

No. 08-_____

IN THE
Supreme Court of the United States

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JOSÉ ERNESTO MEDELLÍN,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

-----◆-----
ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS OR FOR EXTRAORDINARY
WRIT OF HABEAS CORPUS

-----◆-----
**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS OR
FOR EXTRAORDINARY
WRIT OF HABEAS CORPUS**

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Constitutional, Treaty, and Statutory Provisions Involved**Constitution of the United States of America****Article II, Section 2, Clause 2**

He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Optional Protocol to the Vienna Convention on Consular Relations
Concerning the Compulsory Settlement of Disputes, *opened for
signature* April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 487**

Article I

Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

**U.N. Charter, *opened for signature* June 26, 1945,
T.S. No. 993, 59 Stat. 1031**

Article 94(1)

Each 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.

**Statute of the International Court of Justice, *opened for signature*
June 26, 1945, T.S. No. 993, 59 Stat. 1055**

Article 36(1)

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

United States Code**28 U.S.C. § 2241(a)-(c)**

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless-

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

Texas Code of Criminal Procedure**Article 11.071, § 5(a), (d)-(e)**

(a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or

(3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711.

...

(d) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

(e) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

110TH CONGRESS
2^D SESSION

H. R. 6481

To create a civil action to provide judicial remedies to carry out certain treaty obligations of the United States under the Vienna Convention on Consular Relations and the Optional Protocol to the Vienna Convention on Consular Relations.

IN THE HOUSE OF REPRESENTATIVES

JULY 14, 2008

Mr. BERMAN (for himself and Ms. ZOE LOFGREN of California) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To create a civil action to provide judicial remedies to carry out certain treaty obligations of the United States under the Vienna Convention on Consular Relations and the Optional Protocol to the Vienna Convention on Consular Relations.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Avena Case Implemen-
5 tation Act of 2008”.

1 **SEC. 2. JUDICIAL REMEDY.**

2 (a) CIVIL ACTION.—Any person whose rights are in-
3 fringed by a violation by any nonforeign governmental au-
4 thority of article 36 of the Vienna Convention on Consular
5 Relations may in a civil action obtain appropriate relief.

6 (b) NATURE OF RELIEF.—Appropriate relief for the
7 purposes of this section means—

8 (1) any declaratory or equitable relief necessary
9 to secure the rights; and

10 (2) in any case where the plaintiff is convicted
11 of a criminal offense where the violation occurs dur-
12 ing and in relation to the investigation or prosecu-
13 tion of that offense, any relief required to remedy
14 the harm done by the violation, including the vitia-
15 tion of the conviction or sentence where appropriate.

16 (c) APPLICATION.—This Act applies with respect to
17 violations occurring before, on, or after the date of the
18 enactment of this Act.

○

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSE ERNESTO MEDELLÍN,	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO. H-06-3688
	§	
NATHANIEL QUARTERMAN,	§	
Director, Texas Department of	§	
Criminal Justice, Correctional	§	
Institutions Division,	§	
Respondent.	§	

MEMORANDUM AND ORDER

Jose Ernesto Medellín seeks a federal writ of habeas corpus. (Docket Entry No. 1). The State of Texas plans to execute Medellín on August 5, 2008. The Court previously stayed and closed these proceedings during the pendency of Supreme Court review on the issue Medellín raises in his federal petition. As the Supreme Court has issued a decision, the Court will reopen these proceedings for the limited purpose of determining the viability of Medellín’s instant federal petition. For the reasons discussed below, the Court finds that Medellín’s petition must be dismissed as an abuse of the writ.

BACKGROUND

The Court will briefly address the entangled procedural background that led to Medellín’s instant federal action. This Court has already once considered, and denied, a federal habeas petition filed by Medellín. (*Medellín v. Dretke*, H:01-cv-4078). In his initial petition, Medellín, who is a citizen of Mexico, argued that the State of Texas failed to inform him of his right to consular assistance under the Vienna Convention on Consular Relations (“Vienna Convention”), Apr. 24, 1963, [1970] 21 U.S.T. 77, T.I.A.S. No. 6820. Because he procedurally defaulted this issue in state

court, this Court found that a procedural bar prevented federal consideration of Medellín's Vienna Convention claim. The Court also found that no prejudice flowed from the alleged Vienna Convention violation.

While Medellín's request for a Certificate of Appealability ("COA") was pending in the Fifth Circuit, the International Court of Justice ("ICJ") issued a decision ordering the United States to review and reconsider the conviction of 51 Mexican nationals on death row, including Medellín. *See Case Concerning Avena and Other Mexican Nationals (Mex.v.U.S.)*, 2004 I.C.J. 12 (Judgment of Mar. 31) ("*Avena*"). The Fifth Circuit considered the effect of the ICJ's *Avena* judgment, but nonetheless refused to issue a COA. *See Medellín v. Dretke*, 371 F.3d 270, 281 (5th Cir. 2004). The Fifth Circuit specifically held that the Vienna Convention did not create individually enforceable rights and that, in any event, federal precedent subjected such claims to the traditional rules of procedural default.

The Supreme Court granted a writ of certiorari. During the pendency of Supreme Court review, however, President George W. Bush issued a Memorandum to the United States Attorney General directing the state courts to give effect to the *Avena* decision ("Presidential memorandum"). The Supreme Court dismissed certiorari as improvidently granted. *See Medellín v. Dretke*, 544 U.S. 660, 661 (2005). Medellín then filed a state habeas action to avail himself of the *Avena* judgment. The Court of Criminal Appeals dismissed that action as an abuse of the writ, finding that neither the *Avena* judgment nor the President's memorandum supplanted state procedural law. *See Ex parte Medellín*, 223 S.W.3d 315, 322-23 (Tex. Crim. App. 2006). Medellín immediately filed a petition for a writ of certiorari to challenge Texas' dismissal before the United States Supreme Court.

While seeking certiorari review from his successive state proceedings, Medellín filed the

instant federal habeas petition in this Court. Medellín's petition raised a single ground for relief: "The Texas Courts are Required to Provide Mr. Medellín Review and Reconsideration as Mandated by the President's Determination and the *Avena* Judgment." (Docket Entry No. 1 at 19). The substance of his argument, however, assumed that this Court would have the authority to analyze whether the State of Texas violated his Vienna Convention rights in a manner that prejudiced him. Medellín sought the following relief: "Mr. Medellín prays that this Court grant a writ of habeas corpus vacating his conviction and death sentence and discharging him from confinement, unless the Texas state courts review and reconsider his conviction and sentence as required by the *Avena* judgment and the President's determination[.]" (Docket Entry No. 1 at 32). Medellín apparently filed his petition fearing that the Anti-Terrorism and Effective Death Penalty Act's ("AEDPA") one-year limitations period would otherwise preclude federal review.

Respondent filed a motion to transfer this case to the Fifth Circuit. (Docket Entry No. 8). Respondent argued that this Court lacked jurisdiction to consider Medellín's petition because he had already presented his Vienna Convention claim on direct appeal. When the Supreme Court granted certiorari review from Medellín's successive state habeas action, this Court stayed the instant proceedings until the Supreme Court issued a decision. (Docket Entry No. 14).

On March 25, 2008, the Supreme Court affirmed the Court of Criminal Appeals' judgment, finding that: (1) the ICJ judgment in *Avena* did not constitute "binding federal law" that would preempt Texas' abuse-of-the-writ limitations; and (2) that the President lacked authority to make the *Avena* judgment binding on the state courts. *See Medellín v. Texas*, ___ U.S. ___, 128 S. Ct. 1346 (2008).

Medellín has filed a motion to reopen and to extend the stay of his case. (Docket Entry No.

15). Medellín focuses on language in the Supreme Court's most recent consideration of his case to ask for "the stay of the proceedings pending the enforcement of the *Avena* judgment[.]" Medellín alleges that various political discussions, both in the United States and Mexico, involve giving effect to the *Avena* judgment through legislation. Medellín has also filed a copy of letter from United States Attorney General Michael B. Mukasey and Secretary of State Condoleezza Rice to Texas Governor Rick Perry requesting that "Texas take the steps necessary to give effect to the *Avena* decision[.]" (Docket Entry No. 21).

On July 16, 2008, the ICJ entered an order pursuant to a request by the government of Mexico. The ICJ ordered "[t]he United States of America [to] take all measures necessary to ensure that . . . Medellín [and other Mexican nationals] are not executed pending judgement on the Request for interpretation submitted by the United Mexican States, unless and until these five Mexican nationals receive review and reconsideration consistent with" the *Avena* judgment. *Request for Interpretation of the Judgment of 21 March 2004 in the Case Concerning Avena and Other Mexican Nationals* (Mexico v. United States of America), ___ I.C.J. ___ (July 16) (available at <<http://www.icj-cij.org>>). Texas has indicated that it will not recognize any ICJ authority to stay Medellín's execution.

Respondent has filed a motion to dismiss. (Docket Entry No. 16). Respondent argues that Medellín has not received authorization to file a successive habeas petition as required by 28 U.S.C. § 2244(b), the Supreme Court has conclusively resolved the merits of the lawsuit, and his claims are procedurally barred. This case is ripe for adjudication.

ANALYSIS

Medellín's petition raised a single question: whether the President's directive obligated the

States to comply with the *Avena* judgment. Medellín's most recent pleadings, however, ultimately argue that the Vienna Convention affords him relief from his conviction and sentence. He also expresses hope that future legislative action or other developments may provide a forum for renewed consideration of his Vienna Convention claim. None of Medellín's arguments provide a basis for federal habeas relief.

Because Medellín has already once sought federal habeas review, his action presumptively falls under the AEDPA's limitation on successive habeas petitions. The AEDPA prevents this Court from considering the merits of any successive habeas petition without prior authorization from the Fifth Circuit. *See* 28 U.S.C. § 2244(b)(3)(A); *Felker v. Turpin*, 518 U.S. 651, 664 (1996). "Indeed, the purpose and intent of [28 U.S.C. § 2244(b)(3)(A)] was to eliminate the need for the district courts to repeatedly consider challenges to the same conviction unless an appellate panel first found that those challenges had some merit." *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) (citing *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998)). Medellín presented the core of his recent complaint – that the State of Texas violated his Vienna Convention rights – in his initial habeas action. His renewal of that complaint falls squarely under the AEDPA's prohibition on successive petitions. To the extent that Medellín only seeks to raise an issue he presented first on direct appeal – the application of the Vienna Convention to his arrest and trial – his petition is successive and he must receive permission before proceeding with those arguments in district court.

Medellín seeks refuge from the AEDPA's successive petition provisions by arguing that the emergence of the *Avena* case and the President's memorandum after he filed his initial habeas petition insulate his current action from procedural limitations. Relying on cases wherein the Fifth Circuit has found that "a prisoner's application is not second or successive simply because it follows

an earlier federal petition,” *In re Cain*, 137 F.3d 234, 235 (5th Cir.1998); *see also Crone v. Cockrell*, 324 F.3d 833, 836 (5th Cir. 2003), Medellín argues that he could not have raised the current issues before this proceeding.

Notwithstanding the fact that some cases are exempt from the successive-petition provision, Medellín’s current action still falls squarely within the core of claims that the AEDPA intended to exclude. “[A] later petition is successive when it: 1) raises a claim challenging the petitioner’s conviction or sentence that was or could have been raised in an earlier petition; or 2) otherwise constitutes an abuse of the writ.” *Cain*, 137 F.3d at 235.¹ The Fifth Circuit already considered the effect of the *Avena* judgment in his initial petition, *see Medellín*, 371 F.3d at 279-80, thus barring future review. While Medellín could not have relied on the Presidential memorandum in his initial petition, the Supreme Court’s recent treatment of his case precludes federal habeas review. The Supreme Court unambiguously held that the *Avena* judgment and the Vienna Convention are not binding, directly enforceable law in the nation’s domestic courts.² Concomitantly, the Supreme

¹ The AEDPA generally places the question of whether a petition is successive in the circuit courts. *See* 28 U.S.C. § 2244(b)(2). Judicial economy, however, allows this Court to review threshold questions of mootness and ripeness while deciding that Medellín must receive permission from the circuit court before litigating his successive petition.

² Medellín argues that the recent Supreme Court treatment of his claim does not conclusively preclude relief. Medellín focuses on one statement from the majority opinion: “No one disputes that the *Avena* decision – a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes – constitutes an international law obligation on the part of the United States.” *Medellín v. Texas*, ___ U.S. ___, 128 S. Ct. 1346 (2008). Medellín, however, fails to mention the language that follows: “[n]ot all *international* law obligations automatically constitute binding federal law enforceable in United States courts. The question we confront here is whether the *Avena* judgment has automatic *domestic* legal effect such that the judgment of its own force applies in state and federal courts.” *Id.* The Supreme Court unquestionably “conclu[ded] that *Avena* does not by itself constitute binding federal law[.]” *Id.* at 1363.

Court found that the President’s memorandum did not force the state courts to give effect to the *Avena* judgment or the Vienna Convention. *Id.* at 1372. Thus, 28 U.S.C. § 2244(c) – the habeas “law of the case” statute – requires that this Court give full effect to the Supreme Court’s recent decision. The claims Medellín raises in his recent petition are moot and thus it is an abuse of the writ for him to re-urge them in the instant petition. *See McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (finding that the abuse-of-the-writ doctrine “impose[s] on petitioners a burden of reasonable compliance with procedures designed to discourage baseless claims and to keep the system open for valid ones”).

Medellín speculates that future political or legislative action may force Texas to forego executing his otherwise-valid sentence. Medellín particularly hopes that state or federal legislation will require States to give full effect to the Vienna Convention. Medellín’s reliance on that speculation as a ground for relief is unhelpful. Furthermore, the ICJ’s most recent order does not itself create an actionable constitutional ground for habeas relief. As the Supreme Court has noted, “[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts.” *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 354 (2006).

Medellín does not present a judicable controversy and his instant petition falls within the AEDPA’s successive petition limitations. If the Court could reach the substance of his complaints, Medellín’s petition does not present a cognizable ground for habeas review or relief. Accordingly, the Court likewise lacks jurisdiction to stay Medellín’s execution or other legal proceedings. *See Kutzner v. Cockrell*, 303 F.3d 333, 338 (5th Cir. 2002); *Martinez v. Texas Court of Criminal Appeals*, 292 F.3d 417, 423 (5th Cir. 2002).

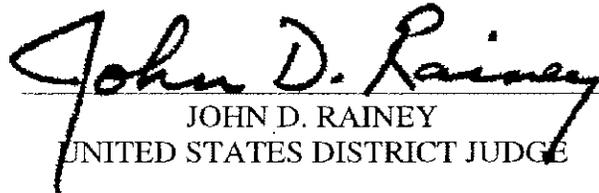
Medellín must receive a COA before the Fifth Circuit can review the dismissal of this action.

This Court finds that Medellín has not met the standards set out in 28 U.S.C. § 2253(c). The Court will not certify any issue for appellate review.

CONCLUSION

The Court GRANTS Respondent's motion to dismiss. The Court DENIES Medellín's request for a stay and all other outstanding motions. The Court will not issue a Certificate of Appealability. The Court DISMISSES this action WITHOUT PREJUDICE.

SIGNED this 22nd day of July, 2008.


JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE



15a

The Senate of
The State of Texas

SENATOR RODNEY ELLIS
District 13

PRESIDENT PRO TEMPORE
1999 - 2000
May 5, 2008

COMMITTEES:

Chair, Government Organization
Criminal Justice
Transportation & Homeland Security
State Affairs

The Honorable Caprice Cospier
339th District Court
Harris County Criminal Justice Center
1201 Franklin, 14th Floor
Houston, Texas 77002

Re: Ex Parte José Ernesto Medellín

Dear Judge Cospier:

In the recent Supreme Court decision in the case of *Medellin v. Texas*, the Supreme Court decided that the President did not have the power to order Texas courts to comply with the decision of the International Court of Justice in *Avena and Other Mexican Nationals*. The ICJ, or World Court as it is commonly known, had ordered the United States to review and reconsider the convictions and sentences of a group of Mexican nationals, including Jose Ernesto Medellin, to evaluate whether they were prejudiced by the violation of Article 36 of the Vienna Convention on Consular Relations. There is no dispute that the United States (and Texas authorities in particular) failed to comply with their obligations to notify Mr. Medellin and the other Mexican nationals of their rights to consular notification and access under the Vienna Convention.

The decision is unfortunate on many levels. First, as a state official, I believe that it is inappropriate for state government to undermine the obligations of the federal government in matters of United States foreign policy. If state courts here in Texas had followed the President's instruction, the damage to our nation's obligations in international law would have been partially remedied.

In addition there is a significant concern for the basic and practical issue of accommodating the consulates of foreign countries that are based in Texas. Making sure that a foreign national arrested in Texas has an opportunity to receive assistance from his or her nation's consulate is one way to measure the importance of the principle outlined in the Vienna Convention on Consular Relations. That principle is an especially important one to Texans living, working and visiting abroad. Showing regard for the foreign nationals in the United States under our treaty obligations serves to protect Texans and other American citizens by ensuring that any detention or arrest is followed by contact with a local United States consulate so that legal assistance and other moral support can be provided. The Supreme Court's decision makes those kinds of assurances harder to establish.

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As Justice Stevens points out in his concurrence, the United States' obligation to comply with the ICJ's decision "falls on each of the States as well as the Federal Government." He observed that "Texas' duty in this respect is all the greater since it was Texas that—by failing to provide consular notice in accordance with the Vienna Convention—ensnared the United States in the current controversy. Having already put the Nation in breach of one treaty, it is now up to Texas to prevent the breach of another."

Texas must find a way to comply with these obligations. It is now clearly the right thing to do because our nation has promised to do so, because of Texans living and visiting abroad, and because of the positive relations we seek to continue with our neighbors in other countries. When I travel abroad, I expect no less as an American citizen and a Texan. Accordingly, I plan to propose legislation at the earliest opportunity that will direct the Texas courts to provide the judicial remedy mandated by the International Court of Justice in the *Avena* case.

The Texas legislature does not reconvene until January 2009. I sincerely hope that the Court will not set an execution date that prevents the legislature from considering measures to comply with the United States' international obligations and to safeguard the interests of all Americans who depend on the protections of the Vienna Convention.

Sincerely,



Senator Rodney Ellis

cc: Roe Wilson
Assistant District Attorney, Harris County, Texas
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SENATOR RODNEY ELLIS
District 13

PRESIDENT PRO TEMPORE
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17a

The Senate of The State of Texas

COMMITTEES:

Chair, Government Organization
Criminal Justice
Transportation & Homeland Security
State Affairs

July 18, 2008

The Honorable Rick Perry
State Capitol Building
1100 Congress, Room 2S.1
Austin, TX 78701

Re: Texas Compliance with International Treaty

Dear Governor Perry:

Recently the World Court, joined by Secretary of State Condoleeza Rice and U.S. Attorney General Michael Mukasey urged you and the State of Texas to stay the executions of five Mexican nationals, including Jose Ernesto Medellin to allow further review to determine whether they were prejudiced by the violation of Article 36 of the Vienna Convention on Consular Relations.

First, as a state official, I believe that it is inappropriate for state government to undermine the obligations of the federal government in matters of United States foreign policy. There is no dispute that the United States (and Texas authorities in particular) failed to comply with their obligations to notify Mr. Medellin and the other Mexican nationals of their rights to consular notification and access under the Vienna Convention.

Making sure that a foreign national arrested in Texas has an opportunity to receive assistance from his or her nation's consulate is one way to measure the importance of the principle outlined in the Vienna Convention on Consular Relations. That principle is an especially important one to Texans living, working and visiting abroad. Showing regard for the foreign nationals in the United States under our treaty obligations serves to protect Texans and other American citizens by ensuring that any detention or arrest is followed by contact with a local United States consulate so that legal assistance and other support can be provided.

As Justice Stevens points out in his concurrence in the Supreme Court decision handed down last May, the United States' obligation to comply with the World Court's decision "falls on each of the States as well as the Federal Government." He observed

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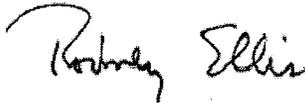
2440 Texas Parkway, Suite 110
Missouri City, Texas 77489
(281) 261-2360
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E-Mail: rodney.ellis@senate.state.tx.us

that "Texas' duty in this respect is all the greater since it was Texas that—by failing to provide consular notice in accordance with the Vienna Convention—ensnared the United States in the current controversy. Having already put the Nation in breach of one treaty, it is now up to Texas to prevent the breach of another."

On July 14, Congressman Berman from California submitted legislation that could definitively determine the states' obligations under international treaties. However, that bill will not come to a vote before Medellin's executions date. Furthermore, the Texas legislature does not reconvene until January 2009. I urge you to grant a reprieve out of respect for Congress and our own state legislature to allow these two political bodies to consider what measures are necessary to comply with the United States' international obligations and to safeguard the interests of all Americans who depend on the protections of the Vienna Convention.

Sincerely,



Senator Rodney Ellis

cc: Texas Board of Pardons and Parole
8610 Shoal Creek Blvd.
P.O. Box 13401
Austin, TX 78711-3401

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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

YEAR 2008

**2008
16 July
General List
No. 139**

16 July 2008

**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

ORDER

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, 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; 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 seize 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, exercising 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 prejudices 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.

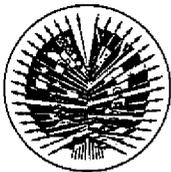
(*Signed*) Rosalyn HIGGINS,
President.

(*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.

(*Initialed*) R. H.

(*Initialed*) Ph. C.



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ORGANIZATION OF AMERICAN STATES

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

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REPORT N° 45/08
CASE 12.644
ADMISSIBILITY AND MERITS
MEDELLIN, RAMIREZ CARDENAS AND LEAL GARCIA
UNITED STATES

Approved by the Commission at its session N° 1758
held on July 24, 2008

REPORT N° 45/08
CASE 12.644
ADMISSIBILITY AND MERITS
MEDELLIN, RAMIREZ CARDENAS AND LEAL GARCIA
UNITED STATES*
July 24, 2008

I. SUMMARY

1. On November 22, 2006, the Inter-American Commission on Human Rights (hereinafter the "Commission" or the "IACHR") received a petition from Sandra L. Babcock, Clinical Professor of Law of Northwestern University School of Law¹ (hereinafter the "Petitioner"), on behalf of Mr. Jose Ernesto Medellin, a citizen of Mexico, incarcerated on death row in the State of Texas, United States of America (hereinafter the "State" or "United States"). On December 12, 2006 the Commission received two petitions from the same Petitioner, on behalf of two other citizens of Mexico incarcerated on death row in the State of Texas, Messrs Ruben Ramirez Cardenas and Humberto Leal Garcia.

2. The Petitioner claimed that the United States is responsible for violations of Messrs Medellin, Ramirez Cardenas and Leal Garcia's rights under Articles I, XVIII, and XXVI of the American Declaration of the Rights and Duties of Man (hereinafter the "American Declaration" or the "Declaration"), based upon deficiencies in the fairness of the criminal proceedings against them. In particular, the Petitioner alleges that, at the time of their arrest, they were not informed of their right to consular notification and access, in violation of Article 36 of the Vienna Convention on Consular Relations (hereinafter "the Vienna Convention"); that they were not afforded competent legal representation by the State; that the mode of execution as currently practiced in Texas creates an unacceptable risk of excruciating pain; that they have been denied a meaningful opportunity to present their cases to a clemency authority prior to execution; and that the conditions in Texas' death row violate the right to humane treatment. The Petitioner also requested that the Commission issue precautionary measures calling upon the United States to ensure that Messrs Medellin, Ramirez Cardenas and Leal Garcia's lives would be preserved while these claims were pending before the IACHR.

3. The Commission referred these petitions to the State separately for observations and granted precautionary measures requesting that the United States take measures to preserve Messrs Medellin, Ramirez Cardenas and Leal Garcia's lives, pending the Commission's investigation of the allegations in the petitions. In view of the impending risk of execution, on January 15, 2008 the Commission consolidated these three petitions into case 12.644 and informed the parties that it would examine the admissibility and merits of the case jointly.

4. In a hearing held before the Commission in March, 2008 the State claimed that Messrs Medellin, Ramirez Cardenas and Leal Garcia had failed to exhaust domestic remedies as required under the Commission's Rules of Procedure. The State contended that the Commission was barred from considering the issues raised in the case due to the duplication of proceedings *vis-a-vis* the decision of the International Court of Justice (hereinafter "the ICJ") in the *Avena Case*. In a latter written submission the State argued that the case was inadmissible because the

* Commission President Paolo Carozza did not take part in the discussion and voting on this case, pursuant to Article 17(2) of the Commission's Rules of Procedure.

¹ The initial petitions and subsequent briefs were signed by Professor Babcock. Alternatively, they were also signed by her students Atif Mian, Jennifer Cassel and Elizabeth Lee.

Commission lacked competence to review issues arising from the Vienna Convention and notification claims did not raise human rights violations. The State also contended that the Petitioner's due process claims were without merit.

5. In view of the information available and the contentions of the parties, the Commission concluded that the claims brought on behalf of Messrs Medellin, Ramirez Cardenas and Leal Garcia were admissible and that the State is responsible for violations of their rights under Articles I, XVIII and XXVI of the American Declaration in respect of the criminal proceedings leading to the imposition of the death penalty against them. Should the State execute Messrs Medellin, Ramirez Cardenas and Leal Garcia based upon those proceedings, it would commit an irreparable violation of their right to life under Article I of the American Declaration. The Commission has also recommended that the State provide them with an effective remedy, including new sentencing hearings in accordance with the due process and fair trial protections under the American Declaration.

II. PROCESSING

6. Following the receipt of Mr. Medellin's petition—which was designated as P1323/06—the Commission transmitted the pertinent parts of the complaint to the United States by means of a note dated December 6, 2006 with a request for observations within two months, as established by the Commission's Rules of Procedure. On December 6, 2006, the Commission also granted precautionary measures in favor of Mr. Medellin, whose execution date was, at that time, to be scheduled shortly, given the refusal by the Texas Criminal Court of Appeals to review his case. The Commission requested that the United States take the necessary measures to preserve Mr. Medellin's life pending the Commission's investigation of the allegations in his petition.

7. Following receipt of Messrs Ramirez Cardenas and Leal Garcia's petitions—which were designated as P1388/06 and P1389/06, respectively—the Commission transmitted the pertinent parts of their respective complaints to the United States on January 30, 2007 with a request for observations within two months, as established by the Commission's Rules of Procedure. Also on January 30, 2007, the Commission granted precautionary measures in favor of Messrs Ramirez Cardenas and Leal Garcia. The Commission requested that the United States take the necessary measures to preserve their lives pending the Commission's investigation of the allegations in their petitions.

8. In a note dated February 22, 2007, the United States responded to the IACHR's request for precautionary measures on behalf of Mr. Medellin by reporting that it had communicated with the relevant state authorities by letter of January 12, 2007. The State enclosed copies of communications addressed to the Attorney General of Texas, the Presiding Officer of the Texas Board of Pardons and Paroles, and the Governor of Texas. In the same note the State requested an extension of time to file its response to the petition. By communication to the State dated February 27, 2007, the Commission granted the State's request for an extension of time.

9. In a note dated March 27, 2007, the United States informed the Commission that it had responded to the request for precautionary measures on behalf of Mr. Ramirez Cardenas by communicating with the relevant state authorities on January 31, 2007. The State enclosed copies of communications addressed to the Attorney General of Texas, the Presiding Officer of the Texas Board of Pardons and Paroles, and the Governor of Texas.

10. Also on March 27, 2007, the United States informed the Commission that it had responded to the request for precautionary measures on behalf of Mr. Leal Garcia by

communicating with the relevant state authorities by letter of January 31, 2007. The State enclosed copies of communications addressed to the Attorney General of Texas, the Presiding Officer of the Texas Board of Pardons and Paroles, and the Governor of Texas.

11. On January 7, 2008 the Commission received a communication from the Petitioner requesting that the decision on the admissibility and the merits of the claims in petitions P1323/06, 1388/06 and 1389/06 be consolidated. The Petitioner also requested a hearing and pointed out the risk that Messrs Medellin, Ramirez Cardenas and Leal Garcia could be executed before the Commission's 2008 session and that "a hearing at the March [2008] session may be the only opportunity to hear these cases while the[y] [...] are still alive."

12. On January 15, 2008 the Commission notified the parties that it had decided to consolidate the aforementioned petitions pursuant to Article 29(1)(d) of its Rules of Procedure in view of the fact that they addressed similar facts and revealed the same alleged pattern of conduct. The Commission also decided to defer the treatment of admissibility until the debate and decision on the merits, according to Article 37.7 of its Rules of Procedure, and examine the consolidated matter under number 12.644.

13. On February 7, 2008 the Commission convened a hearing scheduled for March 7, 2008, during the IACHR's 131st period of sessions. In a note dated February 28, 2008 the United States indicated that the case presented two issues which were then pending before the Supreme Court of the United States and that therefore, "the Commission should not proceed with hearings on matters where the requirement of exhaustion of domestic remedies has so clearly not been met." The State added that the situation "would place US authorities in an extremely awkward position of attempting to present views before the Commission without taking into account the forthcoming judgments of the Supreme Court." As a result, the State requested that the hearing be postponed to a future period of sessions. On March 7, 2008 the Commission held the public hearing on the case, as convened, with the participation of both parties.²

14. On March 14, 2008, the Commission received the Petitioner's supplemental observations on admissibility and the merits. On March 17, 2008 the Commission forwarded to the State these observations, as well as additional documents submitted by the Petitioner during the hearing, with two months to present a response. On March 26, 2008 the Commission transmitted to the State additional observations on the merits submitted by the Petitioner. In a note dated May 7, 2008 the United States requested an extension of time to submit a response. The Commission granted the State's request for an extension until June 17, 2008. The State failed to present its response within the extension granted by the Commission.

15. On June 5, 2008 the Commission received a communication from the Petitioner indicating that the 339th District Court of Harris County, Texas, had scheduled Mr. Medellin's execution for August 5, 2008. In light of this information, the Commission reiterated the precautionary measures adopted on December 6, 2006, in which the Commission requested that the United States take measures to preserve Mr. Medellin's life pending the investigation of the allegations in the petition. On June 23, 2008 the United States informed the Commission that the State had responded the IACHR's request by communicating with the relevant state authorities. The State enclosed copies of communications addressed to the Attorney General of Texas, the Presiding Officer of the Texas Board of Pardons and Paroles, and the Governor of Texas. This communication was forwarded to the Petitioner on June 24, 2008.

² Audio available at <http://www.cidh.org/Audiencias/select.aspx>

16. On July 8, 2008 the State submitted its sole written submission on the admissibility and the merits of the case.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioner

1. Claims relating to the Trial, Conviction and Sentencing of Messrs Medellin, Ramirez Cardenas and Leal Garcia

Jose Medellin

17. The Petitioner indicates that on June 29, 1993, law enforcement authorities arrested Jose Medellin in connection with the murder of Elizabeth Peña perpetrated in Houston, Texas. The Petitioner alleges that although he informed them, as well as Harris County Pre-Trial Services, that he was born in Mexico and was not a US citizen, he was not advised of his rights under Article 36 of the Vienna Convention to contact and receive assistance from the Mexican consulate.³ The Petitioner indicates that Jose Medellin was 18 years old at the time of his arrest.

18. The Petitioner indicates that, since Medellin was indigent, the Texas trial court appointed counsel to represent him. The Petitioner argues that during the course of the investigation and prosecution of the case, his counsel was under a six month suspension from the practice of law for ethics violations in another case. Prior to trial this lawyer was held in contempt of court and arrested for seven days for violating his suspension. The Petitioner indicates that, once the Texas State Bar instituted a second disciplinary proceeding against him, he spent much of the time that should have been allotted to representing Mr. Medellin defending himself before the District Court and the Court of Appeals.

19. The Petitioner alleges that Mr. Medellin's state appointed counsel spent a total of eight hours on the investigation prior to the commencement of jury selection.⁴ Allegedly, during jury selection he failed to strike jurors who revealed their inclination to impose automatically the death penalty; during the trial he called no witnesses; during the penalty phase—that lasted a total of two hours—he presented only one expert witness: a psychologist who had never interviewed Mr. Medellin and whose testimony was detrimental to the alleged victim's case.

20. The Petitioner indicates that on September 16, 1994 Mr. Medellin was convicted of capital murder and on October 11, 1994, he was sentenced to death. On March 16, 1997 the Texas Court of Criminal Appeals affirmed Mr. Medellin's conviction and sentence.⁵

21. The Petitioner alleges that on April 29, 1997, nearly four years after his arrest, Mexican consular authorities first learned of Mr. Medellin's arrest, trial and sentence. In March 26, 1998 Mr. Medellin filed a *habeas corpus* petition, alleging a violation of Article 36 of the Vienna Convention. On January 22, 2001 he was denied relief on the basis that a Texas procedural rule barred the Vienna Convention claim because Mr. Medellin had no individual right to raise an Article 36 violation.⁶ He was also denied a request for an evidentiary hearing. This order

³ Harris County Pre-Trial Services Agency, Defendant Interview, Respondent's Original Answer, Ex. C, Medellin v. State, No. 675430-A (Tex. 339th Dist. Ct).

⁴ Petition alleging the violation of human rights of Jose Ernesto Medellin, November 21, 2006, Exhibit E.

⁵ Texas Court of Criminal Appeals, State v. Medellin, No. AP-71, 997, March 9, 1997.

⁶ Ex Parte Medellin, Order at *19-20, No. 675430-A (339th Dist. Ct. Jan 22, 2001).

was affirmed on October 3, 2001 by the Texas Court of Criminal Appeals.⁷ On November 28, 2001, Mr. Medellín instigated federal *habeas corpus* proceedings. On July 26, 2003, the District Court denied relief and a certificate of appealability.⁸

22. The Petitioner indicates that, separately, on January 9, 2003, the Government of Mexico commenced proceedings against the U.S. for alleged violations of Article 36 of the Vienna Convention, regarding Mr. Avena, and 54 other Mexican nationals, including Mr. Medellín. On March 31, 2004, the ICJ held that in the case of 51 Mexican nationals, the U.S. had breached its obligation under Article 36(1)(b) "to inform detained Mexican nationals of their rights under that paragraph;" that in 49 of those cases the US had breached its obligation "to notify the Mexican consular post of their detention," under Article 36(1)(a); and that in 34 of those cases the U.S. had breached its obligation "to enable Mexican consular officers to arrange for legal representation of their nationals," under Article 36(1)(c). Mr. Medellín was expressly included in all the alleged breaches. The ICJ held that as a remedy for the violation of these provisions the U.S. should, by means of its own choosing, review and reconsider the convictions and sentences of the Mexican nationals identified in the decision.⁹

23. The Petitioner indicates that on October 24, 2003, once the Avena pleadings had been filed with the ICJ but not decided, Mr. Medellín sought a certificate of appealability from the Court of Appeals. On May 20, 2004, after the ICJ had rendered judgment, the Court of Appeals denied Mr. Medellín's application.¹⁰ On December 10, 2004, the US Supreme Court granted certiorari in Mr. Medellín's case to review questions regarding the enforceability of the *Avena* Judgment.

24. The Petitioner indicates that on February 28, 2005 President Bush issued a Memorandum stating that the United States would discharge its international obligations by having state courts give effect to the ICJ's decision. On March 8, 2005, Mr. Medellín requested the Supreme Court to stay his case and hold it in abeyance while he proceeded before the Texas State Court system in accordance with the President's determination. Relying on the *Avena* judgment and the President's Memorandum, on March 24, 2005, Mr. Medellín filed a second state-court *habeas* application challenging his murder conviction and death sentence on the ground that he had not been informed of his Vienna Convention Rights. On November 15, 2006, the Texas Court of Criminal Appeals dismissed Mr. Medellín's application as an abuse of the writ, concluding that neither the *Avena* Judgment nor the President's Memorandum was biding federal law that could displace the limitations under state law on filing successive *habeas* applications.¹¹

⁷ Ex Parte Medellín, No. 50191-01 (Tex. Crim. App. Oct. 3, 2001).

⁸ Medellín v. Cockerel, Civ. No. H-01-4078 (S.D. Tex. Apr. 17, 2003).

⁹ The ICJ established that the review should be carried "within the overall judicial proceedings relating to the individual defendant concerned;" the procedural default doctrine could not bar the required review and reconsideration; 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; and the forum of review must be capable of examining the facts and in particular the prejudice and its causes. ICJ *Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004 <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=18&case=128&code=mus&p3=5> para.153(5-9).

¹⁰ The Court of Appeals indicated that it was bound to disregard the decision in *Avena* unless and until the Supreme Court or the Court of Appeals en banc, decided otherwise. Medellín v. Dretke, 371 F.3d 270 (5th Cir. 2003) at 280.

¹¹ Ex parte Medellín_S.W.3d_, 2006 WL 3302630 at *10 (Tex. Crim. App. 2006).

25. In March 2008, once the Petitioner had presented all the submissions required under the Commissions Rules of Procedure, the US Supreme Court handed down its decision in *Medellin v. Texas* on the enforceability of the ICJ Judgment.¹²

Ruben Ramirez Cardenas

26. The Petitioner indicates that on February 23, 2007 law enforcement officers arrested Mr. Ruben Ramirez Cardenas –a citizen of Mexico who emigrated to the US when he was a child– in connection with the kidnapping and murder of Mayra Laguna, his 16 year old cousin.¹³ Mr. Ramirez Cardenas had no criminal record prior to his arrest. The petitioner alleges that Mr. Ramirez Cardenas was never informed of his right to consular notification, communication, and assistance when arrested, and that consular officers did not learn of his detention until roughly five months later, in violation of Article 36 of the Vienna Convention.

27. The Petitioner alleges that in an interrogation on February 23, 1997 Mr. Ramirez Cardenas denied that Mayra had been kidnapped or that she was dead.¹⁴ Mr. Ramirez Cardenas was then brought before the McAllen Municipal Court for arraignment under Article 15.17 of the Texas Code of Criminal Procedure. The Petitioner alleges that no counsel was appointed to represent Mr. Ramirez Cardenas at the arraignment, even though he was indigent and was constitutionally entitled to legal representation. The Petitioner alleges that shortly after the arraignment, Mr. Ramirez Cardenas was interrogated again by the Police and confessed to kidnapping, raping and murdering Mayra Laguna, while under the combined influence of alcohol and cocaine. He then took the Police to the area where Mayra's body was found.

28. The Petitioner indicates that on February 24, 1997, Mr. Ramirez Cardenas was charged with capital murder, and was again arraigned. Again, no counsel was appointed. The Police continued to interrogate him and took several statements from him after the second arraignment, and obtained his consent to search his home and to take blood and hair samples.¹⁵

29. The Petitioner indicates that on February 26, 1997, Mr. Ramirez Cardenas executed a written request for counsel before a notary public.¹⁶ Counsel was not assigned until March 5, 1997 –nine days after he was arrested. After the written request for counsel was made and submitted to the court, and before counsel was appointed, the Police continued to question and take written statements from Mr. Ramirez Cardenas.¹⁷ On February 27, 1997 the Police reportedly even asked him whether “they had appointed a lawyer for him.”¹⁸

30. The Petitioner argues that Mr. Ramirez Cardenas' various statements were both inconsistent with each other and with other evidence. For instance, although Mr. Ramirez Cardenas told the Police that he had sex with Mayra prior to killing her, there was no semen

¹² *Medellin V. Texas* 552 U.S. (2008).

¹³ According to the Petitioner, Ramirez Cardenas was initially arrested and charged with burglary of a habitation with intent to commit a kidnapping, because he gave inconsistent statements about his whereabouts the night Mayra disappeared.

¹⁴ According to the Petitioner he said Mayra “wanted to get out of the house” and that they had staged a kidnapping, but she was with a friend. Petitioner's cite 10 RP 8; 44 RP 218-219; 45 RP 111-114, 240-242; 46 RP 106-108).

¹⁵ Petitioner's cite 45 RP 157-160, 174-180.

¹⁶ Petitioner's cite Def. Ex. 4; CP 19.

¹⁷ Petitioner's cite 10 RP 57-73; 46 RP 78-88.

¹⁸ Petitioner's cite 46 RP 181.

discovered in Mayra's body or on her underwear. Similarly, although a small blood stain with DNA consistent with Mayra's profile (which would match one of eighteen Hispanics) was found on a floor mat in Mr. Ramirez Cardenas mothers' car, there was no other blood (or semen) found in the car. The Petitioner considers that the lack of a significant quantity of blood or semen is inconsistent with one version of Mr. Cardenas' confession that he had sex and killed Mayra in the car, that she coughed up blood in the car, and that he then transported the body to another location in the vehicle. The Petitioner argues that neither Mr. Ramirez Cardenas' nor Mayra's fingerprints were discovered in the car and that prints belonging to a friend Mr. Ramirez Cardenas' –also detained by the Police for interrogation—were in the vehicle. Finally, none of Mr. Ramirez Cardenas' fingerprints were located at the Laguna residence.

31. The Petitioner alleges that although there was no evidence of sexual assault, the State of Texas charged Mr. Ramirez Cardenas with the capital murder of Mayra Laguna upon the ground that he killed her intentionally during the course either of kidnapping her or of sexually assaulting her. Since extensive forensic testing failed to link him conclusively to the crime, the prosecution relied heavily on the inculpatory statements made by Mr. Ramirez Cardenas to the Police.

32. The Petitioner indicates that the defense moved to suppress the custodial statements to the Police on 5th Amendment grounds, but failed to raise a Sixth Amendment challenge based on the failure to appoint counsel. They likewise failed to raise a challenge based upon the alleged Vienna Convention violation.

33. The Petitioner indicates that the jury found Mr. Ramirez Cardenas guilty within an hour and a half of beginning their deliberation, without specifying whether the verdict rested on a sexual assault or kidnapping. The penalty phase of the trial took place on one day. Since Mr. Ramirez Cardenas had no criminal record, the prosecution introduced evidence that he had stolen from an employer years earlier, in 1991, in a case that did not result in any criminal charges.

34. The defense called an expert witness who concluded that Mr. Ramirez Cardenas was a person of "low average to borderline intellectual functioning."¹⁹ He testified that the use of drugs and alcohol can impair the rational judgment of such people, that prisons do not rehabilitate and that "the more violent incarcerated offender is more likely to prey on the less violent incarcerated." In closing, the prosecutor argued, on the defense expert witness' testimony, that Mr. Ramirez Cardenas would continue committing violent acts while in prison, preying on less violent offenders.²⁰

35. Mr. Ramirez Cardenas appealed to the Court of Criminal Appeals, where he raised issues including attacks on the admission of the confessions, instructional errors, sufficiency of the evidence, and ineffective assistance of counsel. The ineffective assistance claim was based on defense counsels' failure to raise a Vienna Convention claim at trial, failure to strike a juror, failure to call relevant witnesses, and failure to produce testimony regarding Mr. Ramirez Cardenas' good conduct while detained. Appellate counsel did not, however, seek a remand for an evidentiary hearing to support any of the factual allegations they made for the first time on appeal.

36. New counsel for Mr. Ramirez Cardenas provided a new psychological report on his lack of dangerousness. However, even though new counsel argued that trial counsel was ineffective for failing to investigate and present mitigation evidence at the penalty phase of the

¹⁹ Petitioner's cite 49 RP 137-142.

²⁰ Petitioner's 50 RP 184-85.

proceedings, apart from the psychological report regarding future dangerousness, no additional mitigation evidence was supplied to the court in order to show prejudice.

37. After the Texas court rejected Mr. Ramirez Cardenas' post-conviction petition, he filed a federal petition for a writ of *habeas corpus*, raising claims relating to Vienna Convention violations, instructions and jury selection. Both the district and circuit courts rejected the claims, and the United States Supreme Court denied certiorari on June 30, 2006.

38. Mr. Ramirez Cardenas was one of the listed defendants in the *Avena Case* before the ICJ and on March 31, 2004, the ICJ held that he was entitled to review and reconsideration of his conviction and sentence.²¹ The Petitioner indicates that a second post-conviction petition raising a Vienna Convention claim and requesting a hearing pursuant to the *Avena* judgment was filed before the Texas Court of Criminal Appeals. At the moment of filing the original petition before the IACHR this application was pending a determination of whether the Vienna Convention violation caused actual prejudice to Mr. Ramirez Cardenas in the criminal prosecution. However, the petitioner argues that the questions raised in Mr. Ramirez Cardenas' petition have already been decided in the case of Jose Medellin.

39. As indicated above, on February 28, 2005 President Bush issued a Memorandum stating that the United States would discharge its international obligations by having state courts give effect to the ICJ's decision. Relying on the *Avena* judgment and the President's Memorandum, on March 24, 2005, Mr. Medellin filed a second state-court *habeas* application challenging his murder conviction and death sentence on the ground that he had not been informed of his Vienna Convention Rights. On November 15, 2006, the Texas Court of Criminal Appeals dismissed Medellin's application as an abuse of the writ, concluding that neither *Avena* nor the President's Memorandum was biding federal law that could displace the limitations under state law on filing successive habeas applications.²² In March 2008, once the Petitioner had presented all the submissions required under the Commissions Rules of Procedure, the US Supreme Court handed down its decision in *Medellin v. Texas* on the non-enforceability of the ICJ Judgment.²³

Humberto Leal Garcia

40. The petitioner indicates that on May 21, 1994, San Antonio Police officers arrested Humberto Leal García, aged 21, on suspicion of kidnapping, sexual assault and murder of 16 year old Audria Salceda. At pretrial hearings and trial, it was clearly documented for the authorities that Mr. Leal García was a Mexican national. The petitioner alleges that, nevertheless, at no time during his pretrial detention and subsequent capital murder trial did Texas police or prosecutors inform Mr. Leal Garcia of his rights to consular assistance under Article 36 of the Vienna Convention.

41. The Petitioner argues that Mr. Leal Garcia was represented at trial by lawyers who were grossly ineffective. One of them had been disciplined on three occasions for violating state ethics rules and twice he had been given a probated suspension for neglecting legal matters.

²¹ That review should be carried "within the overall judicial proceedings relating to the individual defendant concerned"; the procedural default doctrine could not bar the required review and reconsideration; 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; and the forum of review must be capable of examining the facts and in particular the prejudice and its causes. ICJ *Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004 <http://www.icj-cij.org/doCKET/index.php?p1=3&p2=3&k=18&case=128&code=mus&p3=5> para.153(9).

²² *Ex parte Medellin*, S.W.3d_, 2006 WL 3302630 at *10 (Tex. Crim. App. 2006).

²³ *Medellin V. Texas* 552 U.S._ (2008).

42. In order to obtain a capital conviction the prosecution had to prove that Mr. Leal Garcia had either sexually assaulted or kidnapped Ms. Saucedo, prior to her murder. The Petitioner argues that the prosecution relied heavily on a few key pieces of evidence that have been discredited since trial, largely through the assistance of experts retained with funds provided by the consulate of Mexico: the testimony of a "bitemark expert," who testified that Mr. Leal Garcia's teeth had a pattern consistent with one of the bitemarks found in Ms. Saucedo's body; the testimony of a DNA expert indicating that blood found on Mr. Leal Garcia's underwear was consistent with that of Ms. Saucedo; the testimony of Police Officer Warren Titus, who stated that he had sprayed Luminol on the interior of Leal Garcia's car, which had revealed the presence of human blood; the argument that her blouse had been found in Leal Garcia's home.²⁴

43. As far as bitemarks –which allegedly result in 63.5% false positives²⁵—are concerned, the Petitioner indicates that post-conviction counsel retained a forensic odontologist whose testimony shed serious doubt on the reliability of the bite mark analysis used in Leal Garcia's case, because of the way in which the evidence was handled and explored.²⁶ The Petitioner alleges that this evidence is particularly compelling in light of the fact that Ms. Saucedo had been sexually assaulted by several men on the night she was killed but the prosecution never attempted to match their dental impressions with the marks found in her body.

44. As far as DNA evidence is concerned, one of the state's experts testified that the blood found in the underwear was a mixed sample consistent with Mr. Leal Garcia, his girlfriend and Ms. Saucedo.²⁷ The Petitioner indicates that in post-conviction proceedings the consulate of Mexico provided funds to so that appellate counsel could retain another DNA expert who testified that the lab conducting the testing had not followed accepted protocols, had made mistakes handling the blood samples, and had failed to provide complete results. The expert also indicated that the prosecution had erroneously argued and the defense had erroneously conceded that the blood on Mr. Leal Garcia's underwear could only have come from Ms. Saucedo.²⁸

45. As far as the Luminol test is concerned, the Petitioner argues that the defense attorney failed to ask Detective Titus a single question on cross examination, and that he admitted that he did not know that Luminol testing would result in false positives if exposed to a wide range of environmental, domestic and industrial substances or that it reacts more strongly to old blood.²⁹ The defense attorney failed to present the testimony of Leal Garcia's father who would have testified that he used the car to go deer hunting.

46. The Petitioner argues that the defense failed to exploit suspicious gaps in the prosecution's investigation such as pubic hairs and semen taken from Ms. Saucedo's body which were never subjected to DNA testing.³⁰

47. The Petitioner indicates that on July 10, 1995 Mr. Leal Garcia was convicted of capital murder. The penalty phase hearing was convened on July 11, 1995. The Petitioner indicates that at the penalty phase of the trial the prosecution introduced evidence that Mr. Leal

²⁴ Trial Transcript, Prosecution's closing argument at 826.

²⁵ Petitioners cite K. Artheart and I. Pretty, Results of the 4th ABFO Bitemark Workshop, 1999 Forensic Science International, Volume 124, 2001.

²⁶ Post Conviction Hearing, Vol. V, pp. 70-81.

²⁷ Trial Transcript Vol. XVI, at 670-679.

²⁸ Post- Conviction Transcript pp. 13-35.

²⁹ Post- Conviction Hearing , Vol. III, pp 45 and 46.

³⁰ Post- Conviction Hearing , Vol. II, p. 130.

García had sexually assaulted another teenager who was acquainted with him, an offense for which he had never been prosecuted or convicted. The defense did nothing to investigate this allegation. Moreover, counsel presented little mitigating evidence at the penalty phase of his trial. That same day Mr. Leal Garcia was sentenced to death.

48. Mr. Leal García's direct appeal of the conviction and sentence was denied, as was his state *habeas corpus* petition. On October 20, 2004, a Federal District Court ruled against Mr. Leal García's plea for federal *habeas corpus* relief, and the Fifth Circuit Court of Appeals affirmed that decision. The Supreme Court denied certiorari on April 17, 2006.

49. On March 24, 2005, Mr. Leal García filed a successive post-conviction application in the Texas Court of Criminal Appeals based on the violation of his right under Article 36 of the Vienna Convention. He argued that he was entitled to review and reconsideration of his conviction and sentence pursuant to the judgment of the ICJ in *Avena and other Mexican Nationals*³¹. However, the petitioner argues that the questions raised in Leal García's petition have already been decided in the case of Jose Medellin. On November 15, 2006, the Texas Court of Criminal Appeals held that the President's determination that the United States would comply with the *Avena* judgment "exceeded his constitutional authority by intruding into the independent powers of the judiciary"³².

50. As indicated above, on February 28, 2005 President Bush issued a Memorandum stating that the United States would discharge its international obligations by having state courts give effect to the ICJ's decision. Relying on the *Avena* judgment and the President's Memorandum, on March 24, 2005, Mr. Medellin filed a second state-court habeas application challenging his murder conviction and death sentence on the ground that he had not been informed of his Vienna Convention Rights. On November 15, 2006, the Texas Court of Criminal Appeals dismissed Medellin's application as an abuse of the writ, concluding that neither *Avena* nor the President's Memorandum was binding federal law that could displace the limitations under state law on filing successive *habeas* applications.³³ In March 2008, after the Petitioner had presented all the submissions required under the Commissions Rules of Procedure, the US Supreme Court handed down its decision in *Medellin v. Texas* on the non-enforceability of the ICJ Judgment.³⁴

2. Claims relating to the Alleged Violation of the American Declaration

51. The petitioner asserts that the United States and the State of Texas have violated Messrs Medellin, Ramirez Cardenas and Leal Garcia's rights under Article I (right not to be arbitrarily deprived of life), Article XVIII (right to a fair trial, appeal and effective remedies), Article XXV (right to humane treatment while in custody) and Article XXVI (due process rights and right not to receive cruel, infamous or unusual punishment) of the American Declaration of the Rights and Duties of Man.

(a) Lack of Consular Notification and Access and Right to a Fair Trial

52. The Petitioner argues that Messrs Medellin, Ramirez Cardenas and Leal Garcia were not advised of their right under Article 36 of the Vienna Convention to contact and receive

³¹ ICJ *Avena and other Mexican Nationals (Mexico v. United States)*, March 31, 2004.

³² *Ex parte Medellin*, ___ S.W.3d ___, 2006 WL 3302639 at *10 (Tex. Crim. App. 2006).

³³ *Ex parte Medellin*, S.W.3d_, 2006 WL 3302630 at *10 (Tex. Crim. App. 2006).

³⁴ *Medellin V. Texas* 552 U.S._ (2008).

assistance from the Mexican consulate. The Petitioner argues that, as established by the Inter-American Court of Human Rights, the violation of the right to consular assistance is prejudicial to the guarantees of due process embodied in Article XXVI of the American Declaration since it is one of the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial. Therefore a state may not impose the death penalty in the case of individuals deprived of their Article 36 rights.

53. The Petitioner alleges that in the case of Messrs Medellin, Ramirez Cardenas and Leal Garcia, Mexican consular authorities were prevented from ensuring that their nationals were represented by competent and experienced defense attorneys. By the time Mexican consular authorities learned of their respective arrests, Messrs Medellin, Ramirez Cardenas and Leal Garcia had been sentenced to death.

54. The Petitioner argues that the prejudice suffered by Messrs Medellin, Ramirez Cardenas and Leal Garcia was exacerbated by the incompetence of state appointed counsel during the pre-trial investigation, the trial phase and the sentencing phase of the proceedings.

55. The Petitioner alleges that Mexico's involvement in these cases would have ensured that trial counsel was effective and prepared and provided resources for experts and investigations. She adds that had trial counsel possessed the evidence now developed by Mexico, Messrs Medellin, Ramirez Cardenas and Leal Garcia would not be on death row. Therefore, the Petitioner requests that the IACHR recommend to the US that the death sentences be commuted.

(b) Lack of Due Process in Clemency Procedures

56. The Petitioner argues that death row inmates in Texas have no available or effective mechanism to participate in the clemency process. Specifically, the Board of Pardons and Paroles does not advise condemned prisoners or their counsel of the date on which it will consider their clemency petition; it does not provide any opportunity for representations at the time it considers the petition; it does not allow applicants to view the evidence submitted in opposition to their clemency requests; and it does not afford them an opportunity for appeal or reconsideration of the Board's ruling. Additionally, the Texas Board of Pardons and Paroles is only required to inform the Governor of its decision and does not report on the reasons for its recommendation to reject a clemency petition. The Petitioner indicates that any deficiencies in the clemency process are not subject to judicial remedy.³⁵

57. The Petitioner also argues that the legislature has not provided a set of rules to be taken into account when making clemency determinations,³⁶ nor has the Texas Board of Pardons and Paroles adopted a list of criteria to that effect. Moreover, the Petitioner argues that it has long been the practice of the Texas Board of Pardons and Paroles not to convene clemency hearings –or even meet as a body– when considering clemency petitions in death penalty cases.

58. The Petitioner argues that pursuant to the current system, no clemency hearing has taken place in more than 15 years and the ratio of executions to humanitarian commutations in Texas is 200 to 1, while in other US states –such as Tennessee– the ratio is 4 to 1.

³⁵ The Petitioner cites *Fauder v. Texas Board of Pardons and Paroles*, 178 F.3d 343, 344 (5th Cir. 1999) which establishes that judicial review in the Texas clemency process is confined to ensuring that minimal procedural safeguards are in place and finding that Board procedures meet those requirements.

³⁶ The Petitioner indicates that in 2005 and 2007 the Texas Legislature considered but failed to adopt bills that would have required the Board of Pardons and Paroles to meet as a body when considering each capital clemency petition. S.S. 548, 79th Leg. (Tex. 2005); S.B. 208, 80th Leg. (2007).

59. On the basis of these arguments the Petitioner claims that clemency review in Texas falls short of the minimum standards of due process required by Article XXVI of the American Declaration and should Messrs Medellin, Ramirez Cardenas and Leal Garcia be executed without first providing a minimally fair clemency process, the state would be in clear violation of Article I.

(c) Inhumane Conditions of Detention and Method of Execution

60. The Petitioner alleges that since 1999 all male Texas death row prisoners have been incarcerated in the Polunsky Unit in Livingston, Texas. They are housed in small cells with a sink, a toilet and a narrow bed, where they spend 23 hours of isolation per day, segregated from other prisoners in every aspect of their lives. They are allowed no physical contact with loved ones or even their attorneys, from their entry into death row until their execution. The Petitioner indicates that the inmates receive no educational or occupational training and, unlike any other death row in the US, Texas death row does not offer access to television. Radio is the primary source of stimulation for semi literate inmates and they are allegedly routinely removed from prisoners as a disciplinary sanction.

61. The Petitioner alleges that the conditions on Texas' Death Row have caused Mr. Ramirez Cardenas, in particular, tremendous suffering. Mr. Ramirez Cardenas suffers from Nephrotic Syndrome,³⁷ a type of disease which causes the kidneys gradually to lose their ability to filter wastes and excess water from the blood. The Petitioners indicate that he has been in and out of John Sealey Hospital in Galveston, Texas several times due to this disease, which appeared during his stay on death row. Although hospital policy provides that a patient cannot be removed from the hospital if his attending doctor has not previously discharged him, Mr. Ramirez Cardenas has been returned to death row without being discharged by his doctors on more than one occasion.

62. The Petitioner argues that these conditions of confinement constitute a grave violation of the state's obligation to treat Messrs Medellin, Ramirez Cardenas and Leal Garcia humanely, pursuant to Article XXV of the American Declaration.

63. The Petitioner also alleges that lethal injection as currently practiced in Texas fails to comport with the requirements that a method of execution cause "the least possible physical and mental suffering."³⁸ She claims that the particular combination of drugs used in the lethal injection process creates a risk of extreme and unnecessary suffering and that in Texas and Virginia lethal injections are administered by individuals with no training in anesthesia.

64. The Petitioner argues that given these circumstances the execution of Messrs Medellin, Ramirez Cardenas and Leal Garcia by lethal injection would constitute cruel, infamous and unusual punishment under Article XXVI of the American Declaration.

3. Allegations on the Admissibility of the Claims

65. The Petitioner argues that the claims are admissible under Article 33 of the IACHR's Rules of Procedure on duplication. In her view, the ICJ decision in the *Avena Case*

³⁷ The Petition indicates that Nephrotic Syndrome is a condition marked by high levels of protein in the urine; low levels of protein in the blood; swelling, especially around the eyes, feet, and hands; and high cholesterol. In adults, most of the time the underlying cause is a type of kidney disease.

³⁸ The Petitioner cites paragraph 6 of General Comment 20 by the Human Rights Committee of the United Nations. See Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies, UN Doc HRI/GEN/I/Rev.1 at 30 (1994).

conferred certain rights upon Messrs Medellin, Ramirez Cardenas and Leal Garcia which are enforceable in U.S. courts, but they were not a direct party to the litigation, nor could they have been since States –and not individuals- have standing before the ICJ. The Petitioner argues that Mexico’s application to the ICJ can in no way be described as an individual petition under the Rules and precedents established by the IACHR; while the subject matter of the *Avena Case* concerned a dispute between States over the interpretation and application of the Vienna Convention, the proceedings before the IACHR involve allegations on the violation of the American Declaration, by no means limited to those stemming from the alleged victims’ consular rights. The petitioner alleges that as the claims concern matters distinct from those adjudicated in the *Avena Case*, they cannot be considered a duplication under Article 33 of the Commission’s Rules.

66. As far as the exhaustion of domestic remedies is concerned, the Petitioner argues that the allegations on denial of due process and a fair trial as a result of the United States’ admitted failure to inform Messrs Medellin, Ramirez Cardenas and Leal Garcia of their right to consular notification, have been fully litigated in domestic courts.

67. In her original submission, the Petitioner indicated that Messrs Ramirez Cardenas and Leal Garcia’s Vienna Convention claims have been litigated before state and federal courts and that there is only one pending petition in the Texas Court of Criminal Appeals. In her view, this does not bar the Commission from hearing their claim. First, because there has been an unwarranted delay in adopting a decision in their cases, and based on the Texas Courts decision in *Ex Parte Medellin*, it is certain that the courts will continue to deny Messrs Ramirez Cardenas and Leal Garcia a remedy for their claim.

68. Second, because other death row inmates who have presented their legal claims to all domestic courts, then filed a petition with the IACHR days before their execution, have been executed before the Commission was able to process their petitions.³⁹ The petitioner argues that, under these circumstances, to require Messrs Ramirez Cardenas and Leal Garcia to seek every available domestic remedy before international intervention, would render the Commission powerless to protect them from an illegal execution.

69. As far as the rest of the claims are concerned, the Petitioner argues that under the Commission’s Rules and precedents, failure to exhaust domestic remedies with regard to some of the claims raised in this complaint is justifiable and presents no bar to admissibility. The Petitioner alleges that Messrs Medellin, Ramirez Cardenas and Leal Garcia have not pursued claims in US courts arguing that lethal injection is an illegal manner of execution; that incarceration on Texas’ death row constitutes cruel, inhuman or degrading punishment; and that Texas clemency procedures violate due process. She argues that they should not be required to bring those claims because they have been fully litigated in other cases and doing so would be an exercise in futility.

70. The Petitioner argues that Messrs Medellin, Ramirez Cardenas and Leal Garcia are barred from presenting these claims by state and federal legislation imposing draconian limitations on the presentation of “successive” post-conviction petitions. Specifically, she argues that the Texas Code of Criminal Procedure,⁴⁰ as strictly interpreted by the Texas Court of Criminal Appeals, indicates that courts are barred from considering the merits of claims raised in “successive” or “subsequent” applications, even where those claims were not previously raised due to the incompetence of post-conviction counsel.

³⁹ The Petitioner includes a citation of IACHR Report No. 91/05 (Javier Suarez Medina), United States, Annual Report of the IACHR 2005.

⁴⁰ Petitioners cite Texas Code of Criminal Procedure Article 11.071, section 5(a)(1).

71. The Petitioner alleges that federal legislation establishes equally insurmountable hurdles for prisoners such as Messrs Medellin, Ramirez Cardenas and Leal Garcia. It is alleged that under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), they are barred from litigating these claims unless they could demonstrate that their petitions rested on (1) newly discovered evidence of innocence, or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable.⁴¹

72. The Petitioner argues that in previous cases, the Commission has held that where a death row inmate was precluded from exhausting his domestic remedies by virtue of the draconian limits on post-conviction appeals imposed by appeals and federal legislation, the petition was found admissible under Article 31 of the Commission's Rules.⁴² In her view, this holding reflects the established principle that domestic remedies must be both adequate, in the sense that they must be suitable to address an infringement of a legal right, and effective, in that they must be capable of producing the result for which they were designed.

73. Additionally, the Petitioner argued in each of her respective original petitions on behalf of the alleged victims that with regard to lethal injection, the state of Texas had executed thirteen prisoners since January 2006 [until December, 2006] who had challenged the lethal injection protocols. The Petitioner considers that, for this reason, it is reasonable to assume that this claim has "no reasonable prospect of success," and exhaustion should not be required. As far as conditions of confinement on death row are concerned, the Petitioner alleges that both the Texas Court of Criminal Appeals and the United States Supreme Court have refused to consider arguments relating to those claims as a violation of the prisoner's right to be protected from cruel and unusual punishment.

74. Regarding exhaustion of remedies relating to clemency procedures, the Petitioner alleges that there is no judicial review process for a failed clemency plea. In fact, in Texas such pleas are almost never successful: only one defendant's request for clemency has been granted since 1976. Given the refusal of the Texas Court of Criminal Appeals to examine the state's clemency procedures, and the rejection of nearly all requests for clemency. The Petitioner maintains that it is clear that Messrs Medellin, Ramirez Cardenas and Leal Garcia have no means of redress in domestic courts.

B. Position of the State

75. In a note dated February 28, 2008 the United States indicated that the case presented two issues then pending before the Supreme Court of the United States: (1) the appropriate response to cases of violation of the provisions of the Vienna Convention relating to consular notification (*Medellin v. Texas*); and (2) the lethal injection protocol used in implementing the death penalty (*Baze v. Kentucky*). It argued that the pendency of these issues before the Supreme Court made it obvious that domestic remedies with respect to the claims raised in the petition had not been exhausted and indicated that the decisions were expected by the end of the Supreme Court's term in mid 2008.

76. As far as the hearing scheduled for March 7, 2008 was concerned, the State argued that "the Commission should not proceed with hearings on matters where the requirement of exhaustion of domestic remedies [would] so clearly not been met." The State added that the situation "would place US authorities in an extremely awkward position of attempting to present

⁴¹ 28 U.S.C. 2255.

⁴² The Petitioner includes a citation of IACHR Report No. 97/03 (Gary Graham), United States, Annual Report of the IACHR 2003.

views before the Commission without taking into account the forthcoming judgments of the Supreme Court." As a result, the State requested that the hearing be postponed to a future period of sessions.

77. In the public hearing held in March 2008, during the IACHR's 131 sessions, State representatives indicated that they were not in a position to discuss the merits of the case due to the fact that it involved matters pending before the Supreme Court of the United States. The State indicated that any discussion on the merits would not be productive under the circumstances. Therefore they were only prepared to present arguments on admissibility.

78. In that opportunity the State argued that the Petitioner's claim failed to satisfy the requirements in Article 33 of the Commission's Rules regarding duplication of procedures. During the hearing, the State also argued that Messrs Medellin, Ramirez Cardenas and Leal Garcia had failed to exhaust domestic remedies in accordance with the Commission's Rules and the principles of international law. In its view, the pendency of two cases before the Supreme Court – *Medellin v. Texas* and *Baze v. Kentucky*— regarding the issues of consular notification and the legality of lethal injection, respectively, proved that domestic remedies had not been exhausted. The State argued that the US Government had joined the proceeding in *Medellin v. Texas* as an *amicus* and that it was "trying to comply with the ICJ Judgment" in the *Avena Case*, regarding state responsibility for consular notification under the Vienna Convention.

79. It also stated in the hearing that its position on non compliance with the exhaustion rule found support in procedural, as well as substantive, considerations. Firstly, it argued that –in procedural terms— the petitioner had disregarded available avenues to pursue remedies such as civil rights claims under section 1983, title 42 of the US Code which provides federal remedies for violations of the Constitution by state level officials. The State alleged that at least in one case, when exercised in the state of Florida –although ultimately unsuccessful— the courts had found that this remedy had been appropriately filed. Secondly, it argued that –in substantive terms— pursuing remedies regarding the legality of lethal injection could not be considered futile since this very issue was at the time pending before the Supreme Court in the matter of *Baze v. Kentucky*, "the first time in one hundred years that the US Supreme Court hears [sic] a method of execution claim."

80. The State remarked at the hearing that, in view of the pendency of these matters before the Supreme Court, the admission of the Petitioner's claim before the IACHR would constitute "an affront to the judicial process in a democratic country."

81. In its sole written submission⁴³ –presented after the Supreme Court judgments in *Medellin v. Texas* and *Ralph Baze v. John Rees, Commissioner of the Kentucky Department of Corrections*— the State provides a summary of factual and procedural history relating to Messrs Medellin, Ramirez Cardenas and Leal Garcia's cases, highlighting that they have been in the United States from a young age and that they spoke English at the time of their arrest.

82. Specifically, the State indicates that on July 24, 1993 Mr. Medellin and five other gang members accosted and seized two girls whom they raped and finally strangled to death. Testimony at trial established that Mr. Medellin participated in raping both victims and in killing Elizabeth Peña, for which he was found guilty of capital murder. At the sentencing phase the state presented evidence of seven prior arrests, violent tendencies and the fact that an improvised weapon had been found in his cell while awaiting trial. The State alleges that his attorney offered character witnesses and called an expert who testified that Medellin did not present a future

⁴³ Submission by the United States Permanent Mission to the Organization of American States, dated July 8, 2008.

danger, to counter the prosecution's presentation. After considering the evidence, the sentencing jury imposed the death penalty, finding that Mr. Medellin presented a continuous threat to society.

83. Regarding Ruben Ramirez Cardenas, the State indicates that during the investigation of the kidnapping of Mayra Laguna, police arrested Tony Castillo, who confessed to the kidnapping and named Mr. Ramirez Cardenas as the instigator of the activities. The State argues that after having been advised of his Miranda rights to silence and counsel, Mr. Ramirez Cardenas gave a statement confessing to her rape and murder and led the Police to the scene of the rape, the place at which he had disposed of the evidence and the site of the body. At trial the prosecution presented forensic evidence that his DNA was on the duct tape used to bind Ms. Laguna's hands, and of scratches on his body, consistent with his statement that Ms. Laguna fought back after he raped her. Mr. Ramirez Cardenas was convicted of capital murder and sentenced to death.

84. The State indicates that on May 20, 1994 Humberto Leal Garcia gave a lift to Adria Saucedo from a party, after she appeared to be extremely intoxicated. Not long after his brother was heard to say that Mr. Leal Garcia had arrived home "full of blood, saying he had killed a girl". Mr. Leal Garcia voluntarily went to the police station where he gave voluntary statements and consented to a search of his home. At trial the state presented extensive evidence of the gruesome nature of Ms. Saucedo's death as well as Mr. Leal Garcia's voluntary statements, blood evidence from his car, DNA evidence from his clothing and expert testimony that bite marks on the victim matched his dentition. He was found guilty of capital murder. The State indicates that at the sentencing phase his counsel called an expert to testify to his alcohol dependence and to a possible correspondence between violent tendencies and abuse he had suffered as a child. A jury found that a sentence of death was appropriate because there was a sufficient probability that he would commit further acts of violence and pose a continuing threat to society.

85. The State argues that subsequently Messrs Medellin, Ramirez Cardenas and Leal Garcia "had numerous opportunities to appeal [their] conviction and sentence before the courts of Texas and the United States and to raise due process claims, including claims concerning consular notification" and "in none of these cases [have they] shown a due process violation".⁴⁴

86. On the basis of these antecedents the State alleges that the Petitioner's claims are inadmissible and without merit.

87. Regarding the inadmissibility of the complaints, the State argues that "the Vienna Convention is not a human rights instrument which is demonstrated by the fact that its protections are based on principles of reciprocity, nationality and function which are not commonly enjoyed by all human beings by mere virtue of their human existence." In its view the Commission was established to hear petitions regarding the rights protected in the American Convention and the American Declaration and "consular notification does not raise a human rights issue in an applicable instrument with respect to the Member States of the OAS, as required by Article 27 of the Rules of Procedure." Therefore, the State argues that the Commission is not competent to review claims brought by petitioners on the basis of the Vienna Convention.

88. Regarding the merits of the claims, the State alleges that the Petitioner fails to demonstrate that the fact that consular notification procedures were not followed amounts to a violation of the American Declaration. The State alleges that there is no support either in the Vienna Convention or the Declaration, for the claim that the Vienna Convention consular notification obligation is an integral component of the protection as set forth in Articles XVIII and

⁴⁴ Submission by the United States Permanent Mission to the Organization of American States, dated July 8, 2008.

XXVI of the Declaration. In that respect, the State relies on the Commission's definition of the Declaration's due process protections under Articles XVIII and XXVI, in paragraph 63 of Report 52/02 (Martinez Villarreal).⁴⁵ The State argues that the Declaration in no way indicates that consular notification or assistance is relevant to due process protections.

89. The State alleges that US domestic law provides stringent due process protections to those accused of committing crimes and to criminal defendants as well as post-conviction protections. In its view these protections –which are not dependent upon consular notification, access or assistance— far exceed the guarantees of the American Declaration and “are among the strongest and most expansive in the world”.⁴⁶ The State considers that the US Constitution and federal and state laws and regulations “ensure that all persons, including foreign nationals unfamiliar with English or the US judicial system, will have adequate interpreters and competent legal counsel who can advise them” and that failure to honor these protections can be corrected through appeals.⁴⁷

90. As far as the allegations on clemency proceedings are concerned, the State argues that these proceedings do not come within the scope of the American Declaration. The State indicates that when making her argument, the Petitioner relies on precedents relating to countries that still impose a mandatory death sentence and where those convicted require an opportunity to make a case for a different sentence. In its view, those precedents are not relevant to the present case since Messrs Medellin, Ramirez Cardenas and Leal Garcia did not face a mandatory death sentence upon a finding of guilt and had the opportunity to present individualized mitigating evidence before the sentencing body.

91. Further, the State argues that the rules and precedents cited by the Petitioner are based upon Article 4.6 of the American Convention, to which the US is not a party. The State indicates that in a previous admissibility decision the Commission has asserted that “minimal fairness guarantees” may apply to petitions for clemency under Article XXIV of the Declaration (right to petition) and that in support this claim, cited only mandatory death penalty cases. In its view the Texas Board of Pardons and Paroles –composed of 18 salaried members who serve full time— more than meets the standard of providing certain minimal procedural protections for condemned prisoners. The State asserts that the “Petitioner makes much of the Board's failure to meet as a group, without demonstrating [...] that that failure has any effect on the outcome of board decisions or the substantive fairness of the process.”⁴⁸

92. The State also objects to the Commission's decision to join the examination of the admissibility and the merits of the complaints. In its view, there is no indication of the existence of “exceptional circumstances,” as required in Article 37.3 of the IACHR Rules of Procedure, in the present case.

⁴⁵ The State enumerates them as “the right of a defendant to be presumed innocent until proven guilty according to law, the right to prior notification in detail of the charges against him/her, the right to adequate time and means for the preparation of his/her defense, the right to be tried by a competent, independent and impartial tribunal previously established by law, the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing and to communicate freely and privately with his counsel, and the right not to be compelled to be a witness against himself or to plead guilty.” Submission by the United States Permanent Mission to the Organization of American States, dated July 8, 2008, page 6.

⁴⁶ Submission by the United States, dated July 8, 2008, page 7.

⁴⁷ Submission by the United States, dated July 8, 2008, page 7.

⁴⁸ Submission by the United States Permanent Mission to the Organization of American States, dated July 8, 2008, page 12.

IV. ANALYSIS ON ADMISSIBILITY

A. Competence of the Commission *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci*

93. Upon considering the record before it, the Commission finds that it has competence *ratione personae* to entertain the claims filed by the Petitioner. Under Article 23 of the Rules of Procedure of the Commission, the Petitioner is authorized to file complaints alleging violations of rights protected under the American Declaration of the Rights and Duties of Man. The alleged victims are persons whose rights are protected under the American Declaration, the provisions of which the State is bound to respect in conformity with the OAS Charter, Article 20 of the Commission's Statute and Article 49 of the Commission's Rules of Procedure. The United States has been subject to the jurisdiction of the Commission since June 19, 1951, the date on which it deposited its instrument of ratification of the OAS Charter.

94. The Commission also considers that it is competent *ratione temporis* to examine the complaints because the facts relating to the claims occurred as from 1993. The allegations, therefore, refer to facts occurring subsequent to the date on which the United States' obligations under the Charter and the American Declaration took effect.

95. In addition, the Commission finds that it is competent *ratione loci*, given that the petition indicates that Messrs Medellín, Ramirez Cardenas and Leal Garcia were under the jurisdiction of the United States at the time the alleged events occurred, which reportedly took place within the territory of that State.

96. With regard to competence *ratione materiae*, the State argues that the Commission was established to hear petitions regarding the rights protected in the American Convention and the American Declaration and "consular notification does not raise a human rights issue in an applicable instrument with respect to the Member States of the OAS, as required by Article 27 of the Rules of Procedure." Therefore, the State argues that the Commission is not competent to review claims brought by petitioners on the basis of the Vienna Convention.

97. In previous cases the Commission determined that it was appropriate to consider compliance by a state party to the Vienna Convention on Consular Relations with the requirements of Article 36 of that Treaty in interpreting and applying the provisions of the American Declaration to a foreign national who has been arrested, committed to prison or to custody pending trial, or is detained in any other manner by that state. In particular, the Commission has found that it could consider the extent to which a state party has given effect to the requirements of Article 36 of the Vienna Convention on Consular Relations for the purpose of evaluating that state's compliance with a foreign national's due process rights under Articles XVIII and XXVI of the American Declaration.⁴⁹ In reaching this conclusion, the Commission found support in the Inter-American Court's Advisory Opinion 16/99 on the Rights to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, as well as from the judgment of the International Court of Justice in the *LaGrand* Case.⁵⁰ Based upon the information and arguments before it in the present complaint, the Commission sees no reason to depart from its conclusions in this regard.

⁴⁹ IACHR Report N° 52/02, Case 11.753, Ramon Martinez Villarreal v, United States, Annual Report of the IACHR 2002, para. 77; Report 61/03 (Roberto Moreno Ramos), United States, Admissibility, Annual Report of the IACHR 2003, para 42.

⁵⁰ See also I/A Court H.R., Advisory Opinion OC-16/99 of October 1, 1999, The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, (Ser. A) N° 16 (1999); International Court of Justice, *LaGrand* Case (Germany v. United States), Judgment of June 27, 2001, General List N° 104.

98. Accordingly, the Commission considers that it is competent *ratione materiae* to examine the Petitioner's claims of violations of Articles I, XVII, XVIII and XXVI of the American Declaration, including any implications that the State's alleged non-compliance with Article 36 of the Vienna Convention on Consular Relations may have had upon Messrs Medellin, Ramirez Cardenas and Leal Garcia's rights to due process and to a fair trial.

B. Admissibility

1. Duplication

99. Article 33 of the Commission's Rules of Procedure provides as follows:

1. The Commission shall not consider a petition if its subject matter:
 - a. is pending settlement pursuant to another procedure before an international governmental organization of which the State concerned is a member; or,
 - b. essentially duplicates a petition pending or already examined and settled by the Commission or by another international governmental organization of which the State concerned is a member.
2. However, the Commission shall not refrain from considering petitions referred to in paragraph 1 when:
 - a. the procedure followed before the other organization is limited to a general examination of the human rights situation in the State in question and there has been no decision on the specific facts that are the subject of the petition before the Commission, or it will not lead to an effective settlement; or,
 - b. the petitioner before the Commission or a family member is the alleged victim of the violation denounced and the petitioner before the other organization is a third party or a nongovernmental entity having no mandate from the former.

100. During the hearing held on March 7, 2008 the State objected to the admissibility of the petition on the ground that its subject matter essentially duplicates a claim already examined and settled by another international governmental organization of which the United States is a member, contrary to Article 33(1) of the Commission's Rules of Procedure. In particular, the State argues that the claims refer to three of numerous cases incorporated in a proceeding brought by Mexico before the ICJ against the United States pursuant to the Vienna Convention on Consular Relations Optional Protocol Concerning the Compulsory Settlement of Disputes⁵¹, known as *Avena and other Mexican Nationals (Mexico v. United States)*.⁵² The State suggests that the same issues have been raised before the ICJ as are contained in case 12,644 and therefore consideration of these claims by the Commission is barred by the terms of Article 33 concerning duplication.

101. The Petitioners have disputed the State's contention, essentially on the basis that Article 33 of the Commission's Rules does not apply to a decision by the ICJ. The petitioner argues that the ICJ decision in the *Avena Case* conferred certain rights upon Messrs Medellin, Ramirez Cardenas and Leal Garcia which are enforceable in U.S. courts, but they were not a direct party to the litigation, nor could they have been since States –and not individuals– have standing before the ICJ. The Petitioner argues that Mexico's application to the ICJ in *Avena* can in no way be described as an individual petition under the Rules and precedents established by the IACHR: while the subject matter of *Avena* concerned a dispute between States over the interpretation and application of the Vienna Convention, the proceedings before the IACHR involve allegations on the

⁵¹ In this connection, the United States ratified the Charter of the United Nations on August 8, 1945 and the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes on November 24, 1969. See United Nations Treaty Data Base at <http://untreaty.un.org>.

⁵² ICJ *Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004 <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=18&case=128&code=mus&p3=5>.

violation of the American Declaration, by no means limited to those stemming from their consular rights. The petitioner alleges that as the claims concern matters distinct from those adjudicated in *Avena*, they cannot be considered duplication under Article 33 of the Commission's Rules. In the hearing they also argued that in the *Moreno Ramos Case* the Commission already decided to examine a complaint notwithstanding pending proceedings, precisely, in the *Avena Case*.⁵³

102. In this respect, the Commission takes into consideration its previous jurisprudence according to which a prohibited instance of duplication under the Commission's procedures involves, in principle, the same person, the same legal claims and guarantees, and the same facts adduced in support thereof.⁵⁴ Correspondingly, claims brought in respect of different victims, or brought regarding the same individual but concerning facts and guarantees not previously presented and which are not reformulations, will not in principle be barred by the prohibition of duplication of claims.⁵⁵

103. In the present case, the Commission considers on the information available that it cannot be said that the same parties are involved in the proceedings before the Commission and the ICJ, or that the proceedings raise the same legal claims and guarantees. In particular, it is evident that Messrs Medellín, Ramírez Cardenas and Leal García were not considered a party to the ICJ claim, as participants in contentious proceedings before that Court are limited to states. While the circumstances surrounding their criminal proceedings comprised part of the matters considered by the ICJ in determining Mexico's application, Messrs Medellín, Ramírez Cardenas and Leal García had no independent standing to make submissions in the proceedings or to request relief.

104. Nor can it be said that the same legal claims have been raised before the ICJ and the IACHR. The central issue before the ICJ was whether the United States violated its international obligations to Mexico under Articles 5 and 36 of the Vienna Convention based upon the procedures for the arrest, detention, conviction, and sentencing of 54 Mexican nationals on death row, including Messrs Medellín, Ramírez Cardenas and Leal García. The issue before the Commission, on the other hand, is whether the United States violated Messrs Medellín, Ramírez Cardenas and Leal García's rights to due process and to a fair trial under Articles XVIII and XXVI of the American Declaration, based upon the alleged failure to ensure their right to access to consular notification and assistance under Article 36 of the Vienna Convention and upon the provision of incompetent defense counsel in a capital case. The Petitioner also brought claims regarding humane prison conditions and method of execution. In the Commission's view, the claims brought before the Commission raise substantive issues that are distinct from those decided upon by the ICJ.

105. While the claims in both proceedings are similar to the extent that they require consideration of compliance by the United States with its obligations under Article 36 of the Vienna Convention, this matter is raised in two different contexts: the ICJ was required to adjudicate upon the United States' international responsibility to the state of Mexico for violations of the Vienna Convention, while the Commission is required to evaluate the implications of any failure to provide Messrs Medellín, Ramírez Cardenas and Leal García with consular information and notification in connection with their individual right to due process and to a fair trial under the

⁵³ IACHR Report No. 61/03 (Roberto Moreno Ramos), Unites States, Admissibility, Annual Report of the IACHR 2003.

⁵⁴ IACHR, Report N° 96/98, Peter Blaine (Jamaica), Annual Report of the IACHR 1998, para. 43; and Report No. 61/03 (Roberto Moreno Ramos), Unites States, Admissibility, Annual Report of the IACHR 2003, para. 51.

⁵⁵ IACHR Case 11.827, Report N° 96/98, Peter Blaine (Jamaica), Annual Report of the IACHR 1998, para. 45; and Report No. 61/03 (Roberto Moreno Ramos), Unites States, Admissibility, *Annual Report of the IACHR 2003*, para. 51.

American Declaration. This difference highlights the broader distinction between the mandate and purpose of the ICJ and the Commission. The function of the ICJ, as defined through Article I of the Optional Protocol to the Vienna Convention on Consular Relations, is to settle, as between states, disputes arising out of the interpretation and application of the Vienna Convention on Consular Relations. The IACHR, on the other hand, is the principal human rights organ of the Organization of American States charged with promoting the observance and protection of human rights in the Americas, which includes determining the international responsibility of states for alleged violations of the fundamental rights of persons.

106. Based upon the foregoing, the Commission considers that claims raised in case No.12,644 do not constitute duplication of those considered by the ICJ in its judgment issued in the *Avena Case* within the meaning of Article 33.2 of the Commission's Rules, and therefore finds no bar to the admissibility of the Petitioner's claims on the ground of duplication.

2. Exhaustion of Domestic Remedies

107. Article 31.1 of the Commission's Rules of Procedure specifies that, in order to decide on the admissibility of a matter, the Commission must verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with generally recognized principles of international law. Article 31(2) of the Commission's Rules of Procedure specifies that this requirement does not apply if the domestic legislation of the state concerned does not afford due process of law for protection of the right allegedly violated, if the party alleging the violation has been denied access to domestic remedies or prevented from exhausting them, or if there has been an unwarranted delay in reaching a final judgment under the domestic remedies.

108. In addition, the Inter-American Court of Human Rights has observed that domestic remedies, in order to accord with generally recognized principles of international law, must be both adequate, in the sense that they must be suitable to address an infringement of a legal right, and effective, in that they must be capable of producing the result for which they were designed.⁵⁶

109. Further, when a petitioner alleges that he or she is unable to prove exhaustion, Article 31(3) of the Commission's Rules of Procedure provides that the burden then shifts to the State to demonstrate that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record.

110. In the present case, the Petitioner initially argued that Messrs Medellin, Ramirez Cardenas and Leal Garcia should be excused from exhausting domestic remedies pursuant to Article 31 of the Rules of Procedure since there has been an unwarranted delay in rendering judgment relating to their Article 36 of the Vienna Convention claims. The petitioner also argued in the initial complaints and during the hearing held in March, 2008 that the Supreme Court was likely to issue a decision in *Medellin v. Texas* shortly and predicted that, if the Supreme Court denied their claims for relief, they would soon be facing execution.

111. In addition, the Petitioner argues that any attempt to exhaust domestic remedies by raising new legal arguments, such as the violation of Article 36 of the Vienna Convention, ineffective assistance of counsel at the penalty phase, or the admission of an uncharged offense would be fruitless, as state and federal legislation stringently limit the ability of individuals to bring "successive" or "subsequent" post-conviction applications when they failed to raise those issues at the initial stages of the criminal process.

⁵⁶ I/A Court H.R., *Veíasquez Rodríguez Case*, Merits, Judgment of July 29, 1988, Ser. C N° 4, (1988), paras. 64-66.

112. In response, the State argued in the hearing held on March 7, 2008 that the pendency of two cases before the Supreme Court –*Medellin v. Texas* and *Baze v. Kentucky*—regarding the issues of consular notification and the legality of lethal injection, respectively, proved that domestic remedies had not been exhausted. The State argued that the petitioner had disregarded available avenues to pursue remedies such as civil rights claims under section 1983, title 42 of the US Code providing federal remedies for violations of the Constitution by state level officials. The State alleged that, at least in one case, when exercised in the state of Florida, the courts had found that this claim had been appropriately filed.

113. The State argued that pursuing remedies regarding issues such as the legality of lethal injection could not be considered futile since at the time of the hearing a decision was pending before the Supreme Court in the matter of *Baze v. Kentucky*.⁵⁷ The State recognized that it would be the first time in one hundred years that the US Supreme Court would hear a method of execution claim.

114. In the present complaint, the allegation of the Petitioners, as described in Part III of this report, indicate that Messrs Medellin, Ramirez Cardenas and Leal Garcia have pursued numerous domestic avenues of redress since their conviction and sentencing to death. In particular, the information presented indicates that they pursued a direct appeal for their conviction and sentence. The information also indicates that they pursued several post-conviction proceedings before the state courts and the U.S. federal courts and that Mr. Medellin brought the issue of the enforceability of the *Avena* ICJ judgment before the US Supreme Court.

115. After the hearing, the Commission learned that, on March 25, 2008, the US Supreme Court handed down its decision in *Medellin v. Texas*.⁵⁸ The Supreme Court held that neither the ICJ decision in *Avena* nor the President's Memorandum seeking to enforce that judgment constitute directly enforceable federal law that pre-empts state limitations on the filing of successive *habeas corpus* petitions.⁵⁹ Although the Supreme Court recognized that the *Avena* judgment creates an international obligation on the part of the United States, it held that it does not constitute binding domestic law in the absence of implementing legislation.

116. In view of this decision, Messrs Medellin, Ramirez Cardenas and Leal Garcia appear to have no prospect for judicial review of their Vienna Convention claims, unless the US Congress were to enact the corresponding implementing legislation.

117. The Commission has also learned that on April 16, 2008 the US Supreme Court issued a decision in the case of *Ralph Baze v. John Rees, Commissioner of the Kentucky Department of Corrections*⁶⁰ upholding the constitutionality of the lethal injection protocol.⁶¹ The parties in the present case have indicated that this is the same protocol used in Texas. Consequently, domestic remedies regarding the claim on the incompatibility of the method of

⁵⁷ The case of *Ralph Baze v. John Rees, Commissioner of the Kentucky Department of Corrections* deals with the constitutionality of the lethal injection protocol with the Eighth Amendment's ban on cruel and unusual punishments because of the risk of significant pain in those cases where it is not followed.

⁵⁸ *Medellin v. Texas* 552 U.S. (2008).

⁵⁹ *Medellin v. Texas*, 170 L. Ed. 2d 190, 2008 U.S. LEXIS 291 (2008).

⁶⁰ *Baze v. Rees* 553 U.S. (2008).

⁶¹ The Supreme Court decided that in order to constitute cruel and unusual punishment an execution method must present a "substantial" or "objectively intolerable" risk of serious harm. In its view, any risk of pain is inherent if only from the prospect of error in following the required procedure and therefore the Constitution does not demand the avoidance of all risk of pain when carrying an execution through lethal injection. *Baze v. Rees* 553 U.S. (2008), pp. 8 and 9.

execution with the right not to be subject to inhumane treatment must be deemed to have been fully exhausted.

3. Timeliness of the Petition

118. The record in this case indicates that the petition on behalf of Mr. Medellin was lodged with the Commission on November 22, 2006 and Messrs Ruben Ramirez Cardenas and Humberto Leal Garcia's on December 12, 2006. In their respective submissions, the petitioner alleged that she should be excused from the requirement of exhaustion of domestic remedies on the basis of unwarranted delay in rendering judgment. In view of the fact that a final decision was issued on March 25, 2008 while the complaint was already pending before the IACHR, the Commission finds that it is not barred from consideration under Article 32 of the Commission's Rules of Procedure.

4. Colorable Claim

119. Article 27 of the Commission's Rules of Procedure mandates that, in order to be admitted, petitions must state facts "regarding alleged violations of the human rights enshrined in the American Convention on Human Rights and other applicable instruments." In addition, Article 34(a) of the Commission's Rules of Procedure requires the Commission to declare a petition inadmissible when it does not state facts that tend to establish a violation of the rights referred to in Article 27 of the Rules.

120. The Petitioner alleges that the State has violated Articles I, XVIII, and XXVI of the American Declaration. The Commission has outlined in Part III of this Report the substantive allegations of the Petitioner. After carefully reviewing the information and arguments provided by the Petitioner in light of the heightened scrutiny test applied by the Commission in capital punishment cases, and without prejudging the merits of the matter, the Commission considers that the petition states facts that, if proven, would tend to establish possible violations of Articles I, XVIII, and XXVI of the American Declaration and is not manifestly groundless or out of order. Accordingly, the Commission concludes that the petition should not be declared inadmissible under Article 34 of the Commission's Rules of Procedure.

C. Conclusions on Admissibility

121. In accordance with the foregoing analysis of the requirements of Articles 30 to 34 of the Commission's Rules of Procedure, and without prejudging the merits of the matter, the Commission decides to declare as admissible the claims presented on behalf of Messrs Medellin, Ramirez Cardenas and Leal Garcia in respect of Articles I, XVIII, and XXVI of the American Declaration and continue with the analysis of the merits of the case.

V. ANALYSIS ON THE MERITS

122. Before addressing the merits of the present case, the Commission wishes to reaffirm and reiterate its well-established doctrine that it will apply a heightened level of scrutiny in deciding capital punishment cases. The right to life is widely-recognized as the supreme right of the human being, and the *conditio sine qua non* to the enjoyment of all other rights. The Commission therefore considers that it has an enhanced obligation to ensure that any deprivation of life which may occur through the application of the death penalty comply strictly with the requirements of the applicable inter-American human rights instruments, including the American Declaration. This "heightened scrutiny test" is consistent with the restrictive approach taken by

other international human rights authorities to the imposition of the death penalty,⁶² and has been articulated and applied by the Commission in previous capital cases before it.⁶³

123. The Commission will therefore review the Petitioner's allegations in the present case with a heightened level of scrutiny, to ensure in particular that the right to life, the right to due process, and the right to a fair trial as prescribed under the American Declaration have been properly respected by the State.

A. Right to a Fair Trial and Due Process of Law

1. Consular Notification and Assistance

124. The Petitioner alleges that the State is responsible for violations of Messrs Medellin, Ramirez Cardenas and Leal Garcia's rights to due process and to a fair trial because of failure to inform them of their rights to consular notification under Article 36 of the Vienna Convention thereby causing prejudice to their defense. The State alleges that the Petitioner fails to demonstrate that the fact that consular notification procedures were not followed amounts to a violation of the American Declaration. The State alleges that the Declaration does not include consular notification or assistance as an integral component of the protections set forth in Articles XVIII and XXVI of the Declaration nor does it indicate that consular notification may be relevant to due process protections. Therefore, in its view, the fact that consular notification procedures may not have been followed does not amount to a violation of the American Declaration.

125. The Commission has determined in previous cases⁶⁴ that it is appropriate to consider compliance with Article 36 of the Vienna Convention by a state party to that Treaty when interpreting and applying the provisions of the American Declaration to a foreign national who has been arrested, committed to trial or to custody pending trial, or is detained in any other manner by that state. In particular, the Commission may consider the extent to which a state party has given effect to the requirements of Article 36 of the Vienna Convention for the purpose of evaluating that state's compliance with a foreign national's due process rights under Articles XVIII and XXVI of the American Declaration. Also, the "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas"⁶⁵ adopted by the Commission in 2008 establish that

⁶² See e.g. I/A Court H.R., Advisory Opinion OC-16/99 (1 October 1999) "The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law", para. 136 (finding that "[b]ecause execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result"); U.N.H.R.C., *Baboheram-Adhin et al. v. Suriname*, Communication Nos. 148-154/1983, adopted 4 April 1985, para. 14.3 (finding that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of the state.); Report by the U.N. Special Rapporteur on Extra-judicial Executions, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1994/82, Question of the Violation of Human Rights and Fundamental Freedoms in any part of the World, with particular reference to Colonial and Other Dependent Countries and Territories, U.N. Doc.E/CN.4/1995/61 (14 December 1994) (hereinafter "Ndiaye Report"), para. 378 (emphasizing that in capital cases, it is the application of the standards of fair trials to each and every case that needs to be ensured and, in case of indications to the contrary, verified, in accordance with the obligation under international law to conduct exhaustive and impartial investigations into all allegations of violation of the right to life.).

⁶³ IACHR Report N° 57/96 (*Andrews v. United States*), Annual Report of the IACHR 1997), paras. 170-171; Report N° 38/00 (*Baptiste*), Grenada, Annual Report of the IACHR 1999, paras. 64-66; Report N° 41/00 (*McKenzie et al.*) Jamaica, Annual Report of the IACHR 1999, paras. 169-171.

⁶⁴ IACHR Report 52/02, Case 11.753 (*Ramón Martínez Villarreal*), United States, Annual Report of the IACHR 2002; Report No. 91/05 (*Javier Suarez Medina*), United States, Annual Report of the IACHR 2005; Report No. 1/05 (*Roberto Moreno Ramos*), United States, Annual Report of the IACHR 2005.

⁶⁵ "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas" approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008, <http://www.cidh.org/Basicos/English/Basic21.a.Principles%20and%20Best%20Practices%20PDL.htm>

Persons deprived of liberty in a Member State of the Organization of American States of which they are not nationals, shall be informed, without delay, and in any case before they make any statement to the competent authorities, of their right to consular or diplomatic assistance, and to request that consular or diplomatic authorities be notified of their deprivation of liberty immediately. Furthermore, they shall have the right to communicate with their diplomatic and consular authorities freely and in private.⁶⁶

126. In the present case, the Petitioner alleges that Messrs Medellin, Ramirez Cardenas and Leal Garcia are nationals of Mexico and that law enforcement authorities in Texas were aware of this fact from the time of their detention. In addition, Messrs Medellin, Ramirez Cardenas and Leal Garcia have stated that they were never informed of their right to consular notification when arrested or subsequent thereto, nor did their state appointed defense attorneys seek consular assistance. The State has not disputed the Petitioners contentions in this regard. Accordingly, based upon the information and arguments presented, the Commission concludes that Messrs Medellin, Ramirez Cardenas and Leal Garcia were not notified of their right to consular assistance at or subsequent to the time of their arrest and did not have access to consular officials until after their trials had ended.

127. The Commission notes that non-compliance with obligations under Article 36 of the Vienna Convention is a factor that must be evaluated together with all of the other circumstances of each case in order to determine whether a defendant received a fair trial. In cases in which a state party to the Vienna Convention on Consular Relations fails to fulfill its consular notification obligation to a foreign national, a particular responsibility falls to that state to put forward information indicating that the proceeding against a foreign national satisfied the requirements of a fair trial notwithstanding the state's failure to meet its consular notification obligation.

128. It is apparent from the record before the Commission that, following Messrs Medellin, Ramirez Cardenas and Leal Garcia's conviction and sentencing, consular officials were instrumental in gathering significant evidence concerning their character and background. This evidence, including information relating to their family life as well as expert psychological reports, could have had a decisive impact upon the jury's evaluation of aggravating and mitigating factors in their cases. In the Commission's view, this information was clearly relevant to the jury's determination as to whether the death penalty was the appropriate punishment in light of their particular circumstances and those of the offense.

129. The Commission notes in this respect that the significance of consular notification to the due process rights of foreign nationals in capital proceedings has also been recognized by the American Bar Association, which has indicated in its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases that

[u]nless predecessor counsel has already done so, counsel representing a foreign national should: 1. immediately advise the client of his or her right to communicate with the relevant consular office; and 2. obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client's consular office and inform it of the client's detention or arrest [...]⁶⁷

⁶⁶ Principle V (Due Process) of the "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas" approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008, <http://www.cidh.org/Basicos/English/Basic21.a.Principles%20and%20Best%20Practices%20PDL.htm>

⁶⁷ American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised Edition)(February 2003), Guideline 10.6B "Additional Obligations of Counsel Representing a Foreign National."

130. The Commission emphasizes in this regard its previous decisions concerning the necessity of individualized sentencing in capital cases, where a defendant must be entitled to present submissions and evidence in respect of all potentially mitigating circumstances relating to his or her person or offense for consideration by the sentencing court in determining whether the death penalty is a permissible or appropriate punishment.⁶⁸

131. The potential significance of the additional evidence in Mr. Leal Garcia's case is enhanced by the fact that apart from the circumstances of his crime, the only aggravating factors against him consisted of evidence of an unadjudicated crime. Moreover, the Petitioner made additional submissions based on evidence gathered before and after his conviction and sentencing, which raises serious doubts regarding the criminal conduct attributed to him. These elements confirm that the evidence gathered through the assistance of the consular officials may have had a particularly significant impact upon the jury's determination of responsibility or at the very least the appropriate punishment for Mr. Leal Garcia.

132. Based upon the foregoing, the Commission concludes that the State's obligation under Article 36.1 of the Vienna Convention on Consular Relations to inform Messrs Medellin, Ramirez Cardenas and Leal Garcia of their right to consular notification and assistance constituted a fundamental component of the due process standards to which they were entitled under Articles XVIII and XXVI of the American Declaration, and that the State's failure to respect and ensure this obligation deprived them of a criminal process that satisfied the minimum standards of due process and a fair trial required under Articles XVIII and XXVI of the Declaration.

2. Competent Counsel

133. The Petitioner alleges that the prejudice suffered by Messrs Medellin, Ramirez Cardenas and Leal Garcia was exacerbated by the incompetence of state appointed counsel during the pre-trial investigation, the trial phase and the sentencing phase of the proceedings. The State, for its part, asserts that the US Constitution and federal and state laws and regulations "ensure that all persons, including foreign nationals unfamiliar with English or the US judicial system, will have adequate interpreters and competent legal counsel who can advise them" and that failure to honor these protections can be corrected through appeals.⁶⁹

134. As the Commission has established, the fundamental due process requirements for capital trials include the obligation to afford a defendant a full and fair opportunity to present mitigating evidence for consideration in determining whether the death penalty is the appropriate punishment in the circumstances of his or her case. The Commission has stated in this respect that the due process guarantees under the American Convention and the American Declaration applicable to the sentencing phase of a defendant's capital prosecution guarantee an opportunity to make submissions and present evidence as to whether a death sentence may not be a permissible or appropriate punishment in the circumstances of the defendant's case, in light of such considerations as the offender's character and record, subjective factors that might have motivated his or her conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender.⁷⁰

⁶⁸ IACHR, Report 41/00 (Desmond McKenzie et al.), Jamaica, Annual Report of the IACHR 1999, paras. 207-209.

⁶⁹ Submission by the United States, dated July 8, 2008, page 7.

⁷⁰ See Report N° 38/00 (Baptiste), Grenada, Annual Report of the IACHR 1999, paras. 91, 92; Report N° 41/00 (McKenzie et al.) Jamaica, Annual Report of the IACHR 1999, paras. 204, 205; Case N° 12.067 (Michael Edwards et al.), The Bahamas, Annual Report of the IACHR 2000, paras. 151-153. See also I/A Court H.R., Hilaire, Constantine and Benjamin et al. Case v. Trinidad and Tobago, Judgment of 21 June 2002, Ser. C N° 94, paras. 102, 103.

135. Similar requirements are reflected under domestic standards of legal practice in the United States. In particular, the American Bar Association, the principal national organization for the legal profession in the United States, has prepared and adopted guidelines and related commentaries that emphasize the importance of investigating and presenting mitigating evidence in death penalty cases.⁷¹ They indicate, for example, that the duty of counsel in the United States to investigate and present mitigating evidence is now "well-established" and emphasize that

[b]ecause the sentencer in a capital case must consider in mitigation, 'anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant,' "penalty phase preparation requires extensive and generally unparalleled investigation in to personal and family history." In the case of the client, this begins with the moment of conception.⁷²

136. The Guidelines also emphasize the need for prompt and early mitigation investigation, stating that

[t]he mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations.⁷³

137. The Commission recognizes that the laws of the United States offer extensive due process protections to individuals who are the subject of criminal proceedings, including the right to effective legal representation supplied at public expense if an individual cannot afford an attorney. While it is fundamental for these protections to be prescribed under domestic law, it is also necessary for States to ensure that these protections are provided in practice in the circumstances of each individual defendant.

138. In the present case, the State has not contested the specific allegations of the Petitioner that the attorneys provided by the state for Messrs Medellin, Ramirez Cardenas and Leal Garcia were inadequate and negligent. The information in the record of the case indicates that in two cases the attorneys were suspended from the practice of law for ethics violations in other cases; one of the attorneys was held in contempt of court and arrested for seven days for violating his suspension and spent a total of eight hours on the investigation of the case prior to the commencement of jury selection; during jury selection two of the attorneys failed to strike jurors who revealed their inclination to impose automatically the death penalty; in all of the cases few or no witnesses or expert witnesses were called during the trial phase; there was no cross examination on the credibility or relevance of fingerprint, DNA, Luminol and other evidence produced by the prosecution; in all of the cases the attorneys failed to exploit suspicious gaps in the prosecution's investigation; in all of the cases few or no witnesses or expert witnesses were called during the sentencing phase; in two cases expert witnesses were called whose testimony was detrimental to the alleged victim's case; (see supra Section III, paras. 18, 19, 30, 42-47).

⁷¹ American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised editions) (February 2003) (<http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines.pdf>), Guideline 10.7 – Investigation.

⁷² American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised editions) (February 2003) (<http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines.pdf>), Guideline 10.7 – Investigation, at 82.

⁷³ American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised editions) (February 2003) (<http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines.pdf>), Guideline 10.7 – Investigation, at 83.

139. In this regard, the Commission wishes to reiterate⁷⁴ its concern respecting the Petitioner's submissions on the deficient state of the capital public defender system in the state of Texas, which has no state-wide agency responsible for providing specialized representation in capital cases. A great majority of lawyers who handle death penalty cases in Texas are sole practitioners lacking the expertise and resources necessary to properly defend their clients, and as a result, capital defendants frequently receive deficient legal representation.⁷⁵

140. The Commission has found in a previous case⁷⁶ that the systemic problems in the Texas justice system are linked to deficiencies in part due to the lack of effective oversight by the State. The Commission considers that this may have contributed to the deficiencies in Messrs Medellin, Ramirez Cardenas and Leal Garcia's legal representation.

141. Based upon the information and evidence on the record, it is not apparent to the Commission that the proceedings were fair notwithstanding the State's failure to comply with the consular notification requirements. To the contrary, the Commission considers, based upon the information presented, that the State's failure in this regard had a potentially serious impact upon the fairness of Messrs Medellin, Ramirez Cardenas and Leal Garcia's trial.

142. Based upon the foregoing, the Commission concludes that the State's obligation under Articles XVIII and XXVI of the American Declaration include the right to adequate means for the preparation of a defense, assisted by adequate legal counsel and that the State's failure to respect and ensure this obligation resulted in additional violations of their rights to due process and to a fair trial under these provisions of the Declaration.

143. In the circumstances of the present case, where the defendants' convictions have occurred as a result of sentencing proceedings that fail to satisfy the minimal requirements of fairness and due process, the Commission considers that the appropriate remedy includes the convocation of new sentencing hearings, in accordance with the due process and fair trial protections prescribed under Articles I, XVIII and XXVI of the American Declaration.⁷⁷

3. Use of Evidence of an Unadjudicated Offense

144. The Petitioners have contended, and the State has not contested, that during the sentencing phase of Mr. Leal Garcia's trial, the prosecution introduced evidence of an additional crime that he was alleged to have committed, for which he was never charged, tried or convicted. According to the record, this evidence was presented and relied upon by the prosecution as an aggravating factor for the jury to consider in determining whether Mr. Leal Garcia may have constituted a continuing threat to society and therefore warranted a death sentence.

145. The Commission has decided in previous cases that the state's conduct in introducing evidence of unadjudicated crimes during a sentencing hearing was "antithetical to the

⁷⁴ See IACHR Report No. 1/05 (Roberto Moreno Ramos), United States, Annual Report of the IACHR 2005, para 56.

⁷⁵ See Texas Defender Service *A State of Denial: Texas Justice and the Death Penalty* (2000) available at <http://texasdefender.org/state%20of%20denial/Part1.pdf>. The report was based upon a study of hundreds of death penalty cases in the state of Texas. The Report identifies many instances of poor representation by defense lawyers in capital trials and state habeas corpus proceedings, which in some cases result from the State's refusal to both appoint lawyers with sufficient experience and training and to fund an adequate defense. The Report also indicates that the Texas Court of Criminal Appeals routinely denies any remedies to inmates whose court-appointed lawyers performed poorly.

⁷⁶ IACHR Report No. 1/05 (Roberto Moreno Ramos), United States, Annual Report of the IACHR 2005, para. 57.

⁷⁷ IACHR Report N° 52/02 (Ramón Martínez Villarreal), United States, Annual Report of the IACHR 2002, para. 86; Report N° 127/01, Case N° 12.183, (Joseph Thomas), Jamaica, Annual Report of the IACHR 2001, para. 146.

most basic and fundamental judicial guarantees applicable in attributing responsibility and punishment to individuals for crimes.”⁷⁸ This conclusion is based upon the Commission’s finding that the consequence of using evidence of unadjudicated crimes in this manner is, effectively, to presume the defendant’s guilt and impose punishment for the other unadjudicated crimes, but through a sentencing hearing rather than a proper and fair trial process accompanied by all of the substantive and procedural protections necessary for determining individual criminal responsibility. The Commission has also found that the prejudice resulting from the use of the evidence relating to these other alleged crimes is compounded by the fact that lesser standards of evidence are applicable during the sentencing process.

146. In the present case, the facts establish that the State permitted the introduction of evidence during Mr. Leal Garcia’s sentencing hearing concerning a separate crime that he was alleged to have committed, but for which he was never charged, tried or convicted and against which he could not properly defend through strict rules of evidence and other due process protections applicable during the guilt/innocence phase of a criminal prosecution. In addition, the jury concluded during the sentencing hearing that he committed the separate crime and relied upon this finding in determining that he should be sentenced to death. Further, applicable Texas law, did not prescribe the standard of proof applicable for the jury in considering the evidence relating to the unadjudicated crime, nor was the jury given any such direction from the judge.

147. The Commission must again emphasize that a significant and substantive distinction exists between the introduction of evidence of mitigating and aggravating factors concerning the circumstances of an offender or his or her offense (for example, the age or infirmity of the offender’s victim or whether the defendant had a prior criminal record), and an effort to attribute to an offender individual criminal responsibility and punishment for violations of additional serious offenses that have not been charged and tried pursuant to a fair trial offering the requisite due process guarantees.

148. Based upon the foregoing, the Commission concludes that the State’s conduct in permitting the introduction of evidence of an unadjudicated crime during Mr. Leal Garcia’s capital sentencing hearing contributed to the imposition of the death penalty upon Mr. Leal Garcia in a manner that violated his right to a fair trial under Article XVIII of the American Declaration, as well as his right to due process of law under Article XXVI of the Declaration.

B. Clemency Proceedings

149. The Petitioner alleges that clemency review in Texas falls short of the minimum standards of due process required by Article XXVI of the American Declaration. The State alleges that the Texas Board of Pardons and Paroles –composed of 18 salaried members who serve full time– “more than meets” the standard of providing certain minimal procedural protections for condemned prisoners, as required by the IACHR in its interpretation of Article XXIV of the American Declaration. The State also makes a distinction between clemency review in the case of defendants who face a mandatory death sentence as in prior cases decided by the Commission, upon a finding of guilt and clemency proceedings in the case of Messrs Medellin, Ramirez Cardenas and Leal Garcia who had the opportunity to present individualized mitigating evidence before the sentencing body.

150. The Commission has previously held that right to apply for amnesty, pardon or commutation of sentence under inter-American human rights instruments, while not necessarily subject to full due process protections, is subject to certain minimal fairness guarantees for

⁷⁸ IACHR Report N° 52/02 (Ramón Martínez Villarreal), United States, Annual Report of the IACHR 2002; Report N° 127/01, Case N° 12.183, (Joseph Thomas), Jamaica, Annual Report of the IACHR 2001.

condemned prisoners in order for the right to be effectively respected and enjoyed.⁷⁹ These procedural protections have been held to include the right on the part of condemned prisoners to submit a request for amnesty, pardon or commutation of sentence, to be informed of when the competent authority will consider the offender's case, to make representations, in person or by counsel to the competent authority, and to receive a decision from that authority within a reasonable period of time prior to his or her execution.⁸⁰

151. As indicated *supra*, the Commission has an enhanced obligation to ensure that any deprivation of life which may occur through the application of the death penalty comply strictly with the requirements of the applicable inter-American human rights instruments, including the American Declaration. Therefore, the allegations in the present case require a heightened level of scrutiny to ensure that the rights to life, due process, and fair trial as prescribed under the American Declaration have been properly respected by the State. In the case of Clemency proceedings pending the execution of a death sentence, the minimal fairness guarantees afforded to the applicant should include the opportunity to receive an impartial hearing.

152. The allegations of the parties indicate that the practice followed by the Texas Board of Pardons and Paroles when considering petitions filed on behalf of persons sentenced to death does not allow for opportunities to view the evidence submitted in opposition to clemency requests and that this body does not report on the reasons for its recommendation to reject a clemency petition. The State has not denied the assertion that there is no set of rules or criteria to be taken into account when making clemency determinations regarding death penalty cases in Texas. Therefore, the Commission finds that the procedure in place falls short of establishing minimal safeguards to prevent arbitrary decisions concerning evidence submitted either in favour or in opposition of a clemency request pending the execution of a death sentence.

153. Based upon the foregoing, the Commission concludes that the clemency procedures in Texas fail to guarantee the right to an impartial hearing pursuant to Article XXVI of the American Declaration and that the State's failure to ensure this obligation may result in an additional violations of their rights to a fair trial under the Declaration.

C. Right to life

154. In previous decisions, the Commission has found that Article I of the Declaration prohibits the application of the death penalty when its implementation would result in an arbitrary deprivation of life.⁸¹ In addition, the Commission has included among the deficiencies that will result in an arbitrary deprivation of life through the death penalty the failure of a State to afford an accused strict and rigorous fair trial guarantees.⁸² Accordingly, where the right of a condemned prisoner to a fair trial has been infringed in connection with the proceedings that led to his or her death sentence, the Commission has held that executing the individual pursuant to that sentence will constitute a deliberate and egregious violation of the right to life under Article I of the American Declaration.

⁷⁹ See, IACHR, Case N° 12.023 (Desmond McKenzie *et al.*), Jamaica, Annual Report of the IACHR 1999, para. 228; Case N° 12.067 (Michael Edwards *et al.*), The Bahamas, Annual Report of the IACHR 2000, para. 170.

⁸⁰ See, IACHR, Case N° 12.023 (Desmond McKenzie *et al.*), Jamaica, Annual Report of the IACHR 1999, para. 228; Case N° 12.067 (Michael Edwards *et al.*), The Bahamas, Annual Report of the IACHR 2000, para. 170.

⁸¹ IACHR, Report No. 52/02 (Ramon Martinez Villarreal), United States, Annual Report of the IACHR 2002, para. 84.

⁸² IACHR, Report No. 57/96 (William Andrews) United States, Annual Report of the IACHR 1997, para. 172.

155. In the instant case, the Commission has established that the State is responsible for violations of its obligations under Articles XVIII and XXVI of the American Declaration, based upon its failure to provide the victims with competent legal representation in the course of the criminal proceedings, and its failure to afford Messrs Medellin, Ramirez Cardenas and Leal Garcia their right to consular information under Article 36.1.b of the Vienna Convention. Therefore, the Commission finds that the imposition of the death penalty in the instant case involves an arbitrary deprivation of life, prohibited by Article I of the Declaration. Additionally, should the State execute Messrs Medellin, Ramirez Cardenas and Leal Garcia pursuant to their death sentences, it will commit a deliberate and egregious violation of Article I of the American Declaration.

156. In view of the above, the Commission does not deem necessary to examine the Petitioner's claim relating to the method of execution of capital punishment, referred to *supra* at III.A.2.c.

VI. CONCLUSION

157. The Commission hereby concludes that the State is responsible for violations of Articles I, XVIII and XXVI of the American Declaration against Messrs Medellin, Ramirez Cardenas and Leal Garcia in respect of the criminal proceedings leading to the imposition of the death penalty against them. The Commission also concludes that, should the State execute them pursuant to the criminal proceedings at issue in this case, it would commit an irreparable violation of the fundamental right to life under Article I of the American Declaration.

158. According to the information presently available, the 339th District Court of Harris County, Texas, has scheduled Mr. Medellin's execution for August 5, 2008. In this connection, the Commission recalls its jurisprudence concerning the legal effect of its precautionary measures in the context of capital punishment cases. As the Commission has emphasized on numerous occasions, it is beyond question that the failure of an OAS member state to preserve a condemned prisoner's life pending the completion of the proceedings before the IACHR, including implementation of the Commission's final recommendations, undermines the efficacy of the Commission's process, deprives condemned persons of their right to petition in the inter-American human rights system, and results in serious and irreparable harm to those individuals. For these reasons, the Commission has determined that a member state disregards its fundamental human rights obligations under the OAS Charter and related instruments when it fails to implement precautionary measures issued by the Commission in these circumstances.⁸³

159. In light of these fundamental principles, and in light of the Commission's findings in the present report, the Commission hereby reiterates its requests of December 6, 2006 and January 30, 2007 pursuant to Article 25 of its Rules of Procedure that the United States take the necessary measures to preserve Messrs Medellin's, Ramirez Cardenas' and Leal Garcia's lives and physical integrity pending the implementation of the Commission's recommendations in the matter.

⁸³ Report No. 52/01 (Juan Raul Garza), United States, Annual Report of the IACHR 2000, para. 117; IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, Doc. OEA/Ser.LV/II.111 doc.21 rev. (6 April 2001), paras. 71 and 72. See similarly I/A Court H.R., Provisional measures adopted in the James *et al.* Case, Order of August 29, 1998, Series E; International Court of Justice, *Case Concerning the Vienna Convention on Consular Relations (Germany v. United States of America)*, Request for the Indication of Provisional Measures, Order of 3 March 1999, I.C.J. General List, N° 104, paras. 22-28; United Nations Human Rights Committee, *Dante Piandiong and others v. The Philippines*, Communication N° 869/1999, U.N. Doc. CCPR/C/70/D/869.1999 (19 October 1999), paras. 5.1-5.4; Eur. Court H.R., *Affaire Mamatkulov et Abdurasulovic c. Turkey*, Reqs. Nos. 46827/99, 46951/99 (6 February, 2003), paras. 104-107.

VII. RECOMMENDATIONS

160. In accordance with the analysis and the conclusions in the present report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THAT THE UNITED STATES:

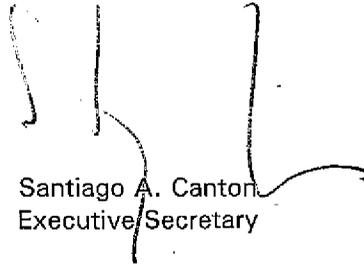
1. Vacate the death sentences imposed and provide the victims with an effective remedy, which includes a new trial in accordance with the equality, due process and fair trial protections prescribed under Articles I, XVIII and XXVI of the American Declaration, including the right to competent legal representation.
2. Review its laws, procedures and practices to ensure that foreign nationals who are arrested or committed to prison or to custody pending trial or are detained in any other manner in the United States are informed without delay of their right to consular assistance and that, with his or her concurrence, the appropriate consulate is informed without delay of the foreign national's circumstances, in accordance with the due process and fair trial protections enshrined in Articles XVIII and XXVI of the American Declaration.
3. Review its laws, procedures and practices to ensure that persons who are accused of capital crimes are tried and, if convicted, sentenced in accordance with the rights established in the American Declaration, including Articles I, XVIII and XXVI of the Declaration, and in particular by prohibiting the introduction of evidence of unadjudicated crimes during the sentencing phase of capital trials.
4. Review its laws, procedures and practices to ensure that persons who are accused of capital crimes can apply for amnesty, pardon or commutation of sentence with minimal fairness guarantees, including the right to an impartial hearing.

VIII. NOTIFICATION

161. The Commission decides to transmit the present report to the United States and to grant it a period of two months to take the necessary measures in order to comply with the preceding recommendation. This period will be counted beginning on the date of transmission of the present report to the State, which will not be at liberty to publish it, pursuant to the provisions of Article 43(2) of the Commission's Rules of Procedure. The Commission also decides to notify the Petitioner of the adoption of this Report.

Done and signed in the city of Washington, D.C., on the 24th day of the month of July, 2008. (Signed): Luz Patricia Mejía Guerrero, First Vice-Chairwoman; Felipe González, Second Vice-Chairman; Sir Clare K. Roberts, Florentín Melendez, Paulo Sérgio Pinheiro and Victor E. Abramovich Commissioners.

The undersigned, Santiago A. Canton, Executive Secretary of the Inter-American Commission on Human Rights, in keeping with Article 47 of the Commission's Rules of Procedure, certifies that this is an accurate copy of the original deposited in the archives of the IACHR Secretariat.



Santiago A. Canton
Executive Secretary

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INTER - AMERICAN COMMISSION ON HUMAN RIGHTS
COMISION INTERAMERICANA DE DERECHOS HUMANOS
COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS
COMMISSION INTERAMÉRICAINÉ DES DROITS DE L'HOMME



ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C. 20006 U.S.A.

December 6, 2006

Ref.: José Medellín, Petition N° P1323-06
Precautionary Measures MC-317-06
United States of America

Dear Ms. Babcock:

On behalf of the Inter-American Commission on Human Rights (IACHR), I am pleased to acknowledge receipt of your petition dated November 21, 2006, which was received by the Commission on November 22, 2006. I also wish to inform you that by note of today's date, the Government of the United States has been provided with the relevant parts of your petition and subsequent observations, with a period of two months to provide a response, in accordance with Article 30 of the Commission's Rules of Procedure.

In addition, given the information contained in your petition and supplementary communication, the Commission addressed the Government of the United States in the following terms:

By this note, the Commission also requests precautionary measures from the United States pursuant to Article 25(1) of its Rules of Procedure,¹ to avoid irreparable damage to the alleged victim in this complaint, Mr. José Medellín. In this regard, the petition alleges that the United States is responsible for violations of Articles I, XVIII and XXVI of the American Declaration of the Rights and Duties of Man in connection with criminal proceedings against Mr. Medellín in the state of Texas for the commission of a crime in 1993. *Inter alia*, the petition alleges that during the course of Mr. Medellín's arrest and detention, no consular assistance was offered to Mr. Medellín, as a Mexican citizen.

Sandra L. Babcock, Professor
Clinical Professor of Law
Jennifer Cassel, Student
Northwestern University School of Law
357 E. Chicago Avenue
Chicago, Illinois 60611

Fax: 312.503.2798

¹ Article 25(1) of the Commission's Rules of Procedure states: "In serious and urgent cases, and whenever necessary according to the information available, the Commission may, in its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons."

75a

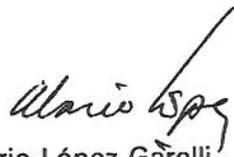
2

It is alleged that given the refusal by the Texas Criminal Court of Appeals to review Mr. Medellín's case, it is expected that an execution date will be scheduled shortly.

If Mr. Medellín were to be executed before the Commission has an opportunity to examine his case, any eventual decision would be rendered ineffectual in terms of potential remedies, and he would suffer irreparable damage. Consequently, pursuant to Article 25(1) of its Rules of Procedure, the Commission hereby requests that the United States take precautionary measures to preserve Mr. Medellín's life pending the Commission's investigation of the allegations in the petition. The Commission respectfully requests an urgent response to this request for precautionary measures.

We will advise you of any response the Commission may receive from the State.

Sincerely yours,



Mario López Garelli

In charge of the Executive Secretariat

INTER - AMERICAN COMMISSION ON HUMAN RIGHTS
COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS
COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS
COMMISSION INTERAMÉRICAINNE DES DROITS DE L'HOMME



ORGANIZACION OF AMERICAN STATES

WASHINGTON, D.C. 20006

June 20, 2008

Ref.: José Medellín Rojas, et al.
Case 12.644, Precautionary Measures request MC 317-06
United States

Excellency:

I have the honor of addressing Your Excellency on behalf of the Inter-American Commission on Human Rights in order to forward the pertinent parts of a communication from the Petitioner received by the Commission June 5, 2008, concerning the above-referenced matter.

According to the Petitioner, the 339th District Court of Harris County, Texas, has scheduled Mr. Medellín's execution for August 5, 2008. In light of this information, the Commission hereby reiterates the precautionary measures adopted in favor of Mr. Medellín on December 6, 2006, in which the Commission requested that the United States take measures to preserve Mr. Medellín's life pending the Commission's investigation of the allegations in the petition.

The Commission hereby requests an urgent response to the reiteration of its precautionary measures.

Please accept, Excellency, the assurances of my highest consideration,

Elizabeth Abi-Mershed
Assistant Executive Secretary

Her Excellency Condoleezza Rice
Secretary of State
VIA His Excellency Hector Morales
Ambassador, Permanent Representative of the United States
to the Organization of American States
Washington, D.C.

Enclosure

77a



THE PERMANENT REPRESENTATIVE
OF THE
UNITED STATES OF AMERICA
TO THE
ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C.

June 23, 2008

Ms. Rissie L. Owens
Presiding Officer
Texas Board of Pardons and Paroles
209 West 14th Street, Suite 500
Austin, Texas 78701

Dear Ms. Owens:

I have the honor to transmit to you a request from the Inter-American Commission on Human Rights (IACHR) concerning the case of Mr. José Medellín Rojas, who is currently on death row in the state of Texas and scheduled for execution on August 5, 2008. The IACHR reiterates its previous request that precautionary measures be adopted in favor of Mr. Medellín. On December 6, 2006, the Commission requested that the United States take measures to preserve Mr. Medellín's life pending the Commission's investigation of the allegations in the petition.

The IACHR is an organ of the Organization of American States (OAS), of which the United States is a member. The IACHR's primary mission is to protect and promote human rights. As part of its mandate, it examines allegations made by individuals within the jurisdiction of any OAS member state, including the United States. The IACHR has received a petition from Mr. Medellín and is now in the process of considering his claims.

The IACHR has asked us to forward the enclosed communication on to you for your consideration. Additional letters have been sent to the Office of the Governor and the Office of the Attorney General. Thank you for your attention to this request.

Sincerely,

A handwritten signature in black ink that reads "Hector E. Morales, Jr." with a stylized flourish at the end.

Hector E. Morales, Jr.
Ambassador

Enclosure: As stated.

7/23/08 MON 18:07 FAX

78a



THE PERMANENT REPRESENTATIVE
OF THE
UNITED STATES OF AMERICA
TO THE
ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C.

June 23, 2008

The Honorable
Mr. Rick Perry
Governor of Texas
P.O. Box 12428
Austin, TX 78771-2428

Dear Governor Perry:

I have the honor to transmit to you a request from the Inter-American Commission on Human Rights (IACHR) concerning the case of Mr. José Medellín Rojas, who is currently on death row in the state of Texas and scheduled for execution on August 5, 2008. The IACHR reiterates its previous request that precautionary measures be adopted in favor of Mr. Medellín. On December 6, 2006, the Commission requested that the United States take measures to preserve Mr. Medellín's life pending the Commission's investigation of the allegations in the petition.

The IACHR is an organ of the Organization of American States (OAS), of which the United States is a member. The IACHR's primary mission is to protect and promote human rights. As part of its mandate, it examines allegations made by individuals within the jurisdiction of any OAS member state, including the United States. The IACHR has received a petition from Mr. Medellín and is now in the process of considering his claims.

The IACHR has asked us to forward the enclosed communication on to you for your consideration. Additional letters have been sent to your Attorney General's office and the Texas Board of Pardons and Paroles. Thank you for your attention to this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Hector E. Morales, Jr.", written in a cursive style.

Hector E. Morales, Jr.
Ambassador

Enclosure: As stated.

79a



THE PERMANENT REPRESENTATIVE
OF THE
UNITED STATES OF AMERICA
TO THE
ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C.

June 23, 2008

The Honorable
Mr. Greg Abbott
Attorney General of the State of Texas
P.O. Box 12548
Austin, TX 78711-2548

Dear Mr. Attorney General:

I have the honor to transmit to you a request from the Inter-American Commission on Human Rights (IACHR) concerning the case of Mr. José Medellín Rojas, who is currently on death row in the state of Texas and scheduled for execution on August 5, 2008. The IACHR reiterates its previous request that precautionary measures be adopted in favor of Mr. Medellín. On December 6, 2006, the Commission requested that the United States take measures to preserve Mr. Medellín's life pending the Commission's investigation of the allegations in the petition.

The IACHR is an organ of the Organization of American States (OAS), of which the United States is a member. The IACHR's primary mission is to protect and promote human rights. As part of its mandate, it examines allegations made by individuals within the jurisdiction of any OAS member state, including the United States. The IACHR has received a petition from Mr. Medellín and is now in the process of considering his claims.

The IACHR has asked us to forward the enclosed communication on to you for your consideration. Additional letters have been sent to the Office of the Governor and the Texas Board of Pardons and Paroles. Thank you for your attention to this request.

Sincerely,

A handwritten signature in black ink that reads "Hector E. Morales, Jr." with a stylized flourish at the end.

Hector E. Morales, Jr.
Ambassador

Enclosure: As stated.

Dear Governor Perry:

We are writing to request the assistance of the State of Texas in carrying out an international legal obligation of the United States. Put simply, the United States seeks the help of the State of Texas.

The international legal obligation at issue concerns the claims of certain Mexican nationals in Texas and several other states under the Vienna Convention on Consular Relations, which among other things requires the United States, upon request, to notify Mexico of the arrest of one of its nationals. These claims were addressed in the International Court of Justice's *Avena* decision, and the U.S. Supreme Court's recent decision in *Medellín v. Texas*.

The United States attaches great importance to complying with its obligations under international law. To that end, the President sought to discharge the international obligation of the United States by having state courts address the Vienna Convention claims of the Mexican nationals at issue. The Supreme Court determined in *Medellín* that the Executive Branch could not direct state courts to provide such relief as a matter of domestic law. In so ruling, however, the Court recognized, as Texas has, that the *Avena* judgment continues to bind the United States as a matter of international law. Of course, after the *Avena* judgment, the United States withdrew from the jurisdiction of the International Court of Justice with respect to matters arising under the Vienna Convention.

The United States has held intensive discussions with the Government of Mexico after the Supreme Court's decision. On June 5 Mexico nonetheless

The Honorable
Rick Perry,
Governor of Texas,
P.O. Box 12428,
Austin, Texas 78711-2428.

made a new filing in the International Court of Justice regarding the *Avena* decision. We continue to seek a practical and timely way to carry out our nation's international legal obligation, a goal that the United States needs the assistance of Texas to achieve. In this connection, we respectfully request that Texas take the steps necessary to give effect to the *Avena* decision with respect to the convictions and sentences addressed therein. We would appreciate the opportunity to discuss possible mechanisms for compliance with the *Avena* decision with you or your representatives.

Sincerely,



Michael B. Mukasey
Attorney General



Condoleezza Rice
Secretary of State



OFFICE OF THE GOVERNOR

RICK PERRY
GOVERNOR

July 18, 2008

The Honorable Condoleezza Rice, Ph.D.
U.S. Secretary of State
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

The Honorable Michael B. Mukasey
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Dear Secretary Rice and General Mukasey:

Thank you for your letter of June 17 requesting that the State of Texas comply with an International Court of Justice order concerning the Vienna Convention on Consular Notification. ~~The State of Texas, as an individual state, is not directly bound by the International Court of Justice's decision in the *Avena* case, as determined by the United States Supreme Court and the Texas Court of Criminal Appeals. Nonetheless, I understand your concerns from a federal standpoint about the importance of international law. That said, I too believe, as also stated in your letter, that this issue is an international obligation and that it is a matter best dealt with by our federal executive branch and Congress.~~

The State of Texas has recognized that ensuring that individuals receive consular notification is highly important. Texas has previously implemented a process for law enforcement officials and magistrates to achieve that goal. We will continue our efforts to ensure that individuals tried for capital crimes in Texas are afforded all of the rights and protections under our laws.

Currently, in federal habeas proceedings in which consular notification is raised, the State of Texas submits briefing on whether actual prejudice or harm may have resulted. This provides the court with a fully presented argument on that issue should the court decide to consider it. I am further advised that if any individual under Texas custody and subject to *Avena* has not previously received a judicial determination of his claim of prejudice under the Vienna Convention and seeks such review in a future federal habeas proceeding, the State of Texas will ask the reviewing court to address the claim of prejudice on the merits.

The Honorable Condoleezza Rice, Ph.D.
The Honorable Michael B. Mukasey
July 18, 2008
Page 2

The consideration of facts showing actual prejudice as discussed in *Avena* also may be urged by an offender before the Texas Board of Pardons and Paroles in its consideration of any clemency request that comes before it.

It is vital in each and every criminal case, especially those where the death penalty is a potential punishment, that justice be applied in a fair and impartial manner no matter what the citizenship of the individual may be. I will continue to support efforts that protect any individual from harm in our criminal justice system that is attributable to their race, economic status, or nationality.

Sincerely,

A handwritten signature in black ink that reads "Rick Perry". The signature is written in a cursive, slightly slanted style. The first letter "R" is large and loops around the "i" and "c". The "P" is also large and loops around the "e" and "r". The "y" has a long, sweeping tail that extends to the right.

Rick Perry
Governor

"2008, Año de la Educación Física y el Deporte"

México City, July 28, 2008

Governor Rick Perry
Office of the Governor
P.O. Box 12428
Austin, Texas
78711-2428

Via fax (512) 463-1849/Via Courier

Dear Governor Perry:

I am writing with regard to Jose Ernesto Medellin Rojas, a Mexican national who is facing execution in Texas on August 5, 2008. I respectfully ask that you exercise your power to suspend Mr. Medellín's execution, unless and until his conviction and sentence are reviewed and reconsidered according to the terms of the International Court of Justice (ICJ) decision of July 16.

In January 2003, Mexico initiated proceedings in the ICJ to resolve a dispute between Mexico and the United States regarding the remedy that should be provided in cases of Mexican nationals, including Mr. Medellín, who had not been advised of their rights to consular notification and access at the time of their capital murder prosecutions. The ICJ's jurisdiction was founded on the Optional Protocol to the Vienna Convention, a treaty that both Mexico and the U.S. had ratified.

As you know, the ICJ issued a decision in March 2004. In brief, the ICJ determined that Mr. Medellín was entitled to judicial review of his conviction and sentence to ascertain whether he was prejudiced by the violation of his consular rights. The ICJ did not hold that Mr. Medellín was automatically entitled to a new trial or a new sentencing hearing. Rather, the remedy was one of *process*. The Texas Court of Criminal Appeals has held that it is prevented from providing this judicial hearing because of state procedural default rules.

...

"2008, Año de la Educación Física y el Deporte"

2 -

I realize you have been provided with ample information about the determination of President Bush to comply with the ICJ's ruling, as well as the 2008 decision of the U.S. Supreme Court regarding the President's determination. I will not discuss those decisions here. But I would like to bring your attention to a few matters that bear upon the pending execution of Mr. Medellin and which support Mexico's request.

As an initial matter, there is unanimous agreement that the United States has an international legal obligation to comply with the ICJ's judgment in Mr. Medellín's case. The U.S. government, the lawyers representing Texas before the U.S. Supreme Court, and every justice of the Supreme Court all acknowledged that the United States committed itself to comply with the ICJ's Judgment by ratifying the Optional Protocol to the Vienna Convention, the UN Charter, and the ICJ Statute.

In light of this undisputed obligation, the U.S. House of Representatives recently introduced legislation to implement the ICJ's judgment. This legislation will authorize the federal courts to convene the judicial hearings that the Texas courts were prevented from holding. I have been informed, however, that there is insufficient time remaining before August 5 to implement this legislation. A reprieve is therefore necessary to ensure Mr. Medellin's case is reviewed under this legislative solution.

On July 16, 2008, the ICJ issued "provisional measures" calling upon the United States to take "all measures necessary" to prevent Mr. Medellin's execution while it considers Mexico's request for interpretation of the court's 2004 judgment. As an international legal matter, this is a binding determination. I urge you to grant the ICJ the respect and comity it deserves as the judicial branch of the United Nations and a court that the United States was instrumental in creating. Although the ICJ has indicated it will act with dispatch in considering Mexico's request, it will likely require some months to issue its final decision. Therefore, Mexico respectfully requests that you grant a reprieve that will allow the ICJ time to resolve Mexico's request for interpretation and will allow the U.S. Congress time to implement a legislative solution that Mexico believes will provide the judicial remedy required under the ICJ's judgment.

.../

"2008, Año de la Educación Física y el Deporte"

- 3 -

Mexico in no way condones violent crime and fully respects Texas' criminal justice system. I also appreciate that Mr. Medellín was convicted of a heinous crime. But the United States made a commitment to Mexico and to its other treaty partners to abide by the rulings of the ICJ.

Without prejudice to Mexico's rights under the current procedures before the International Court of Justice, Mexico remains committed to working closely with all the parties involved in this issue. Our two nations are bound not only by their common border, but by a mutual commitment to the rule of law. I am hopeful that you will work with my government and yours to provide Mr. Medellín with the judicial hearing to which he is entitled.

On behalf of my government, I would like to convey our greatest appreciation for your consideration.

Sincerely,



Patricia Espinosa C.
Secretary of Foreign Affairs

cc: Ms. Rissie Owens, Presiding Officer
Texas Board of Pardons and Paroles
Executive Clemency Unit
Capital Section
P.O. Box 13401
Austin, Texas 78711

By Fax 512.463.8120/Via courier

CR 2008/15

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 2008

Public sitting

held on Thursday 19 June 2008, at 3 p.m., at the Peace Palace,

President Higgins presiding,

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

VERBATIM RECORD

ANNÉE 2008

Audience publique

tenue le jeudi 19 juin 2008, à 15 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

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

COMPTE RENDU

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

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

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

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

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

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

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

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

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

Mr. BELLINGER:

Conclusion

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

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

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

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

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

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

CR 2008/17

**International Court
of Justice**

THE HAGUE

**Cour internationale
de Justice**

LA HAYE

YEAR 2008

Public sitting

held on Friday 20 June 2008, at 4.30 p.m., at the Peace Palace,

President Higgins presiding,

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

VERBATIM RECORD

ANNÉE 2008

Audience publique

tenue le vendredi 20 juin 2008, à 16 h 30, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

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

COMPTE RENDU

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

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

E. Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 the United States has agreed to abide by. And
2 by statute, Congress has placed the President in
3 the position of deciding how you respond to such
4 a judgment.

5
6 So there would be a harder case if the
7 President were to act in the exercise of his
8 foreign affairs power without the direct
9 connection to an international legal obligation
10 that was supported by treaty and statute. And I
11 would answer that case by virtue of the
12 Executive Branch's view of presidential
13 authority by saying, yes he could, but you would
14 not have to agree with me in order to find that
15 in this case there is a unique constellation of
16 factors to authorize the President to act.

17
18 JUDGE: Is it your position that
19 basically what this court should do is to look
20 at our statute, look at the limitations that we
21 have in our statute, and then go ahead and
22 review the merits of 20? Is that your position?

23
24 MAN: The United States has not taken a
25 position on how this court should interpret

1 Texas law. If Texas law authorizes review and
2 reconsideration because it regards the
3 President's determination as a new factual or
4 legal basis for a claim that was not previously
5 available, and I realize that there is some
6 legitimate debate about whether the claim here
7 is reliance on the President's determination or
8 whether the claim is reliance on the underlying
9 Avena Decision. That very dialectic is
10 reflected in the two opinions in the Supreme
11 Court written by Justice O'Connor and the
12 procurium in which there was a question about
13 whether Medellin had properly exhausted the
14 claims that he was bringing to the Supreme
15 Court. But if this court concludes that Texas
16 law authorizes review and reconsideration, then
17 here's what's the President's determination
18 says.

19

20 The President's determination says that
21 full effect will be given to the treaty
22 violations independent of any constitutional
23 claim. That means at the outset that the prior
24 determination that was made by the district
25 court and that was affirmed by this court or

1 adopted by this court, cannot stand. Because
2 previously, the only analysis that I see that
3 was made is whether the Vienna Convention
4 violations produced constitutional violations.
5 The court said no because Medellin didn't
6 receive the effective assistance of counsel, and
7 because he had not suffered any due process
8 violations. That does not give full and
9 independent weight to the treaty violation,
10 which is what Avena requires and which is what
11 the President has directed.

12
13 The second thing that the President's
14 determination requires is that the court not
15 apply procedural default principles to bar any
16 consideration of the claim. They would
17 otherwise be valid and the position of the
18 United States is they should have been adopted
19 by the ICJ. But by virtue of the ICJ's
20 conclusion that the Vienna Convention itself
21 prevented the operation of procedural default
22 principles and the President's decision to give
23 effect to that decision, the court may not apply
24 procedural default principles.

25

State of California)
) ss.
 City of San Diego)

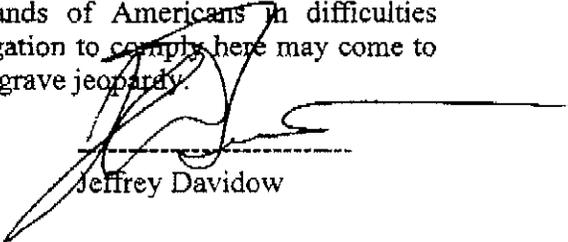
AFFIDAVIT OF JEFFREY DAVIDOW

I, Jeffrey Davidow, swear under the penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am the president of the Institute of the Americas at the University of California, San Diego. In my current position, I am responsible for directing a not-for-profit organization that promotes dialogue on important issues of public policy in Latin America. This includes topics relating to U.S. relations with the hemisphere, good governance, corruption and transparent public service.
2. I joined the U.S. Foreign Service in 1969 and served as an officer in overseas posts in Guatemala, Chile, and South Africa. I served as the U.S. Ambassador to Mexico from 1998 to 2002, under both President Clinton and President Bush, and as U.S. Ambassador to Zambia (1988-1990) and Venezuela (1993-1996). From 1996 to 1998, I was the Assistant Secretary of State for Inter-American Affairs and in that capacity, served as the State Department's chief policy maker for the Western Hemisphere. After leaving Mexico in 2002, I became a Visiting Fellow at Harvard University and the David Rockefeller Center for Latin American Studies and authored a book on U.S.-Mexican relations, entitled *The US and Mexico: The Bear and the Porcupine*. After completion of 34 years of service in the U.S. State Department, I retired with the personal rank of Career Ambassador, the Department of State's highest rank. I believe that that the intention of the USG to not respect the ICJ's *Avena* judgment—as it promised to do under at least four interconnected treaties—would detrimentally impact the conduct of this Nation's foreign policy.
3. *First*, failure to comply would significantly impair the ability of American diplomats to advance critical U.S. foreign policy. Diplomats function in the international arena based on a basic reality: governments will respond in kind to the treatment they receive. This notion of reciprocity is a bedrock principle governing relations between nations, and the United States' good faith enforcement of its own treaty obligations is the only means by which we can ensure other nations will abide by their treaty obligations to us. As a career diplomat, I depended upon strong enforcement of our treaty obligations so that I could credibly carry out important foreign policy objectives on behalf of this country. Without our own strong enforcement of treaties, the United States' efforts in a vast array of contexts—economic, political and commercial—would be significantly undermined. On many occasions, I depended on Mexico's treaty obligations with the United States to pursue American objectives relating to criminal prosecutions and extraditions and supply

of water to areas of Texas.

- 4. *Second*, in the context of the Vienna Convention on Consular Relations—easily the most important treaty governing consular assistance for nationals detained in other countries—the United States compliance is of paramount importance. The costs of non-compliance could not be higher. Thousands of Americans are arrested or detained abroad every year, the largest number being in Mexico. If the United States fails to keep its word to abide by the *Avena* judgment, that action will not only reduce American standing in the world community, but affirmatively place in jeopardy the lives of U.S. citizens traveling, working, and living abroad. My first position in the State Department was as a vice consul in Guatemala, and, in that capacity, I was able to visit and provide counsel to imprisoned American citizens. As ambassador to Mexico, I managed an embassy with the largest number of US consular officers in the State Department, whose job involved assisting hundreds of imprisoned American citizens, often over the objections of local authorities or prison officials who were ultimately compelled to cooperate because of international treaty obligations.
- 5. *Third*, our failure to comply would damage our diplomatic relations with our long-standing ally and neighbor, Mexico. I have spent much of my career developing a particular expertise in our relations with Mexico. In my judgment, our ability as a nation to pursue our own national interests – including the protection of American citizens – is heavily dependent on our willingness to demonstrate a concern for Mexican interests equal to that which we expect from them for our own. Mutual respect is the foundation of useful bilateral relations.
- 6. I am not personally opposed to the death penalty in theory. But this case is not about the United States or Texas's right to implement its criminal laws. This case is about our unequivocal treaty obligation to comply with an ICJ judgment to review and reconsider convictions and sentences and the fact that compliance is necessary to preserve our Nation's basic ability to hold other countries to their treaty obligations to us. The Vienna Convention is one of the most significant treaties to which we are a party and has allowed diplomats such as myself to protect many thousands of Americans in difficulties overseas. I fear that a failure to honor our own obligation to comply here may come to threaten the welfare and lives of Americans, many in grave jeopardy.
FURTHER AFFIANT SAYETH NOT.

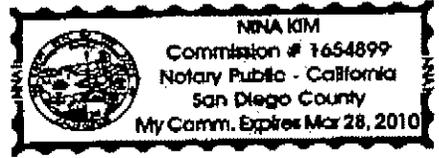


Jeffrey Davidow

Signed and sworn before me this 2nd
day of May, 2008

[Signature]
Notary Public

My commission expires: Mar 28, 2010



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BRAZILIAN EMBASSY
WASHINGTON, D.C.

THE AMBASSADOR

July 14, 2008

The Honorable Governor Rick Perry
Office of the Governor of Texas
State Capitol
P.O. Box 12428
Austin, Texas, 78711-2428

Re: José Ernesto Medellín Rojas

Dear Governor Perry,

I write to you concerning the case of José Ernesto Medellín Rojas, a Mexican citizen who reportedly will face execution from Texas on August 5, 2008. Brazil has followed his case attentively, as it pertains to the implementation of the Vienna Convention on Consular Relations in the United States.

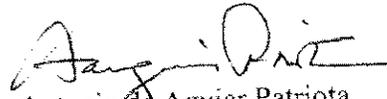
We understand that the U.S. government has publicly recognized its obligations under the Vienna Convention and has expressed its intention to fully comply with them. The Brazilian government holds the same position as the U.S. government on this issue. We firmly believe it is in the best interest of all countries to fully implement the Vienna Convention. Timely consular notification and access are key to ensuring protection of all nationals who travel abroad, regardless of their location, nationality or citizenship.

José Medellín's case has become emblematic of the legal challenges related to implementation of the Vienna Convention. Under the current circumstances, his execution may unintentionally set an undesirable precedent on how to deal with these issues. Respectful as we are of the U.S. court decisions, we believe that much can still be done to provide better protection to our countries' nationals. We

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are confident that the steps being taken in this regard, as announced by the U.S. government on April 1, 2008, may prove to be both productive and successful, but more time is still required to pursue this endeavor. The Brazilian government therefore urges you to grant Mr. Medellín a reprieve.

Sincerely yours,



Antonio de Aguiar Patriota
Ambassador of Brazil



Embassy of Uruguay
Washington, D.C.

July 11, 2008

The Honorable Rick Perry
Office of the Governor
State Capitol
P.O. Box 12428
Austin, Texas 78711-2428

By Fax 512.463.1849

Ms. Rissie Owens, Presiding Officer
Texas Board of Pardons and Paroles
Executive Clemency Unit
Capital Section
P.O. Box 13401
Austin, Texas 78711

By Fax 512.463.8120

Re: José Ernesto Medellín

Dear Governor Perry and Presiding Officer Owens:

I am writing to you regarding the case of Jose Ernesto Medellin, a Mexican national who is facing execution in Texas on August 5, 2008. I urge you to grant Mr. Medellin a reprieve based on several factors, as outlined below.

On March 31st 2004, the International Court of Justice (ICJ) ruled in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) that the United States had violated Mr. Medellin's right to consular notification and access pursuant to Article 36 of the Vienna Convention on Consular Relations. The United States has recognized its international legal obligation to implement the remedies mandated by the ICJ in this judgment. However, in *Medellin v. Texas*, the United States Supreme Court held that Congress must pass legislation implementing the *Avena* judgment before it can be enforced by U.S. courts.

My government is party to the Vienna Convention on Consular Relations and the United Nations Charter, as is the United States. Enforcement of these treaties depends on reciprocal compliance by all member states to the Convention. Respect for our treaty commitments is critical if we wish to uphold the international rule of law.



Embassy of Uruguay
Washington, D.C.

All nations that have acceded to the Charter of the United Nations have agreed to comply with the decisions of the ICJ in any case to which they are a party (Article 94). Therefore, the United States has an international obligation to all member states of the Charter of the United Nations to comply with the *Avena* Judgment.

There is no question that the United States will breach its undisputed international obligation if Mr. Medellín is executed before receiving the remedy to which he is entitled under the *Avena* Judgment. Such a breach would undoubtedly undermine the international rule of law and would potentially impede the ability of consular officials around the world to carry out their duties.

I would also observe that the Inter-American Commission on Human Rights has issued precautionary measures calling upon the United States to refrain from executing Mr. Medellín. The Inter-American Commission is a human rights body that is empowered to investigate and make recommendations regarding human rights violations in the member states of the Organization of American States. As a member of the OAS, my government urges you to grant a reprieve that will allow the Commission to complete its review of Mr. Medellín's case.

For the foregoing reasons, my Government respectfully urges you to grant Mr. Medellín a reprieve so that Congress or the Texas legislature may have sufficient time to pass legislation implementing the *Avena* Judgment.

Please accept the assurances of my highest consideration.

Sincerely,


Carlos Gianelli
Ambassador

Council of Europe
The Secretary General

Strasbourg, 10 July 2008

Dear Ms Owens

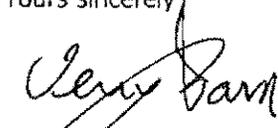
I write to you in your capacity as Presiding Officer of the Texas Board of Pardons and Paroles to express my deep concern about the execution of Mr José E. Medellín and I appeal to you to recommend a stay of execution.

The Council of Europe and its 47 member States are unequivocally opposed to the death penalty and consider that it has no place in a civilised democracy. As an observer State to this Organisation, the United States of America is deemed to share our fundamental values and principles.

An additional concern in this case is that Mr Medellín, a Mexican national, was not duly informed of his rights to consular assistance contrary to Article 36 of the Vienna Convention on Consular Relations. In 2004 in the Avena case, which concerned Mr Medellín and 50 other Mexican nationals, the International Court of Justice ruled that following the breach of their consular rights they were entitled to a review and reconsideration of their convictions and sentences. Mr Medellín's execution would therefore not only contravene international standards, including the recently adopted United Nations General Assembly Resolution calling for a worldwide moratorium on the death penalty, but also, in the absence of such a review and reconsideration, the International Court of Justice's ruling.

As a matter of urgency, I ask you to recommend a stay of Mr Medellín's execution.

Yours sincerely



Right Hon Terry Davis

Ms Rissie Owens
Presiding Officer
Texas Board of Pardons and Paroles
PO Box 13 401
Austin, Texas 78711-3401
USA
Fax: +1 512 463 8120

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*Embassy
of the
Argentine Republic*

Washington, DC, July 11, 2008

The Honorable Rick Perry
Office of the Governor
State Capitol
P.O. Box 12428
Austin, Texas 78711-2428

Re: Jose Ernesto Medellin

Dear Governor Perry and Presiding Officer Owens:

I am writing to you regarding the case of Jose Ernesto Medellin, a Mexican national who is facing execution in Texas on August 5, 2008. I urge you to grant Mr. Medellin a reprieve based on several factors, as outlined below.

On March 31 2004, the International Court of Justice (ICJ) ruled in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) that the United States had violated Mr. Medellin's right to consular notification and access pursuant to Article 36 of the Vienna Convention on Consular Relations. The United States has recognized its international legal obligation to implement the remedies mandated by the ICJ in this judgment. However, in *Medellin v. Texas*, the United States Supreme Court held that Congress must pass legislation implementing the *Avena* judgment before it can be enforced by U.S. courts.

My Government is a party to the Vienna Convention on Consular Relations and the United Nations Charter. The Vienna Convention is crucial for the protection of all nationals who travel abroad. Enforcement of treaty obligations depends on reciprocal compliance by all member states to the Convention. Moreover, all member states to the Charter of the United Nations have agreed to comply with the decisions of the ICJ in any case to which they are a party (Article 94). Therefore, the United States has an international obligation to all member states of the Charter of the United Nations to comply with the *Avena* Judgment.

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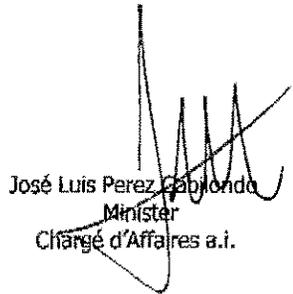
*Embassy
of the
Argentine Republic*
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My Government is concerned that the United States will breach its undisputed international obligation if Mr. Medellin is executed before receiving the remedy to which he is entitled under the *Avena* Judgment. Such a breach would undoubtedly undermine the international rule of law and would potentially impede the ability of consular officials around the world to carry out their duties.

For the foregoing reasons, my Government respectfully urges you to grant Mr. Medellin a reprieve so that Congress or the Texas legislature may have sufficient time to pass legislation implementing the *Avena* Judgment.

Thank you for your consideration of this extremely serious matter.

Sincerely,



José Luis Pérez Gabrondo
Minister
Chargé d'Affaires a.i.



EMBASSY OF BOLIVIA

Washington, DC, July 1st, 2008
COVAR-189/08

The Honorable Rick Perry
Office of the Governor
State Capitol
P.O. Box 12428
Austin, Texas 78711-2428

By Fax 512.463.1849

Ms. Rissie Owens, Presiding Officer
Texas Board of Pardons and Paroles
Executive Clemency Unit
Capital Section
P.O. Box 13401
Austin, Texas 78711

By Fax 512.463.8120

Re: Jose Ernesto Medellin

Dear Governor Perry and Presiding Officer Owens:

I am writing to you regarding the case of Jose Ernesto Medellin, a Mexican national who is facing execution in Texas on August 5, 2008. I urge you to grant Mr. Medellin a reprieve based on several factors, as outlined below.

On March 31 2004, the International Court of Justice (ICJ) ruled in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) that the United States had violated Mr. Medellin's right to consular notification and access pursuant to Article 36 of the Vienna Convention on Consular Relations. The United States has recognized its international legal obligation to implement the remedies mandated by the ICJ in this judgment. However, in *Medellin v. Texas*, the United States Supreme Court held that Congress must pass legislation implementing the *Avena* judgment before it can be enforced by U.S. courts.

My Government is a party to the Vienna Convention on Consular Relations and the United Nations Charter. The Vienna Convention is crucial for the protection of all nationals who travel abroad. Enforcement of treaty obligations depends on reciprocal compliance by all member states to the Convention. Moreover, all



EMBASSY OF BOLIVIA

member states to the Charter of the United Nations have agreed to comply with the decisions of the ICJ in any case to which they are a party (Article 94). Therefore, the United States has an international obligation to all member states of the Charter of the United Nations to comply with the *Avena* Judgment.

My Government is concerned that the United States will breach its undisputed international obligation if Mr. Medellin is executed before receiving the remedy to which he is entitled under the *Avena* Judgment. Such a breach would undoubtedly undermine the international rule of law and would potentially impede the ability of consular officials around the world to carry out their duties.

For the foregoing reasons, my Government respectfully urges you to grant Mr. Medellin a reprieve so that Congress or the Texas legislature may have sufficient time to pass legislation implementing the *Avena* Judgment.

Thank you for your consideration of this extremely serious matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Gustavo Guzman'.

Gustavo Guzman
Ambassador of Bolivia

110a

**EMBAJADA DEL ECUADOR EN ESTADOS UNIDOS DE AMERICA**

Washington D.C., 12th, July, 2008

The Honorable Rick Perry
Office of the Governor
State Capitol
P.O. Box 12428
Austin, Texas 78711-2428

Ms. Rissie Owens, Presiding Officer
Texas Board of Pardons and Paroles
Executive Clemency Unit
Capital Section
P.O. Box 13401
Austin, Texas 78711

Dear Governor Perry and Presiding Officer Owens:

I believe the enforcement of human rights depends on reciprocal compliance by all States. In this context, I am writing to you regarding the case of JOSE ERNESTO MEDELLIN, a Mexican national who is facing death row in Texas.

Taking into account the "Avena Case", the International Court of Justice (ICJ) considered that Mr. Medellin's rights to consular notification and access, pursuant to Article 36 of the Vienna Convention on Consular Relations, were violated.

My Government is a part to the Vienna Convention on Consular Relations and the United Nations Charter. The Vienna Convention is crucial for the protection of all nationals who travel abroad. Moreover, all member states to the Charter of the United Nations have agreed to comply with the decisions of the ICJ in any case to which they are a party (Article 94). Therefore, The United States has an international obligation to all member states of the Charter of the United Nations to comply to with the "Avena Judgment".

I respectfully urge you to grant Jose Ernesto Medellin a reprieve until the Texas legislature passes legislation to implement the "Avena Judgment".

I avail myself of this opportunity to renew to you the assurances of my highest consideration.

A handwritten signature in black ink, appearing to read "Luis Gallegos".

Luis Gallegos
Ambassador of Ecuador



EMBASSY OF EL SALVADOR
1400 16TH ST. N.W., SUITE 100
WASHINGTON DC 20036

July 09th, 2008

The Honorable Rick Perry
Office of the Governor
State Capitol
P.O. Box 12428
Austin, Texas 78711-2428

By Fax 512.463.1849

Ms. Rissie Owens, Presiding Officer
Texas Board of Pardons and Paroles
Executive Clemency Unit
Capital Section
P.O. Box 13401
Austin, Texas 78711

By Fax 512.463.8120

Re: José Ernesto Medellín

Dear Governor Perry and Presiding Officer Owens:

I am writing to you regarding the case of José Ernesto Medellín a Mexican national who is facing execution in Texas on August 5th, 2008. I urge you to grant Mr. Medellín a reprieve based on several factors, as outlined below.

On March 31st, 2004, the International Court of Justice (ICJ) ruled in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) that the United States had violated Mr. Medellín's right to consular notification and access pursuant to Article 36 of the Vienna Convention on Consular Relations. The United States has recognized its international legal obligation to implement the remedies mandated by the ICJ in this judgment. However, in Medellín v. Texas, the United States Supreme Court held that Congress must pass legislation implementing the Avena judgment before it can be enforced by U.S. courts.

My government is a party to the Vienna Convention on Consular Relations and the United Nations Charter. The Vienna Convention is crucial for the protection of all nationals who travel abroad. Enforcement of treaty obligations depends on reciprocal compliance by all member states to the Convention. Moreover, all member states to the Charter of the United Nations have agreed to comply with the decisions of the ICJ in any case to which they are a party (Article 94). Therefore, the United States has an international obligation to all member states of the Charter of the United Nations to comply with the *Avena* Judgment.

My Government is concerned that the United States will breach its undisputed international obligation if Mr. Medellin is executed before receiving the remedy to which he is entitled under the *Avena* Judgment. Such a breach would undoubtedly undermine the international rule of law and would potentially impede the ability of consular officials around the world to carry out their duties.

For the foregoing reasons, My government respectfully urges you to grant Mr. Medellin a reprieve so that Congress or the Texas legislature may have sufficient time to pass legislation implementing the *Avena* Judgment.

Thank you for your consideration of this extremely serious matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Carmen Tobar', with a stylized flourish at the end.

Carmen Tobar
Chargé d'Affaires



Embajada de Guatemala
Washington, D.C.

Washington, DC
July 1st, 2008

The Honorable Rick Perry
Office of the Governor
State Capitol
P.O. Box 12428
Austin, Texas 78711-2428

By Fax 512.463.1849

Ms. Rissie Owens, Presiding Officer
Texas Board of Pardons and Paroles
Executive Clemency Unit
Capital Section
P.O. Box 13401
Austin, Texas 78711

By Fax 512.463.8120

Re: Jose Ernesto Medellin

Dear Governor Perry and Presiding Officer Owens:

I am writing to you regarding the case of Jose Ernesto Medellin, a Mexican national who is facing execution in Texas on August 5, 2008. I urge you to grant Mr. Medellin a reprieve based on several factors, as outlined below.

On March 31 2004, the International Court of Justice (ICJ) ruled in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) that the United States had violated Mr. Medellin's right to consular notification and access pursuant to Article 36 of the Vienna Convention on Consular Relations. The United States has recognized its international legal obligation to implement the remedies mandated by the ICJ in this judgment. However, in *Medellin v. Texas*, the United States Supreme Court held that Congress must pass legislation implementing the *Avena* judgment before it can be enforced by U.S. courts.

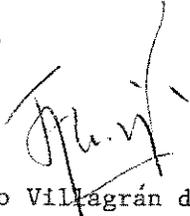
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My Government is concerned that the United States will breach its undisputed international obligation if Mr. Medellin is executed before receiving the remedy to which he is entitled under the *Avena* Judgment. Such a breach would undoubtedly undermine the international rule of law and would potentially impede the ability of consular officials around the world to carry out their duties.

For the foregoing reasons, my Government respectfully urges you to grant Mr. Medellin a reprieve so that Congress or the Texas legislature may have sufficient time to pass legislation implementing the *Avena* Judgment.

Thank you for your consideration of this extremely serious matter.

Sincerely,



Francisco Villagrán de León
Ambassador



SECRETARIA DE RELACIONES EXTERIORES
DE LA REPUBLICA DE HONDURAS

Washington, D.C., July 7, 2008

The Honorable Rick Perry
Office of the Governor
State Capitol
P.O Box 12428
Austin, Texas 78711/242
By fax 512.463.1849

Ms Rissie Owens, Presiding Officer
Texas Board of pardons and paroles
Executive Clemency Unit
Capital Section
P.O. Box 13401
Austin, Texas 78711

Re.: Jose Ernesto Medellin

Dear Governor Perry and presiding Officer Owens:

I am writing to you regarding the case of Jose Ernesto Medellin, a Mexican national who is facing execution in Texas on August 5, 2008. I urge you to grant Mr. Medellin a reprieve on several factors, as outline below.

On March 31 2004, the international Court of Justice (ICJ) ruled in the case concerning Avena and others Mexican Nationals (Mexico v. United States of America) that the United States had violated Mr. Medellin's right to consular notifications and access pursuant to article 36 of the Vienna Convention on Consular Relations. The United States has recognized its international legal obligation to implement the remedies mandated by the ICJ in this judgment.

However, in *Medellin v. Texas*, the United States Supreme Court held that Congress must pass legislation implementing the Avena Judgment before it can be enforced by U.S. Courts.

My Government is a party to the Vienna Convention on Consular Relations and the United Nations charter. The Vienna Convention is crucial for the protection of all nationals who travel abroad. Enforcement of treaty obligations depends on reciprocal compliance by all member states to the Convention. Moreover, all member states to the charter of the United Nations have agreed to comply with the decisions of the ICJ in any case to which they are a party (article 94). Therefore, the United States has an international obligation to all member states of the Charter of the United States to comply with the Avena Judgment.



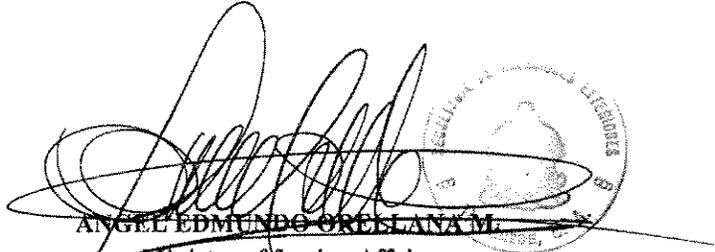
SECRETARIA DE RELACIONES EXTERIORES
DE LA REPUBLICA DE HONDURAS

My Government is concerned that the United States will breach its undisputed international obligation if Mr. Medellin is executed before receiving the remedy to which he is entitled under the Avena judgment. Such a breach would undoubtedly undermine the international rule of law and would potentially impede the ability of consular officials around the world to carry out their duties.

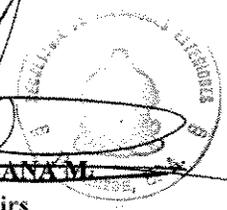
For the foregoing reasons, my Government respectfully urges you to grant Mr. Medellin a reprieve so that Congress or the Texas legislature may have sufficient time to pass legislation implementing the Avena judgment.

Thank you for your consideration of this extremely serious matter.

Sincerely,



ANGEL EDMUNDO ORELLANA M.
Ministry of Foreign Affairs



EMBASSY OF PERU
1700 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20036

July, 7th 2008

The Honorable Rick Perry
Office of the Governor
State Capitol
P.O. Box 12428
Austin, Texas 78711-2428

By Fax 512.463.1849

Ms. Rissie Owens, Presiding Officer
Texas Board of Pardons and Paroles
Executive Clemency Unit
Capital Section
P.O. Box 13401
Austin, Texas 78711

By Fax 512.463.8120

Re: Jose Ernesto Medellin

Dear Governor Perry and Presiding Officer Owens:

I am writing to you regarding the case of Jose Ernesto Medellin, a Mexican national who is facing execution in Texas on August 5, 2008. I urge you to grant Mr. Medellin a reprieve based on several factors, as outlined below.

On March 31 2004, the International Court of Justice (ICJ) ruled in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) that the United States had violated Mr. Medellin's right to consular notification and access pursuant to Article 36 of the Vienna Convention on Consular Relations. The United States has recognized its international legal obligation to implement the remedies mandated by the ICJ in this judgment. However, in *Medellin v. Texas*, the United States Supreme Court held that Congress must pass legislation implementing the *Avena* judgment before it can be enforced by U.S. courts.

My Government is a party to the Vienna Convention on Consular Relations and the United Nations Charter. The Vienna Convention is crucial for the protection of all nationals who travel abroad. Enforcement of treaty obligations depends on reciprocal compliance by all member states to the Convention. Moreover, all member states to the Charter of the United Nations have agreed to comply with the decisions of the ICJ in any case to which they are a party (Article 94).

EMBASSY OF PERU

1700 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20036

Therefore, the United States has an international obligation to all member states of the Charter of the United Nations to comply with the *Avena* Judgment.

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Sincerely,

A handwritten signature in black ink, appearing to be 'F. Ortiz de Zavallos', with a long, sweeping underline that extends to the right and then curves down.

Felipe Ortiz de Zavallos
Ambassador of Peru



Ministerio de Relaciones Exteriores

Asunción, July 14, 2008

VMRE/DGPM/DDIII/N° 46308

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The Honorable Rick Perry
Office of the Governor
State Capitol
P.O. Box 12428
Austin, Texas 78711-2428



DE : DERECHOS HUMANOS-MRE

NO. DE FAX : 595 21 448409

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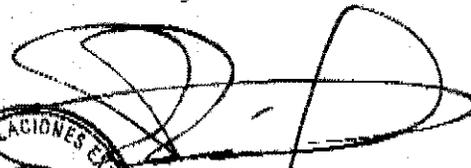
Ministerio de Relaciones Exteriores

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Sincerely


 **Ruben Ramirez Lezcano**
Minister of Foreign Affairs



GOBIERNO DE CHILE
MINISTERIO DE RELACIONES EXTERIORES
EMBAJADA EN ESTADOS UNIDOS

356

Washington D.C., July 7th, 2008

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Office of the Governor
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GOBIERNO DE CHILE
MINISTERIO DE RELACIONES EXTERIORES
EMBAJADA EN ESTADOS UNIDOS

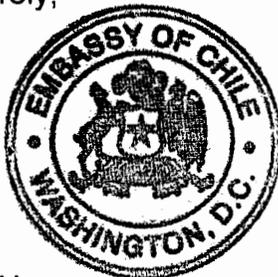
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Thank you for your consideration of this extremely serious matter.

Sincerely,




MARIANO FERNANDEZ AMUNATEGUI
AMBASSADOR OF CHILE

c.c. E. EE.UU.

123a



UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

Peter M. Robinson
President & CEO

June 13, 2008

The Honorable Nancy Pelosi
Speaker of the House
H232 The Capitol
Washington, DC 20515-0001

Via Fax (202) 225-4188

Dear Madam Speaker:

On behalf of the United States Council for International Business (USCIB), I am writing to express our concern about an international situation with serious implications for U.S. business interests. The U.S. is currently in violation of its international treaty obligations in the cases of certain Mexican nationals who were not afforded their rights to consular notification after their detention in this country. This is particularly troublesome for international business because U.S. citizens abroad are now at grave risk of other countries not honoring their reciprocal obligations. Congress should act immediately to remedy this significant problem for U.S. businesses functioning abroad.

The U.S. can remedy these violations by granting judicial hearings to determine whether prejudice resulted from the failure to provide consular access to Mexican nationals named in a recent decision of the International Court of Justice. In *Medellin v. Texas*, the U.S. Supreme Court determined that Congress has the power to provide this remedy and to implement this binding legal obligation across the United States.

The security of Americans doing business abroad is clearly and directly at risk by U.S. noncompliance with its obligations under the Vienna Convention on Consular Relations. American citizens abroad are at times detained by oppressive or undemocratic regimes, and access to the American consulate is their lifeline. The United States thus rightly insists that other countries grant Americans the right to consular access. While examples of Americans being assisted in this way are too numerous to list, suffice it to say that the overseas employees of the U.S. business community need this vital safety net.

1212 Avenue of the Americas
New York, NY 10036-1689
212.703.5046 tel
212.575.0327 fax
www.uscib.org

Global Business Leadership as the U.S. Affiliate of:
International Chamber of Commerce (ICC)
International Organization of Employers (IOE)
Business and Industry Advisory Committee (BIAC) to the OECD
ATA Carnet System

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Throughout the proceedings before both the U.S. Supreme Court and the International Court of Justice, the Administration has supported bringing the U.S. immediately into compliance with this treaty obligation. The consequences of non-compliance are potentially far-reaching: if the United States refuses to uphold its treaty obligations; other parties can and will invoke that non-compliance as justification for ignoring their obligations under the same treaty. Failure to honor our universally recognized treaty obligations will erode global confidence in the enforceability of the United States' international commitments across a broad range of subjects, and will have a negative impact upon its international business dealings.

We urge you to support legislation that would bring the United States into compliance with its international obligations by directing the federal courts simply to hold a review hearing in these cases to determine whether the Mexican nationals were prejudiced by their lack of consular access. The minor inconvenience to our federal courts of granting judicial review in a few dozen cases pales in comparison to the threat to the security of American businesses if no action is taken.

USCIB promotes an open system of global commerce in which business can flourish and contribute to economic growth, human welfare and protection of the environment. Its membership includes more than 300 leading U.S. companies, professional services firms and associations whose combined annual revenues exceed \$3.5 trillion. As the exclusive American affiliate of three global business groups – the International Chamber of Commerce, the International Organization of Employers, and the Business and Industry Advisory Committee to the OECD – USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade.

Sincerely,



Peter M. Robinson

PRESS STATEMENT**Professor Philip Alston, United Nations Human Rights Council Special Rapporteur
on extrajudicial, summary or arbitrary executions****New York, 30 June 2008**

I spent two weeks (June 16-30) visiting the United States at the invitation of the Government and met with federal and state officials, judges, civil society groups, and victims and witnesses in Washington DC, New York City, Montgomery (Alabama), and Austin (Texas).

I am grateful to the U.S. Government for its cooperation and for having facilitated meetings with officials from the Departments of State, Justice, Defense and Homeland Security, as well as with officials in Alabama and Texas. The US Government's willingness to invite me and to engage in a constructive dialogue sends an important message.

Although the title of my mandate may seem complex, it should be simply understood as including any killing which violates international human rights or humanitarian law. This may include unlawful killings by the police, deaths in custody, killings of civilians in armed conflict in violation of humanitarian law, and patterns of killings by private individuals which are not adequately investigated and prosecuted by the authorities. My mandate is not abolitionist, but the death penalty falls within it as regards due process guarantees, its limitation to the most serious crimes and its prohibition for juvenile offenders and the mentally ill.

If there is a single theme that emerges from my visit it is the need for greater transparency in relation to a number of issues of major importance. In most instances, neither laws nor procedures for addressing any potentially unlawful killings are lacking. And, for the most part, data is gathered systematically and responsibly. But in too many cases it is extremely difficult, if not impossible, to gain access to that information. Instead, procedural and other impediments are firmly ensconced in order to thwart those who seek to monitor the accountability of public authorities. This reality is entirely inconsistent with the stated commitments of the Government and my hope is that the necessary steps can be taken to remove the obstacles and ensure full respect for human rights.

In different contexts, I was frequently told by Government officials that although they were unable to answer my specific questions, I should rest assured that there was accountability. Whether or not it does in fact exist, this "private" or "internal" accountability cannot take the place of genuine, public accountability. A Government open and accountable to its people is a foundational premise of a democratic state.

The present statement identifies some, but not all, of the issues and recommendations to be addressed in my final report.

Death penalty

In view of the very limited time available to me, I chose to visit Alabama because it has the highest per capita rate of executions in the US, and Texas because it has the largest number of executions and prisoners on death row.

Executing the innocent: a risk that cannot be ignored

Since 1973, 129 individuals waiting on death row have been exonerated across the US. This number continues to grow. Indeed, while I was in Texas, the conviction of yet another person on death row was overturned by the Court of Criminal Appeals. While in this case DNA testing ultimately prevented the execution of an innocent man, others may have been less fortunate. In Texas, I met a range of officials and others who acknowledged that innocent people might have been executed. The problem is that a criminal justice system with recognized flaws that the government refuses to address will always be capable of mistakes. While some officials seem to consider due process rights as mere "technicalities," the growing number of exonerations underscores that they are in fact indispensable safeguards against injustice in cases in which an error can be fatal. At present, a great deal of time and energy is spent trying to expedite executions. A better priority would be to analyze where the criminal justice system is failing in capital cases and why innocent people are being sentenced to death.

In Texas, there is at least significant recognition that reforms are needed. In Alabama, the situation remains highly problematic. Government officials seem strikingly indifferent to the risk of executing innocent people and have a range of standard responses, most of which are characterized by a refusal to engage with the facts. The reality is that the system is simply not designed to turn up cases of innocence, however compelling they might be. It is entirely possible that Alabama has already executed innocent people, but officials would rather deny than confront flaws in the criminal justice system.

Alabama's systematic rejection of concerns that basic international standards are being violated sits oddly alongside the Government's determined and successful bid to attract foreign investment from the European Union in particular. Indeed, Alabama's largest export market in 2007 was Germany. It would thus be appropriate for Alabama to engage in a dialogue on due process concerns in its death penalty with the international community.

Given the rising number of innocent people being exonerated nationwide, both Alabama and Texas need to ask what might be wrong with their criminal justice systems and how the problems might be fixed. I recommend a three-prong strategy: (1) problems such as judicial independence and the absence of an adequate right to counsel should be addressed immediately; (2) systematic inquiries into the workings of the criminal justice systems should be undertaken to identify needed reforms; and (3) the federal courts should be able to review all substantive claims of injustice in capital cases. I turn now to consider each of these.

Alabama and Texas both have partisan elections for judges. It is not for me to evaluate the compatibility of requirements for judicial independence with a system of multi-million dollar campaigns for judicial elections every four years. But if the outcome of such a system in practice is to jeopardize the right of capital defendants to a fair and just trial and appeal there is clearly a need to consider changes. Many of those with whom I spoke suggested strongly that judges in both states consider themselves to be under popular pressure to impose and uphold death sentences whenever possible and that decisions to the contrary would lead to electoral defeat. Yet the role of the judiciary is to ensure that justice is done in individual cases and to avoid the execution of innocent persons. It is not to ensure that the popular will prevails over other considerations. Too often, under the existing electoral system, the death penalty ends up being treated as a political rather than a legal issue.

This problem of politicizing death sentences is illustrated by Alabama's law permitting judges to override the considered opinion of the jury in sentencing. Even if a jury unanimously decides to sentence a defendant to life in prison, the judge can instead impose a death sentence. When judges override jury verdicts, it is nearly always to increase the sentence to death rather than to decrease it to life, and a significant proportion of those on death row would not be there if jury verdicts were respected. Given the key role of the jury in American justice, it is difficult to justify giving officials who will be held to account for their stance on the death penalty every four years the power to substitute their own individual opinions for those of the 12 member jury. Given concerns about possible innocence and the irreversible nature of the death penalty, Alabama should relieve judges of this invidious role by repealing the law permitting judicial override. Instead, juries should be permitted to play their historical role of protecting individual rights.

In both Alabama and Texas a surprisingly broad range of people in and out of government acknowledged the inadequacy of existing programs for providing criminal defense lawyers to those who cannot afford to hire their own. It is clear that major reforms would be required if the right to counsel is to be taken seriously. Yet, in both states, money-saving half-measures are being discussed when what is needed are state-wide, well-funded, independent public defender services. The system recently setup in the Texas panhandle to provide capital defense in scores of counties is a positive first step in this direction.

There is a clear onus on states to systematically evaluate the workings of their criminal justice systems to ensure that the death penalty is not imposed unjustly. In Texas, a particularly promising approach would be to establish, as some have proposed, an Innocence Commission designed to systematically assess why people have been wrongly convicted in particular cases and then apply these lessons by making recommendations for reforming the criminal justice system. Alabama could draw on the in-depth analysis of the issues produced by the American Bar Association (ABA). While various officials dismissed the ABA as being biased, they generally acknowledged that those who conducted the study were serious lawyers, and none had undertaken a thorough analysis of the report. Given the seriousness of the problems

identified, and the reluctance to undertake any alternative in-depth study, it is incumbent upon the authorities to formally respond to the ABA's findings and recommendations. Giving reasons for accepting or rejecting specific recommendations would indicate a serious concern to respond to alleged injustices.

The role of the federal courts in reviewing death sentences imposed by state courts has been curtailed by federal legislation designed to "expedite" such cases. As initially enacted, this legislation permitted states to opt-in to expedited review, if the state provided counsel for indigent death row inmates in post-conviction cases. The federal courts had responsibility to determine whether states qualified, and they found that few states met statutory requirements for the provision of counsel. The appropriate response to this would have been to improve state systems for indigent defense. Instead, Congress amended the law to permit the Department of Justice to adopt regulations under which it, rather than the Courts, would certify whether state indigent defense systems met this standard. The regulations initially drafted by DOJ were grossly inadequate for this purpose. The final regulations will be promulgated soon, but the approach of DOJ officials with whom I spoke regarding this issue leaves me far from optimistic that they will prove adequate either. Congress should take seriously the extent to which many state criminal justice systems fail to adequately protect constitutional rights in capital cases, rather than trying to find an expeditious shortcut. Instead of being forced to dismiss cases due to procedural technicalities, the federal courts can and should provide a critical back-stop to prevent injustice. The best way forward would be for Congress to enact legislation permitting federal courts to review all issues in death penalty cases on the merits, with appropriate exceptions, such as where a defendant attempts to deliberately bypass state court procedures.

Racism and the death penalty

Studies across the country suggest racial disparities in the application of the death penalty. In particular, many studies suggest that a defendant is more likely to receive the death penalty when the victim is white, and some studies also suggest that a defendant is more likely to receive the death penalty if he is African American. When I raised this issue with federal and state government officials, I was met with indifference or flat denial. Some officials had not read any specific reports on race disparity and showed little concern for the issue. Others conceded racial disparity as a fact, but invoked a handful of studies suggesting that this was not caused by racial bias. Thus I was told that the overrepresentation of African Americans among those sentenced to death as opposed to life without parole was related to racial disparities in criminality, or to the overrepresentation of African Americans in the prison population generally. Many officials wrote-off the results of studies showing racial disparity as being biased because they were written by researchers with anti-death penalty views. Given what is at stake, there is a need for governments at both the state and federal levels to revisit systematically the concerns about continuing racial disparities.

Consular notification

An issue of particular importance in Texas is how to handle the many cases in which foreign nationals have been sentenced to death without having been given the opportunity to contact their national consulates as required by the Vienna Convention on Consular Relations, a treaty to which the US is a party. The US Government has acknowledged that the US has a legal obligation to provide, in accordance with the International Court of Justice's judgment in *Avena*, review and reconsideration of the cases of Mexican nationals on death row who were not notified of their right to consular access. But the Texas Legislature has failed to authorize state courts to provide this review, and the US Congress has similarly failed to authorize federal courts to do so. In both cases, all that would be required is legislation permitting courts to review claims related to consular notification even if these claims would otherwise be dismissed for not having been raised in a timely fashion.

The very simplicity of the available solutions makes it all the more disturbing that nothing has been done. In my discussions with Texas officials, reliance was placed upon the fact that the US Supreme Court (in the *Medellin* case) had found that the federal government could not force Texas to abide by these legal obligations. This is true, but it fails to address the real issue. It is a bedrock principle of international law that when a country takes on international legal obligations those bind the entire state apparatus, whether or not it is organized as a federal system. There are many federal systems around the world and they have all devised means to ensure that treaties, whether dealing with trade, investment, diplomatic immunities, the environment, or human rights bind the entire state as such, including its constituent parts. Why would foreign corporations, relying in part upon treaty protections, invest in a state such as Alabama or Texas if

they risked being told that the treaty bound only the US government but was meaningless at the state level? This is where the *Medellin* standoff leaves things.

The provision of consular rights seems to be treated as an issue affecting only those foreign nationals currently on death row in Texas. But precisely the same issue applies to any American who travels to another country. One legislator with whom I spoke noted that when he travels overseas he is hugely reassured by the fact that he would have the right of access to the US consulate if he was arrested. The present refusal by Texas to provide review undermines the role of the US in the international system, and threatens the reciprocity between states with respect to the rights of each others' nationals. Texas, by refusing to provide review of the foreign nationals' cases, is putting the US in breach of its international legal obligations out of what appears to be pure stubbornness. Putting pride ahead of justice and commonsense is rarely a good strategy.

Deaths in immigration detention facilities

There have been at least 74 deaths in immigration detention facilities since 2003. I received credible reports from a variety of sources of denials of necessary care, long delays in the provision of treatment, and the provision of inadequate care and incorrect medication. The immigration detention facilities, managed by Immigration and Customs Enforcement (ICE), an arm of the Department of Homeland Security (DHS), hold immigrants with ongoing immigration legal proceedings, or awaiting removal from the US in some 365 facilities around the country.

The standards and procedures for medical care in all of these facilities are set by ICE. They are designed primarily to provide emergency care and generally exclude other care unless it is judged necessary for the detainee to remain healthy enough for deportation. Specialty care and testing believed necessary by the detainee's on-site doctor must be pre-approved by the Division of Immigration Health Services (DIHS) in Washington, DC. Reliable reports indicate that, in practice, an often very restrictive interpretation is applied. In their defense, DIHS and ICE explained to me that truly emergency care is formally provided at the discretion of medical personnel at each detention center without prior authorization from DIHS. But it is still necessary to obtain DIHS authorization in order for the care provider to get reimbursed for such emergency care. Denials of such requests have a chilling effect on decisions taken subsequently about whether to go ahead without authorization.

In addition, the ICE standards are merely internal guidelines rather than legal regulations. This has insulated ICE policy-making from the external oversight provided by the normal regulatory process and limits the legal remedies available to detainees when the medical care provided is deficient. ICE reassured me that there are internal grievance procedures, but detainees and their lawyers regularly report no or delayed responses to complaints, and complaint hotline telephones that simply don't work. The DHS should promulgate legally enforceable administrative regulations, and these should be consistent with international standards on the provision of medical care in detention facilities.

With respect to the investigation of detention center conditions, I met with the DHS Inspector General (IG). The IG role is an important one and a number of valuable reports have been prepared. But the system is incomplete by virtue of the fact that internal and external accountability functions are more or less combined. The law enforcement officers who investigate abuses by DHS personnel themselves report to the IG. Existing IG peer review arrangements seem most unlikely to act as an appropriate external check on the performance of the IG in relation to sensitive and problematic cases.

ICE has no legal reporting requirements when a death occurs in ICE custody. This has resulted in a clear failure of transparency by ICE in relation to deaths in custody. Both civil society groups and Congressional staff members told me that for years they were unable to obtain any information at all on the numbers of deaths in ICE custody. ICE's recent public reporting of the number of deaths, and their voluntary undertaking to report future deaths is encouraging, but insufficient. ICE should be required to promptly and publicly report all deaths in custody, and these deaths should be fully investigated.

Due process concerns in death penalty cases under the Military Commissions Act

To date, six "alien unlawful enemy combatants" detained at Guantánamo Bay, Cuba, have been charged with capital offences under the Military Commissions Act (MCA). They are being tried before military commissions on war crimes charges, and if convicted, face the death penalty.

The US has an obligation to provide fair trials which afford all essential judicial guarantees. The fundamental principles of a fair trial may never be derogated from. But the text of the MCA, which provides the rules which govern the trials, and the experiences of those with whom I met during my mission involved in the trial process to date, indicate clearly that these trials utterly fail to meet the basic due process standards required for a fair trial under international humanitarian and human rights law. Access to counsel has been severely limited. Second and third hand hearsay evidence can be used. The prosecution can withhold evidence from the accused. The opportunity for the defense to obtain witnesses is restrictive. It has been publicly stated that at least one of those facing trial was subjected to “waterboarding”, and other forms of coercion during interrogations have been widely acknowledged. Yet the MCA does not prohibit all coerced statements from being admitted into evidence. The commissions are not sufficiently independent from the executive. This incomplete list of fundamental due process flaws suffices to demonstrate that the current procedures constitute a gross violation of the right to a fair trial. It would violate international law to execute someone following this kind of proceeding.

Deaths in Guantánamo Bay, Cuba

There have been five reported deaths of detainees at Guantánamo Bay in 2006-07. Four were classified as suicides, and one was attributed to cancer. In the custodial environment, a state has a heightened duty and capacity to ensure and respect the right to life. As a result, there is a rebuttable presumption of state responsibility — whether through acts of commission or omission — in cases of custodial death. The state has an obligation to investigate the deaths, and publicly report on the findings and the evidence upon which the findings are based. But the Department of Defense (DOD) has provided little public information about the causes or circumstance of any of these deaths. While it has been reported that autopsies were conducted in each case, the results have not been made public — or even provided to the families of the deceased men. It was also reported that the Naval Criminal Investigative Services (NCIS) is conducting investigations into each of the deaths. But over two years since the first deaths, no results of investigations have been released. I spoke with civil society groups who have been attempting during that time to obtain the results, but to no avail. The results of autopsies conducted should be released to the families of the deceased men, and the results of any NCIS investigations should be made public.

Ensuring respect for human rights and the rule of law in US military operations in Afghanistan and Iraq

All governments have an obligation to effectively investigate, prosecute, and punish violations of the right to life in situations of armed conflict. It is important, of course, to acknowledge the unique characteristics of armed conflict. The rules governing the use of lethal force are different than in ordinary situations, and intentional killing is often permitted. But, while different laws apply, the importance of ensuring that these laws are followed remains. In other words, the rule of law must be upheld in war as in peace. Some aspects of the rule of law have been taken seriously during US military operations. Thus, after visiting Afghanistan last month, I noted that I had seen no evidence that the international forces present in Afghanistan — including those of the US — were committing widespread intentional killings in violation of human rights or humanitarian law. In addition, the Government has implemented programs for providing compensation to civilian victims of US military operations. While these programs should be improved, the US should also be proud of the leadership that it has shown in this area.

Tracking civilian casualties

The military has repeatedly stated that it does not systematically compile statistics on civilian casualties that occur during its operations in Afghanistan or Iraq. This was confirmed in my discussions with officials at the Department of Defense. The purported reason for not doing so is that “body counts” are not relevant either to evaluating the effectiveness or legality of military operations. It is true that a simple “body count” is not very useful. However, systematically tracking how different kinds of operations result in different levels of civilian casualties is critical if the US is serious about minimizing civilian casualties. Despite this general policy, the military reportedly has tracked the civilian casualties that occur at checkpoints in Iraq when soldiers fire at civilians they mistakenly believe to be suicide bombers or other attackers. My understanding is that these monitoring efforts resulted in changes to procedures that saved lives. This kind of effort to track, analyze, and learn from the consequences of military operations on civilians should be

made routine not exceptional. The numbers and trends found should be reported publicly so as to strengthen external accountability.

Improving the transparency of the military justice system

The troublingly opaque character of the US military justice system is well illustrated by a case described to me by witnesses and investigators when I visited Afghanistan. On March 4, 2007 US Marines responded to a suicide attack on their convoy in which one soldier was wounded by killing some 19 persons and wounding many others in the space of a ten mile retreat. I asked the regional commander in Afghanistan what follow-up had occurred. He could not tell me and explained that his unit had just arrived in Afghanistan and that accountability for incidents involving the previous unit was its responsibility and that it had taken all the relevant files when it left the country. In fact, a Court of Inquiry into the incident proceeded in North Carolina.

Shortly after I returned from Afghanistan, the US military released a short statement on this incident indicating that the commander of U.S. Marine Corps Forces Central Command had conducted a “thorough review of the report of a Court of Inquiry” and had determined that the soldiers had “acted appropriately and in accordance with the rules of engagement and tactics, techniques and procedures in place at the time in response to a complex attack”. Unsurprisingly, this conclusory and unsubstantiated response to such a serious incident was met with dismay in Afghanistan. Afghans — and Americans — have a right to ask on what basis this conclusion was reached. But all of the documents produced by the Court of Inquiry have remained classified. The record of proceedings has not been released. The 12,000 page report of the Court of Inquiry including recommendations and factual findings has not been released. The Government has even disregarded the existing regulation stating that the convening authority should ensure that an executive summary of the report be made public in order to inform Government officials, the legislative branch, the media, and the next of kin of the victims of the investigation’s findings and recommendations. Whether or not the decision not to initiate courts-martial was justified, the manner in which the military justice system has operated in this case is entirely inconsistent with principles of public accountability and transparency.

Unfortunately, this particular incident is only one of many in which the military justice system has failed to provide the appearance — and, perhaps, the reality — of justice. The system is opaque, making it remarkably difficult for the US public, victims, or even commanders to obtain up-to-date information on the status of cases, the schedule of upcoming hearings, or even judgments and pleadings which are theoretically public. This lack of transparency is, in part, a side-effect of the decentralized character of the system, in which commanders around the world are given the authority to conduct preliminary investigations and act as “convening authorities” to initiate courts-martial.

If there is the will to do so, this problem can be solved quickly and easily. Reporting requirements and a central office, or registry, could be added to the existing system at little cost, and this would markedly improve accountability and reduce the sense among Afghan and Iraqi civilians, and others around the world, that US forces operate with impunity.

Improving the effectiveness of the military justice system

While the US military justice system has achieved a significant number of convictions, some sentences appear too light for the crime committed, and senior officers have not been held to account in the same way that enlisted men have been. The requirement that a sentence be proportionate to the gravity of the offence is one that I have raised with the Government and will explore further in my report.

One possible response to some of these distortions would be to explore the creation of a position of Director of Military Prosecutions. Rather than permitting commanding officers whether to prosecute their own soldiers, this official would make those decisions. This has been done in recent years in various states, including Australia, Canada, Ireland, New Zealand and the United Kingdom. The goal is to ensure independent decisions as to prosecution and to distance the convening authorities from decisions in which they and the troops serving under them can be considered to have a direct and potentially conflicting interest.

With respect to “command responsibility”, it is notable that this is absent from both the Uniform Code of Military Justice (UCMJ) and the War Crimes Act as a basis for criminal liability. This concept has been

systematically recognized since the trials which followed the Second World War. It reflects the importance of hierarchy and discipline within the military as well as the essential role of the military commander in preventing and punishing war crimes. Inaction by a commander in response to crimes committed by his men will only result in impunity and more crimes being committed.

While the US military prosecutes commanders under the UCMJ for “dereliction of duty” this does not adequately reflect the responsibility the commander has for the actions of the men under his orders, nor does it result in sentences proportionate to the gravity of the offences committed. The criminal liability of commanders for having failed to take the necessary steps to prevent or punish the crimes committed by their subordinates should therefore be codified in the UCMJ and the War Crimes Act.

Ensuring accountability for killings by private security contractors and civilian Government employees in Afghanistan and Iraq

The existence of a zone of de facto impunity for killings by private contractors operating in Iraq and elsewhere has been tolerated for far too long. Government officials with whom I met acknowledged this lack of accountability, and it now seems to be recognized that this vacuum is neither legally nor ethically defensible — nor politically sustainable. Indeed, many of the contractors themselves now accept the need for legal regulation and accountability. It is also encouraging that the US has participated in efforts to clarify the relevant international standards as part of the Swiss Initiative on Private Military and Security Companies.

Congress has adopted a series of statutes expanding and clarifying jurisdiction over offences committed by contractors and civilian Government employees operating in areas of armed conflict. To date, however, these legislative initiatives have been largely reactive to specific incidents such as the abuses at Abu Ghraib and the shooting incident at Nisoor Square. The result is legislation that closes particular jurisdictional gaps but leaves others. Congress should adopt legislation that comprehensively provides criminal jurisdiction over contractors and civilian employees. I was briefed by a number of Congressional staffers on ongoing efforts to do exactly this. There was, however, also talk of including a so-called “intelligence carve-out” that would provide impunity for contractors and employees working for US intelligence agencies. This would be wholly inappropriate.

However, the principle problem today is that US prosecutors have failed to use the laws already on the books to prosecute contractors. The Department of Justice (DOJ) is responsible for prosecuting private security contractors, civilian government employees, and US soldiers for violations of a range of federal statutes, including the Military Extraterritorial Jurisdiction Act (MEJA), the Special Maritime Territorial Jurisdiction Act (SMTJ), and the War Crimes Act. But the Department has failed miserably in these areas. Its efforts are coordinated by two bodies. A task force based at the US Attorney’s Office for the Eastern District of Virginia deals with cases of detainee abuse, including those resulting in death. The Domestic Security Section (DSS) of DOJ’s Criminal Division coordinates the prosecution of other cases involving contractors, such as unlawful shootings committed while protecting convoys. The first of these bodies recently stated that it had been referred 24 cases of alleged detainee abuse and that, of these, it had declined to exercise jurisdiction in 22. When I spoke with DSS representatives about the other set of cases, they acknowledged the lack of convictions but refused to provide even ballpark statistics on the allegations received. The lamentable bottom line is that the DOJ has achieved a conviction in only one case involving a contractor in Afghanistan or Iraq.

One well-informed source succinctly described the situation: “The DOJ has been AWOL in response to these incidents”. This must change. The keys are political and prosecutorial will. On the latter issue, one problem is that cases involving contractors are ultimately handled by US Attorneys offices around the country. The incentives of these prosecutors to prioritize cases that are difficult and expensive to investigate have proven inadequate, especially when they are expected to do so with their ordinary operating budget. One important institutional reform would be to establish an office within DOJ dedicated solely to prosecuting cases involving crimes committed by contractors, civilian Government employees, and soldiers in situations of armed conflict, and to provide appropriate funding.

Building on existing arrangements for providing reparations for deaths of civilians

The Government has implemented a number of programs for providing reparations, or compensation, to civilian victims of US military operations. In important ways, these programs provide a model to be emulated. Victims or their families receive compensation before any determination has been made that US soldiers engaged in any unlawful act and in many cases in which the death or injury resulted from what was almost certainly a completely lawful attack. The US is a leader in this area and should continue to build on its achievements by increasing funding, proactively seeking out victims and their families rather than waiting to receive requests, and by regularizing and better coordinating existing programs.

Preliminary recommendations

Domestic US issues

Due process in death penalty cases should be improved

- Alabama and Texas should establish well-funded, state-wide public defender services. Oversight of these should be independent of the executive and judicial branches.
- In light of current flaws in state criminal justice systems and the finality of death, the US Congress should enact legislation permitting federal courts to review all issues in death penalty post-conviction review cases on the merits.
- Executions of foreign nationals who have claims related to consular notification requirements under international law should be suspended until legislation is enacted that authorizes review of such claims on the merits.
- Texas should establish a commission to review cases in which persons convicted of crimes have been subsequently exonerated, analyze the reasons for these wrongful convictions, and make recommendations for reforms to the criminal justice system to prevent future mistakes.
- Alabama should evaluate and respond in detail to the findings and recommendations of the American Bar Association report on the implementation of the death penalty in that state.
- Reforms to the system of partisan elections for judges should be considered in order to ensure that capital case defendants receive a fair trial and appeals process.

Medical care provided in immigration detention should be improved

- All deaths in immigration detention should be promptly and publicly reported and investigated.
- The Department of Homeland Security should promulgate appropriate regulations through the normal administrative rulemaking process, and these should be consistent with international standards on the provision of medical care in detention facilities.

International military operations and “war on terror” issues

Trials of Guantánamo Bay detainees should respect due process standards

- Current proceedings against Guantánamo Bay detainees under the Military Commissions Act should be discontinued. All trials should respect due process standards under international human rights and humanitarian law.
- Investigations and autopsy results into the deaths of persons at Guantanamo Bay should be publicly released.

The transparency of the military justice system should be improved with institutional reforms

- *Central office (registry).* A central office, or “registry”, should be established in the Department of Defense to maintain a docket and track cases from investigation through final disposition.
- *Docket.* All convening authorities under the UCMJ should be required to promptly provide the time, date, and location of all upcoming hearings to the registry, and a centralized, public, web-accessible docket should be maintained.
- *Database for tracking cases.* All convening authorities should also be required to promptly provide copies of the findings of formal and informal investigations, rulings, pleadings, transcripts of

testimony, and exhibits to the registry. The registry should maintain a database of this information which would permit access to each individual document, the tracking of particular cases as they move through the system, and the compilation of statistical information.

- To improve internal oversight, commanders should have immediate access to all information in the database concerning their areas of responsibility.
- To improve transparency and public accountability, the database should be made publicly accessible on a web site insofar as consistent with legal requirements related to national security and individual privacy. This would mean that the public would be able to immediately access some documents (such as judgments and pleadings) as well as up-to-date statistical information on investigations and courts-martial. Other documents should be continually evaluated and made public as appropriate, whether in their entirety or redacted. (The registry should initiate this process regardless of whether it has received any request under the Freedom of Information Act (FOIA).)

Comprehensive criminal jurisdiction over offences that occur in areas of armed conflict should be ensured

- Congress should adopt legislation that comprehensively provides criminal jurisdiction over contractors and civilian employees, including those working for the intelligence agencies.
- The concept of “command responsibility” as a basis for criminal liability should be codified in both the Uniform Code of Military Justice (UCMJ) and the War Crimes Act.
- Consideration should be given to establishing a Director of Military Prosecutions rather than leaving commanding officers to decide whether to prosecute their own troops.
- An office dedicated to the enforcement of statutes providing civilian jurisdiction over unlawful killings by contractors, civilian Government employees, and soldiers in areas of armed conflict should be established within the Department of Justice (DOJ). This should receive the resources and investigative support necessary to handle these cases. The DOJ should promptly make public statistical information on the status of these cases, disaggregated by the kind, year, and country of alleged offence.

Existing programs to provide reparations to civilian victims of armed conflict should be enhanced and regularized

- The level of funding for programs to provide compensation to the families of those killed in US military operations should be increased. Such funds should be dedicated exclusively to providing compensation to civilian victims so that individual commanders need not choose between using their limited discretionary funds to compensate civilians or engage in other priorities.
- In missions involving a range of international forces, such as those in Afghanistan and Iraq, the Government should urge allies to implement similar programs and should promote the development of coordination and information-sharing bodies designed to coordinate policy and help ensure that all cases are covered under one program or another.

July 17, 2008

The Honorable Harry Reid
Majority Leader
U.S. Senate
528 Senate Hart
Washington, DC 20510

The Honorable Mitch McConnell
Minority Leader
U.S. Senate
361A Senate Russell
Washington, DC 20510

The Honorable Joseph Biden
Chairman, Committee on Foreign
Relations
U.S. Senate
438 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Richard Lugar
Ranking Member, Committee on
Foreign Relations
U.S. Senate
450 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy
Chairman, Committee on Judiciary
U.S. Senate
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Arlen Specter
Ranking Member, Committee on
Judiciary
U.S. Senate
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators:

In light of the Supreme Court's recent decision in *Medellin v. Texas*, we urge congressional action to ensure that the United States lives up to its binding international legal obligations under the Vienna Convention on Consular Affairs and the United Nations Charter. As current and past Presidents of the American Society of International Law, writing in our personal capacities, we are concerned about the possible U.S. breach of these obligations and the impact such breach could have on our own nationals abroad and on our reputation as a trusted counterparty in international legal relations.

In the *Medellin* case, the Supreme Court unanimously agreed with the Bush administration that the United States is obliged to comply with the International Court of Justice (ICJ) judgment in the *Case Concerning Avena and Other Mexican Nationals* holding that the United States must provide "review and reconsideration" of the criminal convictions of 51 Mexican nationals in the United States who were denied their Vienna Convention rights of access to their own national consular officials when apprehended.

President Bush had issued a Memorandum to the Attorney General directing that state courts give effect to the *Avena* judgment. The Supreme Court concluded, however,

that both it and the President were powerless to order such “review and reconsideration” and that, absent voluntary action by state executives or legislatures, compliance with this international obligation requires congressional action.

With the execution of the first of the Mexican nationals scheduled to take place in Texas on August 5, 2008, the United States is poised irreparably to violate the Vienna Convention and a judgment of the ICJ. Such violations of international law would set a dangerous precedent, undermining the reciprocal Vienna Convention rights that American citizens are entitled to enjoy while traveling, living, or working abroad.

Such violations would also damage the reputation of the United States as a nation that respects its international legal obligations and holds others to the same high standard. Our ability to conclude agreements binding on other countries facilitates nearly every aspect of our international relations, including critically important issues relating to cooperation in counter-terrorism efforts, trade, nuclear non-proliferation, environmental protection, and international investment. Our interests in these areas dictate that we adhere to our obligations, including those under the Vienna Convention and U.N. Charter.

Both the President and the Supreme Court have concluded that the United States is obliged to comply with the ICJ *Avena* judgment. The President has recognized the importance of such compliance to U.S. international relations. Now it falls to Congress to legislate compliance. If you fail to do so, Americans who are detained abroad may well lose the critical protection of ensured access to United States consular officers. We urge that you act, and act quickly.

We thank you for your attention to this important matter.

Sincerely,



Lucy Reed, ASIL President
520 Madison Avenue, 34th Floor
New York, NY 10022

and

ASIL Past Presidents:
José Alvarez
Charles N. Brower
James H. Carter
Thomas Franck

Louis Henkin
Arthur W. Rovine
Anne-Marie Slaughter
Peter D. Trooboff
Edith Brown Weiss

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(P.2)

CAUSE NO. 675430

EX PARTE
JOSE ERNESTO MEDELLIN,
Defendant

§ IN THE 339TH DISTRICT COURT
§ OF
§ HARRIS COUNTY, TEXAS

EXECUTION ORDER

You, JOSE ERNESTO MEDELLIN, were indicted by the Grand Jury of Harris County, Texas, charging you with the offense of capital murder in cause no. 675430. On September 16, 1994, a jury in this Court returned a verdict finding you guilty of the offense of capital murder. On September 20, 1994, the same jury in this Court returned answers to the special issues, submitted to the jury at punishment pursuant to Article 37.071 of the Texas Code of Criminal Procedure, and this Court, in accordance with the jury's findings at punishment, assessed your punishment at death. The judgment of this Court was reviewed by the Texas Court of Criminal Appeals and the Court of Criminal Appeals affirmed the judgment of this Court in all things. Subsequently, the Court of Criminal Appeals denied your initial application for writ of habeas corpus in cause no. 675430-A. This Court now proceeds with the judgment and sentence in your case and now enters the following order.

IT IS HEREBY **ORDERED** by this Court that you, JOSE ERNESTO MEDELLIN, having been adjudged guilty of capital murder and having been assessed punishment at death, in accordance with the findings of the jury and the judgment of this Court, shall at some time after the hour of 6:00 p.m. on the 5TH day of August, 2008, be put to death by an executioner designated by the Director of the Institutional Division of the Texas Department of Criminal Justice, who shall cause a substance or substances in a lethal quantity to be intravenously injected into your body sufficient to cause your death and until your death: such execution procedure to be determined and supervised by the said Director of the Institutional Division of the Texas Department of Criminal Justice.

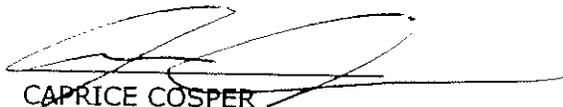
It is **ORDERED** that the Clerk of this Court shall issue a death warrant, in accordance with this sentence, to the Director of the Institutional Division of the Texas Department of

IMAGED

Criminal Justice, and shall deliver such warrant to the Sheriff of Harris County, Texas to be delivered by him to the Director of the Institutional Division of the Texas Department of Criminal Justice together with the defendant, JOSE ERNESTO MEDELLIN.

The Defendant, JOSE ERNESTO MEDELLIN, is hereby remanded to the custody of the Sheriff of Harris County, Texas, to await transfer to Huntsville, Texas and the execution of this sentence of death.

DONE AND ENTERED this 5TH day of May, 2008.


CAPRICE COSPER
Presiding Judge
339TH District Court
Harris County, Texas



STATE OF TEXAS
COUNTY OF HARRIS

I, Theresa Chang, District Clerk of Harris County, Texas, certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office this

6/17/19

THERESA CHANG, DISTRICT CLERK
HARRIS COUNTY, TEXAS
[Signature] Deputy