningful review and reconsideration for its

nationals, and it is *also* convinced that the United States and its constituent parts do not share Mexico's views regarding the scope or meaning of the Judgment.

12. Indeed, the correspondence the United States submitted to the Court yesterday provides a potent illustration of the divergent views of Mexico and the United States. The United States informed you that it had made extraordinary efforts, and had taken highly unusual measures, in order to ensure compliance with the *Avena* Judgment[9]. And the United States went on to say that it considers the *Avena* Judgment to impose an obligation of result[10]. In this regard, I would ask that you examine the letter sent by Secretary Rice and Attorney General Mukasey to Governor Perry on Tuesday. Nowhere do these officials request that Texas refrain from executing Mr. Medellín until he is provided with review and reconsideration. Nowhere does it ask the Governor to grant a reprieve. Nowhere does it suggest that Texas should pass legislation to implement the *Avena* Judgment. I draw your attention to these omissions because if the United States truly agreed with Mexico that the *Avena* Judgment imposed an obligation of result, it would certainly take the not so extraordinary step of simply asking Texas officials to defer the execution of Mr. Medellín. The United States Government similarly declined Mexico's request that it ask Texas prosecutors to refrain from seeking an execution date for Mr. Medellín in the first instance.

13. Madam President, distinguished Members of the Court, Professor Lowe yesterday told the Court that "litigation is not a game"[11]. Mexico could not agree more. One of its nationals is currently sitting in a prison cell in Livingston, Texas, where he has been placed in a form of administrative segregation that the prison authorities call "death watch". It is literally a countdown to his execution. But notwithstanding these facts, the United States has the temerity to suggest that Mexico's Request for interpretation is an abuse of process that would damage "the integrity and reputation of the tribunal which is the target of the attempt to enlist it in inappropriate activities"[12]. It is deeply offensive to suggest that my Government is toying with this Court, that it has "manufactured" a dispute to bring pressure on the United States[13]. Mexico did not "manufacture"

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[9]CR 2008/15, p. 11, para. 9 (Bellinger).

[10]*Id.*, p. 9, para. 3.

[11]CR 2008/15, p. 51, para. 21 (Lowe).

[12]*Id.*, p. 51, para. 24.

[13]*Id.*, pp. 46-47, paras. 5-6.

the execution order in your folders. Mexico did not invent the dispute over the scope and meaning of the *Avena* Judgment. And Mexico has no need to defend its decision to invoke the jurisdiction of this Court.

14. Madam President, I would ask that you call upon my colleague, Mr. Donald Donovan, who will address the requirements for provisional measures. I thank you for your attention.

The PRESIDENT: Thank you, Your Excellency. I now call Mr. Donovan.

Mr. DONOVAN:

Requirements for provisional measures

1. Madam President, Members of the Court, it is always useful at this point in the proceedings to identify exactly what is at issue and what is not. Here, that exercise is especially useful.

2. First, the United States does not contest that at this stage of the proceedings, the Court need satisfy itself only that the Applicant has made out a prima facie case of jurisdiction.

3. Second, the United States does not contest that in order to qualify for provisional measures, the Applicant need satisfy only three well-established requirements: it must show that the measures are intended to preserve the respective rights of the Parties; it must show irreparable injury, which necessarily incorporates a requirement of urgency; and it must show that the provisional measures sought would not anticipate the merits.

4. Third, the United States does not contest that the execution of Mr. Medellín or any of the other four Mexican nationals covered by the request for provisional measures, without having received the review and reconsideration ordered by this Court in *Avena*, would constitute irreparable injury of the most profound kind — both to Mexico and to the nationals for whom it seeks to exercise its right of diplomatic protection.

5. Fourth, the United States does not contest that Mr. Medellín is now scheduled to be executed on 5 August, and that the Texas trial court that scheduled his execution flatly rejected Mr. Medellín's request, as well as that of Mexico, that no date be set in order to allow appropriate

action to be taken at either the state or the federal level to bring about review and reconsideration in his case.

6. Fifth, the United States does not contest that in the circumstances Mexico has established, its Application qualifies as urgent within the meaning of this Court's cases.

7. Sixth, the United States does not contest that by issuing the provisional measures Mexico has sought, the Court would in no way anticipate the merits of the Request for interpretation. Indeed, the United States does not contest the proposition that the *only* way the Court would anticipate the merits is by allowing the execution to go forward, because that would disable the Court from granting effective relief if Mexico prevails on its Request.

8. Finally, the United States does not contest that as a legal matter, the Court may indicate provisional measures in the context of a request for interpretation. For the reasons outlined yesterday by Ms Amirfar, that result follows plainly from Article 41 and its object and purpose.

9. I have not yet addressed the United States position on the existence here of prima facie jurisdiction, or on the requirement in the circumstances here, that provisional measures seek to protect rights that are at issue in the underlying proceeding. On the first, prima facie jurisdiction, the United States argues that "[i]n the absence of a dispute with respect to issues raised by Mexico's Request for interpretation, [its] claim is not capable of falling within the provisions of Article 60"[14], which is the basis on which it has invoked the Court's jurisdiction. And according to the United States, this Court should find now that there is no dispute[15].

10. On the second, the relation between the provisional measures sought and the underlying claim, the United States appears to argue that Mexico has failed to establish the required nexus[16]. Again, its rationale is that Mexico has failed to make an affirmative showing that a dispute exists about the meaning or scope of the *Avena* Judgment.

11. In either form, and those set forth in several sets of submissions, these arguments reduce to the single contention that, even at this stage of the proceedings, the Court can reject Mexico's Request for interpretation *on the merits* on the ground that there is no genuine dispute between the

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[14]CR 2008/14, p. 36, para. 23 (Thessin).

[15]See, e.g., CR 2008/15, p. 9, para. 3 (Bellinger).

[16]CR 2008/15, p. 33, para. 12; p. 36, para. 23 (Thessin).

Parties as to the interpretation of the *Avena* Judgment. As the United States acknowledged in the course of its oral submissions yesterday, it draws myriad consequences from that single point. That means, of course, that if the United States is wrong on that point, none of the consequences follow. So I turn to that point.

12. Before I do so, though, I should pause for a moment. As I just pointed out, the common element in the United States arguments on, first, prima facie jurisdiction and, second, the relation between the relief sought by way of provisional measures and the relief sought in the underlying Application, is that both are premised on the notion that Mexico is wrong *on the merits*. With the greatest respect, the United States has simply ignored the most basic aspect of this Court's provisional measures jurisprudence, which is that the disposition of a request for provisional measures should not prejudge the merits. That rule is so fundamental that you, Madam President, drew the Parties' attention to it at the very outset of the hearing yesterday. It is flatly inconsistent with the standards governing the issuance of provisional measures by this Court for a respondent State to ask that the measures be withheld because it expects to prevail on the merits.

13. That is especially so when the respondent State uses the argument in an attempt to defeat jurisdiction. The foundation of the Court's Article 60 jurisdiction in a dispute over the meaning or scope of a judgment cannot change the prima facie character of the jurisdictional showing required at the provisional measures phase. As the United States effectively acknowledged yesterday, it would have to show that there was *manifestly* no basis for concluding that the Parties dispute the meaning or scope of the *Avena* Judgment before denying provisional measures on the basis of a lack of jurisdiction. Yet in both of the cases the United States cited yesterday, the case concerning the *Legality of the Use of Force* and the case concerning *Armed Activities on the Territory of the Congo*, the instruments on which the applicant sought to found jurisdiction were incapable *on their face* of supporting the types of claims raised by the applicants.

14. Specifically, in the case concerning the *Legality of the Use of Force*, the Court held that Yugoslavia could not properly raise claims against Belgium under the Genocide Convention because the threat or use of force against a State — which was the conduct at issue — could not in itself constitute an act of genocide within the meaning 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. 138, paras. 40-41). Thus, the Court reasoned, even if it were to find that the acts imputed by Yugoslavia to Belgium had in fact been committed, the complained-of conduct was simply not capable of coming within the purview of the instrument conferring jurisdiction. Likewise, in the *Armed Activities on the Territory of the Congo* case, the Court held that one of the jurisdictional basis cited by the Congo, the Unesco Constitution, was on its face incapable of supporting the type of claim raised (*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*, pp. 235-236, para. 42, and p. 248, para. 83).

15. Neither of those cases supports the United States argument here. Article 60 supplies a clear jurisdictional basis upon which to sustain claims concerning a dispute as to the scope or meaning of a judgment of this Court should those claims be substantiated in the merits phase. For purposes of establishing prima facie jurisdiction, that should end the enquiry.

16. In any event, the Court need not linger on these points, because even if the Court were determining the merits, the undisputed facts before the Court plainly reveal the requisite dispute.

17. As an initial matter, Ambassador Hernández emphasized just a few moments ago, and each of Ambassadors Gómez-Robledo, Hernández, and Lomónaco emphasized yesterday, that Mexico welcomes the assurances of Mr. Bellinger and his colleagues that the United States is committed to comply with the *Avena* Judgment and that the federal executive endorses Mexico's interpretation of that Judgment as imposing an obligation of result. The United States pointedly did not come before this Court and advise that it intends to breach.

18. But those assurances cannot change the facts on the ground. The United States emphasized in its submissions yesterday, that an applicant cannot create a dispute by simply alleging one. Fair enough. But, equally, a respondent cannot defeat a request for interpretation by walking into this Court and pretending that the dispute does not exist. The Court has already put that point as well as it can be put: in its 1962 Judgment in the *South West Africa Cases*, the Court explained that 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" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). And as the United States observed yesterday and the Court held in its

Judgment in the *Peace Treaties* case, whether a dispute exists is "a matter for objective determination" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74). Here, the objective circumstances plainly reveal the existence of a dispute.

19. As Ambassador Hernández has just pointed out, the most glaring evidence of that dispute is at tab 1 of your folder: it is the order of the District Court of Harris County, Texas, scheduling the execution of Mr. Medellín for 5 August. Texas is a competent authority of the United States. It is, in Mexico's view, fully bound by the *Avena* Judgment. Yet, as Ms Babcock explained yesterday and the United States does not contest, the District Court expressly rejected requests by Mr. Medellín and Mexico that it exercise its discretion to defer setting an execution date until legislative efforts in Texas or the United States Congress might provide a vehicle for review and reconsideration. Indeed, as Ms Babcock advised, the court did not even do Ambassador Hernández the courtesy of allowing him to speak. That is not a court bound by limitations of domestic law; that is a court bound to violate international law in the form of the *Avena* Judgment. Its actions reflect a different view of the requirements of *Avena* than that enunciated by the federal executive, and its actions establish the existence of a dispute.

20. That difference of view is not limited, by the way, to the local authorities in Texas. There is no indication that the Governor of Texas believes that the State is bound. He has, so far as can be determined, taken no steps of any kind, whether of compulsion or persuasion, to stop the execution, reflecting a position that Texas is not bound.

21. Nor, as Ambassador Hernández has also pointed out, is there any basis for the Court to conclude at this point that there is no difference in view at the federal level. For example, the United States has not identified any action taken to date in Congress that would indicate that the federal legislature understands itself bound by *Avena* to ensure that the nationals covered by the Judgment receive review and reconsideration.

22. Finally, Ambassador Hernández has canvassed the discussions between the respective foreign ministries of Mexico and the United States, which for the reasons he has explained also confirm the existence of a dispute. Among other things, the United States has not identified any

action the executive has taken to urge legislation in the Congress, and it has not given any indication that it will intervene in the Texas proceedings to seek to avoid Mr. Medellín's execution.

23. Assessing those objective circumstances, it simply cannot be said that there is no dispute between Mexico and the United States over the meaning and scope of the *Avena* Judgment, let alone that the absence of such a dispute is so manifest as to prompt the Court to ignore its own jurisprudence by making a final determination on the matter at the provisional measures stage.

24. Finally, with the Court's permission, I would like to address the United States argument that by filing a Request for interpretation of the *Avena* Judgment, and seeking in connection with that Request that the Court indicate provisional measures, Mexico is asking the Court to transgress the proper bounds of the judicial function. That argument takes a hard form and a soft form. The hard form is that Mexico's Request for interpretation should be dismissed now, without further proceedings, as an abuse of process. The soft form is the theme running throughout the United States submissions that Mexico is asking the Court to do something outside its function of determining legal rights, in this case in the form of an interpretation of *Avena*.

25. The hard form first. Here's the proposition. Mr. Medellín is sitting on death row in Texas, and a Texas trial court has just set an execution date in flagrant violation of Mexico's view of the requirements of *Avena*. Neither the Texas executive, nor the Texas legislature, nor the federal executive, nor the federal legislature has taken any legal steps at this point that would stop that execution from going forward. In Mexico's view, that failure to act reflects a dispute over the meaning and scope of *Avena*. So it files a Request for interpretation before this Court and an accompanying request for the indication of provisional measures requiring the United States to take all measures necessary to ensure that the execution does not go forward pending disposition of the Request.

26. The United States considers the initiation of proceedings in those circumstances an abuse of process. Here is the course it urges the Court to take. According to the United States, the Court, without determining whether there is jurisdiction (in other words, even though the Court may have jurisdiction and hence Mexico the right to proceed), and without determining whether Mexico is actually entitled on the merits to the relief it requests under Article 60 (in other words, even though Mexico might be entitled to that relief), should simply dismiss the Application, now, on the ground

that it is improperly motivated. What is the improper motivation? According to the United States, the only reason Mexico could have brought the case was to "bring pressure" on the United States to comply with *Avena* — a formula the United States repeated at least five times[17]. How are we to know that that allegedly improper motivation was the true reason for the filing? No need for evidence. We can rely on common sense, the lawyer's best friend.

27. In short, the United States suggests that, on the basis of the doctrine of abuse of process, this Court might dismiss a jurisdictionally well-founded and meritorious application for relief solely on the basis of speculation that the applicant's true motive is to gain an unfair advantage in pursuit of compliance with a legally binding judgment of this Court. At the same time, the United States insists that the Court would be applying the doctrine in pursuit of the objectives of preserving the integrity of the judicial process and preventing abuse of the judicial function. To be blunt, if those are the objectives, it would be hard to design a procedure or result more surely calculated to make a mockery of them.

28. It is no wonder that the United States does not provide a single international decision dismissing a claim on the basis of abuse of process. In the three cases in which the doctrine was invoked before this Court, including its Judgment in *Armed Activities on the Territory of the Congo* cited by the United States yesterday, the Court summarily rejected it (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Rwanda), Order of 10 July 2002, I.C.J. Reports 2002*, p. 219, paras. 45, 49, 94; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, paras. 37-38; *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Judgment, I.C.J. Reports 1991*, p. 53, paras. 26-27). The United States cannot even identify an accepted definition of the doctrine or the standard by which it would apply.

29. But before I leave abuse of process, there are two additional points to be made about the United States reliance on the *Armed Activities* Judgment. First, while Mexico did not understand the United States to suggest otherwise, we should be clear that the portions of the Judgment quoted by the United States did not rely on the doctrine of abuse of process. Second, in that case, the

[17]CR 2008/15, p. 9, para. 5 (Bellinger); *ibid.*, pp. 46-47, para. 6; p. 56, para. 39, p. 56, para. 41, p. 58, para. 50 (Lowe).

Court was in no way suggesting that it had the authority to look past the objective terms of an applicant's request in order to recharacterize its subjective motivation and, on that basis, dismiss the claim. As is crystal clear not only from the Judgment read as a whole, but from the very passage quoted by the United States, when the Court assessed "the object of the Congo's Application", it did so on the basis of the claim as set forth in Congo's pleadings (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Rwanda), Order of 10 July 2002, I.C.J. Reports 2002*, p. 248, para. 85). That Judgment provides no support whatsoever for the United States extravagant claim here.

30. So to the soft form of the argument. The United States suggests that, in the guise of asking the Court for an interpretation pursuant to Article 60 of the Statute, Mexico is attempting to lure this Court across the boundary between adjudication and enforcement. The United States has squarely asked the Court as well to consider the domestic political effect within the United States of its ruling on Mexico's Application. And by suggesting that the requested interpretation would have no "practical consequences", the United States has effectively suggested that the Court should take account of the prospect of compliance with its ruling in determining whether to render it[18].

31. On earlier occasions when this Court has had to deal with the same subject-matter, the Court has heard similar arguments that it was being asked to sail in forbidden waters. As long ago as 1998, during oral proceedings on Paraguay's request for provisional measures, and subsequently in the *LaGrand* merits phase, the United States warned the Court that by granting the requested relief it would improperly act as a domestic court of criminal appeal[19], and on that basis urged the denial of the relief.

32. In those cases, as well as in *Avena*, the Court was not deterred. Instead, the Court carefully explained that its function was to apply international law to the facts before it, including facts arising from a State's judicial processes, and then prescribed relief moored tightly to the legal rights it had determined. The Court thereby confirmed that the surest way to avoid either

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[18]CR 2008/15, p. 60, para. 5 (Bellinger).

[19]*Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Oral Proceedings*, 7 April 1998, 10 a.m., para. 4.7; *LaGrand (Germany* v. *United States of America), Merits, Oral Proceedings*, 14 Nov. 2000, 10 a.m., para. 2.27.

overstepping its authority or failing to fulfil its duty was to hew faithfully to the applicable legal instruments and the guidance provided by its own jurisprudence.

33. So too here. The instruments here are Articles 41 and 60 of the Court's Statute, and the guidance is that provided by the Court's well-settled jurisprudence on the requirements for provisional measures. Mexico respectfully submits that those authorities plainly entitle it to the relief it has sought, and it requests the Court to exercise its undoubted authority to grant that relief.

34. Madam President, may I now ask the Court to call upon Ambassador Lomónaco Tonda.

The PRESIDENT: Thank you, Mr. Donovan. The Court does now call upon Ambassador Lomónaco Tonda.

Mr. LOMÓNACO: Madam President, distinguished Members of the Court, good morning.

Concluding remarks and submissions

1. It is now my privilege to make brief concluding remarks and to formulate the final submissions of Mexico on its request for the indication of provisional measures. I shall be brief and would emphasize a few points.

2. *First*, as we have repeatedly stated, Mexico welcomes any good faith attempt to ensure that its nationals are provided with effective review and reconsideration that is fully consistent with this Court's mandate in the *Avena* Judgment. Nonetheless, it is clear that constituent organs of the United States do not share Mexico's view that the *Avena* Judgment imposes an obligation of result. It is thus clearly established that there is a dispute between the United States and Mexico as to the meaning and scope of paragraph 153 (9) of said Judgment, as described in our Application and throughout these oral pleadings.

3. *Second*, it has been amply demonstrated that this Court has jurisdiction, and surely prima facie jurisdiction, to entertain Mexico's Request for interpretation.

4. *Third*, Mexico has demonstrated ample basis for the indication of provisional measures. In light of the imminent risk posed by the scheduling of executions of Mexican nationals in the state of Texas, there can be no dispute that Mexico's present request falls squarely within the purview of Article 41 of the Statute of the Court.

5. Madam President, distinguished Members of the Court, taking into account the United States suggestion that Mexico's submissions require greater precision, Mexico makes the following revised submissions:

(a) that the United States, acting through all its competent organs and all its constituent subdivisions, including all branches of government and any official, state or federal, exercising government authority, take all measures necessary to ensure that José Ernesto Medellín, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending the conclusion of the proceedings instituted by Mexico on 5 June 2008, unless and until the five Mexican nationals have received review and reconsideration consistent with paragraphs 138 through 141 of this Court's *Avena* Judgment; and

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

6. This concludes Mexico's oral arguments. Madam President, Members of the Court, I thank you for your kind attention.

The PRESIDENT: Thank you, Your Excellency. This does indeed bring an end to the second round of oral argument of Mexico. The Court meets again at 4.30 this afternoon to hear the second round of oral argument of the United States of America. The Court now rises.

The Court rose at 10.45 a.m.