16 JULY 2008

ORDER

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)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

DEMANDE EN INTERPRÉTATION DE L'ARRÊT DU 31 MARS 2004 EN L'AFFAIRE *AVENA ET AUTRES RESSORTISSANTS MEXICAINS (MEXIQUE c. ÉTATS-UNIS D'AMÉRIQUE)*

(MEXIQUE c. ÉTATS-UNIS D'AMÉRIQUE)

DEMANDE EN INDICATION DE MESURES CONSERVATOIRES

16 JUILLET 2008

ORDONNANCE

INTERNATIONAL COURT OF JUSTICE

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Present: *President* HIGGINS; *Vice-President* AL-KHASAWNEH; *Judges* RANJEVA, KOROMA, BUERGENTHAL, OWADA, TOMKA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV; *Registrar* COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and to Articles 73 and 74 of the Rules of Court,

Having regard to the Application instituting proceedings filed in the Registry of the Court on 5 June 2008 by the Government of the United Mexican States (hereinafter "Mexico"), whereby, referring to Article 60 of the Statute and Articles 98 and 100 of the Rules of Court, Mexico

requested the Court to interpret paragraph 153 (9) of the Judgment delivered by the Court on 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America)* (hereinafter "the *Avena* Judgment"),

Makes the following Order:

1. Whereas in its Application Mexico states that in paragraph 153 (9) of the *Avena* Judgment the Court found "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" mentioned in the Judgment, taking into account both the violation of the rights set forth in Article 36 of the Vienna Convention on Consular Relations (hereinafter "the Vienna Convention") and paragraphs 138 to 141 of the Judgment; whereas it is alleged that "requests by the Mexican nationals for the review and reconsideration mandated in their cases by the *Avena* Judgment have repeatedly been denied";

2. Whereas Mexico claims that, since the Court delivered its Judgment in the *Avena* case, "[o]nly one state court has provided the required review and consideration, in the case of Osvaldo Torres Aguilera", adding that, in the case of Rafael Camargo Ojeda, the State of Arkansas "agreed to reduce Mr. Camargo's death sentence to life imprisonment in exchange for his agreement to waive his right to review and reconsideration under the *Avena* Judgment"; and whereas, according to Mexico, "[a]ll other efforts to enforce the *Avena* Judgment have failed";

3. Whereas it is explained in the Application that, on 28 February 2005, the President of the United States of America (hereinafter the "United States"), George W. Bush, issued a Memorandum (also referred to by the Parties as a "determination"); whereas it is stated in the Application that the President's Memorandum determined that state courts must provide the required review and reconsideration to the 51 Mexican nationals named in the *Avena* Judgment, including Mr. Medellín, notwithstanding any state procedural rules that might otherwise bar review of their claims; whereas the President's Memorandum reads as follows:

> "I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States, that the United States will discharge its international obligations under the decision of the International Court of Justice in *[Avena]*, 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";

and whereas a copy of that Memorandum was attached as an exhibit to the brief filed on behalf of the United States as *amicus curiae* in the case of Mr. José Ernesto Medellín Rojas against the State of Texas, brought before the Supreme Court of the United States;

4. Whereas, according to Mexico, on 25 March 2008, in Mr. Medellín's case, the Supreme Court of the United States, while acknowledging that the *Avena* Judgment constitutes an obligation under international law on the part of the United States, ruled that "the means chosen by the

President of the United States to comply were unavailable under the US Constitution" and that "neither the *Avena* Judgment on its own, nor the Judgment in conjunction with the President's Memorandum, constituted directly enforceable federal law" precluding Texas from "applying state procedural rules that barred all review and reconsideration of Mr. Medellín's Vienna Convention claim"; and whereas Mexico adds that the Supreme Court did confirm, however, that there are alternative means by which the United States still can comply with its obligations under the *Avena* Judgment, in particular, by the passage of legislation by Congress making a "non-self-executing treaty domestically enforceable" or by "voluntary compliance by the State of Texas";

5. Whereas, in its Application, Mexico points out that, since the decision of the Supreme Court, a Texas court has declined the stay of execution requested by counsel for Mr. Medellín in order "to allow Congress to pass legislation implementing the United States's international legal obligations to enforce this Court's *Avena* Judgment", and has scheduled Mr. Medellín's execution for 5 August 2008; whereas, according to Mexico, "Texas has made clear that unless restrained, it will go forward with the execution without providing Mr. Medellín the mandated review and reconsideration"; whereas Mexico asserts that the actions of the Texas court will thereby irreparably breach the United States obligations under the *Avena* Judgment;

6. Whereas it is contended that at least four more Mexican nationals are also "in imminent danger of having execution dates set by the State of Texas without any indication that the Mexican nationals facing execution will receive review and reconsideration"; whereas Mexico states in its Application that, on 29 November 2007, the Supreme Court of California "affirmed the conviction and sentence of Martín Mendoza García and simultaneously rejected his claim that he was entitled to review and reconsideration consistent with *Avena* on the basis of the record on direct appeal"; whereas Mexico also states that, on 31 March 2008, following its decision in Mr. Medellín's case, the Supreme Court of the United States denied petitions for review and reconsideration under the *Avena* Judgment by seven other Mexican nationals in whose cases this Court had found violations of Article 36 of the Vienna Convention, namely Messrs. César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, Ignacio Gómez, Félix Rocha Díaz, Virgilio Maldonado and Roberto Moreno Ramos; and whereas Mexico adds that, on 27 May 2008, the United States Court of Appeals for the Fifth Circuit declined to grant Ignacio Gómez leave to appeal the dismissal of a federal petition for post-conviction relief that was premised in part on the Vienna Convention violation in his case;

7. Whereas Mexico explains that it has sought repeatedly to establish its rights and to secure appropriate relief for its nationals, both before and after the decision of the Supreme Court of the United States, but that its diplomatic démarches have been ineffective; whereas it contends that "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 United Nations Charter to comply with the terms of the *[Avena]* Judgment", but have failed to take appropriate action or have taken affirmative steps in contravention of that obligation;

8. Whereas, in its Application, Mexico refers to Article 60 of the Statute of the Court which provides that "[i]n the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party" and contends, citing the Court's case law, that the Court's jurisdiction to entertain a request for interpretation of its own judgment is based directly on this provision;

9. Whereas Mexico asserts that it understands the language of paragraph 153 (9) of the *Avena* Judgment as establishing "an obligation of result" which is complied with only when review and reconsideration of the convictions and sentences in question has been completed; whereas, according to Mexico, while the United States may use "means of its own choosing", as stated in paragraph 153 (9), "the obligation to provide review and reconsideration is not contingent on the success of any one means" and therefore the United States cannot "rest on a single means chosen"; and whereas Mexico considers that it flows from this paragraph of the *Avena* Judgment that the United States must "prevent the execution of any Mexican national named in the Judgment unless and until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation";

10. Whereas Mexico, in its Application, submits that "anything short of full compliance with the review and reconsideration ordered by this Court in the cases of the 48 Mexican nationals named in the Judgment who are still eligible for review and reconsideration would violate the obligation of result imposed by paragraph 153 (9)";

11. Whereas Mexico points out 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 . . . despite the confirmation by its own Supreme Court that other means are available to ensure full compliance"; and whereas, according to Mexico, it follows that the conduct of the United States confirms the latter's understanding that "paragraph 153 (9) imposes only an obligation of means";

12. Whereas Mexico thus contends that there is a dispute between the Parties as to the meaning and scope of the remedial obligation established in paragraph 153 (9) of the *Avena* Judgment;

13. Whereas, at the end of its Application, Mexico asks the Court to adjudge and declare that

> "the obligation incumbent upon the United States under paragraph 153 (9) of the *Avena* Judgment constitutes an obligation of result as it is clearly stated in the Judgment by the indication that the United States must provide 'review and reconsideration of the convictions and sentences' but leaving it the 'means of its own choosing';
>
> and that, pursuant to the foregoing obligation of result,
>
> 1. the United States must take any and all steps necessary to provide the reparation of review and reconsideration mandated by the *Avena* Judgment; and

2. the United States must take any and all steps necessary to ensure that no Mexican national entitled to review and reconsideration under the *Avena* Judgment is executed unless and until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation";

14. Whereas, on 5 June 2008, after filing its Application, Mexico, referring to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court, also submitted a request for the indication of provisional measures in order "to preserve the rights of Mexico and its nationals" pending the Court's judgment in the proceedings on the interpretation of the *Avena* Judgment;

15. Whereas, in its request for the indication of provisional measures, Mexico refers to the basis of jurisdiction of the Court invoked in its Application, and to the facts set out and the submissions made therein;

16. Whereas Mexico recalls that Mr. José Ernesto Medellín Rojas, a Mexican national, will certainly face execution on 5 August 2008, and that another Mexican national, Mr. César Roberto Fierro Reyna, shortly could receive an execution date on 30 days' notice, while three other Mexican nationals — Messrs. Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos — shortly could receive execution dates on 90 days' notice, in the State of Texas;

17. Whereas Mexico contends that, under Article 41 of the Statute, the Court has the undoubted authority to indicate binding provisional measures "to ensure the status quo pending resolution of the dispute before it";

18. Whereas, in its request for the indication of provisional measures, Mexico notes that the Court indicated provisional measures to prevent executions in three prior cases involving claims brought under the Vienna Convention by States whose nationals were subject to execution in the United States as a result of criminal proceedings conducted in violation of the Convention; and whereas, according to Mexico, given that the Court indicated provisional measures in the *Avena* case concerning a dispute relating to the interpretation and application of the Vienna Convention, the Court similarly should act pursuant to Article 41 of the Statute where the dispute concerns the meaning and the scope of the obligations imposed by its own Judgment in this case;

19. Whereas Mexico indicates that "the paramount interest in human life is at stake" and that "that interest would be irreparably harmed if any of the Mexican nationals whose right to review and reconsideration was determined in the *Avena* Judgment were executed without having received that review and reconsideration"; and whereas Mexico states in the following terms the grounds for its request and the possible consequences if it is denied:

> "Unless the Court indicates provisional measures pending this Court's disposition of Mexico's Request for Interpretation, Mr. Medellín certainly will be executed, and Messrs. Fierro, Leal García, Moreno Ramos, and Ramírez Cárdenas will

be at substantial risk of execution, before the Court has had the opportunity to consider the dispute before it. In that event, Mexico would forever be deprived of the opportunity to vindicate its rights and those of the nationals concerned";

20. Whereas Mexico claims that, as far as the United States is concerned, any delay in an execution would not be prejudicial to the rights of the United States as all of the above-mentioned Mexican nationals would remain incarcerated and subject to execution once their right to review and reconsideration has been vindicated;

21. Whereas Mexico adds in its request that "[t]here also can be no question about the urgency of the need for provisional measures";

22. Whereas it concludes that provisional measures are justified in order "both to protect Mexico's paramount interest in the life of its nationals and to ensure the Court's ability to order the relief Mexico seeks";

23. Whereas Mexico asks that, pending judgment on its Request for interpretation, the Court indicate:

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

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

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

and whereas Mexico further asks the Court to treat its request for the indication of provisional measures as a matter of the greatest urgency "in view of the extreme gravity and immediacy of the threat that authorities in the United States will execute a Mexican national in violation of obligations the United States owes to Mexico";

24. Whereas on 5 June 2008, the date on which the Application and the request for the indication of provisional measures were filed in the Registry, the Registrar advised the Government of the United States of the filing of those documents and forthwith sent it signed originals of them, in accordance with Article 40, paragraph 2, of the Statute of the Court and with Article 38, paragraph 4, and Article 73, paragraph 2, of the Rules of Court; and whereas the Registrar also notified the Secretary-General of the United Nations of that filing;

25. Whereas, on 5 June 2008, the Registrar also informed the Parties that the Court, in accordance with Article 74, paragraph 3, of the Rules of Court, had fixed 19 June 2008 as the date for the opening of the oral proceedings on the request for the indication of provisional measures;

26. Whereas, by a letter of 12 June 2008, received in the Registry on the same day, the United States Government informed the Court of the appointment of an Agent and a Co-Agent for the case;

27. Whereas, at the public hearings held on 19 and 20 June 2008 in accordance with Article 74, paragraph 3, of the Rules of Court, oral statements on the request for the indication of provisional measures were presented:

On behalf of Mexico:

by H.E. Mr. Juan Manuel Gómez-Robledo,
H.E. Mr. Joel Antonio Hernández García,
Ms Sandra Babcock,
Ms Catherine Amirfar,
Mr. Donald Francis Donovan,
H.E. Mr. Jorge Lomónaco Tonda;

On behalf of the United States:

by Mr. John B. Bellinger, III,
Mr. Stephen Mathias,
Mr. James H. Thessin,
Mr. Michael J. Mattler,
Mr. Vaughan Lowe;

and whereas at the hearings a question was put by a Member of the Court to the United States, to which an oral reply was given;

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28. Whereas, in the first round of oral argument, Mexico restated the position set out in its Application and in its request for the indication of provisional measures, and affirmed that the requirements for the indication by the Court of the provisional measures requested had been met in the present case;

29. Whereas Mexico stated that, while it recognized and welcomed the efforts undertaken by the Government of the United States to enforce the *Avena* Judgment in state courts, those efforts, in its view, had fallen short of what was required by the Judgment; whereas Mexico reiterated that "the Governments of Mexico and the United States [had] divergent views as to the meaning and scope of paragraph 153 (9) of the *Avena* Judgment, and that a clarification by [the] Court [was] necessary"; and whereas it added that its request for the indication of provisional measures was limited to what was strictly necessary to preserve Mexico's rights pending the Court's final judgment on its Request for interpretation;

30. Whereas Mexico insisted that there was an overwhelming risk that authorities of the United States imminently would act to execute Mexican nationals in violation of obligations incumbent upon the United States under the *Avena* Judgment; whereas it specifies in particular that, unless provisional measures were indicated by the Court, one of its nationals, Mr. José Ernesto Medellín Rojas, would be executed on 5 August 2008 and that four other Mexican nationals, Messrs. César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos could also be at risk of execution before the Court ruled on the Request for interpretation; and whereas Mexico accordingly stressed that the condition of urgency required for the indication of provisional measures was satisfied;

31. Whereas at the end of the first round of oral observations Mexico thus requested the Court, "as a matter of utmost urgency", to issue an order indicating:

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

32. Whereas, in its first round of oral observations, the United States asserted that Mexico had failed to demonstrate that there existed between the United States and Mexico any dispute as to "the meaning or scope of the Court's decision in *Avena*", as required by Article 60 of the Statute, because the United States "entirely agree[d]" with Mexico's position that the *Avena* Judgment imposed an international legal obligation of "result" and not merely of "means"; whereas, according to the United States, the Court was being "requested by Mexico to engage in what [was] in substance the enforcement of its earlier judgments and the supervision of compliance with them"; whereas the United States observed that, given the fact that it had withdrawn from the Optional Protocol to the Vienna Convention on Consular Relations on 7 March 2005, a proceeding on interpretation was "potentially the only jurisdictional basis" for Mexico to seise the Court in matters involving the violation of that Convention; whereas the United States argued that, in the "absence of a dispute, the Court lack[ed] prima facie jurisdiction to proceed" and thus provisional measures were "inappropriate in this case"; and whereas the United States further urged that, under its "inherent powers", the Court should dismiss Mexico's Application on the basis that it constituted "an abuse of process", being directed to the implementation of the *Avena* Judgment, which lay beyond the Court's judicial function;

33. Whereas the United States explained that it has faced considerable "domestic law constraints" in achieving the implementation of the *Avena* Judgment, due to its "federal structure, in which the constituent states . . . retain[ed] a substantial degree of autonomy, particularly in matters relating to criminal justice", combined with its "constitutional structure of divided

executive, legislative, and judicial functions of government at the federal level"; whereas the United States contended that, despite these constraints, since the *Avena* Judgment, it has undertaken a series of actions to achieve the implementation of the Court's Judgment;

34. Whereas the United States noted in particular that the President of the United States issued a Memorandum in early 2005 to the Attorney General of the United States (see paragraph 3 above) directing that the state courts give effect to the *Avena* Judgment; whereas, according to the United States, under the terms of the Memorandum, in order to provide the Mexican nationals named in the *Avena* Judgment with review and reconsideration in state courts of their claims under the Vienna Convention, "state law procedural default rules were to be deemed inapplicable"; whereas the United States added that "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"; whereas the United States pointed out that the United States Federal Department of Justice filed an amicus brief and 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 reconsideration required by the *Avena* Judgment; whereas the United States stated that "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*", concluding that the President "had acted unconstitutionally in seeking to pre-empt Texas state law, even in order to comply with an international law obligation"; whereas, in addition, the United States referred to three filings it has made in support of the Presidential Memorandum, requiring review and reconsideration for "the *Avena* defendants" in the United States Supreme Court;

35. Whereas the United States indicated that the Supreme Court, in its recent decision, had "rejected the United States arguments and refused to treat the President's determination as binding on state courts", concluding that "the President lacked the inherent authority under [the United States] Constitution" and that "Congress had not given him the requisite additional authority to order states to comply with the decision of [the International] Court [of Justice]"; whereas the United States asserted that the Supreme Court reaffirmed the obligation of the United States under international law to comply with the *Avena* decision; whereas the United States noted however that, in focussing on the status of that obligation in United States domestic law, i.e. "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 the decisions of the International Court of Justice were not automatically and directly enforceable in United States courts; whereas, according to the United States, the Supreme Court "effectively ruled that the President's actions to give effect to *Avena* were *unconstitutional* under United States domestic law" (emphasis in the original);

36. Whereas the United States claimed that, having "fallen short" in its initial efforts to ensure implementation of the Court's Judgment in the *Avena* case, "the United States [was] now urgently considering its alternatives"; whereas the United States submitted that, to that end, a few days before the opening of the hearings,

> "Secretary of State Rice and Attorney General Mukasey [had] jointly sent a letter to the Governor of Texas . . . 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";

and whereas the United States maintained that, since the *Avena* Judgment, in connection with efforts by the United States federal government to persuade states to give effect to that Judgment, several Mexican nationals named therein had already received review and reconsideration of their convictions and sentences;

37. Whereas the United States argued that, contrary to Mexico's suggestion, the United States did not believe that it need make no further effort to implement this Court's *Avena* Judgment, and asserted that it would "continue to work to give that Judgment full effect, including in the case of Mr. Medellín";

38. Whereas the United States requested 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;

39. Whereas in its second round of oral observations Mexico stated that, by scheduling Mr. Medellín's execution before being afforded the remedy provided for in the *Avena* Judgment, the State of Texas, a constituent part and a competent authority of the United States, "has unmistakably communicated its disagreement with Mexico's interpretation of the Judgment" as establishing an international legal obligation of result and has thereby confirmed "the existence of *that* dispute between Mexico and the competent organs and authorities in the state of Texas" (emphasis in the original); whereas Mexico added that nor "[was] there any basis for the Court to conclude at this point that there [was] no difference in view at the federal level" and referred in that connection to the absence of any indication that "the federal legislature [understood] itself bound by *Avena* to ensure that the nationals covered by the Judgment receive review and reconsideration";

40. Whereas at the end of its second round of oral observations Mexico made the following request:

> "*(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)*";

41. Whereas, in its second round of oral observations, the United States stressed the fact that the United States agreed with the interpretation of paragraph 153 (9) requested by Mexico, "in particular that the *Avena* Judgment impose[d] an 'obligation of result' on the United States" and that accordingly, there was no dispute "as to the meaning or scope" of that Judgment; whereas the United States again expressed its view that "Mexico's real purpose in these proceedings [was] enforcement, rather than interpretation, of the *Avena* Judgment"; whereas the United States reiterated that, "since no dispute exist[ed] on the issues on which Mexico [sought] interpretation, there [were] no rights at issue that could be the subject of a dispute"; whereas the United States asserted that, as Mexico had not identified a dispute, Article 60 of the Statute did not provide a jurisdictional basis for its Request for interpretation and that, "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"; whereas, the United States reiterated that, "even putting questions of prima facie jurisdiction aside, Mexico['s request] [did] not meet the other criteria for the indication of provisional measures" as there were no rights in dispute;

42. Whereas the United States argued that its actions "[were] consistent with its understanding that the *Avena* Judgment impose[d] an obligation of result"; whereas it noted that under the United States Constitution, it was the executive branch, under the leadership of the President and the Secretary of State that spoke authoritatively for the United States internationally; whereas the United States explained that, although the acts of its political subdivisions could incur the international responsibility of the United States, that did not mean that these actions were those of the United States for purposes of determining whether there was a dispute with another State; whereas, according to the United States, it cannot be argued that "particular alleged acts or omissions", such as an omission by the United States Congress to undertake legislation to implement the *Avena* Judgment or an omission by the State of Texas to implement such legislation, "reflect[ed] a *legal* dispute as to the interpretation of the *Avena* Judgment" (emphasis in the original); whereas the United States expressed its regret that its full efforts thus far had not arrived at a full resolution of the matter and stated that it would continue to work with Mexico to provide review and reconsideration to the named *Avena* defendants;

43. Whereas at the close of its second round of oral observations, the United States reiterated the request made in the first round (see paragraph 38 above);

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44. Whereas the Court's jurisdiction on the basis of Article 60 of the Statute is not preconditioned by the existence of any other basis of jurisdiction as between the parties to the original case; and whereas it follows that, even if the basis of jurisdiction in the original case lapses, the Court, nevertheless, by virtue of Article 60 of the Statute, may entertain a request for interpretation;

45. Whereas in the case of a request for the indication of provisional measures made in the context of a request for interpretation under Article 60 of the Statute, the Court has to consider whether the conditions laid down by that Article for the Court to entertain a request for interpretation appear to be satisfied; whereas Article 60 provides that: "The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party"; and whereas this provision is supplemented by Article 98 of the Rules of Court, paragraph 1 of which reads: "In the event of dispute as to the meaning or scope of a judgment any party may make a request for its interpretation . . .";

46. Whereas, therefore, by virtue of the second sentence of Article 60, the Court may entertain a request for interpretation of any judgment rendered by it provided that there is a "dispute as to the meaning or scope of [the said] judgment";

47. Whereas Mexico requests the Court to interpret paragraph 153 (9) of the operative part of the Judgment delivered by the Court on 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*; whereas a request for interpretation must relate to a dispute between the parties relating to the meaning or scope of the operative part of the judgment and cannot concern the reasons for the judgment except in so far as these are inseparable from the operative part (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13,* p. 11; *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. 35, para. 10);

48. Whereas Mexico asks the Court to confirm its understanding that the language in that provision of the *Avena* Judgment establishes an obligation of result that obliges the United States, including all its component organs at all levels, to provide the requisite review and reconsideration irrespective of any domestic law impediment; whereas Mexico further submits that the

> "obligation imposed by the *Avena* Judgment requires the United States to prevent the execution of any Mexican national named in the Judgment unless and until that review and reconsideration has been completed and it has been determined whether any prejudice resulted from the Vienna Convention violations found by this Court" (see also paragraph 9 above);

whereas, in Mexico's view, the fact that "[n]either 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 th[e] execution [of Mr. Medellín] from going forward . . . reflects a dispute over the meaning and scope of [the] *Avena*" Judgment;

49. Whereas, according to Mexico, "by its actions thus far, the United States understands the Judgment to constitute merely an obligation of means, not an obligation of result" despite the formal statements by the United States before the Court to the contrary; whereas Mexico contends that notwithstanding the Memorandum issued by President of the United States in 2005, whereby he directed state courts to provide review and reconsideration consistent with the *Avena* Judgment,

"petitions by Mexican nationals for the review and reconsideration mandated in their cases have repeatedly been denied by domestic courts"; whereas Mexico claims that the decision by the Supreme Court of the United States in Mr. Medellín's case on 25 March 2008 has rendered the President's Memorandum without force in state courts; and whereas

> "[a]part from having issued the President's 2005 Memorandum, a means that fell short of achieving its intended result, the United States to date has *not* taken the steps necessary to prevent the executions of Mexican nationals until the obligation of review and reconsideration is met" (emphasis in the original);

50. Whereas the United States contends that Mexico's understanding of paragraph 153 (9) of the *Avena* Judgment as an "obligation of result", i.e. that the United States is subject to a binding obligation to provide review and reconsideration of the convictions and sentences of the Mexican nationals named in the Judgment, "is *precisely* the interpretation that the United States holds concerning the paragraph in question" (emphasis in the original); and whereas, while admitting that, because of the structure of its Government and its domestic law, the United States faces substantial obstacles in implementing its obligation under the *Avena* Judgment, the United States confirmed that "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";

51. Whereas, in the view of the United States, in the absence of a dispute with respect to the meaning and scope of paragraph 153 (9) of the *Avena* Judgment, Mexico's "claim is not capable of falling within the provisions of Article 60" and thus it would be "inappropriate for the Court to grant relief, including provisional measures, in respect to that claim"; whereas the United States contends that the Court lacks "jurisdiction *ratione materiae*" to entertain Mexico's Application and accordingly lacks "the prima facie jurisdiction required for the indication of provisional measures";

52. Whereas the United States submits that, in light of the circumstances, the Court "should give serious consideration to dismissing Mexico's Request for interpretation in its entirety at this stage of the proceedings";

53. Whereas the French and English versions of Article 60 of the Statute are not in total harmony; whereas the French text uses the term "contestation" while the English text refers to a "dispute"; whereas the term "contestation" in the French text has a wider meaning than the term used in the English text; whereas Article 60 of the Statute of the International Court of Justice is identical to Article 60 of the Statute of the Permanent Court of International Justice; whereas the drafters of the Statute of the Permanent Court of International Justice chose to use in the French text of Article 60 a term ("contestation") which is different from the term ("différend") used notably in Article 36, paragraph 2, and in Article 38 of the Statute; whereas, although in their ordinary meaning, both terms in a general sense denote opposing views, the term "contestation" is wider in scope than the term "différend" and does not require the same degree of opposition; whereas, compared to the term "différend", the concept underlying the term "contestation" is more flexible in its application to a particular situation; and whereas a dispute ("contestation" in the French text) under Article 60 of the Statute, understood as a difference of opinion between the

parties as to the meaning and scope of a judgment rendered by the Court, therefore does not need to satisfy the same criteria as would a dispute ("différend" in the French text) as referred to in Article 36, paragraph 2, of the Statute; whereas, in the present circumstances, a meaning shall be given that best reconciles the French and English texts of Article 60 of its Statute, bearing in mind its object; whereas this is so notwithstanding that the English texts of Article 36, paragraph 2, and Articles 38 and 60 of the Statute all employ the same word, "dispute"; and whereas the term "dispute" in English also may have a more flexible meaning than that generally accorded to it in Article 36, paragraph 2, of the Statute;

54. Whereas the question of the meaning of the term "dispute" ("contestation") as employed in Article 60 of the Statute has been addressed in the jurisprudence of the Court's predecessor; whereas "the manifestation of the existence of the dispute in a specific manner, as for instance by diplomatic negotiations, is not required" for the purposes of Article 60, nor is it required that "the dispute should have manifested itself in a formal way"; whereas recourse could be had to the Permanent Court as soon as the interested States had in fact shown themselves as holding opposing views in regard to the meaning or scope of a judgment of the Court (*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); and whereas this reading of Article 60 was confirmed by the present Court in the case concerning *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (*(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, pp. 217-218, para. 46);

55. Whereas the Court needs now to determine whether there appears to be a dispute between the Parties within the meaning of Article 60 of the Statute; whereas, according to the United States, its executive branch, which is the only authority entitled to represent the United States internationally, understands paragraph 153 (9) of the *Avena* Judgment as an obligation of result; whereas, in Mexico's view, the fact that other federal and state authorities have not taken any steps to prevent the execution of Mexican nationals before they have received review and reconsideration of their convictions and sentences reflects a dispute over the meaning and scope of the *Avena* Judgment; whereas, while it seems both Parties regard paragraph 153 (9) of the *Avena* Judgment as an international obligation of result, the Parties nonetheless apparently hold different views as to the meaning and scope of that obligation of result, namely, whether that understanding is shared by all United States federal and state authorities and whether that obligation falls upon those authorities;

56. Whereas, in light of the positions taken by the Parties, there appears to be a difference of opinion between them as to the meaning and scope of the Court's finding in paragraph 153 (9) of the operative part of the Judgment and thus recourse could be had to the Court under Article 60 of the Statute;

57. Whereas, in view of the foregoing, it appears that the Court may, under Article 60 of the Statute, deal with the Request for interpretation; whereas it follows that the submission of the United States, that the Application of Mexico be dismissed *in limine* "on grounds of manifest lack of jurisdiction", can not be upheld; and whereas it follows also that the Court may address the present request for the indication of provisional measures;

* *

58. Whereas the Court, when considering a request for the indication of provisional measures, "must be concerned to preserve . . . the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I),* p. 22, para. 35); whereas a link must therefore be established between the alleged rights the protection of which is the subject of the provisional measures being sought, and the subject of the principal request submitted to the Court;

59. Whereas Mexico contends that its request for the indication of provisional measures is intended to preserve the rights that Mexico asserts in its Request for interpretation of paragraph 153 (9) of the *Avena* Judgment; whereas, according to Mexico, the indication of provisional measures would be required to preserve the said rights during the pendency of the proceedings, as "in executing Mr. Medellín or others, the United States *will forever* deprive these nationals of the correct interpretation of the Judgment" (emphasis in the original); whereas, in Mexico's view, paragraph 153 (9) establishes an obligation of result incumbent upon the United States, namely it "must not execute any Mexican national named in the Judgment unless and until review and reconsideration is completed and either no prejudice as a result of the treaty violation is found or any prejudice is remedied";

60. Whereas Mexico argues that, given the dispute between the Parties as to the meaning and scope of paragraph 153 (9) of the *Avena* Judgment, "there can be no doubt that the provisional relief requested arises from the rights that Mexico seeks to protect and preserve until this Court clarifies the obligation imposed by [that] paragraph";

61. Whereas the United States submits that Mexico's request for the indication of provisional measures aims to prohibit the United States from carrying out sentences with regard to Mexican nationals named therein prior to the conclusion of the Court's proceedings on Mexico's Request for interpretation; whereas the United States contends that, in its Application, Mexico asks the Court to interpret the *Avena* Judgment to mean that the United States must not carry out sentences "unless the individual affected has received review and reconsideration and it is determined that no prejudice resulted from the violation of the Vienna Convention", rather than an absolute prohibition on the United States carrying out sentences in regard to each of the individuals mentioned in *Avena*; whereas the United States claims that, by focusing in the request for the indication of provisional measures on the carrying out of the sentence and not on its review and reconsideration, Mexico seeks to protect rights that are not asserted in its Application for interpretation;

62. Whereas the United States asserts that, as is clear from the Court's case law, "any provisional measures indicated must be designed to preserve [the] rights" which are the subject of the principal request submitted to the Court; and whereas it contends that the provisional measures requested by Mexico do not satisfy the Court's test because they go beyond the subject of the proceedings before the Court on the Request for interpretation;

63. Whereas, in proceedings on interpretation, the Court is called upon to clarify the meaning and the scope of what the Court decided with binding force in a judgment (*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; *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); whereas Mexico seeks clarification of the meaning and the scope of paragraph 153 (9) of the operative part of the 2004 Judgment in the *Avena* case, whereby the Court found that the United States is under an obligation to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals, taking into account both the violation of the rights set forth in Article 36 of the Vienna Convention and paragraphs 138 to 141 of the Judgment; whereas it is the interpretation of the meaning and scope of that obligation, and hence of the rights which Mexico and its nationals have on the basis of paragraph 153 (9) that constitutes the subject of the present proceedings before the Court on the Request for interpretation; whereas Mexico filed a request for the indication of provisional measures in order to protect these rights pending the Court's final decision;

64. Whereas, therefore, the rights which Mexico seeks to protect by its request for the indication of provisional measures (see paragraph 40 above) have a sufficient connection with the Request for interpretation;

* *

65. Whereas the power of the Court to indicate provisional measures under Article 41 of its Statute "presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings" (*LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 15, para. 22);

66. Whereas the power of the Court to indicate provisional measures will be exercised only if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before the Court has given its final decision (see, for example, *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 17, para. 23; *Certain Criminal Proceedings in France (Republic of the Congo* v. *France), Provisional Measure, Order of 17 June 2003, I.C.J. Reports 2003*, p. 107, para. 22; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007*, p. 11, para. 32);

67. Whereas Mexico's principal request is that the Court should order that 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 [concerning the Request for the interpretation of paragraph 153 (9) of the *Avena* Judgment,] unless and until [these] five Mexican nationals have received review and reconsideration consistent with paragraphs 138 to 141 of [that] Judgment";

68. Whereas Mexico asserts that it faces a real danger of irreparable prejudice and that the circumstances are sufficiently urgent as to justify the issuance of provisional measures; whereas Mexico, relying on the Court's previous case law, states that irreparable prejudice to the rights of Mexico would be caused by the execution of any persons named in the *Avena* Judgment pending this Court's resolution of the present Request for interpretation; whereas, according to Mexico,

> "[t]he execution of a Mexican national subject to the *Avena* Judgment, and hence entitled to review and reconsideration before the Court has had the opportunity to resolve the present Request for interpretation, would forever deprive Mexico of the opportunity to vindicate its rights and those of its nationals";

69. Whereas Mexico claims that there indisputably is urgency in the present circumstances given that Mr. Medellín's execution is scheduled for 5 August 2008, another Mexican national named in the *Avena* Judgment shortly could receive an execution date on 30 days' notice and three more shortly could receive execution dates on 90 days' notice; and whereas Mexico states that it "asks the Court to indicate provisional measures only in respect of those of its nationals who have exhausted all available remedies and face an imminent threat of execution" and reserves its right to "return to this Court for protection for additional individuals if changing circumstances make that necessary";

70. Whereas Mexico requests the Court to

> "specify that the obligation to take all steps necessary to ensure that the execution *not* go forward applies to all competent organs of the United States and all its constituent subdivisions, including all branches of government and any official, state or federal, exercizing government authority" (emphasis in the original)

and to order that the United States inform the Court of the measures taken;

71. Whereas the United States argues that, as in the present case there are no rights in dispute, "*none* of the requirements for provisional measures are met" (emphasis in the original);

72. Whereas the execution of a national, the meaning and scope of whose rights are in question, before the Court delivers its judgment on the Request for interpretation "would render it impossible for the Court to order the relief that [his national State] seeks and thus cause irreparable harm to the rights it claims" (*Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 257, para. 37);

73. Whereas it is apparent from the information before the Court in this case that Mr. José Ernesto Medellín Rojas, a Mexican national, will face execution on 5 August 2008 and other Mexican nationals, Messrs. César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos, are at risk of execution in the coming months;

whereas their execution would cause irreparable prejudice to any rights, the interpretation of the meaning and scope of which is in question; and whereas it could be that the said Mexican nationals will be executed before this Court has delivered its judgment on the Request for interpretation and therefore there undoubtedly is urgency;

74. Whereas the Court accordingly concludes that the circumstances require that it indicate provisional measures to preserve the rights of Mexico, as Article 41 of its Statute provides;

* *

75. Whereas the Court is fully aware that the federal Government of the United States has been taking many diverse and insistent measures in order to fulfil the international obligations of the United States under the *Avena* Judgment;

76. Whereas the Court notes that the United States has recognized that, were any of the Mexican nationals named in the request for the indication of provisional measures to be executed without the necessary review and reconsideration required under the *Avena* Judgment, that would constitute a violation of United States obligations under international law; whereas, in particular, the Agent of the United States declared before the Court that "[t]o carry out Mr. Medellín's sentence without affording him the necessary review and reconsideration obviously would be inconsistent with the *Avena* Judgment";

77. Whereas the Court further notes that the United States has recognized that "it is responsible under international law for the actions of its political subdivisions", including "federal, state, and local officials", and that its own international responsibility would be engaged if, as a result of acts or omissions by any of those political subdivisions, the United States was unable to respect its international obligations under the *Avena* Judgment; whereas, in particular, the Agent of the United States acknowledged before the Court that "the United States would be responsible, clearly, under the principle of State responsibility for the internationally wrongful actions of [state] officials";

* *

78. Whereas the Court regards it as in the interest of both Parties that any difference of opinion as to the interpretation of the meaning and scope of their rights and obligations under paragraph 153 (9) of the *Avena* Judgment be resolved as early as possible; whereas it is therefore appropriate that the Court ensure that a judgment on the Request for interpretation be reached with all possible expedition;

79. Whereas the decision given in the present proceedings on the request for the indication of provisional measures in no way prejudges any question that the Court may have to deal with relating to the Request for interpretation;

*

* *

80. For these reasons,

THE COURT,

I. By seven votes to five,

Finds that the submission by the United States of America seeking the dismissal of the Application filed by the United Mexican States can not be upheld;

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Koroma, Abraham, Sepúlveda-Amor, Bennouna;

AGAINST: *Judges* Buergenthal, Owada, Tomka, Keith, Skotnikov;

II. *Indicates* the following provisional measures:

(a) By seven votes to five,

The United States of America shall take all measures necessary to ensure that Messrs. José Ernesto Medellín Rojas, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending judgment on the Request for interpretation submitted by the United Mexican States, unless and until these five Mexican nationals receive review and reconsideration consistent with paragraphs 138 to 141 of the Court's Judgment delivered on 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*;

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Koroma, Abraham, Sepúlveda-Amor, Bennouna;

AGAINST: *Judges* Buergenthal, Owada, Tomka, Keith, Skotnikov;

(b) By eleven votes to one,

The Government of the United States of America shall inform the Court of the measures taken in implementation of this Order;

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Koroma, Owada, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov;

AGAINST: *Judge* Buergenthal;

III. By eleven votes to one,

Decides that, until the Court has rendered its judgment on the Request for interpretation, it shall remain seised of the matters which form the subject of this Order.

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Koroma, Owada, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov;

AGAINST: *Judge* Buergenthal.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this sixteenth day of July, two thousand and eight, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the United Mexican States and the Government of the United States of America, respectively.

(Signed) Rosalyn HIGGINS,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge BUERGENTHAL appends a dissenting opinion to the Order of the Court; Judges OWADA, TOMKA and KEITH append a joint dissenting opinion to the Order of the Court; Judge SKOTNIKOV appends a dissenting opinion to the Order of the Court.

(Initialled) R. H.

(Initialled) Ph. C.