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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2008

Public sitting

held on Friday 20 June 2008, at 4.30 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 vendredi 20 juin 2008, à 16 h 30, 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,

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

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comme conseils.

The PRESIDENT: Please be seated. The Court meets this afternoon to hear the second round of the oral observations of the United States of America on the request for the indication of provisional measures filed by Mexico. And the Agent, Mr. Bellinger, has the floor.

Mr. BELLINGER:

Closing

1. Good afternoon. Thank you again, Madam President and Members of the Court, as we draw to the conclusion of our discussion of these issues.

2. We presented the substance of the United States argument yesterday. And as we stated, the United States agrees with the interpretation requested by Mexico, and in particular that the *Avena* Judgment imposes an "obligation of result" on the United States. Accordingly, there is no dispute "as to the meaning or scope" of that Judgment. Under these circumstances, there is no basis for the Court to proceed, and the Court lacks prima facie jurisdiction to indicate provisional measures. Indeed, because the import of Mexico's Application is not a request for *interpretation*, but rather a request for the Court to monitor *enforcement* of the *Avena* Judgment, the Court should use its inherent powers to dismiss Mexico's Application. That summarizes our position.

3. I now would like to respond to a few points in Mexico's presentation this morning.

A. The existence of a dispute is necessary for the indication of provisional measures

4. Mexico this morning conceded the need for the Court to satisfy itself that it has prima facie jurisdiction over a claim on the merits before it may indicate provisional measures in connection with that claim. As the United States explained yesterday, Mexico has not met this test. Mexico's claim on the merits arises under Article 60 of the Court's Statute. Accordingly, Mexico must show that its Request for interpretation is capable of falling under that Article in order to satisfy the prima facie jurisdiction requirement.

5. Mexico has not done so. Because there is no dispute between Mexico and the United States with respect to the interpretation of the *Avena* Judgment that Mexico has asked this Court to render, Mexico's Request for interpretation is not capable of falling within the scope of Article 60. Article 60 by its terms provides jurisdiction only where a dispute exists with respect to the scope or

meaning of a judgment of the Court. Because, as I will explain in a moment, Mexico has not identified such a dispute, Article 60 does not provide a jurisdictional basis for its Request for interpretation. And in the absence of such a jurisdictional basis, the Court should not proceed to consider the other factors identified by Mexico, and should instead dismiss its request for provisional measures.

6. Now this morning, Mexico suggested that the Court should not, at this stage, enquire into whether Mexico's Request for interpretation properly states the existence of a dispute as to the meaning or scope of the *Avena* Judgment.

7. But this misreads the Court's jurisprudence. The Court's provisional measures Order in the *Legality of Use of Force* case between Yugoslavia and Belgium shows that the Court does not, in fact, accept as true all allegations in determining whether prima facie jurisdiction exists. In that case, the Court observed "that [the] essential characteristic [of genocide] is the intended destruction of 'a national, ethnical, racial or religious group'" (*Legality of Use of Force (Yugoslavia* v. *Belgium), Request for the Indication of Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 138, para. 40). For its part, Yugoslavia alleged that Belgium's acts had deliberately created "conditions calculated at the physical destruction of an ethnic group, in whole or in part" (*id*., p. 125, para 2; p. 136, para. 34). The Court concluded, however, that "it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application . . . 'entail the element of intent, towards a group as such, required by the provision quoted above'" (*id.*, p. 138, para. 40). And on this basis, the Court decided that the Genocide Convention could not "constitute a basis on which the jurisdiction of the Court could prima facie be founded in this case" (*id.*, p. 138, para. 41). In other words, the Court did not simply accept all allegations as true in determining whether prima facie jurisdiction existed.

8. Likewise here, it is not sufficient for Mexico to allege that a dispute exists about the interpretation of the *Avena* Judgment. The Court must find some indication that the alleged dispute is a real one. As Mr. Thessin observed yesterday, if allegations alone were sufficient to satisfy the prima facie jurisdiction test, then that test would be a hollow form that any party could satisfy merely through artful pleading. More is required before the Court's "exceptional powers" to indicate provisional measures can be invoked.

9. But even putting questions of prima facie jurisdiction aside, Mexico does not meet the other criteria for the indication of provisional measures. Mexico's claim to have met these requirements rests on the foundation that there are currently rights at issue that the Court will resolve at a later date. Where, as here, there are no rights that are in dispute, *none* of the requirements for provisional measures are met.

10. Since the United States agrees that the individuals covered by paragraph 153 (9) of the *Avena* decision must get review and reconsideration, there are currently no rights "in issue" in the main proceedings. This is in contrast, and this is important, this is contrast to the prior cases under the Vienna Convention in which there *were* genuine disputes on the issues raised by the applicants' claims on the merits. And I will touch on that later.

11. With regard to irreparable prejudice to rights that are the subject of the dispute, Mexico addressed this question solely by asserting that the application of the death penalty would prejudice the interests of its nationals. Now as we noted yesterday, we fully appreciate the gravity presented by cases involving the death penalty. But Mexico's analysis paid little attention to the second half of the irreparable prejudice requirement — that the rights to be protected must be the subject of a dispute in connection with a claim on the merits. Again, since no dispute exists on the issues on which Mexico seeks interpretation, there are no rights at issue that could be the subject of a dispute.

B. There is no dispute

12. Mexico argues that there *is* in fact a dispute because it claims that the state of Texas, or perhaps even one judge in the state of Texas, has a different interpretation of this Court's *Avena* Judgment than Mexico does. This, Mexico contends, forms the basis of a claim under Article 60 because "the actions of Texas engage the international responsibility of the United States"[1]. But here, Mexico has conflated two sets of principles under international law. The first is the law of State responsibility, under which a State is responsible for the actions of its political organs. This includes federal, state, and local officials[2]. But the second principle involves the question of who speaks authoritatively on behalf of the State.

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[1]CR 2008/16, p. 9, para. 3 (Hernández).

[2]See Article 4, Draft Articles on Responsibility of States for Internationally Wrongful Acts.

13. Of course, the United States agrees that it is responsible under international law for the actions of its political subdivisions. That is not the same, however, as saying that the views of a state court are attributed to the United States for purposes of determining whether there is a dispute between the United States and Mexico as to the meaning and scope of the *Avena* Judgment. As the Commentary to the Articles on the Responsibility of States makes clear, the question of who can speak on behalf of a State is "a separate question from whether the conduct of that person or entity [is] attributable to the State"[3].

14. This Court's *Gulf of Maine* case also makes clear that the Court will give legal effect only to statements made by officials with authority to speak on behalf of the State. Accordingly, in determining whether a dispute exists between the United States and Mexico, the Court *must* look to statements made by officials with authority to speak internationally on behalf of the United States. State officials do not have this authority.

15. As between the federal government and the state government, the United States Constitution places power over foreign relations in the federal government[4]. Our Supreme Court has said specifically that "the power over all the foreign relations of the country . . . [is] forbidden to state governments"[5]. In the field of international relations, the United States speaks with one voice through the executive branch, not through the states, not through local officials, not through the Congress. The statements and actions of state officials simply do not represent the position of the United States Government on these matters, even though the United States would be responsible, clearly, under the principle of State responsibility for the internationally wrongful actions of those officials.

16. The implications of Mexico's contrary position are breathtaking. Might the views of a local government, or even a local official, constitute the views of a country in other cases as well? If a city or a province in a particular country issued a proclamation that a treaty should be interpreted in a certain way, could that constitute the basis of a dispute with another country about the meaning of that treaty, subject to the jurisdiction of this Court? Of course it is not just

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[3]Commentary to Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 20, para. 5.

[4]See Art. I, Sect. 8; Art. II, Sect. 2; *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941).

[5]*Chinese Exclusion* case, 130 U.S. 581, 606 (1889).

questions on the interpretation of treaties that might be implicated. Particular cities or provinces might well have their own views on how a judgment of this Court should be interpreted. Would this be grounds for an interpretation case under Article 60? What would that do for the basic rule under Article 60 that the judgments of this Court are supposed to be "final and without appeal"?

C. Response to Judge Bennouna's question

17. Now this might be a good place to respond to the question that Judge Bennouna asked yesterday afternoon about the views of the United States Congress regarding the *Avena* Judgment. Congress has not in fact adopted legislation on this issue, so there is no real way for me to represent to you the view of our "Congress" as such. Individual Members of Congress may of course have individual views, but that is really a separate question. It is worth noting though that — even assuming a large number of individual Members of Congress might agree that the *Avena* decision is binding as a matter of international law — it does not necessarily mean that Congress would adopt legislation on the point. Congress is a political body, and the actions of Members of Congress can be affected by a wide range of factors. These may include such things as Congress's need to deal with the press of other legislative business, the political need of individual Members to focus on particular issues, and the need to accommodate the concerns of individual Members with a particularly strong interest in an issue, so that even measures with wide support may not be adopted as Congress works to help ensure the success of other parts of its legislative agenda.

18. In any event, I should reiterate that — under the United States Constitution — it is the executive branch, under the leadership of the President and the Secretary of State, not the Congress, that speaks authoritatively for the United States internationally. There is a famous case that addresses this point, which many of you may know, in which our Supreme Court confirmed that it is the President who "is the sole organ of the nation in its external relations, and its sole representative with foreign nations"[6] — the President, not Congress.

19. The idea that the executive branch speaks for the Government also of course accords with the practice internationally in which Heads of State and Ministers for Foreign Affairs are responsible for representing States and presenting their views. There is just no question that this is

[6] *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

the basis on which international relations are conducted. This is reflected in State practice in the negotiation and conclusion of treaties, the representation of governments at international organizations and meetings, the opening and closing of embassies and, indeed, the representation of countries before this Court. It is foreign ministries, and embassies operating under their direction — not municipalities or parliaments — to which the international community looks to represent authoritatively the views of States around the world.

D. The United States actions are consistent with its understanding that the *Avena* Judgment imposes an obligation of result

20. Before this Court, the United States has, unequivocally, agreed with Mexico that the *Avena* Judgment imposes an "obligation of result". Mexico nevertheless claims to detect a genuine dispute about interpretation in diplomatic correspondence between the United States and Mexico. But the correspondence reveals no such thing. It is true that the United States discussed with Mexico measures that could move the United States toward a practical solution. But the United States never suggested that any particular measures would in themselves fulfil the United States obligations under *Avena*.

21. To the extent that Mexico is suggesting that the United States should take or should have taken particular steps to implement the *Avena* Judgment, this is not a dispute as to the scope or meaning of that Judgment, but something else.

22. The *Avena* Judgment quite plainly states that the United States is to implement the review and reconsideration requirement "by means of its own choosing". Full stop. A request that the Court require additional or particular actions on the part of the United States would have the Court rewrite the *Avena* Judgment, not interpret it.

23. Mexico made several references this morning to various steps that it would like the United States to take, that it asserts that the United States has not taken. Mexico stated "neither the Texas executive, nor the Texas legislature, nor the federal executive, nor the federal legislature"[7] has taken particular steps that Mexico seeks.

[7]CR 2008/16, p. 18, para. 25 (Donovan).

24. Now, we can understand that Mexico wants the United States Congress to undertake legislation to implement *Avena*, that it wants Texas to implement such legislation, that it wants the Governor of Texas and the Texas Pardons and Parole Board to grant Mr. Medellín a reprieve in order to allow time for legislation. But it simply cannot be said that an omission on the part of any of these bodies to take specific actions, such as these, reflects a *legal* dispute as to the interpretation of the *Avena* Judgment.

25. According to Mexico, these omissions "reflect[] a dispute over the meaning and scope of *Avena*". Not so. The United States has made clear — consistently — that we fully agree with Mexico that the *Avena* Judgment imposes an obligation of result. Thus, there is no basis for the Court to divine a different interpretation from particular alleged acts or omissions, which often reflect, to quote the Court's Judgment in *Haya de la Torre*, "considerations of practicability or of political expediency". To infer a legal dispute from such acts or omissions would be inappropriate.

E. Conclusion

26. Now, let me conclude with a few final points. First: this morning, Mexico revised the provisional measures order that it is asking the Court to issue. Rather than asking the Court for a blanket order that no executions be carried out in the five specified cases, Mexico now asks for an order that no executions be carried out in those cases unless and until the individuals in question have received review and reconsideration consistent with paragraphs 138 to 141 of the Court's Judgment in *Avena*. We welcome this clarification of Mexico's Request.

27. We note also though, that the revised provisional measures Order adds nothing to the obligation that is already imposed on the United States by paragraph 153 (9) of the *Avena* Judgment. The proposed order would do no more than restate the obligation to provide review and reconsideration in the cases at issue. Any points on which it might provide some arguable additional clarity are not in dispute. There is no question that if a death sentence were carried out in any of these cases without the required review and reconsideration, this would be inconsistent with the *Avena* Judgment. In short, the redundant order that Mexico seeks would serve no purpose. Where a final judgment of this Court clearly states the respective rights of the parties, there is simply no need, and no role, for a provisional measures order under Article 41.

28. Yesterday, Mexico characterized its request for provisional measures as "familiar" and "straightforward", and suggested that this case is no different from the requests for provisional measures in the earlier Vienna Convention cases of *Avena*, *LaGrand*, and *Breard*. But this is simply not so. In the earlier cases, there was a basis for issuing provisional measures to protect the status quo while the Court resolved an issue of "disputed rights" — that is, whether, in light of their Vienna Convention claims, the named defendants were entitled to review and reconsideration of their convictions and sentences. In other words, provisional measures in these earlier cases were preliminary to resolving a legal dispute regarding the rights of the Mexicans, and were necessary to preserve the status quo until that resolution. Mexico's present Application is entirely different. There no longer are "disputed rights" at issue because the nature of those rights was resolved by this Court in its *Avena* Judgment. And as we have made abundantly clear, there is no dispute as to the "meaning or scope" of the *Avena* Judgment.

29. There was reference this morning to Mexico's motivation in initiating these proceedings. The United States does not in any sense question such motivation; we understand and respect the seriousness and depth of Mexico's concerns about the scheduled execution of a Mexican national and implementation by the United States of the *Avena* Judgment. By stating that Mexico's real purpose in these proceedings is enforcement, rather than interpretation, of the *Avena* Judgment, we are not stating that Mexico's *goal* of enforcement is somehow untoward as a general matter. But enforcement of a judgment is not this Court's role.

30. Our legal concerns about the filing of an application that would involve the Court in what is essentially a proceeding to enforce one of its judgments are fundamental. This would not be an appropriate role for the Court under its Statute or the Charter. It does not reflect the proper role of the Court in the international legal system. It would have ramifications well beyond this case. The Court, in our view, should decline such a role. This is the case even if what is requested amounts to no more than a restatement of the judgment it has already delivered.

31. We understand the seriousness of the issue before the Court. We acknowledge that a 5 August execution date has been set for Mr. Medellín. But we contest that this gives rise to a dispute as to the "meaning or scope" of the *Avena* Judgment. To carry out Mr. Medellín's sentence without affording him the necessary review and reconsideration obviously would be inconsistent

with the *Avena* Judgment. But it would not be a *misunderstanding* of the *Avena* Judgment. And we are doing as much as we practically can to avoid that outcome.

32. We therefore continue to work with Mexico to provide review and reconsideration to the named *Avena* defendants. We regret that our full efforts thus far have not arrived at a full resolution of this matter and have brought us again before this Court. The United States deeply values its strong relations with Mexico. We consider Mexico one of our closest friends and allies. Of course, neighbours have their disputes from time to time, and our relationship with Mexico is no different. But I do want to make clear that even though we and Mexico stand on opposite sides of this litigation, we hope to continue to work with our Mexican friends to find a practical and effective way to obtain review and reconsideration for the defendants named in the *Avena* Judgment.

33. At the moment, our efforts are focused on requesting the state of Texas's assistance and initiating a discussion with Texas officials. We believe that this is the most effective way to seek to implement *Avena* and to win review and reconsideration for the named *Avena* defendants. It is not a futile enterprise. The personal participation of the Secretary of State and the Attorney General, who wrote jointly to the Governor of Texas, testifies to the seriousness of the United States commitment and our belief that this approach can succeed.

34. Madam President, Members of the Court, our formal submissions are as we stated yesterday. The Court should reject Mexico's request for provisional measures of protection and, at this time, also dismiss Mexico's Application for interpretation.

35. Thank you for your time and consideration. It has been a privilege to present our position to the Court. Thank you and good afternoon.

The PRESIDENT: Thank you, Mr. Bellinger. The presentation of the United States is now concluded and it brings the present series of sittings to an end. It remains for me to thank the representatives of the two Parties for the able assistance they have given to the Court by their oral observations in the course of these four hearings.

In accordance with practice, I would ask the Agents to remain at the Court's disposal.

The Court will render its Order on the request for the indication of provisional measures as soon as possible. The date on which the Order will be delivered at a public sitting will be duly communicated to the Agents of the Parties.

The Court, having no other business before it today, now rises.

The Court rose at 4.55 p.m.

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