

The Hague, 5 June 2008

The Honorable Rosalyn Higgins  
President  
International Court of Justice  
Peace Palace  
The Hague  
The Netherlands

**Request for Interpretation of Judgment in the  
*Case Concerning Avena and Other Mexican Nationals*  
(United Mexican States v. United States of America)**

Madame President:

Mexico has today instituted proceedings before the Court by filing a Request for Interpretation and a Request for the Indication of Provisional Measures of Protection. This case concerns a request by Mexico that the Court interpret paragraph 153(9) of its Judgment rendered in the *Case Concerning Avena and Other Mexican Nationals* to provide guidance as to the scope and meaning of the remedial obligations incumbent upon the United States.

Mexico hereby designates Mr. Juan Manuel Gómez-Robledo, Ambassador, Undersecretary for Multilateral Affairs and Human Rights of the Mexican Ministry of Foreign Affairs, Mr. Joel Antonio Hernández García, Ambassador, Legal Adviser to the Mexican Ministry of Foreign Affairs, and Mr. Jorge Lomónaco Tonda, Ambassador of Mexico to the Kingdom of the Netherlands, as its Agents in this case.

Mexico further designates as Advocates-Counselors Mr. Donald Francis Donovan of Debevoise & Plimpton LLP in New York, New York; Mr. Pierre-Marie Dupuy, Professor of International Law, European University Institute and Université de Paris II, Panthéon-Assas; Ms. Sandra Babcock, Clinical Director, Center for International Human Rights, Northwestern University Law School, Chicago, Illinois; Ms. Catherine M. Amirfar of Debevoise & Plimpton LLP in New York, New York; Mr. Gregory J. Kuykendall, Director of the Mexican Capital Legal Assistance Program; Mr. Daniel Hernández Joseph, Director General for Protection and Consular Affairs, Ministry of Foreign Affairs of Mexico; Mr. Víctor Manuel Uribe, Deputy Legal Adviser, Ministry of Foreign Affairs of Mexico; Mr. Agustín Rodríguez, Director for Foreign Litigation, Office of the Legal Advisor, Ministry of Foreign Affairs of Mexico; and Mr. Erasmo Lara Cabrera, Legal Counsel to the Embassy of Mexico in the Kingdom of the Netherlands.

Finally, Mexico designates as Assistants Messrs. Pablo Arrocha and Miguel Reyes, Office of the Legal Adviser, Ministry of Foreign Affairs of Mexico.

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May I take this opportunity to provide you, Madam President, the assurance of my highest esteem.

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Ambassador Jorge LOMÓNACO TONDA  
Ambassador of Mexico to the Kingdom of the Netherlands  
The Hague, Netherlands

INTERNATIONAL COURT OF JUSTICE

**REQUEST FOR INTERPRETATION  
OF THE JUDGMENT OF 31 MARCH 2004  
IN THE *CASE CONCERNING AVENA  
AND OTHER MEXICAN NATIONALS***

(UNITED MEXICAN STATES v. UNITED STATES OF AMERICA)

filed in the Registry of the Court  
on 5 June 2008

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Case Concerning Avena and Other Mexican Nationals

(United Mexican States v. United States of America)

**REQUEST FOR INTERPRETATION  
SUBMITTED BY THE GOVERNMENT OF  
THE UNITED MEXICAN STATES**

TO: Mr. Philippe Couvreur  
Registrar  
International Court of Justice  
Peace Palace  
The Hague  
The Netherlands

Sir:

On behalf of the Government of the United Mexican States and in accordance with Article 60 of the Statute of the Court and Rules 98 and 100 of the Rules of Court, I respectfully submit this Request for Interpretation. The Government of Mexico hereby requests that the Court interpret paragraph 153(9) of its Judgment rendered in the *Case Concerning Avena and Other Mexican Nationals* to provide guidance as to the scope and meaning of the remedial obligations incumbent upon the United States.

**I. PRELIMINARY STATEMENT**

1. On 31 March 2004, this Court rendered its Judgment on the merits in the *Case Concerning Avena and Other Mexican Nationals (United Mexican States v. United States of America)* (“*Avena*”). The case concerned Mexico’s allegations of systematic violations of the Vienna Convention on Consular Relations (569 U.N.T.S. 261, done on 24 April 1963) (the “Vienna Convention”) by competent authorities of the United States in the cases of certain Mexican nationals who had been sentenced to death in criminal proceedings in the United States. This Court found, by a vote of fourteen to one, that the United States had breached Article 36 of the Vienna Convention in the cases of 51 of the Mexican nationals by failing to inform them without delay upon detention of their rights to consular access and assistance under Article 36. *Avena, Merits, Judgment of 31 March 2004, I.C.J. Reports 2004*, para. 153(4).
2. This Court also found, again by vote of fourteen to one, “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” whose Vienna Convention rights had been violated “by taking account both of the violation

of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of [the *Avena*] Judgment.” *Avena, Merits, Judgment of 31 March 2004*, para. 153(9). The enumerated paragraphs prescribed that the review and reconsideration “should be both of the sentence and of the conviction,” that it should “guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account,” and that it “should occur within the overall judicial proceedings related to the individual defendant concerned.” *Id.* at paras. 138 and 141.

3. Pursuant to Article 59 of the Statute of the Court, the *Avena* Judgment is final and binding as between Mexico and the United States. Pursuant to Article 94(1) of the Charter of the United Nations, “[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.” Mexico and the United States are both Members of the United Nations and accordingly bound.
4. To date, however, requests by the Mexican nationals for the review and reconsideration mandated in their cases by the *Avena* Judgment have repeatedly been denied. On 25 March 2008, the Supreme Court of the United States determined in the case of José Ernesto Medellín Rojas, one of the Mexican nationals subject to the *Avena* Judgment, that the Judgment itself did not directly require U.S. courts to provide review and reconsideration under domestic law. *Medellin v. Texas*, 128 S. Ct. 1346 (U.S. 2008). The Supreme Court, while expressly recognizing the United States’s obligation to comply with the Judgment under international law, further held that the means chosen by the President of the United States to comply were unavailable under the U.S. Constitution and indicated alternate means involving legislation by the U.S. Congress or voluntary compliance by the State of Texas. *Id.* at 1365, 1368-1369. Since that decision was issued, Texas, a constituent organ of the United States capable of providing the requisite remedy, has scheduled Mr. Medellín for execution on 5 August 2008. Texas has made clear that unless restrained, it will go forward with the execution without providing Mr. Medellín the mandated review and reconsideration and will thereby irreparably breach the United States’s obligations under the *Avena* Judgment. Further, as set forth in the Request for Indication of Provisional Measures accompanying this Request, 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.
5. Mexico understands the operative language of paragraph 153(9) of the *Avena* Judgment to establish an obligation of result incumbent upon the United States. While the United States may use “means of its own choosing,” the obligation to provide review and reconsideration is not contingent on the success of any one means. Mexico understands that in the absence of full compliance with the obligation to provide review and reconsideration, the United States must be considered to be in breach. By its actions thus far, by

contrast, it is clear that the United States understands the Judgment to constitute merely an obligation of means. Further, Texas, a constituent state of the United States, does not recognize that the obligation to comply subjects its own law to that of binding international law.

6. In light of this dispute between Mexico and the United States as to the import of the language in question and Mexico's concern that the United States will irreparably breach its remedial obligations through the imminent execution of certain Mexican nationals, Mexico hereby requests this Court's guidance as to the scope and meaning of the operative language of paragraph 153(9) of the *Avena* Judgment.

## **II. PROCEDURAL HISTORY**<sup>1</sup>

### **A. The *Avena* Case**

7. On 9 January 2003, Mexico initiated proceedings in this Court against the United States, seeking a remedy for violations of the Vienna Convention on Consular Relations in the cases of individual Mexican nationals who were then under sentence of death in the United States. Mexico invoked the United States's consent to jurisdiction in the Vienna Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes. 24 April 1963, 596 U.N.T.S. 487, at Article 1.
8. The United States fully participated in the *Avena* proceedings. After extensive briefing and a week-long hearing, this Court rendered a Judgment that adjudicated the rights of Mexico and its nationals under the Vienna Convention. This Court held that the United States had failed to discharge its Article 36 obligations in 51 cases. Specifically, this Court held that:
  - The United States had breached Article 36(1)(b) in the cases of 51 Mexican nationals by failing "to inform detained Mexican nationals of their rights under that paragraph" and "to notify the Mexican consular post of the[ir] detention." *Avena, Merits, Judgment of 31 March 2004*, paras. 106(1)-(2), 153(4).
  - In 49 of those cases, the United States had also violated its obligations under Article 36(1)(a) "to enable Mexican consular officers to communicate with and have access to their nationals, as well as its obligation under paragraph 1(c) of that Article regarding the right of

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<sup>1</sup> To the extent they are relevant to this Request for Interpretation, all facts and points of law set forth by Mexico, both orally and in writing, in prior submissions in the *Avena* proceedings are incorporated by reference herein.

consular officers to visit their detained nationals.” *Id.* at paras. 106(3), 153(5)-(6).

- In 34 cases, the United States had also violated its obligation under Article 36(1)(c) “to enable Mexican consular officers to arrange for legal representation of their nationals.” *Id.* at paras. 106(4), 153(4), 153(7).
9. As to remedies, this Court directed the United States “to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals” whose Vienna Convention rights had been violated. *Id.* at para. 153(9).
  10. Although this Court granted the United States discretion to provide the required review and reconsideration “by means of its own choosing,” *id.* at para. 153(9), the Court specified that it must take place as part of the “judicial process,” *id.* at para. 140. Further, the Court directed that domestic procedural default doctrines could not bar relief, *id.* at para. 134; that the review and reconsideration must take account of the Article 36 violation on its own terms and not require that it qualify also as a violation of some other procedural or constitutional right, *id.* at para. 139; and finally, that the forum in which the review and reconsideration would occur must be capable of “examin[ing] the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention,” *id.* at para. 122.
  11. In addition, the United States having made assurances of non-repetition, this Court directed that review and reconsideration must be provided to any other Mexican nationals sentenced to severe penalties in the United States without their rights under Article 36(1) having been respected. *Id.* at para. 153(11).

**B. Efforts to Enforce the *Avena* Judgment in United States Courts**

12. Since this Court issued the *Avena* Judgment, individual Mexican nationals in whose cases Vienna Convention violations were found have attempted to secure review and reconsideration consistent with the terms of paragraph 153(9). Only one state court has provided the required review and reconsideration, in the case of Osvaldo Torres Aguilera.<sup>2</sup> In the case of Rafael

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<sup>2</sup> Osvaldo Torres Aguilera was under sentence of death in the State of Oklahoma when *Avena* was decided on the merits. Following the *Avena* Judgment, Mr. Torres filed a state petition for post-conviction relief premised in part on the violation of his rights under the Vienna Convention. The Oklahoma Court of Criminal Appeals concluded, after an evidentiary hearing, that Mr. Torres had in fact been prejudiced in the sentencing phase of his trial (but not as to his conviction). His claim for relief as to his sentence was rendered moot by the discretionary decision of the Governor of Oklahoma in a clemency proceeding to

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. All other efforts to enforce the *Avena* Judgment have failed.

13. All competent authorities of the United States government at both the state and federal levels acknowledge that the United States is under an international law obligation under Article 94(1) of the U.N. Charter to comply with the terms of the Judgment, but those authorities have either failed to take appropriate action or have taken affirmative steps in contravention of that obligation. Of most immediate concern, a court of the State of Texas, a constituent entity of the United States capable of providing the remedy, has set an execution date for one of the Mexican nationals after repeatedly refusing to comply with this Court's mandate in *Avena*. Execution Order, *Ex Parte Medellin*, No. 675430 (339th Dist. Ct., Harris County, Tex., May 5, 2008) (attached as Annex A). Having taken this affirmative step, Texas has made clear that unless restrained, it will execute José Ernesto Medellín Rojas without providing the requisite review and reconsideration and will thereby irreparably breach the United States's obligations under the *Avena* Judgment.

**1. Medellín Rojas, José Ernesto**

14. José Ernesto Medellín Rojas ("Mr. Medellín") is a Mexican national under sentence of death in the State of Texas whose Vienna Convention rights this Court found to have been violated. *Avena, Merits, Judgment of 31 March 2004*, paras. 106(1) and 106(4).
15. Prior to the issuance of this Court's final Judgment in *Avena*, Mr. Medellín had filed petitions for post-conviction relief in state and federal courts, raising claims based on the Vienna Convention violation in his case, but the state courts refused to consider these and other claims based on the municipal law doctrine of "procedural default." *Ex parte Medellin*, No. 50, 191-01 (Tex. Crim. App. Oct. 3, 2001). The federal court of first instance upheld the application of the Texas procedural default rule, and concluded that Mr. Medellín had forfeited his right to consideration of the Vienna Convention violation by failing to object to the violation at trial – even though he was at the time unaware of his Article 36 rights due to the failure of the competent authorities to notify him of those rights. *Medellin v. Cockrell*, 2003 U.S. Dist. LEXIS 27339, at \*36 (S.D. Tex. June 26, 2003). The federal court also held that the Vienna Convention did not create individually enforceable rights and, hence, no judicial remedy was available for its violation. *Id.* at \*37.

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commute his death sentence to life imprisonment without parole. *Torres v. Oklahoma*, 120 P.3d 1184 (Okla. Crim. App. 2005).

16. On 24 October 2003, while *Avena* was pending before this Court, Mr. Medellín sought leave to proceed before the federal Court of Appeals on several grounds, including his Vienna Convention claim. On 20 May 2004, after this Court had rendered the *Avena* Judgment, the Court of Appeals expressly refused to follow this Court’s mandate and denied Mr. Medellín’s application. *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004).

- a. **U.S. Supreme Court Proceedings and Intervention by the President of the United States (2004-2005)**

17. On 10 December 2004, the Supreme Court of the United States agreed to hear Mr. Medellín’s case to decide whether, under the U.S. Constitution, courts in the United States must give effect to the United States’s treaty obligation to comply with the *Avena* Judgment. *Medellin v. Dretke*, 543 U.S. 1032 (2004) (order granting writ of certiorari).

18. On 28 February 2005, approximately one month after Mr. Medellín had submitted his opening brief in the Supreme Court, President George W. Bush issued a signed, written determination 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. The President declared:

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.

19. The President’s determination was attached as an exhibit to the brief filed on behalf of the United States as *amicus curiae* in Mr. Medellín’s case. Br. for U.S. as Amicus Curiae Supporting Resp’t at App. 2, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). In that brief, which was filed in support of Texas, the United States did not endorse the position of Mr. Medellín that the *Avena* Judgment was directly binding on the courts of the United States pursuant to the treaty obligations voluntarily undertaken by the United States. *Id.* at 8-9. Instead, the United States argued that the *Avena* Judgment was enforceable as a result of the President’s determination to comply. *Id.* at 41.
20. The United States explained that pursuant to the President’s determination, individual Mexican nationals named in the Judgment “may file a petition in state court seeking [the] review and reconsideration [ordered in *Avena*], and the state courts are to recognize the *Avena* decision.” *Id.* at 42. In such a case, “a state court would not be free to reexamine whether the ICJ correctly

determined the facts or correctly interpreted the Vienna Convention.” *Id.* at 46. Finally, state procedural rules that might otherwise prevent a state court from giving effect to the *Avena* Judgment “must give way.” *Id.* at 43.

21. In deference to the President’s determination, Mr. Medellín filed a motion to stay his case in the Supreme Court, requesting that the case be held in abeyance while Mr. Medellín exhausted in state court his claims based on *Avena* and the President’s determination—neither of which existed at the time of his first state post-conviction petition. In order to ensure compliance with any applicable statute of limitations, Mr. Medellín filed the contemplated petition for a writ of habeas corpus in the Texas Court of Criminal Appeals while his case was pending before the Supreme Court, and he asked the Texas court to hold his petition in abeyance until the Supreme Court ruled on his motion for a stay.
22. On 23 May 2005, the Supreme Court dismissed the case “[i]n light of the possibility that the Texas courts [would] provide Medellín with the review he seeks pursuant to the *Avena* judgment and the President’s memorandum.” *Medellin v. Dretke*, 544 U.S. 660 (2005) (*per curiam*). The Court noted that it could later review the questions presented, “unencumbered by the issues that arise from the procedural posture” of a federal habeas case, following the resolution of Mr. Medellín’s subsequent state habeas action. *Id.* at 664 n.1; *see also id.* at 669 (Ginsburg, J., concurring); *id.* at 694 (Breyer, J., dissenting).

**b. State Court Proceedings (2005-2006)**

23. Following the dismissal of Mr. Medellín’s case from the Supreme Court, the Texas Court of Criminal Appeals set his habeas petition for briefing and oral argument on whether it satisfied the requirements of Article 11.071, § 5, of the Texas Code of Criminal Procedure (“Section 5”). *Ex parte Medellin*, 206 S.W.3d 584 (Tex. Crim. App. 2005) (order directing briefing). Section 5 is the Texas provision governing subsequent applications by petitioners who have previously sought post-conviction relief.
24. In both his petition and his brief, Mr. Medellín argued that the *Avena* Judgment and the President’s determination to comply with it constituted binding federal law that, by virtue of the U.S. Constitution, preempted any inconsistent provisions of Texas law, including any applicable procedural bars. Reply Br. of Applicant, *Ex parte Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006) (No. AP-75,207). As *amicus curiae*, the United States urged the Texas court to grant Mr. Medellín the review and reconsideration he sought, on the ground that President’s determination constituted preemptive federal law. Br. for U.S. as Amicus Curiae at 49-50, *Ex parte Medellin*, 223 S.W.3d 315 (No. AP-75,207).

25. On 14 September 2005, the Texas Court of Criminal Appeals heard oral argument from Mr. Medellín, the State of Texas, and the United States. On 15 November 2006, that court dismissed Mr. Medellín’s application, holding that he was procedurally barred from seeking review and reconsideration and that neither the *Avena* Judgment nor the President’s determination required a different result. *Ex parte Medellin*, 223 S.W.3d 315, 352 (Tex. Crim. App. 2006).
26. With respect to the *Avena* Judgment, the court held that Mr. Medellín’s claim was foreclosed by *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (U.S. 2006), which, the Texas court observed, had interpreted the Vienna Convention in a manner inconsistent with the *Avena* Judgment.<sup>3</sup> *Ex parte Medellin*, 223 S.W.3d at 330-332. “In this case,” the court concluded, “we are bound by the Supreme Court’s determination that ICJ decisions are not binding on United States courts.” *Id.* at 331. The Texas court did not address the question of whether the *Avena* Judgment, as Mr. Medellín had argued, would still be binding in the cases of individuals like him, but unlike the petitioners in *Sanchez-Llamas*, whose rights had been expressly adjudicated by this Court.<sup>4</sup>
27. With respect to the President’s determination, the Texas court was divided, with no single rationale commanding a majority. Four judges found that the President had “exceeded his inherent constitutional foreign affairs authority by directing state courts to comply with *Avena*.” *Id.* at 343. Specifically, those judges concluded that “the President has exceeded his constitutional authority by intruding into the independent powers of the judiciary.” *Id.* at 335.
28. Having found that neither the President’s determination nor the *Avena* Judgment amounted to binding federal law, the Court of Criminal Appeals concluded that it could not override applicable state law. The court then held that Mr. Medellín’s application was barred by state procedural default rules, and on that basis, dismissed it. *Id.* at 348-352.

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<sup>3</sup> In a case involving a Mexican national not subject to the *Avena* Judgment, the Supreme Court disagreed with the interpretation that this Court gave to the Vienna Convention in *Avena* and, noting that interpretations of this Court are entitled to “respectful consideration” but not conclusive effect in domestic courts, held that Article 36 claims may be subjected to the same procedural default rules that apply generally to other federal law claims. *Sanchez-Llamas*, 126 S. Ct. at 2685, 2687.

<sup>4</sup> See Subsequent Application for Post-Conviction Writ of Habeas Corpus, at 20-23, *Ex parte Medellin*, 223 S.W.3d 315 (No. AP-75,207); Br. of Applicant at 36, 41-43, 51, *Ex parte Medellin*, 223 S.W.3d 315 (No. AP-75,207).

**c. U.S. Supreme Court Proceedings (2007-2008)**

29. Following the decision of the Texas Court of Criminal Appeals, Mr. Medellín again petitioned the U.S. Supreme Court for review of his case. The Supreme Court agreed to hear Mr. Medellín's case to determine whether (1) the President of the United States acted within his authority when he determined that the states must comply with the United States's treaty obligation to give effect to the *Avena* Judgment, and (2) whether state courts were independently bound to give effect to the *Avena* Judgment in the cases of the 51 Mexican nationals whose rights were adjudicated therein. *Medellin v. Texas*, 127 S. Ct. 2129 (U.S. 2007) (order granting writ of certiorari).
30. Mr. Medellín argued that the United States, by ratifying the U.N. Charter, the Optional Protocol, and the Vienna Convention on Consular Relations, had agreed to comply with decisions of this Court in cases to which it was a party. Pet'r Br. at 16, *Medellin v. Texas*, 128 S. Ct. 1346 (U.S. 2008) (No. 06-984). While conceding that the U.S. Supreme Court had held in *Sanchez-Llamas* that U.S. courts were not bound by the *Avena* decision as a general matter, Mr. Medellín argued that compliance with the *Avena* Judgment was a binding treaty obligation as to the 51 individuals whose rights had been adjudicated by this Court. *Id.* at 21-22. Mr. Medellín thus argued that, under the Supremacy Clause of the U.S. Constitution, which places treaties on a level equal to acts of Congress, domestic courts are bound to enforce the *Avena* Judgment in the cases of the 51 Mexican nationals concerned and that any contrary state laws are preempted. *Id.* at 23-28. Furthermore, he argued that the President's determination that state courts should give effect to the *Avena* Judgment was a valid exercise of the President's Executive authority under the U.S. Constitution. *Id.* at 17-18.
31. The United States joined the proceedings as *amicus curiae* supporting Mr. Medellín and argued that the Texas Court of Criminal Appeals had erred in failing to give effect to the *Avena* Judgment. Br. for U.S. as Amicus Curiae Supporting Pet'r at 4, *Medellin v. Texas*, 128 S. Ct. 1346 (No. 06-984). But the United States, even while acknowledging an "international law obligation to comply with the ICJ's decision in *Avena*," contended that the Judgment was not independently enforceable in domestic courts absent intervention by the President. *Id.* The United States stated that although the President disagreed with this Court's decision in *Avena*, he had determined that it was in the interests of the nation to comply with the Judgment. *Id.* at 4.
32. The State of Texas argued that the *Avena* Judgment is not enforceable in domestic courts, with or without the President's approval. Resp't Br. at 9, *Medellin v. Texas*, 128 S. Ct. 1346 (No. 06-984). With regard to the Judgment standing alone, Texas argued that the Vienna Convention, the Optional Protocol, and the U.N. Charter, even taken together, did not create justiciable rights that may be invoked in U.S. courts. *Id.* at 11-12. Texas also argued,

among other things, that under U.S. constitutional law, the President lacked the unilateral power to render the treaty judicially enforceable. *Id.* at 10-11.

33. On 25 March 2008, the Supreme Court ruled in favor of Texas by a vote of 6-3, holding that neither the *Avena* Judgment on its own, nor the Judgment in conjunction with the President's Memorandum, constituted directly enforceable federal law that precluded Texas from applying state procedural rules that barred all review and reconsideration of Mr. Medellín's Vienna Convention claim. *Medellin v. Texas*, 128 S. Ct. 1346 (U.S. 2008) (attached as Annex B).
34. The Supreme Court explicitly acknowledged that the United States has an international law obligation to comply with the *Avena* Judgment, noting that "[n]o one disputes that the *Avena* decision -- a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes -- constitutes an international law obligation on the part of the United States." *Id.* at 1356. Yet it held that "not all international law obligations automatically constitute binding federal law enforceable in United States courts." *Id.* In this case, the Court held that the *Avena* Judgment "does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions." *Id.* at 1367.
35. The Supreme Court's decision turned in large part on its understanding of the United States's obligations under Article 94 of the U.N. Charter. The Court considered that the "obligation on the part of signatory nations to comply with ICJ judgments derives not from the Optional Protocol," which the Supreme Court construed as a "bare grant of jurisdiction," but instead "from Article 94 of the United Nations Charter -- the provision that specifically addresses the effect of ICJ decisions." *Id.* at 1358. In the Supreme Court's view, the enforcement structure established by Article 94 precluded the possibility that ICJ decisions are intended to be automatically enforceable as domestic law in the State concerned.<sup>5</sup> *Id.* at 1360.
36. With regard to Article 94(1), the Supreme Court interpreted the language "undertakes to comply" not to constitute a directive to domestic courts, but rather "a compact between independent nations" that "depends for the enforcement of its provisions on the interest and the honor of the governments

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<sup>5</sup> The Supreme Court considered this Court's Statute to provide further evidence of the unenforceable nature of the *Avena* Judgment. In particular, the Supreme Court viewed Article 59's express limitation of the binding force of this Court's Judgment to the State parties concerned as a barrier to the application of the Judgment in judicial proceedings involving one of the nationals whose claims were explicitly espoused by Mexico and adjudicated therein. 128 S. Ct. at 1360.

which are parties to it.” *Id.* at 1358-59 (citation omitted). Thus, the “[t]he words of Article 94 ... call upon governments to take certain action.” *Id.* at 1358 (citation omitted). In the event that a government fails to take the requisite action, Article 94(2) was held to provide “the sole remedy for noncompliance: referral to the United Nations Security Council by an aggrieved state.” In the Supreme Court’s view, the fact that the Charter provides “an express diplomatic -- that is, nonjudicial -- remedy is itself evidence that ICJ judgments were not meant to be enforceable in domestic courts.” *Id.* at 1359.

37. Furthermore, whereas the President—who agreed with the Supreme Court that the *Avena* Judgment was not automatically enforceable—believed he had authority under the U.S. Constitution to give the Judgment domestic legal effect, the Supreme Court held that the President’s directive could not render a treaty binding on domestic state courts. *Id.* at 1371.
38. The Supreme Court did confirm, however, that there are ample means by which the United States still can come into compliance with its obligations under *Avena*. In particular, the Court noted that “Congress is up to the task of implementing non-self-executing treaties,” *id.* at 1366, and that once a treaty is “ratified without provisions clearly according it domestic effect,” *id.* at 1369, only the passage of legislation by Congress can make a non-self-executing treaty domestically enforceable.
39. In a concurring opinion, Justice Stevens urged the State of Texas to effect statewide compliance with *Avena*, noting that “the United States’ obligation to ‘undertak[e] to comply’ with the ICJ’s decision falls on each of the States as well as the Federal Government.” *Id.* at 1374 (Stevens, J., concurring). “[T]he fact that the President cannot legislate unilaterally does not absolve the United States from its promise to take action necessary to comply with the ICJ’s judgment.” *Id.* “Having already put the Nation in breach of one treaty,” Justice Stevens wrote, “it is now up to Texas to prevent the breach of another.” *Id.*
40. Justice Breyer, joined by Justices Souter and Ginsburg, dissented. He observed that noncompliance with the *Avena* Judgment would exact a heavy toll on the United States by “increas[ing] the likelihood of Security Council *Avena* enforcement proceedings, [] worsening relations with our neighbor Mexico, [] precipitating actions by other nations putting at risk American citizens who have the misfortune to be arrested while traveling abroad, or [] diminishing our Nation’s reputation abroad as a result of our failure to follow the ‘rule of law’ principles that we preach.” *Id.* at 1391 (Breyer, J., dissenting). Justice Breyer would have held that this Court’s Judgment in *Avena* was directly enforceable by courts in the United States. *Id.* at 1385, 1389.

**d. Execution Date Set**

41. Almost immediately following the Supreme Court's decision, Texas state prosecutors sought an execution date for Mr. Medellín. At a hearing held for that purpose on 5 May 2008, counsel for Mr. Medellín sought leave to present evidence concerning the importance of and prospects for compliance with the *Avena* Judgment, but the judge refused to hear the testimony of an international law expert and denied the request of the Legal Adviser of the Mexican Ministry of Foreign Affairs to present the views of Mexico.
42. Counsel requested that the Court defer scheduling of an execution date to allow Congress to pass legislation implementing the United States's international legal obligations to enforce this Court's *Avena* Judgment, but the court declined to issue the requested stay and instead scheduled Mr. Medellín's execution for the first date available under state law. *See Annex A*. As a result, Mr. Medellín is scheduled to die by lethal injection on 5 August 2008.

**2. Other Mexican Nationals Named in the *Avena* Judgment**

43. On 31 March 2008, following its decision in Mr. Medellín's case, the U.S. Supreme Court denied petitions for review by seven other Mexican nationals in whose cases this Court found Article 36 violations, namely César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, Ignacio Gomez, Felix Rocha Diaz, Virgilio Maldonado and Roberto Moreno Ramos. Each had asserted his right to review and reconsideration under the *Avena* Judgment. In each case, the Supreme Court denied the petition without comment. *See Order List, 552 U.S. \_\_\_, (March 31, 2008), available at <http://www.supremecourtus.gov/orders/courtorders/033108pzor.pdf>.*
44. Subsequently, on 27 May 2008, the United States Court of Appeals for the Fifth Circuit declined to grant Ignacio Gomez 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. The court held that "[n]o reasonable jurist could conclude, in light of the explicit pronouncements in Medellín and Sanchez-Llamas, that Gomez's constitutional rights were violated when the Texas court refused to suppress his confession" on the basis of the Vienna Convention violation. *Gomez v. Quarterman*, No. 04-70047, 2008 U.S. App. LEXIS 11379, at \*17-18 (5th Cir. May 27, 2008).
45. Finally, on 29 November 2007, the Supreme Court of California unanimously affirmed the conviction and sentence of Martin Mendoza Garcia 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. *People v. Mendoza*, 171 P.3d 2, 19-20 (Cal. 2007).

### C. Diplomatic Overtures by Mexico to the United States

46. Prior to filing this Application, Mexico sought repeatedly to establish its rights and to secure appropriate relief for its nationals. On 28 March 2008, the Mexican government sent a diplomatic note to the United States government protesting the failure of the United States to comply with the *Avena* Judgment and conveying its view that the Judgment establishes an obligation of result. It stated:

[T]he Embassy wishes to convey to the Department of State that the Government of Mexico reserves the right to continue to pursue any actions necessary to achieve full respect for the ICJ decision, by all means at its disposal.

Nevertheless, the Embassy wishes to express the full confidence of the Government of Mexico that the Department of State will take all necessary steps to achieve proper compliance by the United States with the ICJ decision, namely the effective review and reconsideration of the cases of the 51 Mexican nationals sentenced to death, including the case of Mr. Medellín.

Demarche from Embassy of United Mexican States to U.S. Department of State, 28 March 2008. Since the issuance of the U.S Supreme Court decision, Mexico has continued to engage top officials of the United States government in meetings and conversations in order to promote implementation of the *Avena* Judgment.

47. Prior to the setting of an execution date in Mr. Medellín's case, Mexico submitted a declaration to the Texas court indicating that his execution before the United States implements the *Avena* Judgment "would be a breach of the United States' treaty obligations to Mexico." Declaration of Joel Antonio Hernandez Garcia, Legal Adviser, Mexican Ministry of Foreign Affairs, 24 April 2008, para.8.
48. Although several members of the U.S. Congress and one member of the Texas legislature have expressed interest in supporting legislation to implement the *Avena* Judgment, no such legislation has yet been introduced. Furthermore, because the Texas legislature will not reconvene until January 2009, there is no prospect of such relief at the state level before Mr. Medellín is scheduled to be executed on 5 August 2008. As set forth in the Request for Indication of Provisional Measures accompanying this Application, other Mexican nationals on death row in Texas could also be scheduled for execution before the end of 2008. In any event, even if Texas were to take the step of passing legislation to give effect to the *Avena* Judgment in Texas, that action would not discharge the United States's remedial obligations with respect to the other Mexican nationals on death rows in other states.

### III. LEGAL BASIS FOR THE REQUEST

49. Article 60 of the Statute of the Court provides: “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.”
50. The Court’s jurisdiction to provide an interpretation of one of its own judgments “is a special jurisdiction deriving directly from Article 60 of the Statute.” *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgment of 10 December 1985, *I.C.J. Reports 1985*, p. 216, para. 43; see also *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, Judgment of 25 March 1999, *I.C.J. Reports 1999*, p. 35, para. 10 (“By virtue of the second sentence of Article 60, the Court has jurisdiction to entertain requests for interpretation of any judgment rendered by it.”).
51. A dispute as to the meaning or scope of a judgment need not have manifested in any particular or formal manner; rather, “it should be sufficient if the two Governments have in fact shown themselves as holding opposite views in regard to the meaning or scope of a judgment of the Court.” *Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory) (Germany v. Poland)*, Judgment of 16 December 1927, *P.C.I.J., Series A No. 13, 1927*, p. 11.
52. The present dispute between Mexico and the United States concerns the scope and meaning of the remedial obligation established in paragraph 153(9) of the *Avena* Judgment. Mexico understands the language in question to establish an obligation of result, that is, to attain the precise result of review and reconsideration of the convictions and sentences in accord “with paragraphs 138 to 141 of [the *Avena*] Judgment.” *Avena Merits, Judgment of 31 March 2004*, para. 153(9).<sup>6</sup> While the United States may use “means of its own

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<sup>6</sup> See, e.g., J. Crawford, *Second Report on State Responsibility*, UN doc. A/CN.4/498 at para. 53 (“In particular, ‘the conditions in which an international obligation is breached vary according to whether the obligation requires the State to take some particular action or *only* requires it to achieve a certain result, while leaving it free to choose the means of doing so.’ The essential basis of the distinction is that obligations of conduct, while they will have some purpose or result in mind, determine with precision the means to be adopted; hence they are sometimes called obligations of means. By contrast, obligations of result do not do so, leaving it to the State party to determine the means to be used.”); P.M. Dupuy, “Reviewing the Difficulties of Codification: On Agos’s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility,” *European Journal of International Law*, 1999, Vol. 10, n°2, 375-378 ([A]n obligation of conduct is, as rightly pointed out by Combacau, ‘une

choosing” under paragraph 153(9), the obligation to provide review and reconsideration is not contingent on the success of any one means. As a result, the United States cannot rest on a single means chosen; it must provide the requisite review and reconsideration and 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.

53. The actions of Texas, a political subdivision of the United States, engage the international responsibility of the United States. As set forth in Article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts:

The 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.

*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); see also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, I.C.J. Reports 1999, p. 87, para. 62.<sup>7</sup> As a result, the scheduling of Mr. Medellín’s execution for 5 August 2008 is fundamentally inconsistent with the United States’s obligation of reparation to

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*obligation de s’efforcer*’, i.e., an obligation to endeavor or to strive to realize a certain result. ...In contrast, in the case of an obligation of result, as it is commonly understood, there is a burden on the person who owes such an obligation to attain a precise result.”); see also J. Combacau, *Obligations de résultat et obligations de comportement. Quelques questions et pas de réponse*, in *Mélanges offerts à Paul Reuter*, Paris, 1981, p. 181 ss.

<sup>7</sup> This Court confirmed this basic principle in its order of provisional measures in *LaGrand* when it observed that “the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State” and therefore that “the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States.” *LaGrand (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999, p. 16, para. 28; see also *LaGrand, Merits, Judgment of 27 June 2001*, I.C.J. Reports 2001, p. 507-08, para. 113.

Mexico, as is the failure of various state and federal actors to intervene to ensure compliance with that obligation.

54. Equally, the United States cannot invoke its municipal law as justification for failure to perform its international legal obligation under the *Avena* Judgment. *E.g., Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949, I.C.J. Reports 1949*, p. 180 (where a “claim is based on the breach of an international obligation on the part of [a] Member [State], . . . the Member [State] cannot contend that this obligation is governed by municipal law.”); *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion of 4 February 1932, P.C.I.J., Series A/B, No. 44, 1932*, p. 24 (“[A] State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.”); *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland), Order of 6 December 1930, P.C.I.J., Series A, No. 24, 1930*, p. 12 (a State “cannot rely on [its] own legislation to limit the scope of [its] international obligations.”); Vienna Convention on the Law of Treaties, 23 May 1963, art. 27, 1155 U.N.T.S. 331 (“[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”).
55. In any event, the U.S. Supreme Court’s decision in the case of Mr. Medellín makes clear that there are other means available to the United States to effect compliance. Mexico understands the United States’s obligation under paragraph 153(9) to extend to taking the steps set forth by the Supreme Court, including legislative action at the federal or state levels or compliance by state courts or the state legislatures. “[A] State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken.” *Exchange of Greek and Turkish Populations, Advisory Opinion of 21 February 1925, P.C.I.J., Series B, No. 10, 1925*, p. 20.
56. Mexico submits that anything short of full compliance with the review and reconsideration ordered by this Court in the cases of the forty-eight 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). If the United States were to wait for an execution to take place before fulfilling its obligation of result, the gravest kind of irreparable harm would already have occurred.
57. The conduct of the United States, however, confirm its understanding that paragraph 153(9) imposes only an obligation of means. Having chosen to issue the President’s 2005 determination directing state courts to comply, the United States to date has taken no further action. Now, by virtue of the acts of Texas, the United States is poised to execute Mr. Medellín without providing him the requisite remedy of review and reconsideration and despite the

confirmation by its own Supreme Court that other means are available to ensure full compliance.

58. For the foregoing reasons, Mexico believes that there is a fundamental dispute between the parties as to the scope and meaning of paragraph 153(9) of the *Avena* Judgment and accordingly requests that the Court interpret the operative language to provide guidance to the parties in light of this Request.

**IV. THE INTERPRETATION REQUESTED**

59. The Government of Mexico asks the Court to adjudge and declare that the obligation incumbent upon the United States under paragraph 153(9) of the *Avena* Judgment constitutes an obligation of result as it is clearly stated in the Judgment by the indication that the United States must provide “review and reconsideration of the convictions and sentences” but leaving it the “means of its own choosing;”

and that, pursuant to the foregoing obligation of result,

- (1) the United States must take any and all steps necessary to provide the reparation of review and reconsideration mandated by the *Avena* Judgment; and
- (2) the United States must take any and all steps necessary to ensure that no Mexican national entitled to review and reconsideration under the *Avena* Judgment is executed unless and until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation.

**V. RESERVATION OF RIGHTS**

60. Mexico reserves the right to modify and extend the terms of this Request for Interpretation, as well as the grounds invoked.

**VI. PROVISIONAL MEASURES**

61. Mexico requests that the Court indicate interim measures of protection, as set forth in a separate Request filed concurrently with this Request for Interpretation.

**VII. APPOINTMENT OF AGENT**

62. Mexico has designated Mr. Juan Manuel GÓMEZ-ROBLEDO, Ambassador, Undersecretary for Multilateral Affairs and Human Rights of the Mexican Ministry of Foreign Affairs, Mr. Joel Antonio HERNÁNDEZ GARCÍA, Ambassador, Legal Advisor to the Mexican Ministry of Foreign Affairs, and Mr. Jorge LOMÓNACO TONDA, Ambassador of Mexico to the Kingdom of the Netherlands, as its Agents.

63. Pursuant to Article 40(1) of the Rules of Court, all communications relating to this case should be sent to:

Ambassador Juan Manuel GÓMEZ-ROBLEDO

or

Ambassador Joel Antonio HERNÁNDEZ GARCÍA

and

Ambassador Jorge LOMÓNACO TONDA

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\* \* \*

I have the honor to reassure the Court of my highest esteem and consideration.

5 June 2008

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Ambassador Jorge LOMÓNACO TONDA  
Ambassador of Mexico to the Kingdom of the Netherlands  
The Hague, Netherlands