INTERNATIONAL COURT OF JUSTICE

SUBMISSION OF MEXICO IN RESPONSE TO THE WRITTEN OBSERVATIONS OF THE UNITED STATES OF AMERICA

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

(UNITED MEXICAN STATES v. UNITED STATES OF AMERICA)

filed in the Registry of the Court

on 17 September 2008

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I. INTRODUCTION

1. This Court has already found on a provisional basis that "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." *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), Provisional Measures, Order of 16 July 2008* (hereafter "Provisional Measures Order"), ¶ 55.

2. The United States's Written Observations of 29 August only confirm the Court's reasoning at the provisional measures stage. The assertion of the United States that only the assurances of its Agent may be considered by this Court in determining the existence of a dispute is tantamount to an argument that the Court may not look beyond a State's words to determine the understanding reflected in its deeds. Indeed, on the view of the United States, a State could evade Article 60 jurisdiction simply by making assurances that there was no dispute. Nothing in this Court's jurisprudence contemplates such a result.

3. There is perhaps no better evidence of a dispute than the fact of the execution of Mr. José Ernesto Medellín on 5 August. The objective circumstances leading to the execution of one of the Mexican nationals subject to the *Avena* Judgment and this Court's 16 July Order leaves no room for doubt: despite the United States's protestations, the United States and Mexico have differing views as to the scope and meaning of the obligation of result imposed by this Court's Judgment in *Avena*. In particular, the record of acts and omissions by the Federal Executive, the U.S. Supreme Court, and the U.S. Congress confirm that there is a dispute and that hence, this Court is properly seized of Mexico's Request.

4. On the basis of the record before the Court, Mexico is entitled to an interpretation of paragraph 153(9) of the *Avena* Judgment in the terms it has requested. It is also entitled to a declaration that the United States has breached its obligation under Article 94(1) of the U.N. Charter to abide by the Court's Order of 16 July indicating provisional measures and guarantees by the United States of non-repetition of the breach of the Judgment.

II. STATEMENT OF FACTS

A. The U.S. Supreme Court's Decision in *Medellin v. Texas*

5. As this Court will recall, the Supreme Court granted review of Mr. Medellín's case in November 2007 to determine (1) whether the President of the United

States acted within his authority when he determined that individual states must comply with the United States's treaty obligation to give effect to the *Avena* Judgment, and (2) whether state courts were independently bound to give effect to the *Avena* Judgment in the cases of the fifty-one Mexican nationals whose rights were adjudicated therein. *Medellin v. Texas*, 127 S. Ct. 2129 (2007) (order granting writ of certiorari).

6. The United States actively participated in the proceedings as *amicus curiae*, but its support for enforcement of the *Avena* Judgment was expressly conditioned on the President's executive determination that compliance was in the best interests of the United States. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 6, *Medellin v. Texas*, 128 S. Ct. 1346 (2008) (No. 06-984) ("[W]hile petitioner is entitled to review and reconsideration *by virtue of the President's determination*, such review and reconsideration would not be available to petitioner in the absence of the President's determination.") (emphasis in original). Thus, although the United States acknowledged an "international law obligation to comply with the ICJ's decision in *Avena*," *id.* at 4, the United States contended that the Judgment was not independently enforceable in domestic courts absent intervention by the President, *id.* at 7, 27-29.

7. While rejecting the United States's argument about the authority of the President to implement a treaty obligation, the Supreme Court expressly adopted the United States's argument as to the lack of independent enforceability of the Judgment in domestic courts. *Medellin v. Texas*, 128 S. Ct. 1346, 1358 (2008) (hereafter "*Medellin II*"). Hence, the Court held that neither the *Avena* Judgment on its own, nor the Judgment in conjunction with the President's determination to comply, constituted directly enforceable federal law that precluded Texas from applying state procedural rules that barred all review and reconsideration of Mr. Medellín's Vienna Convention claim. *Id.* at 1353.

8. The Supreme Court did confirm, however, that there are ample means by which the United States still can come into compliance with its obligations under *Avena*. In particular, the Court noted that "Congress is up to the task of implementing non-self-executing treaties," *id.* at 1366, and that once a treaty is "ratified without provisions clearly according it domestic effect," the passage of legislation by Congress can make a non-self-executing treaty domestically enforceable, *id.* at 1369.

B. The United States's Failure To Support Mr. Medellín's Requests For a Stay Or a Reprieve

9. Almost immediately following the Supreme Court's decision, a Texas state court scheduled Mr. Medellín's execution for 5 August 2008. Thereafter, Mr. Medellín sought a reprieve from his execution in multiple state and federal courts and through the clemency process, relying in part on proposed

legislation introduced in the U.S. Congress on 14 July 2008 to give the *Avena* Judgment domestic legal effect. The Federal Executive declined to offer its support in any forum, and none of those fora provided relief.

1. Congressional Action to Implement the *Avena* Judgment

10. On 14 July 2008, Members of the House of Representatives of the U.S. Congress introduced legislation to give the *Avena* Judgment domestic legal effect. The "Avena Case Implementation Act of 2008" would grant foreign nationals a right to judicial review of their convictions and sentences in light of Vienna Convention violations in their cases. *See* Avena Case Implementation Act of 2008, H.R. 6481, 110th Cong. (2d Sess. 2008) (2008) (attached as Exhibit A). The proposed bill specifically authorizes courts to provide "any relief required to remedy the harm done by the violation [of rights under Article 36 of the Vienna Convention], including the vitiation of the conviction or sentence where appropriate." *Id.* at § 2(b)(2). The bill was introduced by Howard L. Berman, Chairman of the Committee for Foreign Affairs and Vice Chairman of the Judiciary Committee, and referred to the Judiciary Committee for consideration. Since that time, the Chairman of the Judiciary Committee, John Conyers, Jr., and Committee Members Zoe Lofgren and William D. Delahunt have joined as co-sponsors of the bill.

11. On 1 August 2008, the Chairman of the House Judiciary Committee (John Conyers, Jr.), the Chairman of the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties (Jerome Nadler), and the Chairman of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security (Robert "Bobby" Scott) wrote a letter to Governor Rick Perry of Texas, explaining that there was insufficient time remaining before Mr. Medellín's execution to pass the proposed legislation and requesting that he stay Mr. Medellín's execution. *See* Letter from Rep. John Conyers, Jr., Rep. Jerrold Nadler, and Rep. Robert "Bobby" Scott to Governor Rick Perry (August 1, 2008) (attached as Exhibit C).

2. Efforts to Obtain a Stay of Execution in the Lower Courts

12. On 28 July 2008, Mr. Medellín filed an application for a writ of habeas corpus in the Texas Court of Criminal Appeals, and along with it, an application for a stay of execution. Mr. Medellín argued that his constitutional rights to life and due process of the law entitled him to reasonable access to the remedy mandated by this Court in *Avena*, and that to execute him before the competent political actors were given a reasonable opportunity to convert the nation's international law obligation under the *Avena* Judgment into a justiciable legal right would amount to an unconstitutional deprivation of his right to life without due process of law. *See* Second Subsequent Application for Habeas Corpus at 20-22, 24-26, *Ex parte Medellin*, No. WR-50,191-03 (Tex. Crim. App. July 28, 2008). In addition, Mr. Medellín argued that his execution without having received the required review and reconsideration

would impinge upon the constitutional authority of Congress to give effect to the United States's obligation under Article 94(1) of the U.N. Charter to comply with the *Avena* Judgment. *Id.* at 20-22; Application for a Stay of Execution at 12-14, *Ex parte Medellin*, No. WR-50,191-03 (Tex. Crim. App. July 28, 2008). In his stay application, Mr. Medellín asked the Court to delay his execution to allow the competent political authorities a reasonable opportunity to implement the Judgment. Application for a Stay of Execution at 8-10, *Ex parte Medellin*, No. WR-50,191-03 (Tex. Crim. App. July 28, 2008). Mr. Medellín also advised the Texas court of this Court's 16 July provisional measures Order, and urged the court to stay his execution as a matter of comity and respect for this Court. *Id.* at 19-22.

13. The United States did not file a brief in support of Mr. Medellín's motion for stay of execution in the Texas court.

14. On 31 July 2008, the Texas Court of Criminal Appeals denied Mr. Medellín's motion for stay of execution and dismissed his habeas application. *Ex parte Medellin*, No. 50,191-03, 2008 WL 2952485 (Tex. Crim. App. July 31, 2008) (per curiam) (attached as Exhibit D). The Court expressly refrained from conducting review and reconsideration of his claim. *See id.* at *2. Instead, the court dismissed his application as procedurally barred under Texas law without articulating its reasons. *Id.*

15. Judge Price filed a concurring statement in which he observed that the Texas court's precedent and governing legislation prevented it from granting a stay. But at the same time, he urged the Texas Governor to act, noting that "[i]t would be an embarrassment and a shame to the people of Texas and the rest of the country . . . if we were to execute the applicant despite our failure to honor the international obligation embodied in the *Avena* judgment when legislation may well be passed in the near future by which that obligation would become, not merely precatory, but legally (and retroactively) binding upon us." *Id.* at *4 (Price, J., concurring).

16. Judge Cochran also filed a concurring opinion and speaking only for herself, claimed that Mr. Medellín "failed in his duty to inform [the] authorities that he was a Mexican citizen." *Id.* (Cochran, J., concurring). She admitted, however, that Mr. Medellín had told the police during his interrogation that he was born in Mexico—a fact this Court has held is sufficient to trigger the authorities' obligations under Article 36. *Id.* at *4 n.1; *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p.121, ¶ 89. She next faulted Mr. Medellín for not raising his Article 36 violation at the time of trial, notwithstanding the fact that the authorities never advised him of his consular rights. With regard to Mr. Medellín's argument that this Court's *Avena* Judgment precluded the application of procedural default rules in this context, Judge Cochran observed: "We would give even the Devil the benefit of our American law, but if we cut down the laws to suit another sovereign that operates under a

different system of justice, we could not stand upright in the lawless winds that would then blow." *Ex parte Medellin*, 2008 WL 2952485, at *6 (Cochran, J., concurring). She then described in detail the facts of the crime for which Mr. Medellín had been convicted, and concluded that there was "no likelihood" that Mr. Medellín was prejudiced by the authorities' violation of Article 36. *Id.* at *8.

17. Mr. Medellín next filed an application for a stay of execution and a motion for authorization to file a successive habeas corpus application in the U.S. Court of Appeals for the Fifth Circuit, in which he reiterated the arguments that he had raised in the Texas court. The motions were denied as procedurally barred on 4 August 2008. *Medellin v. Quarterman*, No. 08-20495 (5th Cir. Aug. 4, 2008) (attached as Exhibit J).

18. The United States did not file a brief in support of Mr. Medellín's motion for stay in the Fifth Circuit.

3. Efforts to Obtain a Stay of Execution Through the Clemency Process

19. Parallel to his efforts to obtain a stay of execution in the courts, Mr. Medellín filed an application for commutation of his sentence or for a reprieve from execution with the Texas Board of Pardons and Paroles. Commenting on reports of this Court's 16 July Order in the press, the Governor's office stated: "The world court has no standing in Texas and Texas is not bound by a ruling or edict from a foreign court." Allan Turner & Rosanna Ruiz, *Texas to World Court: Executions Are Still On*, HOUSTON CHRON., July 17, 2008, at A1.

20. In its written submissions to this Court dated 29 August 2008, the United States explained that it had engaged in extensive discussions with the Board and other Texas officials regarding Mr. Medellín's case. At no time, however, did the United States represent that it had asked Texas to stay Mr. Medellín's execution. Although Secretary of State Condoleezza Rice and Attorney General Michael Mukasey sent a letter to the Texas Governor requesting Texas's "help" in carrying out the nation's international legal obligations under the *Avena* Judgment, they did not ask the Governor to grant Mr. Medellín a reprieve from his execution. *See* Letter from Condoleezza Rice, U.S. Secretary of State, and Michael Mukasey, U.S. Attorney General, to Rick Perry, Governor of Texas (17 June 2008) (attached as Exhibit 2 to Written Observations of the United States).

21. On 4 August 2008, the Board unanimously rejected Mr. Medellín's application for commutation and a reprieve. It issued no reason for the denial. *See* Letter from Maria Ramirez, Legal Support Director, Texas Board of Pardons and Paroles, to Sandra Babcock (4 August 2008) (attached as Exhibit 5 to Written Observations of the United States). On 5 August 2008, the Governor of Texas denied a separate request for a thirty-day reprieve.

22. The United States submitted a letter from Governor Perry as an Exhibit to its Written Submissions dated 29 August 2008. In the letter, Governor Perry declared that if any *Avena* defendant detained in Texas "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 review the claim on the merits." Letter from Rick Perry, Governor of Texas, to Condoleezza Rice, U.S. Secretary of State, and Michael Mukasey, U.S. Attorney General, at 1 (July 18, 2008) (attached as Exhibit 3 to Written Observations of United States). To date, however, the Texas Attorney General has failed to ask any court to conduct review and reconsideration of any Mexican national's conviction and sentence in accordance with the criteria set forth in *Avena.* Instead, the Texas Attorney General's office has continued to argue that each national's Vienna Convention claim is procedurally barred and/or that judicial decisions issued before *Avena* that failed to give full weight to the treaty violation constitute review and reconsideration.

C. The United States's Failure To Request a Stay of Execution From The U.S. Supreme Court Or To Support Mr. Medellín's Request.

23. On 31 July 2008, Mr. Medellín requested the U.S. Supreme Court to stay his execution and grant review of his case.[1] Once again, he argued that his constitutional right not to be deprived of his life without due process of law would be violated if Texas carried out his execution without giving Congress a reasonable opportunity to implement the right to judicial review and reconsideration mandated by *Avena*. *See* Petition for Writ of Certiorari at 15, 18-19, *Medellin III*; Petition for Writ of Habeas Corpus at 15, *Medellin III*; Motion to Recall and Stay the Court's Mandate at 4, *Medellin III*; Application for Stay of Execution at 2, 8, *Medellin III*. He also urged the Court to grant a stay out of comity and respect for this Court's Order indicating provisional measures. *See* Application for Stay of Execution at 4, 18-22, *Medellin III*. And he pointed out that his execution would put the United States in breach of its international legal obligations. *See* Petition for Writ of Certiorari at 15, 26,

[1] Because Mr. Medellín sought relief pursuant to three separate procedural vehicles, the Supreme Court assigned multiple docket numbers to the proceedings. Petition for Writ of Certiorari, *Medellin v. Texas*, No. 08–5573 (U.S. July 31, 2008) (attached as Exhibit E); Petition for Writ of Habeas Corpus, *In re Medellin*, No. 08–5574 (U.S. July 31, 2008) (attached as Exhibit F); Motion to Recall and Stay the Court's Mandate, *Medellin v. Texas*, No. 06–984 (U.S. July 31, 2008) (attached as Exhibit G); Application for Stay of Execution, *Medellin v. Texas*, Nos. 06–984 (08A98), 08–5573 (08A99), 08–5574 (08A99) (U.S. July 31, 2008) (attached as Exhibit H). The Court's decision on each of the applications adjudicated thus far was reported at 554 U.S. __, 2008 WL 3821478 (August 5, 2008) (attached as Exhibit K). For simplicity, that decision and all of the constituent proceedings are referred to herein collectively as "*Medellin III*."

Medellin III; Petition for Writ of Habeas Corpus at 15, *Medellin III*; Motion to Recall and Stay the Court's Mandate at 4, *Medellin III*; Application for Stay of Execution at 1, *Medellin III*.

24. In opposing the application, the State of Texas contended that the possibility of legislation was too remote and further, that Mr. Medellín had already received review and reconsideration consistent with the *Avena* Judgment by virtue of a state court decision issued prior to *Avena* that analyzed the Vienna Convention violation as a matter of whether it qualified as a constitutional violation.

25. On reply, Mr. Medellín observed that the United States had already recognized that the prior treatment of Mr. Medellín's Article 36 claim in the Texas courts did not comply with *Avena*. Mr. Medellín directed the Supreme Court to the oral argument of the United States in the Texas Court of Criminal Appeals, where the United States asserted that the prior state-court review did not comply with *Avena*'s review and reconsideration requirement because the prior review "d[id] not give full and independent weight to the treaty violation, which is what *Avena* requires." Petitioner's Reply to Respondent's Brief in Opposition, *Medellin II* (attached as Exhibit I) (citing Transcript of Oral Argument, Vol. 1 at 49:8-11, *Ex parte Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006) (No. AP-75,207)).

26. On 5 August 2008, by a vote of 5-4, at approximately 9:45 p.m., the Supreme Court denied Mr. Medellín's petition for writ of habeas corpus and his request for a stay of execution. The Court held that the possibility that Congress would pass legislation implementing the *Avena* Judgment was "too remote to justify an order from this Court staying the sentence imposed by the Texas courts." *Medellin III*, 2008 WL 3821478, at *1.

27. Four justices would have granted a stay in order to request the views of the United States Executive Branch on the matter. Justices Souter and Ginsburg noted the representations made by the United States to this Court, in which the Agent of the United States advised the Court that the United States would "continue to work to give [the *Avena*] Judgment full effect, including in the case of Mr. Medellín." *Id.* at *2 (citing Provisional Measures Order, ¶ 37).

28. The United States declined to intervene in support of Mr. Medellín's applications to the Supreme Court or any other court. The Supreme Court assumed from the Executive's silence that it did not support the grounds for a stay of execution advanced by Mr. Medellín, observing that "[t]he Department of Justice of the United States is well aware of these proceedings and has not chosen to seek our intervention." *Id.* at *1.

29. The Supreme Court itself did not purport to conduct the review and reconsideration required by *Avena*, either as to the conviction or the sentence. Nor did it suggest that any other U.S. court had. In denying the stay of

execution, the majority stated its view that "[t]he beginning premise for any stay, and indeed for the assumption that Congress or the [Texas] legislature might seek to intervene in this suit, must be that petitioner's confession was obtained unlawfully." *Id.* In dissent, Justice Breyer observed that the circumstances surrounding Mr. Medellín's confession were not dispositive of his claim. *Id.* at *3-4. He pointed out that "the question before us is whether the United States will carry out its international legal obligation to enforce the decision of the ICJ. That decision requires a further hearing to determine whether a conceded violation of the Vienna Convention (Texas' failure to inform petitioner of his rights under the Vienna Convention) was or was not harmless." *Id.* at *4. Justice Breyer also cited this Court's 16 July Order as one of several grounds justifying a stay of execution. *Id.* at *3.

30. Immediately following the Supreme Court's denial of relief, Texas officials executed Mr. Medellín by lethal injection.

III. MEXICO IS ENTITLED TO AN INTERPRETATION OF THE *AVENA* JUDGMENT.

A. The Words and Deeds of the United States Demonstrate That a Dispute Exists as to the Meaning of the *Avena* Judgment.

31. In its Written Observations of 29 August, the United States reiterates its argument that there is no dispute, and hence no jurisdiction, because the Executive Branch shares Mexico's understanding of the *Avena* Judgment to establish an obligation of result. *See* Written Observations of the United States, ¶ 32. But the United States also concedes, as it must, that statements by representatives of a State, offered in the context of a contentious proceeding, do not conclude the Court's analysis. *See id.* ¶ 27 ("The Court has made clear that a party's own characterization of whether a dispute exists is not dispositive…."). Instead, "[w]hether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence." *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports 1950*, p. 65, at 74.[2]

[2] *See also South West Africa (Ethiopia v South Africa; Liberia v South Africa) Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319, at p. 328 ("The Court will itself determine the real dispute that has been submitted to it. It will base itself not only on the Application and final submissions, but on diplomatic exchanges, public statements, and other pertinent evidence.") (citations omitted); *Fisheries Jurisdiction (Spain v. Canada), Judgment, I.C.J. Reports 1998*, p. 432, ¶ 31; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 12, ¶ 35.

32. As this Court confirmed when it issued provisional measures in these proceedings, "'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[.]'" Provisional Measures Order, ¶ 54 (quoting *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). As a result, recourse may be had to this 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." *Id.* (emphasis added).

33. Applying those basic principles, this Court held that that "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." *Id.* ¶ 55.

34. The United States's only response to the Court's holding is to point out that there is a distinction between the rules for imputation of a wrongful act as a matter of the law of state responsibility and the authority to speak on behalf of a State. Mexico readily acknowledges the distinction between these two legal rules. That distinction, however, does not save the United States's position here.

35. As this Court has just held, the existence of a dispute over the meaning and scope of a judgment of the Court giving rise to jurisdiction to provide an interpretation of that judgment depends not solely upon the statements of a State, in the person of its agent, before this Court, but upon a full assessment of all the objective circumstances, including the statements of authorized officials of the government when dealing with the subject matter of the judgment and its acts, of omission as well as commission, in dealing with that subject matter. Here, the Court is fully entitled to assess the position of the United States as reflected not simply in its arguments before this Court, but in its words and deeds when faced with the imminent and glaring prospect that Texas would execute Mr. Medellín in violation of the *Avena* judgment.

36. Accordingly, even if the Federal Executive generally conducts international relations on behalf of the United States, *see* Written Observations of the United States, Part II.B, it is still the case that its views and acts in other fora (including the U.S. Supreme Court), as well as the views and acts of other competent organs of federal and state government are relevant to the objective determination of the dispute. *See* Provisional Measures Order, ¶ 55 (indicia of a "dispute" include "whether that understanding [of an obligation of result] is shared by all United States federal and state authorities and whether that obligation falls upon those authorities"). For instance, the Court in the *Headquarters Agreement* case was called upon to determine the existence of a

dispute between the United States and the United Nations that was occasioned by the enactment of domestic legislation inconsistent with the nation's international obligations under the U.N. Headquarters Agreement. *Applicability of the Agreement to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, ICJ Reports 1988*, p. 12. Specifically, the U.S. Congress had enacted legislation that required closure of an office of the Palestine Liberation Organization ("PLO") Observer Mission to the United Nations. *Id.* ¶ 15. The United States argued that the mandatory dispute resolution procedures set forth in the Headquarters Agreement had not yet come into play because the office had not yet been closed and it thus "had not yet concluded that a dispute existed." *Id.* ¶¶ 17, 22, 39.

37. The Court rejected the argument. The Court reiterated that the existence of a dispute is "a matter for objective determination" and cannot depend upon the mere assertions or denials of the parties." *Id.* ¶ 35 (quoting *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports 1950*, p. 65, at 74). Furthermore, the Court stated that while the existence of a dispute presupposes a claim, that claim can arise out of "the behaviour of," as well as "a decision by," one of the parties. *Id.* ¶ 42. In determining the existence of a dispute, the Court thus looked beyond the statements of the parties to the objective circumstances, including events that occurred both prior and subsequent to the filing of the case that were "of possible relevance to, or capable of throwing light on" the question of a dispute. *Id.* ¶ 23. Although the PLO office had not yet been closed, the Court concluded—based upon the enactment of the legislation, the legal provision requiring its automatic implementation ninety days later, and the U.S. Attorney General's expressed intent to implement it absent a contrary ruling from a domestic court—that a dispute existed between the parties. *Id.* ¶¶ 42-43.

38. The United States's reliance on the *Gulf of Maine* case is misplaced. In that case, the statement rejected by the Court was the technical opinion of a mid-level federal official who expressly disclaimed authority to commit the United States to any particular position. *See Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment, I.C.J. Reports 1984*, p. 246, ¶ 133. In addition, the Court specifically noted that the official "was acting within the limits of his technical responsibilities and did not seem aware that the question of principle which the subject of the correspondence might imply had not been settled, and that the technical arrangements he was to make with his Canadian correspondents should not prejudge his country's position in subsequent negotiations between the governments." *Id.* ¶ 139. In contrast, the federal and state organs whose words and deeds belie the position of the United States before this Court operate at the highest levels of the executive, judicial and legislative branches, and those words and deeds go precisely to the question of principle before this Court.

39. In effect, the United States argues that in determining whether there is a dispute, this Court may only take account *only* of the litigation position before this Court of a State that denies the existence of the dispute. In other words, on the United States's view, a State's characterization of a claim before this Court would be dispositive. As this Court has just held, *see* Provisional Measures Order, ¶ 55, that cannot be the rule, for the simple reason that one party to a judgment could thereby defeat the rights of another party seeking an interpretation to which it might be entitled by adopting a position before this Court that is at odds with a fair assessment of the "objective circumstances" by which the Court determines its jurisdiction. Objectively assessing the words and deeds of the responsible United States actors here—the "objective circumstances" by which this Court's established jurisprudence teaches it must determine the existence or not of a dispute—there can be no question that the parties hold different understandings of the meaning and scope of the *Avena* Judgment.

B. The Words and Deeds of the United States Government As a Whole Confirm the Existence of a Dispute.

40. The United States argues as if Mexico relies for the existence of a dispute exclusively on the actions of the State of Texas—which, as the United States concedes, does not view the *Avena* Judgment as imposing an obligation of result. *See, e.g.*, Written Observations of the United States, ¶ 36. But that is not the case. As Mexico stated in its Request for Interpretation, reiterated at the provisional measures hearing, and elaborates below, each of the Federal Executive, Judiciary, and Legislature have failed to treat the *Avena* Judgment as imposing an obligation of result.[3]

1. The Actions and Omissions of the Federal Executive Belie Its Assurances in These Proceedings that It Interprets the *Avena* Judgment to Impose an Obligation of Result.

41. Mexico recognizes that, so long as the means chosen by the United States to comply are consistent with the obligation imposed by *Avena* to provide review and reconsideration by judicial process, they are a matter for its domestic law. Here, the Federal Executive successfully urged upon the U.S. Supreme Court a position as to the available means of compliance within the domestic legal system that made it enormously more difficult for the United States to comply with this Court's Judgment, and then, having made compliance more difficult,

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[3] *See, e.g.*, Request for Interpretation, ¶¶ 13, 19, 31, 36; Provisional Measures Order, ¶¶ 48 ("[W]hereas, 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[.]").

it failed to take the steps necessary to achieve compliance in the situation it helped to create. Its course of conduct reflects its disagreement with Mexico as to the obligation imposed by the Judgment, and that disagreement—unlike the underlying matters of U.S. domestic law—is central to Mexico's Request here.

42. When the Federal Executive intervened as an *amicus curiae* in the *Medellin II* proceedings to present the views of the United States, it argued that the *Avena* Judgment could be given effect in the U.S. domestic legal system only on the President's authority to determine compliance with an ICJ judgment. *See supra*, ¶ 6. In support of that position, the Federal Executive argued that Article 94(1) was directed only to the political branches of States Party to the U.N. Charter rather than to the State Party as a whole. Brief for United States as Amicus Curiae Supporting Petitioner at 27-29, *Medellin II*. There is no support for that reading of Article 94(1) in either its text, its object and purpose, or principles of general international law. The Federal Executive also argued in prior proceedings that the recourse to the Security Council made available by Article 94(2) supported its reading of Article 94(1). Brief for the United States as Amicus Curiae Supporting Respondent at 35, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). In other words, the Federal Executive argued that the prospect of noncompliance reflected in Article 94(2) counseled in favor of reading Article 94(1) to *restrict* the domestic means of achieving the compliance required by that Article. That reading of Article 94, both in its parts and in the whole, was fundamentally erroneous. *See infra*, Part III.B.2.

43. The Supreme Court adopted the Executive's interpretation of Article 94—the very treaty requiring compliance—to reject its own authority to order compliance. In reaching that result, the Court specifically noted that "the United States' interpretation of a treaty 'is entitled to great weight,'" and in that connection observed that "[t]he Executive Branch has unfailingly adhered to its view that the relevant treaties do not create domestically enforceable federal law." *Medellin II*, 128 S. Ct. at 1361 (citations omitted). The Supreme Court rejected, however, the Executive's assertion that the President, acting alone, had the constitutional authority to order compliance. As to such matters of domestic constitutional law, as opposed to questions of treaty interpretation, the Court generally does not defer to the Executive's interpretation. The Supreme Court thus held that the obligation to comply with *Avena* was not directly enforceable in the U.S. legal system absent implementing legislation by Congress. *See supra*, Part II.A.

44. Having prompted an application of domestic law, premised in large part on an erroneous interpretation of Article 94 of the U.N. Charter, that precluded the most straightforward means of implementing the *Avena* Judgment, the Federal Executive then took no effective steps whatsoever to bring about compliance within the domestic law regime left in the wake of the *Medellin II* decision. While the United States points to several letters politely requesting the

cooperation of Texas authorities, there is no dispute about what it did not do. And what it did not do unequivocally reflects the disagreement between Mexico and the United States as to the obligation imposed by *Avena*.

45. *First*, notwithstanding its acknowledgement that Mr. Medellín had not yet received review and reconsideration as mandated by *Avena*, *see supra* ¶ 25, the Federal Executive did not appear in the Texas trial court to support Mr. Medellín's request—let alone make the request itself—that the Texas trial court exercise its discretion to defer the setting of an execution date until Congress had had the opportunity to make the decision that the U.S. Supreme Court had just held was constitutionally entrusted to it: to determine whether the United States would comply with *Avena*.

46. *Second*, the United States did not support Mr. Medellín's application to the Texas Court of Criminal Appeals seeking a stay of execution, even though by then several leading Members of Congress had proposed legislation designed to implement the *Avena* Judgment in accordance with the Supreme Court's *Medellin II* decision. *See supra*, Part II.B.2. By that point, the United States had already stated to this Court during the course of the June provisional measures hearing that it agreed with Mexico's interpretation of the judgment to impose an obligation of result, yet it stood on the sidelines during judicial proceedings initiated by Mr. Medellín to bring about that result. *See supra*, Part II.B.

47. *Third*, the Federal Executive took no steps to support legislation proposed in Congress that would implement *Avena* or to assist in moving forward the legislation that Members of Congress introduced.

48. *Finally*, the Federal Executive remained on the sidelines when, the Texas courts having rejected his request for relief and the Governor of Texas having given every indication that he would too, Mr. Medellín petitioned the U.S. Supreme Court to issue a stay to allow Congress time to act. Again, that failure to speak proved dispositive, as the Supreme Court relied in large part on the silence of the Federal Executive as justification to deny the relief requested. In a terse two page opinion, the Court specifically noted that "[t]he Department of Justice of the United States is well aware of these proceedings and has not chosen to seek our intervention." *Medellin III*, 2008 WL 3821478, at *1. The Court also noted that"[n]either the President nor the Governor of the State of Texas has represented to us that there is any likelihood of congressional or state legislative action." *Medellin III*, 2008 WL 3821478, at *1. Describing the Federal Executive's silence as "no surprise," the Court also stated, without citation and in the absence of any argument to that effect by Texas or anyone else, that "[t]he United States has not wavered in its position that petitioner was not prejudiced by his lack of consular access." *Id.* That statement was factually erroneous, as the Federal Executive, while stating unequivocally that Mr. Medellín had never received review and reconsideration, had never taken a position as to whether the review and

reconsideration mandated by *Avena* would result in a finding of prejudice within the meaning of the Judgment. The Executive's silence ensured that the Supreme Court's error went uncorrected.

49. In sum, the Federal Executive, having prompted a holding that U.S. courts could not themselves comply with *Avena* based in large part on an erroneous interpretation of Article 94, and then having had its own assertion of executive authority to implement the Judgment rejected, took no steps either to bring about implementing legislation or to require Texas to defer execution until such legislation could be passed. That course of conduct reflects a fundamental dispute between Mexico and the United States about the United States's obligation to bring about a specific result by any necessary means. Whereas Mexico considers that the United States must take any action necessary to make the review and reconsideration ordered in *Avena* effective as part of an obligation of result, the United States contents itself with steps insufficient to bring about that result. These acts and omissions demonstrate that for the United States, the obligation imposed is merely one of means.

2. The U.S. Supreme Court's Interpretation of the United States's Obligations Under the *Avena* Judgment Also Is Wholly At Odds With Mexico's View of the Judgment.

50. The United States asserts that "[i]n light of the well-established authority of the U.S. federal executive to speak on behalf of the United States, there is no reason to inquire into … the Supreme Court's understanding of the *Avena* Judgment," and that "to the extent the Supreme Court's understanding can be discerned, it would have to be regarded as sharing Mexico's requested interpretation." Written Observations of the United States, ¶¶ 52, 53. Mexico disagrees.

51. As an initial matter, the Supreme Court is the highest federal judicial authority of the United States. U.S. CONST. art. III, § 1. Its interpretations of treaty obligations are conclusive as a matter of domestic law and binding on all state and federal courts and officials—including the Federal Executive. *See generally Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173, 177 (1803). And as discussed *supra* in Part III.A, the views of the Supreme Court as to the scope and meaning of the United States's treaty obligations are relevant for purposes of the objective determination of a dispute.

52. Contrary to the United States's assertion that the Supreme Court "shar[es] Mexico's requested interpretation," the Supreme Court clearly disavowed—in both the *Medellin II* decision and in its denial of a stay of execution—the view advanced by the Federal Executive in these proceedings that the *Avena* Judgment imposes an obligation of result. In *Medellin II*, the Supreme Court held that state courts were free to breach the nation's obligations under the *Avena* Judgment absent new federal legislation. 128 S. Ct. at 1356-57. That holding was based upon an interpretation of Article 94 of the U.N. Charter

advanced by the Federal Executive that is fundamentally incompatible with Mexico's interpretation in three respects.

53. *First*, the Supreme Court construed Article 94(1) of the U.N. Charter not as an obligation of result binding on all constituent organs of the United States—including the state and federal judiciaries—but instead as a "*commitment* on the part of the U.N. Members to take *future* action through their *political* branches to comply with an ICJ decision." *Id.* at 1358 (citing argument of the United States). The Court reasoned that because Article 94(1) "does not provide that the United States 'shall' or 'must' comply with an ICJ decision," it "is not a directive to domestic courts" to provide immediate legal effect. *Id.*[4] In effect, the Court found that the expression of the obligation to comply in Article 94(1) somehow precluded the judicial branch—the authority best suited to implement the obligation imposed by *Avena*—from taking steps to comply. There is nothing in the text or object and purpose of Article 94(1) that suggests such an incongruous result. It is moreover fundamentally inconsistent with the interpretation of the *Avena* Judgment as imposing an obligation of result incumbent on all constituent organs, including the judiciary. Needless to say, Mexico does not agree with the Supreme Court's interpretation.

54. *Second*, in construing Article 94, the Supreme Court held, at the urging of the Federal Executive, that the provisions of Article 94(2) contemplating enforcement measures in the Security Council for failure to comply with Article 94(1) "fatally undermined" the proposition that the obligation was presently enforceable in United States courts. *Id.* at 1360. In effect, the Supreme Court took the provision of an enforcement mechanism at the international level, which was meant to promote compliance, as a directive to the States Party to facilitate breach: to preserve what the Supreme Court called the "option of noncompliance contemplated by Article 94(2)." *Id.* This interpretation of the text of Article 94 turns the principle of *pacta sunt servanda*—that parties should perform their treaty obligations—on its head. Again, Mexico does not agree.

55. *Finally*, the Supreme Court construed the operative language of the *Avena* Judgment as a "mere suggestion" that the judicial process would be best suited to provide the requisite review and reconsideration, and concluded that the *Avena* Judgment itself "confirm[s] that domestic enforceability in court is not

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

part and parcel of an ICJ judgment." *See id.* Once again, Mexico does not agree.

56. Quite apart from the Supreme Court's erroneous interpretation of an international law instrument, it is clear that that Court does not share Mexico's view of the *Avena* Judgment—that is, that the operative language establishes an obligation of result reaching all organs, including the federal and state judiciaries, that must be discharged irrespective of domestic law impediments. If it did, it would have acted upon that understanding when Mr. Medellín sought a stay of his execution to allow Congress a reasonable chance to act pursuant to the Supreme Court's settlement of the constitutional allocation of responsibility for compliance. Instead, the Supreme Court failed to intervene to stop Texas from proceeding with Mr. Medellín's execution and thereby irreparably breaching the *Avena* Judgment.

3. Congress Failed to Implement Legislation That Could Have Prevented the Breach.

57. Following the Supreme Court's decision in *Medellin II*, several Members of Congress responded to the call by proposing legislation to give the *Avena* Judgment domestic legal effect, but the legislative calendar did not permit adequate opportunity for Congress to fully consider and enact the bill into law before Mr. Medellín's execution date. Mexico understands that Congress remains seized of the matter and that there remains the possibility that implementing legislation will be enacted before any other Mexican national subject to the *Avena* Judgment is scheduled for execution.

58. "[A] State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken." *Exchange of Greek and Turkish Populations, Advisory Opinion, P.C.I.J., Series B, No. 10, 1925*, p. 20. Mexico is unaware of any efforts by the Federal Executive to urge the passage of the necessary legislation to give effect to the *Avena* Judgment.

59. In sum, the words and deeds of the Federal Executive, the Supreme Court and Congress confirm the existence of a dispute, namely, that the constituent federal and state organs of the United States neither shared the understanding of Mexico as to the meaning and scope of the obligation of result nor considered themselves subject to that obligation.

C. Mexico Is Entitled To Its Requested Interpretation of the *Avena* Judgment.

60. Accordingly, Mexico is entitled to an interpretation of paragraph 153(9) of the *Avena* Judgment in the terms it has requested. In particular, as set forth below in its Submissions, Mexico requests an interpretation that the obligation incumbent upon the United States under paragraph 153(9) of the *Avena* Judgment constitutes an obligation of result that binds all the competent

organs and all the constituent subdivisions of the United States, including all branches of government and any official, state or federal, exercising government authority. Mexico also requests an interpretation that the obligation of result requires those organs and subdivisions to take all measures necessary to provide the reparation of review and reconsideration mandated by the *Avena* Judgment in paragraph 153(9) and 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.

IV. THE FAILURE OF THE UNITED STATES TO TAKE ALL MEASURES NECESSARY TO PREVENT MR. MEDELLÍN'S EXECUTION BEFORE HE RECEIVED REVIEW AND RECONSIDERATION CONSTITUTES A BREACH OF THIS COURT'S PROVISIONAL MEASURES ORDER AND THE *AVENA* JUDGMENT ITSELF.

61. By its Order of 16 July 2008, pursuant to Articles 41 and 48 of the Statute of the Court and Articles 73 and 74 of the Rules of the Court, this Court directed:

> 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)*.

Provisional Measures Order, ¶ 80. The United States breached the obligation imposed by this Order.

A. The Court Has Jurisdiction to Consider Mexico's Claim That the United States Breached the 16 July Order of Provisional Measures.

62. Following this Court's decision in the *LaGrand* case, there can be no doubt that the Court has jurisdiction to consider Mexico's claim that the United States breached its obligation to abide by the 16 July Order.[5] In *LaGrand*, the Court explicitly affirmed its determination in the *Fisheries Jurisdiction* case that "in order to consider [a] dispute in all aspects it may also deal with a submission that 'is one based on facts subsequent to the filing of the

[5] On 28 August 2008, Mexico sought leave to amend its pleadings to state a claim based on the violation of this Court's Order on provisional measures. The Court granted Mexico's request on 2 September 2008.

Application, but arising directly out of the question which is the subject-matter of that Application.'" *See LaGrand*, ¶ 45 (citing *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland) Merits, Judgment, I.C.J. Reports 1974*, p. 175, ¶ 72)). On that basis, the Court declared:

> Where the Court has jurisdiction to decide a case, it also has jurisdiction to deal with submissions requesting it to determine that an order indicating measures which seeks to preserve the rights of the Parties to this dispute has not been complied with.

Id. Mexico's claim of breach here fits squarely within this ancillary jurisdiction.

B. The Provisional Measures Order Clearly Was Compulsory.

63. After the *LaGrand* case, there also can be no doubt that this Court's 16 July Order was compulsory upon the United States. In *LaGrand*, the Court firmly rejected a claim by the United States that provisional measures were not legally binding, *id.*, ¶ 96, concluding instead that that because such orders fall within the compulsory language of Article 94(1) of the UN Charter, "orders on provisional measures under Article 41 have binding effect," *id.* ¶ 109.

64. The United States has not challenged the binding force of the 16 July Order.

C. There is No Dispute That Mr. Medellín Did Not Receive the Review and Reconsideration Mandated by *Avena* Before He Was Executed.

65. It is undisputed that Mr. Medellín did not receive the review and reconsideration to which he was entitled under the *Avena* Judgment. The United States has never contended otherwise. Although the State of Texas argued that the state and federal courts that disposed of Mr. Medellín's Article 36 claim *prior to Avena* had effectively conducted the review and reconsideration required by this Court's Judgment, the United States has acknowledged that the pre-*Avena* decisions did not comply with *Avena*'s review and reconsideration requirement because the prior review "d[id] not give full and independent weight to the treaty violation, which is what *Avena* requires." Transcript of Oral Argument, Vol. 1 at 49:8-11, *Ex parte Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006) (No. AP-75,207).

66. No U.S. court has purported to conduct review and reconsideration of Mr. Medellín's conviction and sentence since this Court issued its *Avena* Judgment. The Texas Court of Criminal Appeals did not even suggest, either in its 2005 or 2008 decisions, that it had already conducted the review and reconsideration that *Avena* requires. In her concurring opinion in 2008, Judge Cochran stated her view that review and reconsideration was likely to lead to a finding of no prejudice, but she did not contend that the review and reconsideration required by *Avena* had already occurred.

67. Similarly, the United States Supreme Court refused to conduct review and reconsideration of Mr. Medellín's conviction and sentence in light of the Article 36 violation. At oral argument in November 2007, Chief Justice Roberts recognized that under the *Avena* Judgment, the courts would be required to conduct *de novo* review of the Vienna Convention claims of Mexican nationals named in the *Avena* Judgment. The United States again agreed. *See* Transcript of Oral Argument at 26-27, *Medellin II*, *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-984.pdf. And in its March 2008 opinion, the Court expressly declined to "consider whether Medellin was prejudiced in any way by the violation of his Vienna Convention rights," and did not suggest that Mr. Medellín had previously received a determination as to prejudice in compliance with *Avena*. *Medellin II*, 128 S. Ct. at 1355 n.1.

68. In August 2008, the Supreme Court refused even to hear Mr. Medellín's petition for review that was filed in the week before his execution. In a decision issued on the evening of Mr. Medellín's execution, the Supreme Court implied that it was unlikely that a reviewing court would find prejudice, at least as to the conviction. But the Court did not itself conduct the review required by *Avena*. As Justice Breyer observed, "the question before us is whether the United States will carry out its international legal obligation to enforce the decision of the ICJ. That decision requires a further hearing to determine whether a conceded violation of the Vienna Convention (Texas' failure to inform petitioner of his rights under the Vienna Convention) was or was not harmless."[6] *Medellin III*, 2008 WL 3821478, at *4 (Breyer, J., dissenting).

D. The United States Failed to Take All Measures Necessary to Prevent the Execution of José Medellín.

69. The United States stated unequivocally before the Texas Court of Criminal Appeals that the domestic proceedings in his case prior to this Court's Judgment in *Avena* could not qualify as review and reconsideration under that

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[6] Indeed, the only tribunal to have reviewed all of the evidence pertaining to the Vienna Convention violation in Mr. Medellín's case in a manner consistent with the *Avena* Judgment found that he had been prejudiced. Following written submissions and oral argument in which the United States fully participated, the Inter-American Commission on Human Rights issued a preliminary report concluding that Mr. Medellín had in fact been prejudiced by the Vienna Convention violation and recommending that he be granted a new trial as a result. *See Medellin et al. v. United States*, Case No. 12.644, Inter-Am. C.H.R., Report No. 45/08, OEA/Ser/L/VIII.132, doc. 21, ¶¶ 128, 132, 160 (July 24, 2008) (attached as Exhibit B). The Commission also requested that the United States take precautionary measures to preserve Mr. Medellín's life pending the implementation of its recommendations. *Id.* ¶ 159.

Judgment. It has never disavowed that position, which follows from the prospective nature of the Judgment itself. *See Avena*, ¶ 153(9).

70. Mr. Medellín was executed on 5 August. Prior to his execution, no court purported to conduct the review and reconsideration required by *Avena*. *See supra*, Part IV.C. On those undisputed facts alone, this Court must conclude that the United States breached the provisional measures order by failing to take all steps necessary to prevent his execution without having provided review and reconsideration consistent with the terms of the *Avena* Judgment.

71. While it should not matter to the basic holding of breach, the failure is attributable to the refusal to act of numerous responsible and competent actors within the United States.

1. The U.S. Supreme Court Failed to Exercise Its Authority to Stay the Execution.

72. The U.S. Supreme Court had the constitutional authority to issue a stay pending congressional consideration of implementing legislation, but it declined to exercise its authority to do so. *See Medellin III*.[7] It thereby failed to take all measures necessary to prevent the execution. Indeed, not only did the Supreme Court refuse to issue a stay pending congressional action, but it refused to issue a stay even to hear the views of the Federal Executive as to the international obligations involved. *See supra*, ¶ 27.

73. Among the failures cited by this Court in its determination that the United States breached the provisional measures order in *LaGrand* was the failure of the Supreme Court to grant a stay of execution to consider, after briefing from all interested parties, the jurisdictional and legal issues presented by Germany. *LaGrand*, ¶¶ 113. The same observation applies with equal force here.

2. The Federal Executive Failed to Recommend a Stay of Execution and the Governor of Texas Failed To Issue a Reprieve.

74. The Court in *LaGrand* also cited the failure of the Federal Executive to encourage the U.S. Supreme Court and the Governor of Arizona to stay Walter LaGrand's execution in light of provisional measures, and the failure of the Governor of Arizona to issue a reprieve. *LaGrand*, ¶¶ 112, 114. Here, the Federal Executive was required to raise this Court's 16 July Order and *Avena* Judgment to the domestic courts and state administrative authorities seized of Mr. Medellín's request for a stay of execution. As noted above, the Executive here failed entirely to intervene in the proceedings in both state and federal

[7] Indeed, as noted above, four dissenting justices of the U.S. Supreme Court explicitly lamented the failure of the majority to delay the execution long enough to solicit the views of the Federal Executive. *See supra*, ¶ 27.

court. Its failure to do so thus constitutes a breach of the Order and the *Avena* Judgment.

75. To the best of Mexico's knowledge, the Executive also failed to ask the Governor of Texas to exercise his authority to grant a thirty-day reprieve. *See supra*, Part II.B.3. The United States also should have appealed to the Texas Board of Pardons and Paroles, which had authority as part of the clemency process to recommend that the Governor commute Mr. Medellín's death sentence or grant a reprieve from execution. TEXAS CONST. art. IV, § 11; 37 TEX. ADMIN. CODE §§ 143.42-43 (reprieve), 143.57 (commutation) (2006). Without such a recommendation, the Governor's unilateral power to grant a reprieve was limited to thirty days, but on the recommendation of the Board the Governor could have stayed Mr. Medellín's execution long enough to allow Congress a reasonable opportunity to enact implementing legislation. *See* TEX. CODE CRIM. PROC. art. 48.01. Mr. Medellín asked the Board to recommend that the Governor grant a reprieve of 240 days. *See* Petition for Recommendation of Executive Clemency and Petition for Reprieve from Execution on Behalf of José Ernesto Medellín at 6, 35, Texas Board of Pardons and Paroles (July 14, 2008).

76. The United States has provided this Court with a copy of a letter sent by its Agent in these proceedings to the Presiding Officer of the Board of Pardons and Paroles. Letter from John B. Bellinger III, Legal Adviser to the Secretary of State, to Rissie Owens, Presiding Officer of the Texas Board of Pardons and Paroles (July 30, 2008) (attached to Written Observations of the United States as Exhibit 4). Far from urging compliance with the 16 July Order, the letter expressly declined to take a position on whether Mr. Medellín's sentence should be commuted or on any other aspect of his clemency petition, including his request for a reprieve from execution. *Id.* at 1.

77. Finally, as noted, the Governor of Texas also had unilateral authority to issue a thirty-day reprieve from execution, but declined to do so. *See supra*, ¶ 75. Although in practice a thirty-day reprieve would not have guaranteed Congress a reasonable opportunity to act, the Governor was required to take all necessary steps to prevent the execution.

E. Mexico Is Entitled To A Declaration of Breach.

78. In its oral presentation on Mexico's request for provisional measures, the United States twice acknowledged that it would constitute a breach of the *Avena* Judgment if Mr. Medellín were to be executed without having received the review and reconsideration ordered therein. *See* Transcript of Public Sitting, 20 June 2008, 4:30 p.m., ¶¶ 27, 31. The Court noted the statement of the United States in its 16 July Order: "Whereas the Court further notes that the United States has recognized that, were any of Mexican nationals names 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. Medellin's sentence without affording him the necessary review and reconsideration obviously would be inconsistent with the *Avena* Judgment." Provisional Measures Order, ¶ 76. It follows from the terms of the Order on provisional measures that Mr. Medellín's execution also constitutes a breach of that Order.

79. The United States does not appear to contest this point. Rather, the United States readily admits, as it must, that it is liable as a matter of international law for the wrongful acts of all state and federal officials. *See* Written Observations of the United States, ¶¶ 55, 58; Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 4, adopted by the International Law Commission at its Fifty-third session (2001), Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10). In light of the foregoing, Mexico is entitled to a declaration that the United States breached the Order of 16 July 2008 and the *Avena* Judgment by executing Mr. Medellín without having provided review and reconsideration consistent with the terms of the *Avena* Judgment.

V. MEXICO IS ENTITLED TO GUARANTEES OF NON-REPETITION.

80. In these circumstances, Mexico is entitled to guarantees of non-repetition by the United States. Article 30 of the International Law Commission Articles on State Responsibility provides that States are obliged "to offer appropriate assurances and guarantees of non-repetition, if circumstances so require." Guarantees are a well-established remedy under international law, as they aid "the restoration and repair of the legal relationship affected by the breach." *See* Commentary to Draft Articles on Responsibility for Internationally Wrongful Acts, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), [2001] Y.B. Int'l L. Comm'n at 88 (Commentary to Article 30, ¶ 1).[8] They also "serve a preventive function" to ensure that future violations of the same type will not occur again. *Id.*; *see also* Crawford, Peel & Olleson, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading*, 12 E.J.I.L. 963, 987 (2001) ("[G]uarantees are likely to be appropriate only where there is a real risk of repetition causing injury to the requesting state or others on whose behalf it is acting.").

81. This Court has on several occasions ordered measures of relief that establish prospective obligations to avoid further unlawful conduct. For example, in the

[8] *See, e.g.*, *Loayza-Tamayo v. Peru*, Merits, Reparations and Costs, Judgment of November 27, 1998, Inter-Am. Ct. H.R., Series C No. 42, ¶ 85 ("Reparations is a generic term that covers the various ways a State may make amends for the international responsibility it has incurred (*restitutio in integrum*, payment of compensation, satisfaction, guarantees of non-repetitions among others).").

case concerning *United States Diplomatic and Consular Staff in Tehran*, the Court, having found Iran's detention of U.S. diplomatic and consular staff in Tehran to constitute a violation of its international obligations to the United States, not only ordered Iran to release the detained individuals but also granted the prospective relief sought by the United States and ordered Iran to refrain from holding any diplomatic or consular staff member captive in Iran for purposes of future judicial proceedings. *See United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, ¶ 95(3)-(4).[9]

82. The purposes served by guarantees of non-repetition are squarely implicated here, where the obligations set forth in the *Avena* Judgment—to which the Order on provisional measures was addressed—will continue to bind the United States as a matter of international law, and yet "there is a real risk of repetition causing injury" to Mexico and its nationals.

83. Concrete and compelling circumstances demonstrate the need for the guarantees sought here. To be clear, the guarantees that Mexico seeks here are not adequately addressed by the measures that the United States has taken to promote compliance with its obligations under Article 36 of the Vienna Convention. *Cf. LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 466, ¶¶ 123-124; *Avena*, ¶¶ 149, 153(10). Nor are they satisfied by the prospective obligation reflected in the *LaGrand* and *Avena* decisions to provide review and reconsideration to individuals nonetheless deprived of their Article 36 rights. *See LaGrand*, ¶¶ 125, 127; *Avena*, ¶¶ 150, 153(11). Here, Mexico seeks guarantees of non-repetition specifically to ensure that no other Mexican national already adjudged by this Court to be entitled to review and reconsideration is executed without having received that remedy.

84. Having failed to take all measures necessary to prevent the execution of Mr. Medellín without having provided review and reconsideration, the United States has offered no assurance that it will take the requisite action to prevent another such breach. There is, moreover, every reason to believe that the courts of Texas and the United States would permit further unlawful executions to proceed absent implementing legislation, and yet the Executive,

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[9] Similarly, in the case concerning *Military and Paramilitary Activities in and Against Nicaragua*, the Court found that the United States had breached its obligation not to violate Nicaragua's sovereignty and therefore was "under a duty immediately to cease *and to refrain* from all such acts as may constitute breaches of the foregoing legal obligations." *Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Report 1986*, p. 14, ¶ 292(12) (emphasis added).

despite its claim to agree with Mexico in these proceedings, has not even taken the step of pronouncing its support for the enactment of a new federal law.[10]

85. Accordingly, Mexico is entitled to an order requiring the United States Executive to guarantee that no other 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.

VI. SUBMISSIONS

86. Based on the foregoing, the Government of Mexico asks the Court to adjudge and declare as follows:

(a) That the correct interpretation of the obligation incumbent upon the United States under paragraph 153(9) of the *Avena* Judgment is that it is 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;"

and that, pursuant to the interpretation of the foregoing obligation of result,

(1) 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, must take all measures necessary to provide the reparation of review and reconsideration mandated by the *Avena* Judgment in paragraph 153(9); and

(2) the United States, acting through all its competent organs and all its constituent subdivisions, including all branches of

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[10] The United States characterized Governor Perry's letter stating that "the State of Texas will ask the reviewing court to review the claim on the merits," as an "important commitment" on the part of the Governor. Written Observations of the United States, ¶ 13. The United States failed to observe that Governor Perry did not agree to support review and reconsideration as mandated by this Court in *Avena*. Instead, Texas opposed Mr. Medellín's request for review and reconsideration at every turn. Texas claimed that state and federal courts prior to *Avena* had concluded that Mr. Medellín was not prejudiced by the Vienna Convention violation, and took the position that this "review" satisfied this Court's mandate in *Avena*. *See, e.g.*, Brief for Respondent at 32-33, *Ex parte Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006) (No. AP-75,027); Brief in Opposition at 12-17, *Medellin III*; Brief for Respondent at 49, 50, *Medellin II*. The United States agrees with Mexico that these pre-*Avena* decisions did not constitute sufficient review and reconsideration. *See infra* ¶ 65.

government and any official, state or federal, exercising government authority, must take all measures 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;

(b) That the United States breached the Court's Order of 16 July 2008 and the *Avena* Judgment by executing José Ernesto Medellín Rojas without having provided him review and reconsideration consistent with the terms of the *Avena* Judgment; and

(c) That the United States is required to guarantee that no other 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.

* * *

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

17 September 2008

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

I

110TH CONGRESS
2D 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

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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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Avena Case Implementation Act of 2008''.

SEC. 2. JUDICIAL REMEDY.

(a) CIVIL ACTION.—Any person whose rights are infringed by a violation by any nonforeign governmental authority of article 36 of the Vienna Convention on Consular Relations may in a civil action obtain appropriate relief.

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

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

(2) in any case where the plaintiff is convicted of a criminal offense where the violation occurs during and in relation to the investigation or prosecution of that offense, any relief required to remedy the harm done by the violation, including the vitiation of the conviction or sentence where appropriate.

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

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ORGANIZATION OF AMERICAN STATES

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

IACHR

OEA/Ser/L/V/II.132
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July 24, 2008
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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 Law[1] (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

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* 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. Medellín'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. Medellín'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.

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[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

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[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. Medellin 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. Medellin's application.[10] On December 10, 2004, the US Supreme Court granted certiorari in Mr. Medellin'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. Medellin 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. 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 Mr. Medellin'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 fling successive *habeas* applications.[11]

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

[8] Medellin 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. Medellin v. Dretke, 371 F.3d 270 (5th Cir. 2003) at 280.

[11] *Ex parte Medellin*_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 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

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[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

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[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 fling 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.

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[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. Sauceda, 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. Sauceda's body; the testimony of a DNA expert indicating that blood found on Mr. Leal Garcia's underwear was consistent with that of Ms. Sauceda; 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 positives[25]—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. Sauceda 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. Sauceda.[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. Sauceda.[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. Sauceda'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

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[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.

Garcia 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 Garcia'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 Garcia'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 biding federal law that could displace the limitations under state law on fling 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

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[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.

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[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*

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[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 theses 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.

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[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

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[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 submission[43] –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 Sauceda 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. Sauceda'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. It 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.

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[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 is 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.

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[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 Unites 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 Disputes[51], 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 García 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

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[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 Medellin, Ramirez Cardenas and Leal Garcia 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 Medellin, Ramirez 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 Medellin, Ramirez Cardenas and Leal Garcia. The issue before the Commission, on the other hand, is whether the United States violated Messrs Medellin, Ramirez Cardenas and Leal Garcia'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 Medellin, Ramirez Cardenas and Leal Garcia with consular information and notification in connection with their individual right to due process and to a fair trial under the

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[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.

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[56] I/A Court H.R., Velásquez 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 García 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

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[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 cases[64] 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

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[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 Martinez 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]

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[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]

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[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).

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[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 reiterate[74] 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 case[76] 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

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[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 Martinez 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 Martinez 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.

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[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.

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[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.L/V/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

ONE HUNDRED TENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951
http://www.house.gov/judiciary

August 1, 2008

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

Dear Governor Perry:

We write today regarding a matter that has implications for the foreign policy of the United States and for the safety and security of our citizens as they travel in other countries. We urge you to with work us to implement procedures to effectuate our treaty obligations, especially in light of two executions scheduled for next week that directly impact this situation.

As you are well aware, the United States Supreme Court recently considered the case of José Medellín, who is currently scheduled for execution in Texas on August 5, 2008. The Supreme Court held that the United States is currently not in compliance with its international treaty obligations in a number of cases in which persons were not afforded their rights to consular notification under the Vienna Convention. Medellin v. Texas, 552 U.S. ___ (March 25, 2008).

There is a relatively simple means of coming into compliance with the ruling of the Supreme Court, but it cannot be completed before the scheduled execution dates next week. The International Court of Justice ("ICJ") has determined that the situation be remedied in a simple and straightforward way -- through a judicial review proceeding to determine whether prejudice has resulted from the failure to provide consular access. Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals ("Avena").

In its recent decision, the Supreme Court determined that Congress has the legislative authority to authorize the judicial review directed, and to ensure compliance with this legal obligation across the United States. Accordingly, the "Avena Case Implementation Act of 2008" (H.R. 6481) was introduced in the House of Representatives on July 14, 2008. The legislation creates a cause of action that is narrowly focused on evaluating the impact of any violation of the Vienna Convention on Consular Relations.

The legislative calendar makes it impossible for us to complete a thorough and careful lawmaking process prior to the scheduled execution of Mr. Medellin on August 5th, or the scheduled execution of Heliberto Chi Acheituno on August 7th. With this in mind, we respectfully request that you exercise your power to stay these execution dates in order to provide Congress with the time needed to consider this situation and to make an appropriate judgment as to the important policy matter in question. As the Supreme Court recognized, compliance with the Vienna Convention is a critical aspect of national security and foreign policy, including the reciprocal treatment of U.S. persons overseas.

Thank you for your consideration and accommodation. We appreciate your time and attention to these important matters, and look forward to working with you to address this situation.

Sincerely,

John Conyers, Jr.
Chairman

Jerrold Nadler
Chairman, Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Robert "Bobby" Scott
Chairman, Subcommittee on Crime, Terrorism, and Homeland Security

cc: The Honorable Lamar Smith
Texas Board of Pardons and Paroles
Secretary of State Condoleezza Rice
Attorney General Michael B. Mukasey

Ex parte Medellin
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Criminal Appeals of Texas.
Ex parte José Ernesto MEDELLÍN,[FN1] Applicant.
No. WR-50191-03.

July 31, 2008.

On Application for Writ of Habeas Corpus, Motion for Leave to File an Original Writ of Habeas Corpus, and Motion for Stay of Execution from Cause No. 675430, In the 339th District Court, Harris County.

Morris Moon, for José Ernesto Medellín.

ORDER

PER CURIAM.
***1** We have before us a subsequent application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5, a motion in the alternative for leave to file the application as an original writ of habeas corpus, and a motion for stay of execution.

On September 16, 1994, a jury found applicant guilty of the offense of capital murder. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set applicant's punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Medellin v. State*, No. AP-71,997 (Tex.Crim.App. Mar. 19, 1997) (not designated for publication). Applicant timely filed in the convicting court his initial post-conviction application for writ of habeas corpus in which he raised a claim alleging the violation of his rights under Article 36 of the Vienna Convention. The convicting court recommended that we deny this claim because applicant: (1) had failed to comply with the well-settled Texas contemporaneous-objection rule at trial; and (2) had no individually enforceable right to raise a claim, in a state criminal trial, regarding the Vienna Convention's consular access provisions. We adopted the trial court's findings of fact and conclusions of law and denied habeas relief. *Ex parte Medellin*, No. WR-50,191-01 (Tex Crim.App. Oct. 3, 2001)(not designated for publication). Applicant then filed the same claim in federal district court and was ultimately denied relief. *Medellin v. Cockrell*, Civ. No. H-01-4078 (S.D.Tex. April 17, 2003).

On March 31, 2004, the International Court of Justice (ICJ) issued a decision in *Case Concerning Avena and Other Mexican Nationals (Avena)*, 2004 I.C.J. No. 128 (March 31, 2004). The ICJ held that (1) the Vienna Convention guaranteed individually enforceable rights; (2) the United States must "provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [specified] Mexican nationals"; and (3) the United States must determine whether the violations "caused actual prejudice" to those defendants, without allowing American procedural default rules or laws to bar such review.*Id.* at 121-22, 153.In response to the opinion, President Bush issued a memorandum in which he stated that the United States would discharge its obligations under the *Avena* judgment by having State courts give effect to the ICJ decision in accordance with general principles of comity. Arguing that the ICJ opinion and the presidential memo were new legal and factual bases for his Vienna Convention claim, applicant filed a subsequent application for writ of habeas corpus with the trial court. Reviewing the claim under Article 11.071, § 5, this Court filed and set applicant's case and ordered briefing. *Ex parte Medellin*, 206 S.W.3d 584 (Tex.Crim.App.2005). After briefing, argument, and an exhaustive analysis, this Court determined that neither the *Avena* decision nor the presidential memorandum constituted new legal or factual bases and dismissed the application. *Ex parte Medellin*, 223 S.W.3d 315, 352 (Tex.Crim.App.2006).

***2** On this, his second subsequent application for writ of habeas corpus, and in his motion for a stay of

execution, applicant again argues that new developments require us to provide him with judicial review and reconsideration of his Vienna Convention claim under *Avena*.[FN2]Applicant argues that these new developments consist of: (1) the United States Supreme Court's decision in *Medellin v. Texas*, 552 U.S. ---- (2008), affirming and clarifying this Court's opinion in applicant's case; (2) the fact that a bill has been introduced in the United States House of Representatives which, if passed into law, would grant applicant a right to the judicial process required by *Avena;* (3) the indication by a Texas Senator that he will introduce similar legislation in the Texas Legislature in the 2009 session; and (4) the fact that the Inter-American Commission on Human Rights, allegedly the "only body to have reviewed *all* of the evidence pertaining to [applicant's] Vienna Convention violation under the standard required by the ICJ," on July 24, 2008, issued its preliminary findings concluding that applicant was prejudiced by the violation of his Vienna Convention rights. Application p. 2.

We have reviewed applicant's second subsequent application and find that it does not meet the dictates of Article 11.071, § 5, and should be dismissed.Art. 11.071, § 5(a). Applicant's motion in the alternative for leave to file the application as an original writ of habeas corpus is denied as is his motion for stay of execution.

IT IS SO ORDERED THIS THE 31ST DAY OF JULY, 2008.

PRICE, J., filed a concurring statement in which COCHRAN and HOLCOMB, JJ., joined, except for Part V; COCHRAN, J., filed a concurring statement in which HOLCOMB, J., joined; MEYERS, J., filed a dissenting statement.

CONCURRING STATEMENT

PRICE, J., filed a concurring statement in which HOLCOMB and COCHRAN, JJ., joined except as to Part V.

The applicant alleges three circumstances he contends should qualify him to re-raise his Vienna Convention claim in yet another subsequent post-conviction application for writ of habeas corpus.[FN1]First, he points to the fact that Mexico has initiated another proceeding in the International Court of Justice (ICJ) seeking clarification of the *Avena* decision,[FN2] and that the ICJ has requested the United States to take precautionary measures (*i.e.*, refrain from executing him) until it can render a decision. Second, he points to a determination by the Inter-American Commission on Human Rights (IACHR), an international tribunal that is an arm of the Organization of American States, that he was in fact prejudiced by the violation of his Vienna Convention rights.[FN3]Third, he argues that it would violate due process to execute him now because 1) legislation is pending in Congress that would effectively make the *Avena* judgment binding on domestic courts in the United States, and 2) a state senator has indicated he will introduce a similar bill in the next state legislature. I agree that none of these circumstances justifies this Court in entertaining a subsequent writ application under Article 11.071, Section 5.[FN4] For the reasons about to be given, I believe this Court's hands are tied. But that does not mean that the Executive Branch cannot act.

I. International Court of Justice

***3** In his first subsequent writ application, the applicant argued that, under the Supremacy Clause,[FN5] the *Avena* decision constituted binding federal law that trumped the abuse-of-the-writ provisions of Article 11.071, Section 5. In our opinion in *Ex parte Medellin*, we expressly rejected that argument.[FN6]Alternatively, the applicant argued that the *Avena* decision constituted new law and/or new facts that would justify a subsequent writ application under Article 11.071, Section 5. We rejected that argument in *Medellin* as well.[FN7]Having rejected these arguments, we cannot very well hold that a request for precautionary measures pending a new proceeding that has been instituted in the ICJ that would merely clarify the holding of *Avena* either trumps, or, alternatively, falls under the ambit of, Article 11.071, Section 5. The United States Supreme Court ratified our reliance upon the statutory abuse-of-the-writ doctrine, notwithstanding *Avena*, in its certiori review of our decision.[FN8]We must therefore heed the current legislative prohibition against entertaining a subsequent writ under these circumstances-unless and until Congress should act in such a way that we should be bound by the *Avena* judgment, notwithstanding contrary state law.

II. Inter-American Commission on Human Rights

The applicant also alleges that the IACHR's decision that the violation of his Vienna Convention rights was prejudicial and amounted to a violation of the due process guarantees embodied in the 1948 Declaration of the Rights and Duties of Man, constitutes both new law and new facts for purposes of Article 11.071, Section 5. But in *Medellin*, we held that the *Avena* decision constituted law, not fact, and the same must surely be said of any decision of the IACHR.[FN9] With respect to new law, we held in *Medellin* that, to be cognizable under Article 11.071, Section 5, it must emanate 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."[FN10]International tribunals are not included within this statutory ambit. In any event, it is not clear-and it has not been pled here-that a decision of the IACHR is binding on domestic courts in the same way that it has been arguable that a decision of the ICJ with respect to the Vienna Convention is binding under the Supremacy Clause by virtue of the Optional Protocol.[FN11]Thus, even if the IACHR judgment somehow constituted a new fact or law for purposes of Article 11.071, Section 5, notwithstanding what we said in *Medellin*, it is still not clear that by invoking it the applicant has presented anything that, even if true, would entitle him to relief.

III. Pending Legislation

The applicant alleges that on July 14, 2008, a bill was introduced in the House of Representatives, entitled the "Avena Case Implementation Act of 2008," which would expressly provide for judicial remedies to carry out the treaty obligations that *Avena* construed the Vienna Convention to impose.[FN12]The applicant contends that to execute him while such legislation is pending would violate federal due process, given the fact that nobody disputes that the *Avena* decision, once implemented by Congress, would require domestic courts to undergo a review and reconsideration of his conviction and sentence before he could be executed.[FN13]This is entirely too speculative to support a due process claim. The applicant has no expectation that the proposed legislation will be enacted. Until such a statute is passed, the *Avena* decision is not binding; and if *Avena* is not binding, the applicant cannot predicate a due process claim upon it. Again, the applicant simply fails to state facts that would entitle him to habeas corpus relief. Any claim based upon legislation that might be introduced at the next legislative session in Texas suffers a similar fate.

IV. Original Application for Writ of Habeas Corpus

***4** The applicant urges us to by-pass the abuse-of-the-writ provisions of Article 11.071, Section 5, by simply treating his application as an invocation of our original writ jurisdiction. This we may not do. It is indisputable that the applicant is challenging the validity of his conviction and death sentence. We have made it clear that under such circumstances we are bound to entertain any post-conviction writ of habeas corpus only under the purview of the procedures set out in Article 11.071-including the abuse-of-the-writ provisions in Article 11.071, Section 5.[FN14]

V. Executive Clemency

For all of the above reasons, this Court is not at liberty to stop the applicant's execution. But the Governor is. The applicant informs us that he has requested that the Board of Pardons and Paroles recommend to the Governor that he grant the applicant a 240-day reprieve so that there will be time for the proposed federal legislation to be considered in Congress.[FN15]Moreover, the Governor himself may grant a 30-day reprieve even absent a recommendation from the Board.[FN16]It would be an embarrassment and a shame to the people of Texas and the rest of the country (albeit not presently unconstitutional) if we were to execute the applicant despite our failure to honor the international obligation embodied in the *Avena* judgment when legislation may well be passed in the near future by which that obligation would become, not merely precatory, but legally (and retroactively) binding upon us. The Executive Branch most appropriately exercises its clemency authority when the judicial branch finds itself powerless to rectify an obvious and manifest injustice. This, I think, is such a situation, and I would urge the Board and the Governor to act.

COCHRAN, J., filed a concurring statement. HOLCOMB, J., joins.

I join the Court's Order denying applicant's motion for leave to file an original application and motion for

a stay of execution and dismissing his third application for a writ of habeas corpus. Even if our law allowed for consideration of this third (and repetitious) application, which it does not, applicant is not entitled to any relief on the merits of his claim under Texas or United States law.

First, let us be clear about applicant's claim. Born in Mexico, applicant was brought to the United States when he was three years old and, at the time he was arrested, had lived in this country for fifteen of his eighteen years. He spoke fluent English, but he never obtained, nor apparently ever sought, U.S. citizenship. So, at the time of his arrest and trial, he was legally a Mexican citizen. His claim is that no one informed him of his right to contact the Mexican consulate. This is true. It is also true that he was never denied access to the Mexican consulate. The problem is that he apparently never told any law enforcement or judicial official that he was a Mexican citizen until some four years after his conviction. Applicant never informed the arresting officers that he was a Mexican citizen.[FN1]He makes no claim that he informed any magistrate that he was a Mexican citizen. He points to no evidence that he informed the trial judge before or during his trial that he was a Mexican citizen.[FN2]We do not know what the arresting officers, the magistrate, or the trial judge would have done had any of them been informed that applicant was a citizen of Mexico. Perhaps they would have informed him of his right to contact his consulate for assistance. While Texas authorities clearly failed in their duty to inform this foreign national of his rights under the Vienna Convention, this foreign national equally failed in his duty to inform those authorities that he was a Mexican citizen. Although one would like to think that all Texas public officials are clairvoyant about the nationality of all who appear before them, they are not required to be, nor, when there is no reason to believe that a defendant is anything but a U.S. citizen, should they be.

***5** As this Court explained at considerable length in applicant's last application for a writ of habeas corpus,[FN3] Texas law does not permit a defendant to raise a claim four years after his trial that he was not notified before or during his trial of his rights under the Vienna Convention, the U.S. Constitution, the Texas Constitution, or any other law. This claim was procedurally defaulted by the failure to raise it in a timely manner.

In Texas, we have a contemporaneous objection rule which requires all litigants to make a timely request, claim, or objection or forfeit the right to raise that request, claim, or objection after trial. This same rule applies in every jurisdiction in America. As the Supreme Court explained over thirty years ago, the contemporaneous objection rule serves important judicial interests in American criminal cases and deserves respect throughout the land.

> A contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding. It enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question.[FN4]

Furthermore, a contemporaneous objection permits the trial judge to remedy potential error before it occurs.[FN5]In the present case, for example, had applicant informed any legal officer that he was a Mexican national and wanted to consult with his consulate, any such official could have (and presumably would have) willingly complied with the requirements of the Vienna Convention. If applicant had delayed telling anyone of his Mexican citizenship until trial, the trial judge could have immediately informed the Mexican consulate, allowed applicant to do so himself, or perhaps given him a continuance to seek assistance from his consulate.

As the Supreme Court has explained, the failure to abide by the contemporaneous objection rule "may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off."[FN6]Finally, it is the criminal trial itself that is "the main event"; it is not "a tryout on the road" to more than a decade of appellate review and re-review. [FN7]

> The failure of the federal habeas courts generally to require compliance with a contemporaneous-objection rule tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event. A defendant has

> been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the court-room, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification.[FN8]

***6** Texas courts have long followed the Supreme Court's reasoning concerning the importance of the contemporaneous objection rule in the fair, effective, and efficient operation of its state courts.[FN9]Indeed, the contemporaneous objection rule has been a bulwark of the Anglo-American Common Law for centuries. It is based upon our fundamental concept of an adversarial system of justice. The International Court of Justice, however, is more familiar with the Napoleonic Code and an inquisitorial system of criminal justice. That system is very different from our own, and has its own virtues and vices. It does not rely upon our adversarial principles in which a jury listens to opposing lawyers presenting all of the relevant, conflicting, and competing evidence and witnesses to the factfinder at one time and in one place with the judge ruling on all legal questions and claims at that time. In our Anglo-American system the trial is the main event. The European criminal justice system does not depend upon our finely-tuned jury trial procedures, and thus it need not be concerned about the importance of our contemporaneous objection rule or that of procedural default. But those rules are essential to our American justice system.

Applicant claims that the *Avena* judgment necessarily trumps all Texas and federal procedural rules because it ordered that the convictions of fifty-four foreign nationals be "reviewed" regardless of bedrock American procedural default rules. The Supreme Court held otherwise in its recent decision in *Medellin v. Texas*.[FN10]Although we accord the greatest respect to, and admiration for, the International Court of Justice (ICJ) and its judgments, we, like the Supreme Court, cannot trample on our own fundamental laws in deference to its judgment. We would give even the Devil the benefit of our American law, but if we cut down our laws to suit another sovereign that operates under a different system of justice, we could not stand upright in the lawless winds that would then blow.[FN11]If we violate our state and federal procedural rules for this particular applicant, we should violate them for all American defendants as well. And then we would have no rules and no law at all.

But it seems that the ICJ intended to do just that: to impose its sense of Napoleonic Code inquisitorial justice without regard for other sovereigns' well-established laws and procedures. So let me consider this case from its perspective and review the merits of applicant's claim in accord with the ICJ's *Avena* judgment.[FN12]

Applicant was arrested for, charged with, and convicted of an extraordinarily gruesome rape and murder of two teen-aged girls in Houston, Texas, in 1993. The two girls, 14-year-old Jennifer Lee Ertman and 16-year-old Elizabeth Pena, were friends and classmates at Waltrip High School. They were simply walking home one June evening when they were attacked by applicant and several of his gang-members who repeatedly raped both girls, then dragged them into the woods to kill them and hide their bodies. Applicant helped to strangle at least one of the girls with her own shoelace. He later complained to a friend that he had a hard time getting Jennifer Ertman to die and had to step on her throat to finish her off. The girls' decomposed bodies were discovered four days later.

***7** Applicant bragged to his buddies that both of the girls were virgins until he and his cohorts raped them. He confessed to police officers after being properly advised of his rights to counsel under *Miranda*.[FN13]He explained, in great detail, how his group was involved in a gang-initiation rite until the two girls innocently wandered past them on their way home. His written confession displayed a callous, cruel, and cavalier attitude toward the two girls that he had raped and helped to murder. Surely no juror or judge will ever forget his words or his sordid deeds.

Applicant and four of his fellow gang members were convicted of these murders and all were sentenced to death.[FN14]One of them, Sean Derrick O'Brien, has been executed. The death sentences for two of the gang members were later commuted to life in prison under *Simmons v. Roper*, because they were seventeen at the time of the murders.[FN15]Applicant and Peter Cantu both remain in prison awaiting execution.

Applicant's argument on the merits of his consular notification claim is as follows:

> • If I had been told before trial that I could notify the Mexican consulate that I had been arrested for a double murder and rape, I would have done so;
>
> • If I had notified the Mexican consulate before trial that I wanted its help, it would have given me "substantial assistance";
>
> • The "substantial assistance" that the Mexican consulate would have given me would be that of providing me with a top-notch lawyer instead of the lawyer that the trial court appointed to represent me;
>
> • The lawyer that did represent me at trial had been suspended from the practice of law for ethics violations in a different case;
>
> • If a different, better lawyer, paid by the Mexican Consulate, had represented me at trial, I would not have been sentenced to death for the rape-murder of these two girls, even though my four cohorts were all sentenced to death in their trials, represented by their lawyers.

Applicant argues that a lawyer chosen by the Mexican consulate would have introduced sufficient background, character, and "life history" evidence that the jury would necessarily have sentenced him to life in prison instead of death. He argues that a better pretrial investigation by a better lawyer would have shown that applicant grew up in an environment of abject poverty and violence. He states that he was abandoned by his parents at the age of four and left to live with an elderly relative. He also states that he became "exposed to serious violence shortly after rejoining his parents in Houston five years later."Then, simultaneously abandoned and abused by his parents, he was further exposed to "bad influences" in middle school. He claims that, "[a]s recent immigrants, his parents lacked the skills to understand and address the pressures [applicant] faced at school."So he developed behavioral and emotional problems as well as an alcohol abuse problem, and he dropped out of school. And those "profound experiences" explain why he and his five fellow gang-members raped, robbed, and killed two teen-aged girls who just happened to walk by during their gang initiation. Applicant asserts, "On the record before this Court, the result is not fairly in doubt: were it not for the violation of the Vienna Convention, [applicant] would not be on death row."

***8** This argument might have some plausible intellectual appeal had just one, any one, of applicant's cohorts not been sentenced to death despite the best efforts of their respective attorneys during their individual trials. Applicant may or may not have been the ringleader of this gang, but he was, at a minimum, fully and gleefully involved in the brutal rapes and murders of these two young girls.[FN16]The evidence at trial showed that he bragged about his gory and sadistic exploits to his friends. The State also put on considerable evidence showing his prior violence and post-offense violence in jail. The jurors heard a great deal of evidence about applicant's extensive gang-related illegal activities before this crime and how he was expelled from school because of gang activities. No Officer Krupke would ever conclude that applicant's crimes and those of his cohorts were just the unfortunate product of a sad and sorry upbringing.[FN17]

Applicant complains that his trial attorney was incompetent. These claims have been reviewed by the trial court, by this Court, by a federal district court, and by the Fifth Circuit Court of Appeals.[FN18]All of these courts (a total of fourteen individual judges) have rejected those complaints as being totally without merit. This claim could have been, but was not, submitted to the U.S. Supreme Court. Further review by any lower court would be redundant. It is highly improbable that any lawyer in the State of Texas, the United States, the European Union, or any other jurisdiction could have saved applicant (or any of his cohorts) from a sentence of death for the heinous, horrific and mindless offenses that they committed during one summer evening in

1993 in the State of Texas.

In sum, I wholeheartedly agree with Justice Stevens's conclusion that "[t]he cost to Texas of complying with *Avena* would be minimal, particularly given the remote likelihood that the violation of the Vienna Convention actually prejudiced José Ernesto Medellin."[FN19] I would go further: there is no likelihood at all that the unknowing and inadvertent violation of the Vienna Convention actually prejudiced Medellin. This was a truly despicable crime committed by five truly brutal young men who were deadly dangerous to anyone who might find themselves near them. All five were sentenced to death by separate juries after hearing all of the evidence in each of their individual trials. No matter how long the courts of this state, this nation, or any other nation review, re-review, and re-review once again the disgusting facts of this crime and these perpetrators, the result should be the same: These juries reached a reasonable verdict, beyond a reasonable doubt, that a sentence of death was the only appropriate punishment under Texas law.

Some societies may judge our death penalty barbaric. Most Texans, however, consider death a just penalty in certain rare circumstances. Many Europeans may disagree. So be it. But until and unless the citizens of this state or the courts of this nation decide that capital punishment should no longer be allowed under any circumstances at all, the jury's verdict in this particular case should be honored and upheld because applicant received a fundamentally fair trial under American law.

MEYERS, J., filed a dissenting statement.
***9** I would file and set applicant's Article 11.071/original writ. *See Ex parte Davis*, 947 S.W.2d 216 (Tex.Crim.App.1996).

FN1. Applicant filed the pleadings in this case under the name "José Ernesto Medellín Rojas." However, all of the prior papers filed in this Court, the papers filed in the United States Supreme Court, and documents at the Texas Department of Criminal Justice were entered under the name "José Ernesto Medellín." For consistency, we will continue to use the name "José Ernesto Medellín."

FN2. Applicant does not phrase his claims specifically in terms of the Vienna Convention. However, the Vienna Convention and the *Avena* judgment are the underlying bases of the claims raised.

FN1.Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820.

FN2.*Case Concerning Avena and Other Mexican Nationals (Mex.v.U.S.),* 2004 I..C.J. No. 128 (Judgment of Mar. 31).

FN3.*Medellin v. United States*, Case 12.644, Inter-Am. C.H.R., Report No. 45/08 OEA/Ser/L/V/II.132, doc. 21 (2008).

FN4.TEX.CODE CRIM. PROC. art. 11.071, § 5.

FN5.U.S. CONST. art. II, § 2, cl. 2.

FN6.223 S.W.3d 315, 330-32 (Tex.Crim.App.2006).

FN7.*Id.* at 348-352.

FN8.*Medellin v. Texas*, --- U.S. ----, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008).

FN9.*Ex parte Medellin, supra*, at 351.

FN10.*Id.* at 352.

FN11. Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations, Apr. 21, 1963, 21 U.S.T. 325, T.I.A.S. No. 6820. "By ratifying the Optional Protocol to the Vienna Convention, the United States consented to the specific jurisdiction of the ICJ with respect to claims arising out of the Vienna Convention."*Medellin v. Texas, supra*, S.Ct. at 1354.

FN12. As introduced in the House of Representatives, and referred to the Judiciary Committee, the bill reads:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Avena Case Implementation Act of 2008".

SECTION 2. JUDICIAL REMEDY.

(a) CIVIL ACTION.-Any person whose rights are infringed by a violation by any nonforeign governmental authority of Article 39 of the Vienna Convention on Consular Relations may in a civil action obtain appropriate relief.

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

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

(2) in any case where the plaintiff is convicted of a criminal offense where the violation occurs during and in relation to the investigation or prosecution of the offense, any relief required to remedy the harm done by the violation, including the vitiation of the conviction or sentence where appropriate.

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

FN13. In *Medellin v. Texas*, *supra*, S.Ct. at 1356, the Supreme Court observed, "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."But the Supreme Court held that implementing legislation was required before the particular international law obligation embodied in Article 36 of the Vienna Convention as construed by the ICJ in *Avena* would have binding domestic legal effect. *See, e.g., id.* at 1357, 1367 ("Because none of these treaty sources creates binding federal law in the absence of implementing legislation, and because it is uncontested that no such legislation exists, we conclude that the *Avena* judgment is not binding domestic law. * * * In sum, while the ICJ's judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions.").

FN14.*Ex parte Smith*, 977 S.W.2d 610, 611 (Tex.Crim.App.1998), *citing Ex parte Davis*, 947 S.W.2d 216, 221, 223 (Tex.Crim.App.1996) (Opinion of McCormick, P.J.) ("the Legislature clearly has intended for Article 11.071 to provide the exclusive means by which this Court may exercise its original habeas corpus jurisdiction in death penalty cases.").

FN15.TEX. CONST. art. IV, § 11(b); 37 TAC §§ 143.41(b) & (c); §§ 143.43(f)(1) & (j)(1).

FN16.TEX. CONST. art. IV, § 11(b); 37 TAC § 143.41(a).

FN1. In his confession to the police, he did tell the interviewing officer that "I was born in Laredo Mexico on 3/4/75. I last went to school at Eisenhower High School and have a total of 8 years of formal education."He did nothing to inform the officer that, despite his almost life-long residence in the U.S., he was not a U.S. citizen. He did tell the Harris County Pre-Trial Services Agency that he was not a U.S. citizen, but that public service agency has no law enforcement or judicial role. It merely collects information for assessing whether to recommend release on a pre-trial recognizance bond.

FN2. Applicant, like three of his fellow gang-member co-defendants and applicant's younger brother, the one juvenile co-defendant, has a Hispanic surname. In the

melting pot that is America, many U.S. citizens have ethnic names, but are native born or naturalized. Our laws do not assume that those who were born in a foreign country or who have ethnic surnames are not fellow citizens.

FN3.*Ex parte Medellin*, 223 S.W.3d 315 (Tex.Crim.App.2006), *aff'd*,123 S.Ct. 1346 (2008).

FN4.*Wainwright v. Sykes*, 433 U.S. 72, 88, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

FN5.*Id.*

FN6.*Id.* at 89.

FN7.*Id.* at 90.

FN8.*Id.*

FN9.*See, e.g.*, *Saldano v. State*, 70 S.W.3d 873, 886-88 (Tex.Crim.App.2002) ("Our rules require defendants to object at trial in order to preserve an error for review on appeal.... Our law has always been thus. The courts of every state and the courts of the United States have similar rules.") (footnotes omitted). In *Saldano*, we noted that "objections promote the prevention and correction of errors. When valid objections are timely made and sustained, the parties may have a lawful trial. They, and the judicial system, are not burdened by appeal and retrial. When a party is excused from the requirement of objecting, the results are the opposite."*Id.* at 887.Of course, not *all* rights are necessarily waived by the failure to assert them in a timely manner. As we stated in *Saldano*,"[a]ll but the most fundamental rights are thought to be forfeited if not insisted upon by the party to whom they belong. Many constitutional rights fall into this category. When we say 'that even constitutional guarantees can be waived by failure to object properly at trial,' we mean that some, not all, constitutional rights may be forfeited."*Id.* (some internal quotations omitted). Thus, violations of " 'rights which are waivable only' and denials of 'absolute systemic requirements' " may be raised for the first time on appeal.

> The failure to notify a foreign national defendant of his right to contact his consulate is not such a "waivable only" right nor is it one that is an absolute systemic requirement without which a trial is necessarily fundamentally unfair. In fact, the United States Supreme Court has expressly held that Vienna Convention claims are subject to normal American rules of procedural default if a defendant fails to make a contemporaneous objection. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 360, 126 S.Ct. 2669, 165 L.Ed.2d 557 (2006) ("We therefore conclude, as we did in *Breard*, that claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims."); *Breard v. Greene*, 523 U.S. 371, 375-76, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998) (*per curiam*).

FN10.--- U.S. ----, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008).

FN11.*See* Robert Bolt, A Man for All Seasons (1960):

> William Roper: So, now you give the Devil benefit of law!
>
> Sir Thomas More: Yes! What would you do? Cut a great road through the law to get after the Devil?
>
> William Roper: Yes, I'd cut down every law in England to do that!
>
> Sir Thomas More: Oh? And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man's laws, not God's! And if you cut them down, and you're just the

> man to do it, do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake!

FN12. Justice Stevens, in his concurring opinion in *Medellin*, not-so-subtly suggested that, even though he and six other members of the Supreme Court affirmed the legal position of this Court concerning the procedural default rule, we really should review the merits of applicant's claim because "[t]he cost to Texas of complying with *Avena* would be minimal, particularly given the remote likelihood that the violation of the Vienna Convention actually prejudiced José Ernesto Medellin." 128 S.Ct. at 1375 (Stevens, J., concurring). I agree with Justice Stevens that it is extremely remote that applicant was prejudiced in any way by the failure of Texas officials to inform him that he could seek assistance from his consulate.

FN13.*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). One can only wonder if the criminal justice systems with which the distinguished judges on the ICJ are familiar require that law enforcement officers give all arrested suspects explicit warnings concerning their right to silence, their right to an attorney before talking to the police, the right to have an attorney appointed for them if they cannot afford them, notification that any statements that they make can be used against them in a court of law, and, under Texas law, the right to terminate an interview with the police at any time. Telling an arrested foreign national that he has a right to contact his consulate is an important international right, but surely it is not nearly as important as giving him *Miranda*-type warnings.

FN14. A sixth member of the gang was also prosecuted, but was not sentenced to death because, under Texas law, he was a juvenile at the time of the offense and thus ineligible for the death penalty.

FN15.*See Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

FN16. In addressing applicant's legal claims, it is not necessary to recite all of the specific details of this disgusting sexual attack and tortuous murders. Suffice it to say that the jury heard overwhelming evidence of applicant's depravity and of the girls' suffering.

FN17.*See* Stephen Sondheim, *"Gee Officer Krupke," West Side Story:*

> Dear kindly Sergeant Krupke,
>
> You gotta understand,
>
> It's just our bringin' up-ke
>
> That gets us out of hand.
>
> Our mothers all are junkies,
>
> Our fathers all are drunks.
>
> Golly Moses, natcherly we're punks!
>
> Gee, Officer Krupke, we're very upset;
>
> We never had the love that ev'ry child oughta get.
>
> We ain't no delinquents,
>
> We're misunderstood.
>
> Deep down inside us there is good!

FN18. In its published opinion, *Medellin v. Dretke*, 371 F.3d 270 (5th Cir.2004), the Fifth Circuit sets out the history of these ineffective assistance of counsel claims. One of those claims was that counsel failed to offer evidence that applicant had successfully completed a prior juvenile probation and this evidence would have shown that he was not a future danger. The Fifth Circuit noted that this failure was

> hardly important in comparison to the brutal murders he committed thereafter or the fact that on "two separate occasions while [applicant] was in the Harris County jail awaiting trial, [he] was found to have hidden shanks in his cell. One cannot reasonably fathom how the fact that [applicant] once complied with probation as a juvenile rebuts the overwhelming evidence that [he] posed a future danger. Nothing that his probation officer may have said could have conceivably caused the jury to decide the question of [applicant's] future dangerousness in [his] favor."*Id.* at 276.
>
> FN19.*Medellin v. Texas*, --- U.S. ----,----, 128 S.Ct. 1346,1375, 170 L.Ed.2d 190 (2008) (Stevens, J., concurring).

Tex.Crim.App.,2008.
Ex parte Medellin
--- S.W.3d ----, 2008 WL 2952485 (Tex.Crim.App.)

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No. 08-_____

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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CAPITAL CASE

QUESTIONS PRESENTED

In the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31), the International Court of Justice determined that José Ernesto Medellín and fifty other Mexican nationals under sentence of death in the United States were entitled to receive judicial review and reconsideration of their convictions and sentences in light of the violation of their rights under the Vienna Convention on Consular Relations in their capital murder trials. In *Medellín v. Texas*, 128 S. Ct. 1346 (2008), this Court held that the United States is bound under Article 94(1) of the United Nations Charter to comply with the *Avena* Judgment and settled the procedures by which, as a matter of U.S. constitutional law, the international obligation to comply may be given domestic effect. Specifically, this Court held that neither it nor the President had the authority to execute the international obligation, which instead lies with the Congress. In response to that ruling, legislation to implement *Avena* has been introduced in the U.S. House of Representatives, yet the State of Texas, having scheduled Mr. Medellín's execution for August 5, 2008, has indicated that it intends to go forward with the execution before Congress has had a reasonable opportunity to exercise its constitutional prerogative to determine compliance.

This case presents the following questions:

1. Whether Mr. Medellín's Fourteenth Amendment right not to be deprived of his life without due process of law entitles him to remain alive until Congress has had a reasonable opportunity to exercise its constitutional prerogative to implement the right to judicial review and reconsideration under *Avena and Other Mexican Nationals*, so that he can secure access to a remedy to which he is entitled by virtue of a binding international legal obligation of the United States;

2. Whether the Court should grant a writ of habeas corpus to adjudicate Mr. Medellín's claim on the merits, where he seeks relief pursuant to a binding international legal obligation that the federal political branches seek to implement, and where adequate relief cannot be obtained in any other form or from any other court; and

3. Whether the Court should recall and stay its mandate in *Medellín v. Texas,* 128 S. Ct. 1346, not to revisit the merits, but to allow Congress a reasonable opportunity to implement legislation consistent with the Court's decision in that case.

PARTIES

All parties to the proceedings below are named in the caption of the case.

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TABLE OF AUTHORITIES

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OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas has not yet issued. In light of his scheduled execution on August 5, 2008, Petitioner lodges this submission with the Court in the event that that Court denies him the relief sought.

JURISDICTION

The final judgment of the Court of Criminal Appeals of Texas, that state's court of last resort in criminal matters, will issue before August 5, 2008. Having been lodged, this petition will have been filed within 90 days of that judgment. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, TREATY AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions, which are reproduced beginning at page 1a in the Appendix.

STATEMENT OF THE CASE

A. *Avena* and Subsequent Proceedings

In the *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31) ("*Avena*"), the International Court of Justice ("ICJ") determined that Mr. Medellín and fifty other Mexican nationals under sentence of death in the United States, whose rights to consular notification and access under the Vienna Convention on Consular Relations had been violated in their capital murder trials, were entitled to receive judicial review and reconsideration of their convictions and sentences in light of the violations in their cases. On December 10, 2004, in response to Mr. Medellín's petition, this Court granted a writ of certiorari to decide whether, under the Supremacy

Clause of the Constitution, courts in the United States must give effect to the United States's treaty obligations to comply with the Judgment of the ICJ. *Medellín v. Dretke*, 543 U.S. 1032 (2004) (order granting writ of certiorari).

On February 28, 2005, before the case had been fully submitted, President George W. Bush issued a written determination that the United States had a binding obligation under international law to comply with *Avena*. Br. for U.S. as Amicus Curiae Supporting Resp't at App. 2, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). He also determined that, to achieve compliance, state courts should provide review and reconsideration to the fifty-one Mexican nationals named in the *Avena* Judgment, including Mr. Medellín, pursuant to the criteria set forth by the ICJ, notwithstanding any state procedural rules that might otherwise bar review of the claim on the merits.

In deference to the President's determination, Mr. Medellín filed a motion to stay his case in this Court, requesting that the case be held in abeyance while he exhausted in state court his claims based on *Avena* and the President's determination, neither of which had been issued at the time of his first state post-conviction petition.

On May 23, 2005, this Court dismissed the writ of certiorari as improvidently granted, in part because of the prospect of relief in Texas state court and in part because of potential obstacles to reaching the merits posed by the procedural posture of the case as then before the Court. *Medellín v. Dretke*, 544 U.S. 660, 662 (2005) (per curiam).

Following this Court's dismissal, Mr. Medellín pursued relief in the Texas Court of Criminal Appeals, where he argued that the treaty obligation to abide by the *Avena* decision and the President's determination to comply each constituted binding federal

law that, by virtue of the Supremacy Clause of the Constitution, preempted any inconsistent provisions of state law. On November 15, 2006, the Court of Criminal Appeals dismissed Mr. Medellín's application, holding that neither the *Avena* Judgment nor the President's determination constituted preemptive federal law and that Mr. Medellín was procedurally barred from seeking relief on a subsequent habeas application. *Ex parte Medellín*, 223 S.W.3d 315 (Tex. Crim. App. 2006).

On April 30, 2007, on Mr. Medellín's petition, the Court granted a writ of certiorari to determine whether courts in the United States or the President had the authority to execute the United States's obligation to comply with *Avena*. *Medellin v. Texas*, 127 S. Ct. 2129 (U.S. 2007) (order granting writ of certiorari).

B. *Medellín v. Texas*

In *Medellín v. Texas*, 128 S. Ct. 1346 (2008), the Court held that under Article 94(1) of the United Nations Charter, a valid treaty of the United States, the United States has a binding international obligation to comply with *Avena* by providing review and reconsideration to Mr. Medellín and the other Mexican nationals subject to that judgment. Specifically, the Court observed that "no one disputes" that the obligation to abide by the *Avena* judgment, which "flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an *international* law obligation on the part of the United States." *Id.* at 1356. The Court also expressly noted its agreement with the President as to the importance of United States's compliance with that obligation. *Id.* at 1367.

The Court held, however, that that international obligation had not yet been validly executed as a matter of U.S. domestic law. *First*, courts are not empowered to automatically enforce ICJ decisions as domestic law because the "sensitive foreign policy decisions" of whether and how to comply are reserved for the he political branches. *Id.* at 1360. *Second*, the "array of political and diplomatic means available [to the President] to enforce international obligations" does not include the power to "unilaterally convert[] a non-self-executing treaty into a self-executing one." *Id.* at 1368. Hence, "while the ICJ's judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions." *Id.* at 1367. Instead, an additional step by the political branches is necessary, including action by Congress to pass implementing legislation, *id.* at 1369, or by the President "by some other means, so long as they are consistent with the Constitution," *id.* at 1371.

Concurring in the judgment, Justice Stevens also noted that the United States's international obligation to provide review and reconsideration under the *Avena* Judgment was undisputed. *Id.* at 1374. He urged action by Texas to "shoulder the primary responsibility for protecting the honor and integrity of the Nation," *id.* at 1374, particularly where "the costs of refusing to respect the ICJ's judgment are significant," *id.* at 1375.

Justice Breyer, joined by Justices Souter and Ginsburg, dissented, stating that the Supremacy Clause of the U.S. Constitution required that the state courts comply with *Avena*, since "the treaty obligations, and hence the judgment, resting as it does upon the

consent of the United States to the ICJ's jurisdiction, bind[s] the courts no less than would 'an act of the [federal] legislature.'" *Id.* at 1376 (internal cites omitted). Like the majority, Justice Breyer recognized that noncompliance would exact a heavy toll on the United States. *Id.* at 1391.

C. Scheduling of Execution Date

Almost immediately following this Court's decision, Texas state prosecutors sought an execution date for Mr. Medellín. At a hearing before the Texas trial court on May 5, 2008, Mr. Medellín requested that the court defer scheduling an execution date in order to allow the national and state legislatures time to implement the *Avena* Judgment, as this Court's decision contemplated. Texas State Senator Rodney Ellis wrote to the court to request that it defer setting a date in light of his intention to introduce legislation by which Texas would comply with *Avena* as soon as the Texas Legislature reconvened in January 2009. 15a-16a. On May 2, 2008, Ambassador Jeffrey Davidow, who holds the rank of Career Ambassador (the highest rank available to diplomats) and served as an ambassador for the United States in the administrations of Presidents Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush, submitted a declaration addressing the negative ramifications for U.S. foreign relations, including for the protection of Americans abroad. The court declined to hear evidence and instead scheduled Mr. Medellín's execution for the first date available under state law. *See* 136a. Hence, Mr. Medellín is scheduled to die by lethal injection on August 5, 2008.

D. Subsequent Proceedings Before the International Court of Justice

On June 5, 2008, in light of the action by Texas to execute Mr. Medellín without having provided him review and reconsideration and the failure as of that date by the United States effectively to implement the judgment within its domestic legal system, Mexico instituted new proceedings in the International Court of Justice by filing a Request for Interpretation of the *Avena* Judgment. *See* Application Instituting Proceedings, Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), June 5, 2008.[1] Mexico asked the ICJ to declare that the United States has an obligation to use any and all means necessary to provide that review before any execution is carried out. In conjunction with its Request for Interpretation, Mexico also asked the ICJ to indicate provisional measures with respect to Mr. Medellín and four other Mexican nationals named in the *Avena* Judgment who face imminent execution in Texas.[2] Mexico's Request for Interpretation of the *Avena* Judgment opens a new case before the ICJ and is currently pending review.

The ICJ held oral proceedings on the request for provisional measures on June 19 and 20, 2008. At argument, the Legal Adviser to the Secretary of State confirmed "that the United States takes its international law obligation to comply with the Avena

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[1] The parties' written and oral pleadings and the judgment, orders and press releases of the International Court of Justice in respect of the Request for Interpretation are available at http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=&case=139&k=11 (last visited July 30, 2008).

[2] The four other Mexican nationals subject to the request for provisional measures have not received execution dates but are eligible under state law to have dates scheduled.

Judgment seriously" and agreed that *Avena* requires the provision of review and reconsideration prior to the imposition of any death sentence. *See* 90a; 92a; 93a.

On June 16, 2008, the ICJ rejected the United States's request to dismiss the case and granted Mexico's request for provisional measures, directing the United States to "take all measures necessary to ensure that Messrs. José Ernesto Medellín Rojas [and four other Mexican nationals] 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 [*Avena*] Judgment." 38a, ¶ 80(a). In particular, the Court noted

> 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; … in particular, the Agent of the United States declared before the ICJ 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[.]"

37a, ¶ 76. The Court further noted that "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[.]'" *Id.* at ¶ 77. Nonetheless, commenting on reports of the ICJ's Order in the press, Texas Governor Perry's office stated: "The world court has no standing in Texas and Texas is not bound by a ruling or edict from a foreign court." Allan Turner & Rosanna Ruiz, *Texas to World Court: Executions Are Still On*, Houston Chron., July 17, 2008, at A1.

The submission of the United States in response to Mexico's Request for Interpretation is due on August 29, 2008. The case has been set on an expedited schedule and a decision is likely to issue this year.

E. Introduction of Congressional Legislation

On July 14, 2008, following this Court's decision in *Medellín v. Texas*, Members of the House of Representatives introduced legislation to give the *Avena* Judgment domestic legal effect. The "Avena Case Implementation Act of 2008" grants foreign nationals such as Mr. Medellín a right to judicial review of their convictions and sentences in light of Vienna Convention violations in their cases. 5a-6a. The proposed bill specifically authorizes courts to provide "any relief required to remedy the harm done by the violation [of rights under Article 36 of the Vienna Convention], including the vitiation of the conviction or sentence where appropriate." 6a, § 2. The bill was introduced by Howard L. Berman, Chairman of the Committee for Foreign Affairs and Vice Chairman of the Judiciary Committee, and referred to the Judiciary Committee for consideration. Since that time, the Chairman of that Committee, John Conyers, Jr., and Committee Members Zoe Lofgren and William D. Delahunt have joined as co-sponsors of the bill.

The bill is now under review. On June 19, 2008, before the International Court of Justice, the United States stated that "[g]iven the short legislative calendar for our Congress this year, it [will] not be possible for both houses of our Congress to pass legislation" implementing the *Avena* decision. 88a, ¶ 26.

F. Denial of Federal Habeas Relief

On November 21, 2006, to satisfy the applicable statute of limitations while his first subsequent habeas application was pending in the Texas Court of Criminal Appeals, Mr. Medellín filed a habeas petition in the U.S. District Court for the Southern District of Texas, raising claims related to the enforceability of the *Avena* Judgment as a matter of applicable treaties and the President's 2005 determination to comply. After this Court granted a writ of certiorari to review the denial of Mr. Medellín's first subsequent application, the district court stayed and administratively closed Mr. Medellín's case. On July 22, 2008, the court reopened proceedings for the limited purpose of determining jurisdiction over Mr. Medellín's petition, and denied relief. *Medellin v. Quarterman*, No. H-06-3688, 2008 U.S. Dist. LEXIS 55758 (S.D. Tex. July 22, 2008). The court concluded that the federal habeas statute's limitation on successive petitions prevented it from considering Mr. Medellín's petition on the merits without prior authorization from the Court of Appeals. *Id.* at *7.

G. Decision of the Inter-American Commission on Human Rights

On November 21, 2006, Mr. Medellín filed a petition before the Inter-American Commission on Human Rights raising the violation of his consular rights as well as several violations of the 1948 Declaration of the Rights and Duties of Man ("American Declaration"). The Inter-American Commission is the principal human rights organ of the Organization of American States ("OAS") and is empowered to consider and evaluate the merits of human rights violations raised by individuals from any OAS member state.

See Inter-American Commission on Human Rights, *What is the IACHR?*, *at* http://www.cidh.oas.org/what.htm; *see also* Thomas Buergenthal, International Human Rights in a Nutshell 174, 179, 181-82 (2d ed. 1995). As a member of the OAS, the United States has recognized the Commission's competence to consider such petitions.[3]

On December 6, 2006, the Commission issued precautionary measures—analogous to a temporary injunction and similar to the provisional measures ordered by the ICJ—calling upon the United States to take all measures necessary to preserve Mr. Medellín's life pending the Commission's investigation of the allegations raised in his petition. 74a-75a. After Mr. Medellín was scheduled for execution, the Commission reiterated to the United States the precautionary measures it adopted in favor of Mr. Medellín in 2006 and reminded the United States of its request that Mr. Medellín's life be preserved pending the investigation of his petition. 76a; *see also* 77a-79a.

Both Mr. Medellín and the United States filed written submissions and made oral arguments to the Commission at a hearing conducted on March 7, 2008, at the Commission headquarters in Washington, D.C. The Commission also considered extensive documentary evidence, including many of the documents submitted to the court

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3 The United States has signed and ratified the Charter of the Organization of American States ("OAS Charter"), Apr. 30, 1948, 2 U.S.T. 2394, as well as the Protocol of Buenos Aires that amended the OAS Charter and established the Commission as a principal organ through which the OAS would accomplish its purposes. Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847. As ratified treaties of the United States, both instruments apply with equal force and supremacy to all states, including Texas. U.S. Const. art. VI, cl. 2. The amended OAS Charter specifically provided that "[t]here shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters." OAS Charter, art. 106. Under Article 145, the Inter-American Commission is given the responsibility to "keep vigilance over the observance of human rights." *Id.*, art. 145.

below. On July 24, 2008, after reviewing the legal arguments of both parties and the facts submitted in support of Mr. Medellín's claims for relief, the Commission issued a preliminary report concluding, in pertinent part, that Mr. Medellín was prejudiced by the violation of his rights to consular notification and assistance. Specifically, the Commission found:

> It is apparent from the record before the Commission that, following [Mr.] Medellin['s] conviction and sentencing, consular officials were instrumental in gathering significant evidence concerning [his] character and background. This evidence, including information relating to [his] 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 [his] case[]. 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 [his] particular circumstances and those of the offense.

65a, ¶ 128. The Commission concluded that the United States's obligation under Article 36(1) of the Vienna Convention to inform Mr. Medellín of his right to consular notification and assistance constituted a fundamental component of the due process standards to which he was entitled under the American Declaration, and that the United States's failure to respect and ensure this obligation deprived him of a criminal process that satisfied the minimum standards of due process and a fair trial required by the Declaration. 66a, ¶ 132.

As to remedies, the Commission recommended, among other things, that the United States vacate Mr. Medellín's death sentence and provide him with "an effective remedy, which includes a new trial in accordance with the equality, due process and fair

trial protections prescribed under . . . the American Declaration, including the right to competent legal representation." 72a, ¶ 160. The Commission also reiterated its requests of December 6, 2006, and January 30, 2007, that the United States take precautionary measures to preserve Mr. Medellín's life pending the implementation of the Commission's recommendations in the matter. 71a, ¶ 159.[4]

H. Further Political and Diplomatic Efforts to Effect Compliance with the *Avena* Judgment.

Since this Court issued its decision in *Medellin v.* Texas, the governments of Mexico and the United States have resumed their efforts to achieve compliance with the *Avena* Judgment. On June 17, 2008, Secretary of State Condoleezza Rice and Attorney General Michael B. Mukasey asked for Texas's help in complying with the *Avena* Judgment. In a joint letter to Governor Rick Perry, the Secretary of State and Attorney General stated:

> The United States attaches great importance to complying with its obligations under international law . . . . We continue to seek a practical and timely way to carry out our nation's international legal obligation [under *Avena*], 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.

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[4] The Commission has not yet issued its final report, and will not do so until the United States has had an opportunity to respond to the Commission's findings. *See* Rule 43.2, Rules of Procedure of the Inter-American Commission on Human Rights, *available at* http://www.cidh.org/Basicos/English/Basic18.Rules%20of%20Procedure%20of%20the%20Commission.htm. Until the United States takes steps to implement the Commission's recommendations, precautionary measures remain in effect.

80a-81a. On July 18, 2008, Governor Perry responded, acknowledging the "concerns from a federal standpoint about the importance of international law" and stating his belief that the "international obligation" to comply with *Avena* is properly a matter within the province of the federal executive branch and Congress. 82a. Governor Perry further stated that he was "advised" that the "State of Texas will ask the reviewing court [in federal habeas proceedings] to address the claim on the merits." *Id.*

On July 28, 2008, Mexico's Secretary of Foreign Affairs, Patricia Espinosa Cantellano, also sent a letter to Governor Perry and asked him to suspend Mr. Medellín's execution and to help ensure that Mr. Medellín is afforded the judicial hearing to which he is entitled as a result of the *Avena* Judgment. 84a-85a.

I. The Proceedings Below

On July 28, 2008, after his federal habeas petition was dismissed, Mr. Medellín filed a second subsequent application for a writ of habeas corpus in the Texas Court of Criminal Appeals, and along with it, an application for a stay of execution. Mr. Medellín argued that his constitutional rights to life and due process of the law entitle him to reasonable access to a remedy of judicial process that the United States is bound as a matter of international law to provide, and that therefore to execute Mr. Medellín before the competent political actors have had a reasonable opportunity to convert the Nation's international law obligation under the *Avena* Judgment into a justiciable legal right would amount to an unconstitutional deprivation of his right to life without due process of law. In addition, Mr. Medellín argued that his execution without having received the required

review and reconsideration would impinge upon the constitutional authority of Congress, confirmed by this Court, to give effect to the United States's obligation under Article 94(1) of the United Nations Charter to comply with the *Avena* Judgment. In his stay application, Mr. Medellín asked the Court to delay his execution to allow the competent political authorities a reasonable opportunity to implement the Judgment.

Although the Texas Court of Criminal Appeals has not yet ruled on Mr. Medellín's applications, his scheduled execution in six short days from now compels him to file in the event the CCA denies relief.

REASONS FOR GRANTING A WRIT OF CERTIORARI

Mr. Medellín is scheduled to be executed by lethal injection on August 5, 2008, although he has yet to receive the review and reconsideration of his conviction and sentence mandated by the *Avena* Judgment of the International Court of Justice. In *Medellin v. Texas*, 128 S. Ct. 1346 (2008), this Court confirmed that the United States is bound as a matter of international law to comply with the *Avena* Judgment, and clarified that it falls to Congress to determine whether and how to give the Judgment domestic legal effect.

No one—not this Court, not the Executive, not Congress, not Texas—disputes the United States's "plainly compelling" interest in complying with the international obligation reflected in *Avena*. In the four months since this Court's decision in *Medellín v. Texas,* federal and state actors have been engaged in unprecedented efforts to find an alternative and expeditious means of implementing the United States's obligations under the *Avena* Judgment. The House of Representatives has introduced legislation sponsored

jointly by the Chairmen of both the Committees of Foreign Affairs and the Judiciary, the Secretary of State and Attorney General have called upon Texas to work with the federal government to avoid a breach of its treaty commitments, a Texas senator has promised to introduce legislation to implement *Avena* as soon as the Texas Legislature reconvenes, and leaders of the diplomatic and business communities have warned that Mr. Medellín's execution could have grave consequences for Americans abroad.

Despite this extraordinary and unique set of circumstances, Texas has set Mr. Medellín's execution for the earliest possible date under Texas law, and proceeds implacably towards execution on August 5. If allowed to proceed, Texas will simultaneously deprive Mr. Medellín of reasonable access to a remedy required under a binding international legal obligation and place the United States in irreparable breach of its treaty obligations. Under these unique circumstances, Mr. Medellín's execution would violate his constitutionally protected right not to be deprived of his life without due process of law. And by placing the United States in irreparable breach of its treaty commitments before Congress and the federal Executive can act to compel compliance, Texas effectively will usurp the institutional prerogative of the federal political branches—advocated by Texas in *Medellin v. Texas* and confirmed by this Court—to determine whether and how to give domestic legal effect to the treaty obligations of the Nation. This Court must not allow Texas to subvert Mr. Medellín's constitutional rights and the compelling institutional interests of Congress and the Executive in a race to execution, particularly given the overwhelming public interest in achieving compliance with the *Avena* Judgment.

In view of the exceptional circumstances of this case, Mr. Medellín respectfully seeks three alternative forms of relief from this Court: (1) a writ of certiorari in the event that the Texas Court of Criminal Appeals dismisses his pending applications for habeas relief and a stay of execution; or (2) a writ of habeas corpus; or (3) recall of this Court's mandate in *Medellin v. Texas*, 128 S. Ct. 1346 (2008), for the purpose of preserving Congress's ability to bring the nation into compliance with the *Avena* Judgment. Finally, in connection with whichever form of relief the Court may deem appropriate to grant, Mr. Medellín asks this Court to grant his motion for a stay of his execution for such time as is necessary to permit the competent political actors a reasonable opportunity to act to comply consistent with this Court's decision in *Medellin v. Texas*.

I. The Court Should Grant The Writ of Certiorari In Order To Protect Mr. Medellín's Due Process Rights, The Constitutional Prerogatives Of Congress, And The Foreign Policy Interests Of The United States.

A. The Court Should Grant The Writ In Order To Prevent The Irreparable Deprivation Of Mr. Medellín's Life Without Due Process Of Law By Virtue Of His Execution In Violation Of An Undisputed Legal Obligation Of The United States.

This case comes to this Court in a unique but extraordinarily compelling set of circumstances. Every Member of this Court, the President of the United States, and, in pleadings before this Court, the State of Texas have confirmed that the United States has a binding legal obligation arising under Article 94(1) of the United Nations Charter not to execute Mr. Medellín unless and until he has received the review and reconsideration ordered by the ICJ in *Avena*. That obligation has been confirmed within the last two weeks in correspondence between, on the one hand, the Attorney General and Secretary

of State of the United States and, on the other, the Governor of Texas. Hence, if Texas were to proceed with the scheduled execution of Mr. Medellín next Tuesday, August 5, there could be no dispute that that execution would be unlawful—specifically, in violation of treaty commitments validly made by the United States through constitutionally prescribed processes.

In *Medellín v. Texas*, this Court has just held, however, that the international legal obligation arising from the U.S.'s ratification of the United Nations Charter has not yet been made effective as a matter of U.S. domestic law. Specifically, the Court held, *first*, that the Article 94(1) obligation to comply with *Avena* was not self-executing so as to allow a court in the United States to enforce it, and, *second*, the President acted beyond his authority when he ordered that the United States would comply with the obligation by having state courts provide the required review and reconsideration. Hence, the Court held, it was Congress to which the Constitution assigned the authority to determine whether and how the United States would comply with the undisputed international obligation arising from Article 94(1).

In response to this Court's decision, Congress has begun to act. On July 14, 2008, legislation was introduced by leaders of the U.S. House of Representatives that would grant to Mr. Medellín a domestic-law right to the review and reconsideration ordered by the ICJ. The bill is now sponsored by the Chairman, and two additional Members, of the Judiciary Committee as well as the Chairman of the Committee for Foreign Affairs. *See* Statement of the Case, Part E. In addition, on May 5, 2008, Texas State Senator Rodney Ellis stated that he would introduce legislation by which Texas would, as a matter of state

law, achieve compliance with *Avena*. *See* Statement of the Case, Part C. Needless to say, however, there has not been enough time for either of these legislative initiatives to bear fruit. It will simply not be possible for Congress to complete consideration of the bill in light of the short legislative calendar this year, 88a, ¶ 26, and Senator Ellis will not be able to introduce his bill until the Texas Legislature reconvenes in January 2009.

In these circumstances, it would violate Mr. Medellín's right not to be deprived of his life without due process of law were he to be executed as scheduled on August 5. *See* U.S. Const. amend. XIV; *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288 (1998) ("[a] prisoner under death sentence remains a living person and consequently has an interest in his life") (O'Connor, J., concurring); *id.* at 291 ("There is . . .no room for legitimate debate about whether a living person has a constitutionally protected interest in life.") (Stevens, J., concurring in part and dissenting in part). "[A]s [the Supreme Court has] often stated, there is a significant constitutional difference between the death penalty and lesser punishments." *Beck v. Alabama*, 447 U.S. 625, 637 (1980).

At its most basic, due process guarantees to a criminal defendant a right not to be deprived of "fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236 (1941); *see also Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (noting "the truism that '[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."); *cf. Logan v. Zimmerman*, 455 U.S. 422, 429-30 (1982) (due process bars a state from denying a litigant "an opportunity

to be heard upon [his] claimed [right].") (quoting *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971). Applying that basic principle here, Mr. Medellín cannot be executed consistent with due process if he is executed in violation of a binding legal obligation arising from a treaty voluntarily entered into by the United States to provide him additional process in the form of review and reconsideration. As a matter of law, that additional process could change the outcome on either his conviction or sentence. *See* 65a, ¶ 128 (finding prejudice as a result of the Vienna Convention violation in Mr. Medellín's case); App. for Stay of Execution Pending Disposition of Mot. to Recall and Stay the Mandate and Petition for Writ of Certiorari at Part I.A, *Medellin v. Texas*, No. 08-___ (July 31, 2008) (discussing factual basis for claim of prejudice); *cf. United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967) ("[T]he right[] . . . to petition for a redress of grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights."); *Bounds v. Smith*, 430 U.S. 817, 822 (1977) (there is a constitutional right to "adequate, effective, and meaningful" access to process). As a matter of law, therefore, his execution would violate the most fundamental objectives of the due process clause.

That conclusion is reinforced by the character of the penalty Mr. Medellín faces. *See Gardner v. Florida*, 430 U.S. 349, 357 (1977) ("[D]eath is a different kind of punishment from any other which may be imposed in this country.") (opinion of Stevens, J.). It is thus "of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner*, 430 U.S. at 358; *see also Barefoot v. Estelle*, 463 U.S.

880, 888 (1983) ("[A] death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding."). To carry out a sentence of death when an undisputed legal obligation, albeit one not yet effective on the domestic level, remains unfulfilled would be antithetical to the very notion of lawful process.

While the circumstances of this case may be unique, those circumstances all militate in favor of recognizing a right to relief here. *First*, it is no answer to the request for relief that Mr. Medellín's entitlement to review and reconsideration has not yet been realized as a matter of U.S. domestic law. After all, the United States was by no means a stranger to the processes by which the obligation that binds it arose, and the treaty-making processes by which the United States undertook the obligation have constitutional significance. Under the plain and unambiguous terms of the Supremacy Clause, "treaties made . . . under the authority of the United States [are] the supreme law of the land." U.S. Const. art. VI, cl. 2; *see also Medellin v. Texas*, 128 S. Ct. at 1360 ("If ICJ judgments were instead regarded as automatically enforceable domestic law, they would be immediately and directly binding on state and federal courts pursuant to the Supremacy Clause."). Unless the Court means to write the plain and unambiguous language of the Supremacy Clause out of the Constitution, the treaty relevant here—Article 94(1) of the United Nations Charter—must be taken into account as part of the due process analysis, even if it has not yet been executed as a matter of U.S. law. It remains, as the Supremacy Clause tells us, an exercise of the constitutional authority of the President and Senate and, as such, part of the supreme law of the land.

And it is precisely this previous exercise of constitutional treatymaking authority—now manifest in the undisputed international legal obligation to provide review and reconsideration—that distinguishes Mr. Medellín from an individual who merely awaits, with no guarantee of success, a prospective conferral of rights by the legislative process. To be sure, there can be no due process violation of a right Congress has not yet created. But that is not the case here. The constitutionally designated house of Congress has *already acted*, when the Senate advised on and consented to the Optional Protocol to the Vienna Convention and the UN Charter and the President thereby ratified them. By the action of the President and the Senate, the constitutionally designated political branches, the treaty obligation to provide review and reconsideration *already exists*, as a matter of international law. And the constitutionally designated domestic lawmaking branches have *already begun to act* to convert that international law obligation into a domestic right. In these circumstances, Mr. Medellín indisputably has a right to remain alive until he can vindicate the right to the relief contemplated by this country's treaty commitment.

Second, it is no answer to the request for relief that it is uncertain whether Congress will enact legislation to execute the treaty obligation to comply with *Avena*. To be sure, this Court has construed Article 94(1) to preserve to Congress the "option of noncompliance," *Medellin v. Texas*, 128 S. Ct. at 1360, and even had the Court held Article 94(1) to be self-executing with respect to the judicial right at issue here, Congress would have retained, by virtue of the last-in-time rule, the authority to legislate a breach of the treaty. *See*, *e.g.*, *Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888); *Head Money*

Cases (Edye v. Robertson),112 U.S. 580, 598-99 (1884). But this Court has long instructed that, as a matter of law, it should decide cases on the presumption that Congress intends the United States to comply with the treaty commitments it makes. *Cf. Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (in the absence of clear instruction from Congress, courts should not construe statues in a manner that would place the United States in breach of its treaty obligations). Any other approach would be an insult to the constitutionally designated treatymakers: the President, in negotiating a treaty, and the Senate, in providing its advice and consent, would fulfill those roles under a cloud.

Here, the presumption that the United States will do what it promises to do is reinforced by the President's unequivocal determination that the United States should do just that. *See* Br. for the United States as Amicus Curiae Supporting Petitioner at 8-9, *Medellin v. Texas*, 128 S. Ct. 1346 (No. 06-984); Br. for the United States as Amicus Curiae Supporting Respondent at 43, 45, *Medellin v. Dretke*, 544 U.S. 660 (No. 04-5928) (President has determined it is in the "paramount interest of the United States" to achieve "prompt compliance with the ICJ's decision with respect to the 51 named individuals"). The President is the sole organ of the United States in conducting its foreign affairs. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). While this Court has held that he does not have the constitutional or statutory authority to execute the Article 94(1) obligation here, his views on compliance are entitled to respect in this Court, and they surely will carry weight in the Congress, as will this Court's endorsement of those views. *See Medellin v. Texas*, 128 S. Ct. at 1361, 1367 ("United States interests

in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law . . . are plainly compelling").

Third, it is no answer to the request for relief that Congress has not yet acted. When Mr. Medellín first came to this Court, the only four Justices who reached the issue concluded that Mr. Medellín arguably had an individual right to raise claims in court under the *Avena* Judgment or the Vienna Convention itself. *See Medellin v. Dretke*, 544 U.S. 660, 687 (2005) (O'Connor, J., dissenting) (joined by Stevens, Souter, Breyer, JJ.); *id.* at 693 (Breyer, J. dissenting) (joined by Stevens, J.). And, of course, while his case was pending, the President asserted constitutional authority to execute the obligation. Until this Court issued its decision in March, there was simply no reason for Congress to believe it needed to act. Indeed, one of the indicia of a self-executing treaty is the failure of Congress to take up the question of implementation. *See, e.g.,* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 reporters' notes 5 ("[I]f the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by courts."). Here, prior to the issuance of *Medellin v. Texas*, Congress had neither indicated that it needed to implement the obligation or indicated that it did not intend the United States to comply.

Finally, it is no answer to the request for relief that it was Mexico, not Mr. Medellín, who was the party that obtained the judgment in *Avena* whose implementation Congress has now taken up. *See Medellin v. Texas*, 128 S. Ct. at 1360-61. There is no

dispute that the ICJ ordered that review and reconsideration of *Mr. Medellin*'s conviction and sentence take place in the context of judicial proceedings in *Mr. Medellin*'s own case. *Avena*, ¶¶ 141, 153(9). Hence, the United States cannot fulfill its obligation under Article 94(1) unless *he* receives review and reconsideration, and it is *his* life that hangs on the outcome of that review and reconsideration. Confirming that point, the Avena Implementation Act of 2008 that has now been introduced in Congress would give Mr. Medellín the right to bring a claim for review and reconsideration. It follows that the due process right not to be executed until Congress has had an adequate opportunity to implement the Article 94(1) obligation to comply with *Avena* belongs to Mr. Medellín.

B. The Court Should Grant The Writ In Order To Preserve The Constitutional Prerogative Of Congress To Determine Compliance With The United States's Obligation Under Article 94(1).

In *Medellin v. Texas*, this Court held that it was up to Congress to determine whether the United States would comply with its commitment under Article 94(1) of the United Nations Charter to comply with *Avena*. 128 S. Ct 1346, 1358, 1362 (2008). In settling the constitutional process for enforcement of Article 94(1), this Court confirmed that a treaty is "'equivalent to an act of the legislature,'" and self-executing when it 'operates of itself without the aid of any legislative provision." *Id.* at 1356 (quoting *Foster v. Nelson*, 26 U.S. (2 Pet.) 253, 315 (1829) (Marshall, C.J.), overruled on other grounds, *United States v. Percheman*, 26 U.S. (7 Pet.) 51 (1833)). However, the Court explained, some treaties are not fully realized at the time ratified, and in those cases, Congress must take further action to execute the treaty by enacting implementing

legislation. *Id.* at 1356 (citing *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)). Thus, in those cases, Congress retains the option to choose not to comply—"always an option by the political branches." *Id.* This Court noted that it would be "particularly anomalous" to leave Congress without that choice, "in light of the principle that 'the conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative –'the political' – Departments.'" *Id.* at 1360 (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918)).

In holding that it was up to Congress to determine the question of compliance with *Avena*, the Court vindicated the position of Texas and several of its amici states. For example, in *Medellin v. Dretke*, Texas took it for granted that the United States would comply with *Avena*, but emphasized the importance of allowing the federal political branches to determine how:

> It is beyond cavil that . . . America should keep her word. But the choice of how to do so, and how to respond to alleged treaty violations, is left to the political branches of government. . . . The President and Congress could seek to pass legislation addressing the *Avena* decision[.]

Respondent's Br. at 7, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). Again, in *Medellin v. Texas*, Texas stated: "To be sure, Texas recognizes the existence of an international obligation to comply with the United States's treaty commitments, including, as appropriate, through changes to domestic law." Respondent's Br. at 12, *Medellin v. Texas*, 128 S. Ct 1346 (2008) (No. 06-984). Nearly half the states supported that position in this Court and the Texas Court of Criminal Appeals. *See* Br. of the States of Alabama, Montana, Nevada and New Mexico as Amici Curiae in Support of Respondent at 16 n.8,

Ex parte Jose Ernesto Medellin, 223 S.W.3d 315 (No. AP-75,207) ("the proper way to render the ICJ's judgment binding on the state courts would be by an Act of Congress"); Br. for the States of Alabama et al., as Amici Curiae, in Support of Respondent at 17-18, *Medellin v. Dretke*, 544 U.S. 660 (No. 04-5928) ("As a delicate matter of foreign policy, [the] task [of choosing how to comply with *Avena*] should be left to the Executive Branch and Congress, at least in the first instance.").

Having determined that Congress has the authority to determine compliance with *Avena*, this Court should ensure that it has the opportunity to do so. The Court interpreted the scheme of Article 94 of the United Nations Charter to preserve to the political branches the "option of noncompliance"—specifically, their ability "to determine whether and how to comply with an ICJ judgment." *Medellin v. Texas*, 128 S. Ct. at 1360. It need hardly be said that, if the option of noncompliance must be preserved for decision by the political branches, so too should the option of compliance.

Yet Texas's rush to execute Mr. Medellín threatens to deprive the political branches of the very decision the Court reserved to them. There can be no dispute that, if Texas executes Mr. Medellín without providing review and reconsideration in accord with *Avena*, it will cause the United States to breach a treaty obligation that, in light of the Court's decision that the obligation was non-self-executing, Congress has already begun to take steps to execute, that Congress has to this date given no indication that it wishes the United States to breach, and with which the President has taken vigorous steps to bring about compliance. That result would turn the constitutional design set out by this Court in *Medellin v. Texas* on its head, and, at the same time, indulge the most cynical

view of the United States's intentions when, by the considered actions of its President and Senate, it enters into bilateral or multilateral treaty commitments with other nations.

C. The Court Should Grant The Writ In Order To Preserve The United States's Credibility In International Affairs Generally And In Its Treatymaking Activity Specifically.

The point has been made so many times during the course of this and related cases that it is important not to become inured to its significance: by constitutionally prescribed processes, by constitutionally designated actors, acting on behalf of the American people as a whole, the United States promised the international community that it would abide by judgments of the ICJ in cases in which it was a party. U.N. Charter, art. 94(1); Statute of the International Court of Justice, art. 59. The United States fully participated in the proceedings that led to the *Avena* judgment, and the President has told the world that the United States must and will comply. Yet Texas, by rushing to execution before Congress has had a chance to act, seeks to break the United States's promise. The damage that would be done to the United States's credibility in world affairs if Texas were permitted to do so would be incalculable. And by placing in doubt the United States's ability to comply with these treaty commitments, the decision would compromise the ability of United States consular officials and citizens to rely on the important protections embodied in the Vienna Convention.

The President shoulders the primary responsibility for our nation's foreign relations, *Curtiss-Wright*, 299 U.S. at 319, and he has already advised this Court of the critical interests at stake. In its amicus brief submitted in *Medellin v. Texas*, the United

States cited two principal foreign policy considerations prompting the President's 2005 decision to direct state courts to provide review and reconsideration: "the need for the United States to be able to protect Americans abroad" and the need to "resolve a dispute with a foreign government by determining how the United States will comply with a decision reached after the completion of formal dispute-resolution procedures with that foreign government." Br. for the United States as Amicus Curiae Supporting Respondent at 43, 45, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). In light of these objectives, the President considered it in the "paramount interest of the United States" to achieve "prompt compliance with the ICJ's decision with respect to the 51 named individuals" including Mr. Medellín. *Id.* at 41; *see also* Br. for the United States as Amicus Curiae Supporting Petitioner 8-9, *Medellin v. Texas*, 128 S. Ct. 1346 (No.06-984).

Every Member of this Court recognized that there is a vital public interest in achieving compliance with the United States's obligations under the *Avena* Judgment. Writing for the majority, Chief Justice Roberts noted that

> [I]n this case, the President seeks to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law. These interests are plainly compelling.

Medellin v. Texas, 128 S. Ct. at 1367. Concurring in the judgment, Justice Stevens agreed that "the costs of refusing to respect the ICJ's judgment are significant." *Id.* at 1375. And Justice Breyer, joined by Justices Souter and Ginsburg, observed in his dissenting opinion that noncompliance with the *Avena* Judgment would exact a heavy toll on the United States by "increase[ing] the likelihood of Security Council *Avena*

enforcement proceedings, [] worsening relations with our neighbor Mexico, [] precipitating actions by other nations putting at risk American citizens who have the misfortune to be arrested while traveling abroad, or [] diminishing our Nation's reputation abroad as a result of our failure to follow the 'rule of law' principles that we preach." *Id.* at 1391.

In a submission to the Texas trial court prior to the hearing at which Mr. Medellín urged that court to defer setting an execution date, Ambassador Jeffrey Davidow, who holds the rank of Career Ambassador and served as ambassador for the United States in the Administrations of Presidents Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush, elaborated on those interests. Noting the reciprocal character of the rights and obligations set forth in Article 36 of the Vienna Convention on Consular Relations, which the *Avena* judgment interprets and applies, Ambassador Davidow explained:

> 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 …. 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.

99a, ¶ 3; *see also* Br. of Former U.S. Diplomats as Amici Curiae in Support of Petitioner at 5, 28, *Medellin v. Texas*, 128 S. Ct 1346 (No. 06-984); Br. of Former U.S. Diplomats as Amici Curiae in Support of Petitioner at 5, 26, *Medellin v. Dretke*, 544 U.S. 660 (No.

04-5928). Hence, failure to comply with the *Avena* Judgment "would significantly impair the ability of American diplomats to advance critical U.S. foreign policy." 88a, ¶ 3. The importance to the United States's treaty partners of its compliance with its treaty obligations is dramatically illustrated here by the submission in 2007 of amicus briefs from *sixty countries* urging compliance in *Medellin v. Texas*. *See* Br. of Amici Curiae the European Union and Members of the Int'l Community in Support of Petitioner, *Medellin v. Texas*, 128 S. Ct. 1346 (No. 06-984) (forty-seven nations and the European Union); Br. Amicus Curiae of the Government of the United Mexican States in Support of Petitioner José Ernesto Medellín, *Medellin v. Texas*, 128 S. Ct. 1346 (No. 06-984) (Mexico); Br. of Foreign Sovereigns as Amici Curiae in Support of Petitioner José Ernesto Medellín, *Medellin v. Texas*, 128 S. Ct. 1346 (No. 06-984) (twelve nations); *see also* 101a-122a (letters from Council of Europe and eleven nations to Texas officials).

From a perspective even closer to the ground, there can be no doubt, moreover, that the consular rights afforded by the Vienna Convention are critical to the safety and security of Americans who travel, live and work abroad: tourists, business travelers, expatriates, foreign exchange students, members of the military, missionaries, Peace Corp volunteers, U.S. diplomats, and countless others. Timely access to consular assistance is crucially important whenever individuals face detention or prosecution under a foreign and often unfamiliar legal system. The United States thus insists that other countries grant Americans the right to prompt consular access.[5] For example, in 2001, when a U.S.

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[5] U.S. consulates provide arrested Americans with a list of qualified local attorneys, explain local legal procedures and the rights accorded to the accused, ensure contact with family and friends, protest any discriminatory or abusive treatment, and monitor their well-being throughout their incarceration. *See*

Navy spy plane made an emergency landing in Chinese territory after colliding with a Chinese jet, the State Department cited the Vienna Convention in demanding immediate consular visits to the plane's crew. *See* Press Briefing, U.S. State Department (Apr. 2, 2001), *available at* http://www.state.gov/r/pa/prs/dpb/2001/1889.htm. Chinese authorities granted consular visits to the crew members, who were detained in China for eleven days. During the tense standoff, the U.S. Ambassador to China emphasized that these rights of immediate and unobstructed consular access to detained American citizens are "the norms of international law," *China Grants U.S. Access to Spy Plane Crew*, CNN, Apr. 3, 2001, http://archives.cnn.com/2001/WORLD/asiapcf/east/04/03/china.aircollision, while the President warned that the failure of the Chinese government "to react promptly to our request is inconsistent with standard diplomatic practice, and with the expressed desire of both our countries for better relations[,]" Statement by the President on American Plane and Crew in China, The White House (Apr. 2, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/04/20010402-2.html.

For that reason, the business community has expressed grave concern about the prospect of noncompliance with the *Avena* Judgment. In a letter to House Speaker Nancy Pelosi urging Congress to pass legislation implementing *Avena*, Peter M. Robinson, President and CEO of the United States Council for International Business (the United States branch of the International Chamber of Commerce), observed:

> The security of Americans doing business abroad is clearly and directly at risk by U.S. noncompliance with its

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U.S. Department of State, Assistance to U.S. Citizens Arrested Abroad, http://travel.state.gov/travel/tips/emergencies/emergencies_1199.html.

> 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. . . . 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.

123a. Accordingly, Mr. Robinson wrote: "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." 124a.

Key international observers have likewise emphasized the importance to the United States of achieving compliance with *Avena*. For example, on July 17, 2008, the current and nine past presidents of the American Society of International Law urged Members of the Senate to act expeditiously on the pending legislation in order to ensure compliance with international law:

> [T]he United States is poised irreparably to violate the Vienna Convention and a judgment of the ICJ. ..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.135a.

For another example, Professor Phillip Alston, the United Nations Human Rights Council Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, recently

singled out the lack of compliance with the *Avena* Judgment as an issue of particular concern:

> 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.

128a. Professor Alston further noted that noncompliance with *Avena* threatens to undermine other treaty regimes involving such varied subjects as trade, investment and the environment. "Why," he queried, "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." 127a-128a.

In short, "[i]f 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." 100a, ¶ 4. Those consequences will be suffered not only by Texas, but by the Nation. As James Madison emphasized at the Constitutional Convention, "[a] rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (Max

Farrand ed., rev. ed. 1996). If denying Mr. Medellín the review and reconsideration of his conviction and sentence ordered by the ICJ is so important as possibly to justify the serious harm to U.S. interests identified by the President, this Court, and many, many others that would follow from that treaty breach , that judgment should be made by the U.S. Congress, not Texas.

The United States's word should not be so carelessly broken, nor its standing in the international community so needlessly compromised. In order to vindicate the constitutional allocation of authority to determine compliance with *Avena* that it has just identified in *Medellin v. Texas,* and to allow the competent political actors to comply with this country's international commitments, this Court should grant the writ and stay the execution.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari or, in the alternative, grant a writ of habeas corpus, or, in the further alternative, pursuant to the accompanying motion, recall and stay its mandate in *Medellin v. Texas*, 128 S. Ct. 1346 (2008). In addition the Court should stay the execution of José Ernesto Medellín to allow the competent political actors a reasonable opportunity to implement the international law obligations of the United States reflected in the Judgment of the International Court of Justice.

Respectfully submitted,

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July 31, 2008

No. 08-_____

IN THE

Supreme Court of the United States

IN RE JOSÉ ERNESTO MEDELLÍN,
Petitioner,

ON PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS

PETITION FOR WRIT OF HABEAS CORPUS

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CAPITAL CASE

QUESTIONS PRESENTED

In the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31), the International Court of Justice determined that José Ernesto Medellín and fifty other Mexican nationals under sentence of death in the United States were entitled to receive judicial review and reconsideration of their convictions and sentences in light of the violation of their rights under the Vienna Convention on Consular Relations in their capital murder trials. In *Medellín v. Texas*, 128 S. Ct. 1346 (2008), this Court held that the United States is bound under Article 94(1) of the United Nations Charter to comply with the *Avena* Judgment and settled the procedures by which, as a matter of U.S. constitutional law, the international obligation to comply may be given domestic effect. Specifically, this Court held that neither it nor the President had the authority to execute the international obligation, which instead lies with the Congress. In response to that ruling, legislation to implement *Avena* has been introduced in the U.S. House of Representatives, yet the State of Texas, having scheduled Mr. Medellín's execution for August 5, 2008, has indicated that it intends to go forward with the execution before Congress has had a reasonable opportunity to exercise its constitutional prerogative to determine compliance.

This case presents the following questions:

1. Whether Mr. Medellín's Fourteenth Amendment right not to be deprived of his life without due process of law entitles him to remain alive until Congress has had a reasonable opportunity to exercise its constitutional prerogative to implement the right to judicial review and reconsideration under *Avena and Other Mexican Nationals*, so that he can secure access to a remedy to which he is entitled by virtue of a binding international legal obligation of the United States;

2. Whether the Court should grant a writ of habeas corpus to adjudicate Mr. Medellín's claim on the merits, where he seeks relief pursuant to a binding international legal obligation that the federal political branches seek to implement, and where adequate relief cannot be obtained in any other form or from any other court; and

3. Whether the Court should recall and stay its mandate in *Medellín v. Texas,* 128 S. Ct. 1346, not to revisit the merits, but to allow Congress a reasonable opportunity to implement legislation consistent with the Court's decision in that case.

PARTIES

All parties to the proceedings below are named in the caption of the case.

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 2241.

CONSTITUTIONAL, TREATY AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions, which are reproduced beginning at page 1a in the Appendix.

STATEMENT OF THE CASE

A. *Avena* and Subsequent Proceedings

In the *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31) ("*Avena*"), the International Court of Justice ("ICJ") determined that Mr. Medellín and fifty other Mexican nationals under sentence of death in the United States, whose rights to consular notification and access under the Vienna Convention on Consular Relations had been violated in their capital murder trials, were entitled to receive judicial review and reconsideration of their convictions and sentences in light of the violations in their cases. On December 10, 2004, in response to Mr. Medellín's petition, this Court granted a writ of certiorari to decide whether, under the Supremacy Clause of the Constitution, courts in the United States must give effect to the United States's treaty obligations to comply with the Judgment of the ICJ. *Medellín v. Dretke*, 543 U.S. 1032 (2004) (order granting writ of certiorari).

On February 28, 2005, before the case had been fully submitted, President George W. Bush issued a written determination that the United States had a binding obligation under international law to comply with *Avena*. Br. for U.S. as Amicus Curiae Supporting Resp't at App. 2, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). He also

determined that, to achieve compliance, state courts should provide review and reconsideration to the fifty-one Mexican nationals named in the *Avena* Judgment, including Mr. Medellín, pursuant to the criteria set forth by the ICJ, notwithstanding any state procedural rules that might otherwise bar review of the claim on the merits.

In deference to the President's determination, Mr. Medellín filed a motion to stay his case in this Court, requesting that the case be held in abeyance while he exhausted in state court his claims based on *Avena* and the President's determination, neither of which had been issued at the time of his first state post-conviction petition.

On May 23, 2005, this Court dismissed the writ of certiorari as improvidently granted, in part because of the prospect of relief in Texas state court and in part because of potential obstacles to reaching the merits posed by the procedural posture of the case as then before the Court. *Medellín v. Dretke*, 544 U.S. 660, 662 (2005) (per curiam).

Following this Court's dismissal, Mr. Medellín pursued relief in the Texas Court of Criminal Appeals, where he argued that the treaty obligation to abide by the *Avena* decision and the President's determination to comply each constituted binding federal law that, by virtue of the Supremacy Clause of the Constitution, preempted any inconsistent provisions of state law. On November 15, 2006, the Court of Criminal Appeals dismissed Mr. Medellín's application, holding that neither the *Avena* Judgment nor the President's determination constituted preemptive federal law and that Mr. Medellín was procedurally barred from seeking relief on a subsequent habeas application. *Ex parte Medellín*, 223 S.W.3d 315 (Tex. Crim. App. 2006).

On April 30, 2007, on Mr. Medellín's petition, the Court granted a writ of certiorari to determine whether courts in the United States or the President had the authority to execute the United States's obligation to comply with *Avena*. *Medellin v. Texas*, 127 S. Ct. 2129 (U.S. 2007) (order granting writ of certiorari).

B. *Medellín v. Texas*

In *Medellín v. Texas*, 128 S. Ct. 1346 (2008), the Court held that under Article 94(1) of the United Nations Charter, a valid treaty of the United States, the United States has a binding international obligation to comply with *Avena* by providing review and reconsideration to Mr. Medellín and the other Mexican nationals subject to that judgment. Specifically, the Court observed that "no one disputes" that the obligation to abide by the *Avena* judgment, which "flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an *international* law obligation on the part of the United States." *Id.* at 1356. The Court also expressly noted its agreement with the President as to the importance of United States's compliance with that obligation. *Id.* at 1367.

The Court held, however, that that international obligation had not yet been validly executed as a matter of U.S. domestic law. *First*, courts are not empowered to automatically enforce ICJ decisions as domestic law because the "sensitive foreign policy decisions" of whether and how to comply are reserved for the he political branches. *Id.* at 1360. *Second*, the "array of political and diplomatic means available [to the President] to enforce international obligations" does not include the power to "unilaterally convert[] a

non-self-executing treaty into a self-executing one." *Id.* at 1368. Hence, "while the ICJ's judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions." *Id.* at 1367. Instead, an additional step by the political branches is necessary, including action by Congress to pass implementing legislation, *id.* at 1369, or by the President "by some other means, so long as they are consistent with the Constitution," *id.* at 1371.

Concurring in the judgment, Justice Stevens also noted that the United States's international obligation to provide review and reconsideration under the *Avena* Judgment was undisputed. *Id.* at 1374. He urged action by Texas to "shoulder the primary responsibility for protecting the honor and integrity of the Nation," *id.* at 1374, particularly where "the costs of refusing to respect the ICJ's judgment are significant," *id.* at 1375.

Justice Breyer, joined by Justices Souter and Ginsburg, dissented, stating that the Supremacy Clause of the U.S. Constitution required that the state courts comply with *Avena*, since "the treaty obligations, and hence the judgment, resting as it does upon the consent of the United States to the ICJ's jurisdiction, bind[s] the courts no less than would 'an act of the [federal] legislature.'" *Id.* at 1376 (internal cites omitted). Like the majority, Justice Breyer recognized that noncompliance would exact a heavy toll on the United States. *Id.* at 1391.

C. Scheduling of Execution Date

Almost immediately following this Court's decision, Texas state prosecutors sought an execution date for Mr. Medellín. At a hearing before the Texas trial court on May 5, 2008, Mr. Medellín requested that the court defer scheduling an execution date in order to allow the national and state legislatures time to implement the *Avena* Judgment, as this Court's decision contemplated. Texas State Senator Rodney Ellis wrote to the court to request that it defer setting a date in light of his intention to introduce legislation by which Texas would comply with *Avena* as soon as the Texas Legislature reconvened in January 2009. 15a-16a. On May 2, 2008, Ambassador Jeffrey Davidow, who holds the rank of Career Ambassador (the highest rank available to diplomats) and served as an ambassador for the United States in the administrations of Presidents Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush, submitted a declaration addressing the negative ramifications for U.S. foreign relations, including for the protection of Americans abroad. The court declined to hear evidence and instead scheduled Mr. Medellín's execution for the first date available under state law. *See* 136a. Hence, Mr. Medellín is scheduled to die by lethal injection on August 5, 2008.

D. Subsequent Proceedings Before the International Court of Justice

On June 5, 2008, in light of the action by Texas to execute Mr. Medellín without having provided him review and reconsideration and the failure as of that date by the United States effectively to implement the judgment within its domestic legal system, Mexico instituted new proceedings in the International Court of Justice by filing a

Request for Interpretation of the *Avena* Judgment. *See* Application Instituting Proceedings, Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), June 5, 2008.[1] Mexico asked the ICJ to declare that the United States has an obligation to use any and all means necessary to provide that review before any execution is carried out. In conjunction with its Request for Interpretation, Mexico also asked the ICJ to indicate provisional measures with respect to Mr. Medellín and four other Mexican nationals named in the *Avena* Judgment who face imminent execution in Texas.[2] Mexico's Request for Interpretation of the *Avena* Judgment opens a new case before the ICJ and is currently pending review.

The ICJ held oral proceedings on the request for provisional measures on June 19 and 20, 2008. At argument, the Legal Adviser to the Secretary of State confirmed "that the United States takes its international law obligation to comply with the Avena Judgment seriously" and agreed that *Avena* requires the provision of review and reconsideration prior to the imposition of any death sentence. *See* 90a; 92a; 93a.

On June 16, 2008, the ICJ rejected the United States's request to dismiss the case and granted Mexico's request for provisional measures, directing the United States to "take all measures necessary to ensure that Messrs. José Ernesto Medellín Rojas [and four other Mexican nationals] are not executed pending judgment on the Request for

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[1] The parties' written and oral pleadings and the judgment, orders and press releases of the International Court of Justice in respect of the Request for Interpretation are available at http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=&case=139&k=11 (last visited July 30, 2008).

[2] The four other Mexican nationals subject to the request for provisional measures have not received execution dates but are eligible under state law to have dates scheduled.

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 [*Avena*] Judgment." 38a, ¶ 80(a). In particular, the Court noted

> 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; … in particular, the Agent of the United States declared before the ICJ 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[.]"

37a, ¶ 76. The Court further noted that "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[.]'" *Id.* at ¶ 77. Nonetheless, commenting on reports of the ICJ's Order in the press, Texas Governor Perry's office stated: "The world court has no standing in Texas and Texas is not bound by a ruling or edict from a foreign court." Allan Turner & Rosanna Ruiz, *Texas to World Court: Executions Are Still On*, Houston Chron., July 17, 2008, at A1. The submission of the United States in response to Mexico's Request for Interpretation is due on August 29, 2008. The case has been set on an expedited schedule and a decision is likely to issue this year.

E. Introduction of Congressional Legislation

On July 14, 2008, following this Court's decision in *Medellín v. Texas*, Members of the House of Representatives introduced legislation to give the *Avena* Judgment domestic legal effect. The "Avena Case Implementation Act of 2008" grants foreign nationals such as Mr. Medellín a right to judicial review of their convictions and sentences in light of Vienna Convention violations in their cases. 5a-6a. The proposed bill specifically authorizes courts to provide "any relief required to remedy the harm done by the violation [of rights under Article 36 of the Vienna Convention], including the vitiation of the conviction or sentence where appropriate." 6a, § 2. The bill was introduced by Howard L. Berman, Chairman of the Committee for Foreign Affairs and Vice Chairman of the Judiciary Committee, and referred to the Judiciary Committee for consideration. Since that time, the Chairman of that Committee, John Conyers, Jr., and Committee Members Zoe Lofgren and William D. Delahunt have joined as co-sponsors of the bill.

The bill is now under review. On June 19, 2008, before the International Court of Justice, the United States stated that "[g]iven the short legislative calendar for our Congress this year, it [will] not be possible for both houses of our Congress to pass legislation" implementing the *Avena* decision. 88a, ¶ 26.

F. Denial of Federal Habeas Relief

On November 21, 2006, to satisfy the applicable statute of limitations while his first subsequent habeas application was pending in the Texas Court of Criminal Appeals,

Mr. Medellín filed a habeas petition in the U.S. District Court for the Southern District of Texas, raising claims related to the enforceability of the *Avena* Judgment as a matter of applicable treaties and the President's 2005 determination to comply. After this Court granted a writ of certiorari to review the denial of Mr. Medellín's first subsequent application, the district court stayed and administratively closed Mr. Medellín's case. On July 22, 2008, the court reopened proceedings for the limited purpose of determining jurisdiction over Mr. Medellín's petition, and denied relief. *Medellin v. Quarterman*, No. H-06-3688, 2008 U.S. Dist. LEXIS 55758 (S.D. Tex. July 22, 2008). The court concluded that the federal habeas statute's limitation on successive petitions prevented it from considering Mr. Medellín's petition on the merits without prior authorization from the Court of Appeals. *Id.* at *7.

G. Decision of the Inter-American Commission on Human Rights

On November 21, 2006, Mr. Medellín filed a petition before the Inter-American Commission on Human Rights raising the violation of his consular rights as well as several violations of the 1948 Declaration of the Rights and Duties of Man ("American Declaration"). The Inter-American Commission is the principal human rights organ of the Organization of American States ("OAS") and is empowered to consider and evaluate the merits of human rights violations raised by individuals from any OAS member state. *See* Inter-American Commission on Human Rights, *What is the IACHR?*, *at* http://www.cidh.oas.org/what.htm; *see also* Thomas Buergenthal, International Human

Rights in a Nutshell 174, 179, 181-82 (2d ed. 1995). As a member of the OAS, the United States has recognized the Commission's competence to consider such petitions.[3]

On December 6, 2006, the Commission issued precautionary measures—analogous to a temporary injunction and similar to the provisional measures ordered by the ICJ—calling upon the United States to take all measures necessary to preserve Mr. Medellín's life pending the Commission's investigation of the allegations raised in his petition. 74a-75a. After Mr. Medellín was scheduled for execution, the Commission reiterated to the United States the precautionary measures it adopted in favor of Mr. Medellín in 2006 and reminded the United States of its request that Mr. Medellín's life be preserved pending the investigation of his petition. 76a; *see also* 77a-79a.

Both Mr. Medellín and the United States filed written submissions and made oral arguments to the Commission at a hearing conducted on March 7, 2008, at the Commission headquarters in Washington, D.C. The Commission also considered extensive documentary evidence, including many of the documents submitted to the court below. On July 24, 2008, after reviewing the legal arguments of both parties and the facts submitted in support of Mr. Medellín's claims for relief, the Commission issued a

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3 The United States has signed and ratified the Charter of the Organization of American States ("OAS Charter"), Apr. 30, 1948, 2 U.S.T. 2394, as well as the Protocol of Buenos Aires that amended the OAS Charter and established the Commission as a principal organ through which the OAS would accomplish its purposes. Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847. As ratified treaties of the United States, both instruments apply with equal force and supremacy to all states, including Texas. U.S. Const. art. VI, cl. 2. The amended OAS Charter specifically provided that "[t]here shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters." OAS Charter, art. 106. Under Article 145, the Inter-American Commission is given the responsibility to "keep vigilance over the observance of human rights." *Id.*, art. 145.

preliminary report concluding, in pertinent part, that Mr. Medellín was prejudiced by the violation of his rights to consular notification and assistance. Specifically, the Commission found:

> It is apparent from the record before the Commission that, following [Mr.] Medellin[']s] conviction and sentencing, consular officials were instrumental in gathering significant evidence concerning [his] character and background. This evidence, including information relating to [his] 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 [his] case[]. 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 [his] particular circumstances and those of the offense.

65a, ¶ 128. The Commission concluded that the United States's obligation under Article 36(1) of the Vienna Convention to inform Mr. Medellín of his right to consular notification and assistance constituted a fundamental component of the due process standards to which he was entitled under the American Declaration, and that the United States's failure to respect and ensure this obligation deprived him of a criminal process that satisfied the minimum standards of due process and a fair trial required by the Declaration. 66a, ¶ 132.

As to remedies, the Commission recommended, among other things, that the United States vacate Mr. Medellín's death sentence and provide him with "an effective remedy, which includes a new trial in accordance with the equality, due process and fair trial protections prescribed under . . . the American Declaration, including the right to competent legal representation." 72a, ¶ 160. The Commission also reiterated its requests

of December 6, 2006, and January 30, 2007, that the United States take precautionary measures to preserve Mr. Medellín's life pending the implementation of the Commission's recommendations in the matter. 71a, ¶ 159.[4]

H. Further Political and Diplomatic Efforts to Effect Compliance with the *Avena* Judgment.

Since this Court issued its decision in *Medellin v.* Texas, the governments of Mexico and the United States have resumed their efforts to achieve compliance with the *Avena* Judgment. On June 17, 2008, Secretary of State Condoleezza Rice and Attorney General Michael B. Mukasey asked for Texas's help in complying with the *Avena* Judgment. In a joint letter to Governor Rick Perry, the Secretary of State and Attorney General stated:

> The United States attaches great importance to complying with its obligations under international law . . . . We continue to seek a practical and timely way to carry out our nation's international legal obligation [under *Avena*], 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.

80a-81a. On July 18, 2008, Governor Perry responded, acknowledging the "concerns from a federal standpoint about the importance of international law" and stating his belief that the "international obligation" to comply with *Avena* is properly a matter within the

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[4] The Commission has not yet issued its final report, and will not do so until the United States has had an opportunity to respond to the Commission's findings. *See* Rule 43.2, Rules of Procedure of the Inter-American Commission on Human Rights, *available at* http://www.cidh.org/Basicos/English/Basic18.Rules%20of%20Procedure%20of%20the%20Commission.htm. Until the United States takes steps to implement the Commission's recommendations, precautionary measures remain in effect.

province of the federal executive branch and Congress. 82a. Governor Perry further stated that he was "advised" that the "State of Texas will ask the reviewing court [in federal habeas proceedings] to address the claim on the merits." *Id.*

On July 28, 2008, Mexico's Secretary of Foreign Affairs, Patricia Espinosa Cantellano, also sent a letter to Governor Perry and asked him to suspend Mr. Medellín's execution and to help ensure that Mr. Medellín is afforded the judicial hearing to which he is entitled as a result of the *Avena* Judgment. 84a-85a.

I. The Proceedings Below

On July 28, 2008, after his federal habeas petition was dismissed, Mr. Medellín filed a second subsequent application for a writ of habeas corpus in the Texas Court of Criminal Appeals, and along with it, an application for a stay of execution. Mr. Medellín argued that his constitutional rights to life and due process of the law entitle him to reasonable access to a remedy of judicial process that the United States is bound as a matter of international law to provide, and that therefore to execute Mr. Medellín before the competent political actors have had a reasonable opportunity to convert the Nation's international law obligation under the *Avena* Judgment into a justiciable legal right would amount to an unconstitutional deprivation of his right to life without due process of law. In addition, Mr. Medellín argued that his execution without having received the required review and reconsideration would impinge upon the constitutional authority of Congress, confirmed by this Court, to give effect to the United States's obligation under Article 94(1) of the United Nations Charter to comply with the *Avena* Judgment. In his stay

application, Mr. Medellín asked the Court to delay his execution to allow the competent political authorities a reasonable opportunity to implement the Judgment.

Although the Texas Court of Criminal Appeals has not yet ruled on Mr. Medellín's applications, his scheduled execution in six short days from now compels him to file in the event the CCA denies relief.

REASONS FOR GRANTING A WRIT OF HABEAS CORPUS

Mr. Medellín is scheduled to be executed by lethal injection on August 5, 2008, although he has yet to receive the review and reconsideration of his conviction and sentence mandated by the *Avena* Judgment of the International Court of Justice. In *Medellin v. Texas*, 128 S. Ct. 1346 (2008), this Court confirmed that the United States is bound as a matter of international law to comply with the *Avena* Judgment, and clarified that it falls to Congress to determine whether and how to give the Judgment domestic legal effect.

No one—not this Court, not the Executive, not Congress, not Texas—disputes the United States's "plainly compelling" interest in complying with the international obligation reflected in *Avena*. In the four months since this Court's decision in *Medellín v. Texas,* federal and state actors have been engaged in unprecedented efforts to find an alternative and expeditious means of implementing the United States's obligations under the *Avena* Judgment. The House of Representatives has introduced legislation, the Secretary of State and Attorney General have called upon Texas to work with the federal government to avoid a breach of its treaty commitments, a Texas senator has promised to introduce legislation to implement *Avena* as soon as the Texas Legislature reconvenes,

and leaders of the diplomatic and business communities have warned that Mr. Medellín's execution could have grave consequences for Americans abroad.

Despite this extraordinary and unique set of circumstances, Texas has set Mr. Medellín's execution for the earliest possible date under Texas law, and proceeds implacably towards execution on August 5. If allowed to proceed, Texas will simultaneously deprive Mr. Medellín of reasonable access to a remedy required under a binding international legal obligation and place the United States in irreparable breach of its treaty obligations. Under these unique circumstances, Mr. Medellín's execution would violate his constitutionally protected right not to be deprived of his life without due process of law. And by placing the United States in irreparable breach of its treaty commitments before Congress and the federal Executive can act to compel compliance, Texas effectively will usurp the institutional prerogative of the federal political branches—advocated by Texas in *Medellin v. Texas* and confirmed by this Court—to determine whether and how to give domestic legal effect to the treaty obligations of the Nation. This Court must not allow Texas to subvert Mr. Medellín's constitutional rights and the compelling institutional interests of Congress and the Executive in a race to execution, particularly given the overwhelming public interest in achieving compliance with the *Avena* Judgment.

In view of the exceptional circumstances of this case, Mr. Medellín respectfully seeks three alternative forms of relief from this Court: (1) a writ of certiorari in the event that the Texas Court of Criminal Appeals dismisses his pending applications for habeas relief and a stay of execution; or (2) a writ of habeas corpus; or (3) recall of this Court's

mandate in *Medellin v. Texas*, 128 S. Ct. 1346 (2008), for the purpose of preserving Congress's ability to bring the nation into compliance with the *Avena* Judgment. Finally, in connection with whichever form of relief the Court may deem appropriate to grant, Mr. Medellín asks this Court to grant his motion for a stay of his execution for such time as is necessary to permit the competent political actors a reasonable opportunity to act to comply consistent with this Court's decision in *Medellin v. Texas*.

I. The Same Compelling Circumstances That Weigh In Favor of A Grant of A Writ of Certiorari Weigh In Favor of a Grant of A Writ Under This Court's Original Habeas Powers.

The Court may act to prevent Mr. Medellín's execution in violation of the *Avena* Judgment by the grant of a writ of habeas corpus pursuant to 28 U.S.C. § 2241, which empowers this Court to grant the Great Writ where a prisoner is "in custody in violation of the Constitution or laws or treaties of the United States[.]" 28 U.S.C. § 2241(c)(3). By exercising its discretion in the form of an extraordinary writ, this Court would preserve its ability, in truly exceptional circumstances, to prevent the incalculable harm that would ensue from a breach of the nation's treaty commitments, to preserve the undisputed right of Congress to take action, and to protect Mr. Medellín's right not to be deprived of his life without due process of law.

A. If A Writ Of Certiorari Is Unavailable, This Court Should Grant A Writ of Habeas Corpus.

Although the extraordinary writs are a rare form of relief, sparingly exercised in the discretion of the Court, the circumstances of this case plainly are exceptional—indeed unprecedented, unlikely to repeat themselves, and of the highest possible significance, in

terms both of the caliber of interests implicated and the detriment that will befall the institutions of federal government, the American public, and Mr. Medellín himself if his case is permitted to fall into a black hole in the constitutional design.

Indeed, the circumstances here are in some respects reminiscent of—yet easily more extraordinary than—the cases where this Court has granted a writ of habeas corpus in an original action. For example, in *Ex parte Grossman*, 267 U.S. 87 (1925), the petitioner had been sentenced to a single year of imprisonment for the unlawful sale of liquor. The President issued a pardon; the district court committed the petitioner to serve the sentence notwithstanding the pardon; and this Court intervened to vindicate the authority of the President to pardon criminal contempt. *Id.* at 107-08. There, the stakes were plainly less dramatic where the sentence was minor and there was no claim that the petitioner's case had broader implications, yet the Court intervened to make effective the President's constitutional power to issue pardons. *See* U.S. Const. art. II, § 2. The intervention of this Court here would not only protect Congress's constitutional prerogative to enact legislation to give effect to a non-self-executing treaty commitment of the United States, but also the right of the petitioner not to be deprived of a remedy that the competent political actors seek to provide him. *See* Part I above.

This Court's jurisdiction under 28 U.S.C. § 2241 to entertain and grant original writs of habeas corpus was not repealed by the amendments to 28 U.S.C. §§2244 and 2254 in the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Felker v. Turpin*, 518 U.S. 651, 654 (1996) ("[AEDPA] does not preclude this Court from

entertaining an application for habeas corpus relief[.]"); *see also id.* at 658 (AEDPA "does not deprive this Court of jurisdiction to entertain original habeas petitions.").

B. Adequate Relief Cannot Be Obtained In Any Other Form Or From Any Other Court.

The Court has made it clear that its exercise of discretion to issue a writ of habeas requires that the petitioner also "show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted." *Id.* at 665 (quoting Sup. Ct. R. 20.4(a)). This case meets this demanding test.

As the United States has stated, Mr. Medellín has never received review and reconsideration in conformity with the guidelines set forth in *Avena*. 98a, lines 8-11 ("[The previous holding] does not give full and independent weight to the treaty violation, which is what *Avena* requires and which is what the President has directed."); *see also Medellin v. Texas*, 128 S. Ct. at 1389-90 (Breyer, J., dissenting) ("While Texas has already considered [whether the police failure to inform Medellin of his Vienna Convention rights prejudiced Medellin], it did not consider fully, for example, whether appointed counsel's coterminous 6-month suspension from the practice of the law 'caused actual prejudice to the defendant'—prejudice that would not have existed had Medellin known he could contact his consul and thereby find a different lawyer."). While the Governor of Texas has conveyed his understanding that the Texas Attorney General's office will now seek merits review of all Vienna Convention claims presented in federal court by Mexican nationals subject to the *Avena* Judgment who have never before received such review, he has not explicitly acknowledged that that process must

represent prospective, de novo review, on a full record presented at an evidentiary hearing, and in light of the correct legal standard, all in accord with the ICJ's rulings in *Avena*. In any event, Mr. Medellín petitions this Court for a writ of habeas corpus because he anticipates that the Court of Appeals will hold that he is effectively without any federal forum in which he can benefit from Texas's newly announced position.

Petitioner files this petition in anticipation of the prospect that he will be unable to obtain relief from any other court.[5] He has applied for relief from the Texas state courts, and that application remains pending. *See* Second Subsequent Application for Post-Conviction Writ of Habeas Corpus. Further, while Mr. Medellín has not yet filed in the Court of Appeals because of the Texas two-forum rule,[6] he anticipates that if it becomes necessary to file in that Court, the Court will hold that he is unable to meet the successive petition requirements of 28 U.S.C. § 2244(b). The District Court has already held that he cannot meet those literal standards and therefore cannot obtain leave to file a § 2254 petition in the lower federal courts. *Medellin v. Quarterman*, No. H-06-3688, 2008 U.S. Dist. LEXIS 55758, at *7 (S.D. Tex. July 22, 2008). Even if the Court of Appeals were to accept his argument that his present claim arises from the *Avena* Judgment, a decision that came down after he had already presented his Vienna Convention claim in his initial

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[5] Petitioner is also seeking to obtain relief from this Court in every "other form" that he believes to be arguably available, including a petition for a writ of certiorari for review of the judgment of the Texas Court of Criminal Appeals and a motion to recall and stay the Court's mandate in *Medellin v. Texas*.

[6] *See* Ex parte Soffar, 143 S.W.3d 804, 805-06 (Tex. Crim. App. 2004) (Texas state courts defer action on causes properly within their jurisdiction "until the courts of another sovereignty with concurrent powers, and already cognizant of litigation, have had an opportunity to pass upon the matter."). Given the imminent execution date, Mr. Medellin will lodge his papers in the Court of Appeals, for filing if the Court of Criminal Appeals does not grant relief.

application, the Court of Appeals could hold that it is bound by the wording of the successor provision's requirements of "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2244(b)(2); *Medellin v. Dretke*, 544 U.S. at 666 (2005) ("A certificate of appealability may be granted only where there is 'a substantial showing of the denial of a *constitutional* right.' To obtain the necessary certificate of appealability to proceed in the Court of Appeals, Medellin must demonstrate that his allegation of a treaty violation could satisfy this standard.") (Court's emphasis)). This Court would not be so bound.[7]

The exceptional circumstances of this case satisfy the equitable principles embodied in the statutory standards. Mr. Medellin has not abused the writ by holding back his Vienna Convention claim, having raised the claim in his first state and federal habeas petition. His claim has now been transformed by the *Avena* judgment, which, although not announcing a rule of constitutional law, interprets a treaty made under the authority of the United States which is also part of the Supreme Law of the Land under Article VI, clause 2 of the Constitution. That decision was made retroactive—and, indeed, directly applicable to petitioner's own case—by a court possessing authority with

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[7] Just as the Court's jurisdiction under 28 U.S.C. § 2241 was not repealed by AEDPA, the limitations on second or successive petitions imposed by AEDPA similarly do not apply to original writ applications made under § 2241. Rather, those limitations apply specifically and exclusively to "claim[s] presented in a second or successive habeas corpus application under section 2254." 28 U.S.C. §§ 2244(b)(1)-(2). However, the Court has held that the statutory limitations reflect "'a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions,'" and hence should "certainly inform our consideration of original habeas petitions." *Felker v. Turpin*, 518 U.S. at 663-64 (quoting *McCleskey v. Zant*, 499 U.S. 467, 489 (1991)). Although the Court's decisions under § 2241 are informed by those principles, its jurisdiction is not limited by them; that jurisdiction extends to any case in which "a prisoner . . . is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). *See Felker v. Turpin*, 518 U.S. at 659 n.2.

regard to the interpretation of this treaty. Even if in the process of becoming judicially enforceable, that decision established new predicates for the claim that were not previously available to petitioner, those predicates are, at a minimum, determinations by a court whose judgments on the subject are entitled to "respectful consideration," *see Medellin v. Texas*, 128 S. Ct. at 1361 n.9 (quoting *Breard v. Greene*, 523 U.S. 371, 375 (1998); *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2683 (2006), especially when rendered in a full and fair proceeding in which the United States fully participated.[8]

Further, the Inter-American Commission has now determined, after reviewing evidence that would have to be considered in the course of the review and reconsideration ordered by the ICJ but has never been considered on the merits in a U.S. court, that the Vienna Convention violation caused Mr. Medellin prejudice, in large part by preventing Mexico from arranging for his legal representation and ensuring he had an adequate defense. *See* 65a, ¶ 128. The Commission recommended that the United States vacate Mr. Medellín's death sentence and provide him with a new trial. Pet. App. 65a, ¶ 128; 72a, ¶ 160. While Mr. Medellin should not have to show that he would prevail in the course of review and reconsideration in order to vindicate his entitlement to receive it, the

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[8] In *Garza v. Lappin,* 253 F.3d 918 (7th Cir. 2001), the United States Court of Appeals for the Seventh Circuit allowed a habeas petition raising a treaty claim to be brought under § 2241, although the petitioner could not surmount the restrictions on successive § 2255 petitions. The court in *Garza* held that because the petitioner's treaty claim had not ripened until the announcement of the decision of the international tribunal on which it was based, the § 2255 remedy was "inadequate or ineffective to test the legality of [his] detention," making his petition "properly cognizable under § 2241." *Id*. at 921 (quoting 28 U.S.C. § 2255(e)). In *Garza*, the Court of Appeals also noted that, because the legal predicate for the treaty claim did not exist at the time of petitioner's earlier habeas filings, it was arguable that the petition before it was not "second or successive" at all. *Id.* at 923-24 (citing *Stewart v. Martinez-Villareal*, 523 U.S. 637, 642-45 (1998)).

Inter-American Commission's determination adds weight to the factors counseling in favor of granting the writ.

Thus, to the extent that this Court's exercise of its equitable discretion under § 2244 is informed by the terms of § 2244, this case qualifies for its consideration. But that is only one aspect of the exceptional circumstance this case presents. Far more exceptional—indeed, unique in this Court's history—are the circumstances set forth above in support of the petition for a writ of certiorari: a court of competent jurisdiction, vested by treaty made by the President and ratified by the Senate with the authority to resolve disputes regarding the interpretation and application of that treaty, has found a violation of petitioner's rights and required a judicial remedy that appears to be available in no other forum.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari or, in the alternative, grant a writ of habeas corpus, or, in the further alternative, pursuant to the accompanying motion, recall and stay its mandate in *Medellin v. Texas*, 128 S. Ct. 1346 (2008). In addition the Court should stay the execution of José Ernesto Medellín to allow the competent political actors a reasonable opportunity to implement the international law obligations of the United States reflected in the *Avena* Judgment of the International Court of Justice.

Respectfully submitted,

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July 31, 2008

No. 08-___

IN THE

Supreme Court of the United States

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JOSÉ ERNESTO MEDELLÍN,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

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MOTION TO RECALL AND STAY THE COURT'S MANDATE IN *MEDELLIN V. TEXAS*

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TABLE OF AUTHORITIES

Federal Cases:

Federal Statute:

To the Honorable Antonin Scalia, Circuit Justice for the Fifth Circuit:

Petitioner José Ernesto Medellín respectfully moves this Court to recall and stay its mandate in *Medellin v. Texas*, 128 S. Ct. 1346 (2008). The purpose of the recall is not to revisit the merits of the Court's judgment, but to grant the political branches a reasonable opportunity to act in accordance with that judgment. Having declared unconstitutional the Executive's attempt to comply with the *Avena* Judgment of the International Court of Justice without the aid of Congress, the Court should ensure that its judgment does not have the unintended effect of preventing the political branches from complying with the nation's treaty obligations.

FACTS AND PRIOR PROCEEDINGS

Mr. Medellín hereby incorporates by reference the statement of facts and prior proceedings set forth in his Petition for Writ of Certiorari and for a Writ of Habeas Corpus, filed herewith.

REASONS FOR GRANTING A RECALL OF THE MANDATE

The Court Should Recall The Mandate To Avoid An Irreparable Breach Of The Nation's Treaty Obligations And In The Interest Of Justice.

This Court has not hesitated to stay the issuance of its mandate to allow Congress an opportunity to act in a manner consistent with its decisions, particularly when Congressional action is necessary to implement valid enforcement mechanisms. For instance, after finding the 1978 Bankruptcy Reform Act unconstitutional and determining that it fell to Congress to "restructure[e] the [Act] to conform to the requirements of Art. III in the way that will best effectuate the legislative purpose," the Court stayed its

mandate in order to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 & n.40 (1982). Similarly, after deeming unconstitutional the conferral of certain powers on the Federal Election Commission, the Court stayed its judgment to "afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains, allowing the present Commission in the interim to function de facto in accordance with the substantive provisions of the Act." *Buckley v. Valeo*, 424 U.S. 1, 143 (U.S. 1976).

The Court also has recalled its mandate "in the interest of fairness." *See Cahill v. New York, New Haven & Hartford R.R. Co.*, 351 U.S. 183-84 (1956) (granting motion to recall and amend mandate to provide for remand of unresolved issue). Indeed, the Court's authority is broad, founded in 28 U.S.C. § 2106 as well as the inherent power of a court to recall a mandate to "avoid injustice." *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268, 277 (D.C. Cir. 1972) (as a matter of general doctrine, appellate courts have inherent authority to recall a mandate to avoid injustice); 28 U.S.C. § 2106 ("The Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.").

In cases involving election laws, for instance, the Court has been sensitive to the need to provide legislatures sufficient time to react to its judgments. In *Georgia v. United States*, 411 U.S. 526, 541 (1973), the Court affirmed the judgment of the district court enjoining the Georgia House of Representatives from conducting elections under a new reapportionment plan, and on remand, the Court instructed the district court to enjoin any future elections until the State complied with a requirement that it obtain federal approval of its districting plan. *See also Fortson v. Morris*, 385 U.S. 231, 235 (1966) (allowing state legislature to act even though it had been found malapportioned and was under court order to reapportion itself); *cf. Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 675-76 (1964) (not needing to reach question of remedy because "sufficient time exists for the Maryland Legislature to enact legislation reapportioning seats in the General Assembly prior to the 1966 primary and general elections.").

On July 14, 2008, Members of the U.S. House of Representatives, in response to this Court's decision settling the process required under the Constitution to give domestic force to the *Avena* Judgment, introduced the "Avena Case Implementation Act of 2008," "[t]o 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." 5a. The proposed bill specifically authorizes courts to provide "any relief required to remedy the harm done by the violation [of rights under Article 36 of the Vienna Convention], including the vitiation of the conviction or sentence where appropriate." *Id.* § 2(b)(2). But as the United States represented to the ICJ a short time ago, "[g]iven the short

legislative calendar for our Congress this year, it [will] not be possible for both houses of our Congress to pass legislation" implementing the *Avena* decision before Mr. Medellín's scheduled execution on August 5.

Likewise, Texas Senator Rodney Ellis has stated that he intends to introduce implementing legislation at the state level. 16a. But as he advised the Texas trial court that scheduled Mr. Medellín's execution, the Texas Legislature is not presently in session, and it will not reconvene until January 2009. In other words, the competent political actors have the necessary will, but need the time to implement.

Should Texas execute Mr. Medellín before Congress has a reasonable opportunity to convert the *Avena* Judgment into a justiciable federal right, the State of Texas will forever deprive Mr. Medellín of his constitutionally protected right not to be deprived of his life without due process of law. And by placing the United States in irreparable breach of its treaty commitments before Congress and the federal Executive can act to compel compliance, Texas effectively will usurp the institutional prerogative of the federal political braches—advocated by Texas and confirmed by this Court—to determine whether and how to give domestic legal effect to the treaty obligations of the Nation. This Court must not allow Texas to subvert Mr. Medellín's constitutional rights, the authority of Congress to determine compliance with *Avena*, and the Nation's credibility in world affairs by racing to execute Mr. Medellín before Congress has had an opportunity to act. *See* Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas or for Writ of Habeas Corpus, filed concurrently herewith, at Part 1.

This Court has warned that recall of a mandate to revisit the merits of a case carries the risk of impinging on the finality of judgments and should only be used in extraordinary circumstances. *Calderon v. Thompson*, 523 U.S. 538, 557 (1998). That concern is not implicated here. Mr. Medellín does not ask the Court to revisit the merits of his case. Instead, he asks the Court to recall and stay its mandate to ensure that its judgment has its intended effect of guiding the political branches to a constitutionally permissible method of complying with the Nation's treaty obligations.

CONCLUSION

For the foregoing reasons, Mr. Medellín respectfully requests that this Court (a) recall the mandate in *Medellín v. Texas*, and (b) stay further proceedings until Congress has had a reasonable opportunity to enact legislation consistent with this Court's decision in that case. By separate motion, Mr. Medellín respectfully requests that upon recall of the mandate, the Court stay his execution now scheduled for August 5, 2008.

Dated: July 31, 2008

Respectfully submitted,

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No. 08-_____

IN THE

Supreme Court of the United States

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 WRIT OF HABEAS CORPUS

APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF MOTION TO RECALL AND STAY THE MANDATE AND PETITION FOR WRIT OF CERTIORARI OR WRIT OF HABEAS CORPUS

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To the Honorable Antonin Scalia, Circuit Justice for the Fifth Circuit:

Petitioner José Ernesto Medellín respectfully submits this application for a stay of his execution, now scheduled for August 5, 2008, in the above entitled proceeding, pending resolution of his Motion to Recall and Stay the Court's Mandate in *Medellín v. Texas*, 128 S. Ct. 1346 (2008), and his Petition for Writ of Certiorari from the Texas Court of Criminal Appeals and for a Writ of Habeas Corpus.

These filings raise issues of extraordinary importance. As an initial matter, every Member of this Court, the President of the United States, and, indeed, the State of Texas have confirmed that Applicant José Ernesto Medellín has a right arising under treaty commitments voluntarily made by the United States not to be executed unless and until he receives the review and reconsideration specified by the International Court of Justice in its judgment in the *Avena* case. There is no dispute that if Texas executes Mr. Medellín in these circumstances, Texas would cause the United States irreparably to breach treaty commitments made on behalf of the United States as a whole and thereby compromise U.S. interests that both this Court and the President have described as compelling.

Federal and state actors at the highest levels of government are currently engaged in unprecedented efforts to bring the Nation into compliance by providing a judicial forum to grant him the review and reconsideration to which he is entitled. Members of the House of Representatives have introduced legislation, the Secretary of State and Attorney General have requested Texas to assist the United States in carrying out its international obligations, a Texas senator has committed to introducing legislation at the

earliest opportunity when the Texas Legislature reconvenes, and leaders of the diplomatic and business communities have warned that Mr. Medellín's execution could have grave consequences for Americans abroad. But as the United States informed the ICJ a few weeks ago, "[g]iven the short legislative calendar for our Congress this year, it [will] not be possible for both houses of our Congress to pass legislation" implementing the *Avena* decision.

Yet Mr. Medellín remains scheduled for execution on August 5, 2008, and to date, no Texas actor has taken steps to halt his execution. Should Texas carry out Mr. Medellín's execution before Congress has had a reasonable opportunity to implement this legislation, it will irreparably violate the nation's treaty obligations just as the appropriate political branches are attempting to prevent such a breach.

There are several factors unique to this case that compel the issuance of a stay.

First, Mr. Medellín's petition reflects unique and compelling circumstances weighing heavily in favor of a grant of a writ of certiorari or habeas corpus. Fundamental principles of due process under the Fourteenth Amendment dictate that Mr. Medellín cannot lawfully be executed in violation of a binding legal obligation arising from a treaty voluntarily entered into by the United States to provide him additional process in the form of review and reconsideration. To carry out a sentence of death when an undisputed legal obligation, albeit one not yet effective on the domestic level, remains unfulfilled would be antithetical to the very notion of lawful process. In these unique circumstances, this Court should exercise its discretion to grant a stay to fully consider the issues of extraordinary importance presented by his petition. *See* Petition for Writ of

Certiorari and for a Writ of Habeas Corpus, Part I.A, *Medellin v. Texas*, No. 08-__ (July 31, 2008).

Second, a stay of execution is necessary to preserve the ability of the political branches to comply with the nation's treaty obligations by the constitutional process settled by this Court in *Medellín v. Texas*, 128 S. Ct. 1346 (2008). Texas should not be permitted to impinge on the constitutional authority of Congress, as just confirmed by this Court, to give effect to the United States's obligations under Article 94(1) of the United Nations Charter to comply with the *Avena* judgment. *See* Petition for Writ of Certiorari and for a Writ of Habeas Corpus, Part I.B, *Medellin v. Texas*, No. 08-__ (July 31, 2008).

Third, the Court should grant a stay to vindicate the public's interest in preserving the United States's international standing and protecting the rights of Americans abroad. This Court has already recognized that the "United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law . . . are plainly compelling." *Medellin v. Texas*, 128 S. Ct. at 1361, 1367. By granting a stay, this Court will avoid an irreversible breach of the nation's international obligations and protect the welfare of all Americans who rely on the protections afforded by the Vienna Convention on Consular Relations and various other treaty regimes that would be implicated by the United States's breach here. The public interest could not be stronger in favor of a stay because the breach caused by Mr. Medellín's execution *could not be*

remedied. *See* Petition for Writ of Certiorari and for a Writ of Habeas Corpus, Part I.C, *Medellin v. Texas*, No. 08-__ (July 31, 2008).

Finally, a stay is also necessary to give "respectful consideration" to the findings and proceedings of the ICJ. The ICJ has issued provisional measures on July 16, 2008 calling on the United States to "take all measures necessary" to prevent Mr. Medellín's execution. The ICJ's provisional measures order was issued in connection with Mexico's request for interpretation of its 2004 *Avena* judgment. The ICJ has set an accelerated briefing schedule in the case, reflecting its appreciation of all parties' interest in a speedy resolution of Mexico's request. The United States's pleadings are currently due on August 29, and the ICJ will likely issue a decision on the merits before the end of 2008.

Another international body, the Inter-American Commission on Human Rights, has likewise issued precautionary measures calling upon the United States to prevent Mr. Medellín's execution. The Commission is the only body to have reviewed all of the evidence pertaining to the Vienna Convention violation in Mr. Medellín's case and to have done so under in a manner consistent with the *Avena* Judgment. Only days ago, the Commission issued a preliminary report concluding that he had been prejudiced by the Vienna Convention violation and recommending that he be granted a new trial as a result.

Under these circumstances, and for the additional reasons outlined below, a stay in this case is both warranted and necessary.

FACTS AND PRIOR PROCEEDINGS

Mr. Medellín hereby incorporates by reference the statement of facts and prior proceedings set forth in his Petition for Writ of Certiorari and for a Writ of Habeas Corpus, filed simultaneously herewith.

REASONS FOR GRANTING A STAY OF EXECUTION

I. The Court Should Exercise its Discretion to Grant a Stay of Execution.

A stay of execution is appropriate if an applicant makes a four-part showing: *first*, that there is a "reasonable probability" that four Justices of the Court will vote to issue a writ of certiorari; *second*, that there is a "fair prospect" that a majority of the Court will reverse the decision below; *third*, that irreparable harm will likely result if the stay is not granted; and *fourth*, that the "balance [of] the equities" weighs in favor of a stay, based on the relative harms to the applicant and respondent, as well as the interests of the public. *See Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). Where a stay is sought in conjunction with a petition for a writ of certiorari, as opposed to on direct appeal, "the consideration of prospects for reversal dovetails, to a greater extent, with the prediction that four Justices will vote to hear the case." *In re Roche*, 448 U.S. 1312, 1314 n.1 (1980) (Brennan, J., in chambers).

These general principles apply to cases on review in this Court from both state and federal courts. *See California v. Brown*, 475 U.S. 1301 (1986) (Rehnquist, J., in chambers) (applying these principles in granting stay of state court judgment invalidating a death sentence); *In re Roche*, 448 U.S. at 1314 (granting stay of state court mandate,

following denial of stay by state court). The Court has never had occasion to consider these principles in connection with a motion to recall and stay its mandate.

A. Mr. Medellín Meets Both the "Reasonable Probability" and "Fair Prospect" Prongs of the Standard.

The issues presented in the accompanying motion to recall the mandate and petition for writ of certiorari raise compelling questions of extraordinary importance, including:

1. Whether Mr. Medellín's Fourteenth Amendment right not to be deprived of his life without due process of law entitles him to remain alive until Congress has had a reasonable opportunity to exercise its constitutional prerogative to implement the right to judicial review and reconsideration under *Avena and Other Mexican Nationals*, so that he can secure access to a remedy to which he is entitled by virtue of a binding international legal obligation of the United States;

2. Whether the Court should grant a writ of habeas corpus to adjudicate Mr. Medellín's claim on the merits, where he seeks relief pursuant to a binding international legal obligation that the federal political branches seek to implement, and where adequate relief cannot be obtained in any other form or from any other court; and

3. Whether the Court should recall and stay its mandate in *Medellín v. Texas,* 128 S. Ct. 1346, not to revisit the merits, but to allow Congress a reasonable opportunity to implement legislation consistent with the Court's decision in that case.

As an initial matter, this Court has now settled the constitutional processes that must be undertaken for the United States to comply with its international legal obligation to comply with the *Avena* judgment. In *Medellin v. Texas*, this Court held, *first*, that the Article 94(1) obligation to comply with *Avena* was not self-executing so as to allow a court in the United States to enforce it, and, *second*, the President acted beyond his authority when he ordered that the United States would comply with the obligation by

having state courts provide the required review and reconsideration. *Medellin v. Texas*, 128 S. Ct. 1346, 1366 (2008). The Court has held that, instead, action by the federal political branches is needed to render the *Avena* decision enforceable in Mr. Medellín's case. *Id.* at 1366 ("Congress is up to the task of implementing non-self-executing treaties."); *see also id.* at 1369, 1371 (noting action by Congress and/or by the President); *id.* at 1374 (Stevens, J., concurring in judgment) ("[T]he fact that the President cannot legislate unilaterally does not absolve the United States from its promise to take action necessary to comply with the ICJ's judgment.").

In response, the "Avena Implementation Act of 2008" has been introduced in the House of Representatives to confer on Mr. Medellín the right to judicial review and reconsideration mandated by the ICJ. 5a-6a. Such relief would include "any declaratory or equitable relief necessary to secure the rights," and "any relief required to remedy the harm done by the violation [of his consular rights], including the vitiation of the conviction or sentence where appropriate." *Id.* § 2(b). Texas State Senator Rodney Ellis also has said that he will propose implementing legislation at the state level as soon as the Texas legislature reconvenes in January 2009. *See* 15a-16a. And negotiations at the highest levels of the federal and state executives continue to settle upon a means of compliance. *See* 80a-83a.

The fact that additional time is required for the political branches to give the *Avena* Judgment domestic legal effect should not operate to deprive Mr. Medellín of his undisputed rights, particularly where his very life hangs in the balance. Simply put, Mr. Medellín cannot be executed consistent with a binding legal obligation arising from a

treaty voluntarily entered into by the United States to provide him additional process in the form of review and reconsideration. As a matter of law, therefore, his execution would violate the most fundamental objectives of the due process clause. *See* Pet. for Writ of Certiorari or for Writ of Habeas Corpus, Part I, *Medellin v. Texas*, No. 08-__ (July 31, 2008).

While Mr. Medellín's ability to demonstrate prejudice has no bearing on his entitlement under international law to the procedural remedy of review and reconsideration—which is undisputed—the remedy would not be an empty exercise. The undisputed violation of his Vienna Convention rights in his case goes to the very heart of the validity of his conviction and sentence. Evidence submitted to the court below but never considered by it or any other U.S. court on the merits establishes that during the investigation and prosecution of Mr. Medellín's case, his defense attorney was under a six-month suspension from the practice of law, was jailed prior to trial for seven days for violating his suspension, and indeed, less than three weeks before the beginning of Mr. Medellín's trial, was forced to file a writ of habeas corpus *on his own behalf* in order to keep himself out of jail. *See* Second Subsequent Application for Post-Conviction Writ of Habeas Corpus at 40, *In re Medellin*, No. __ (Tex. Crim. App. July 28, 2008). Billing records indicate that the sole investigator for the defense spent *a total of eight hours* on the case prior to trial, including time spent with Mr. Medellín. *Id.* at 41. Had Mr. Medellín received review and reconsideration, he would have been able to demonstrate that if the Mexican consulate had been notified of his detention *before* he was tried and convicted, the consulate would have rendered material assistance. *Id.* at 38-39, 46-47.

Indeed, the Inter-American Commission on Human Rights, the only tribunal to consider Mr. Medellín's claim of prejudice resulting from the Vienna Convention violation on the merits using a standard consistent with the *Avena* Judgment, has determined that he was prejudiced and that due process demanded a new trial. *Id.* at 34-36.

As the United States has acknowledged, Mr. Medellín has yet to receive the requisite review and reconsideration mandated by *Avena*, notwithstanding the alternative prejudice findings by the Texas Court of Criminal Appeals and the federal district court in his first habeas applications. *See* 98a ("[The previous holdings] do[] not give full and independent weight to the treaty violation, which is what *Avena* requires and which is what the President has directed.").[1] Justice Breyer, writing also on behalf of Justices

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[1] The Texas trial court considering Mr. Medellin's first habeas application found, in its consideration of the merits of the Vienna Convention violation, that Mr. Medellin "fail[ed] to show foreign nationality which requires notification of a foreign consulate" and could not show that the violation affected the constitutional validity of his conviction and sentence. *See* Second Subsequent Application for Post-Conviction Writ of Habeas Corpus at 6, 33-34, *In re Medellin*, No. __ (Tex. Crim. App. July 28, 2008). That decision was before the ICJ when it issued *Avena*. Not only does it apply the wrong standard, but any finding on nationality or prejudice could not trump the obligation under that judgment to prospectively review and reconsider the conviction and sentence. Mr. Medellin recognizes that in *Medellin v. Texas*, slip op at 5 n.1, this Court suggested, in dictum on a point not at issue in the case, that he had "likely waived" any claim that he had been deprived of the assistance of Mexican consular officers in developing mitigation evidence. The ICJ judgment in *Avena*, however, requires that the Mexican nationals subject to the judgment be given a full, prospective opportunity to present all evidence relevant to the issue of prejudice. *See* Second Subsequent Application for Post-Conviction Writ of Habeas Corpus at 6-7, *In re Medellin*, No. __ (Tex. Crim. App. July 28, 2008). Hence, only if Mr. Medellin is given that opportunity to put on that evidence would the United States fulfill its treaty obligation under Article 94(1) of the United Nations Charter and Avena. Mr. Medellin respectfully suggests that, if given an opportunity to fully consider that issue on the merits, a court would so hold.

Souter and Ginsburg, noted: "While Texas has already considered [whether the police failure to inform Medellin of his Vienna Convention rights prejudiced Medellin], it did not consider fully, for example, whether appointed counsel's coterminous 6-month suspension from the practice of the law 'caused actual prejudice to the defendant'--prejudice that would not have existed had Medellin known he could contact his consul and thereby find a different lawyer." *Medellin v. Texas*, 128 S. Ct. at 1389-1390 (Breyer, J., dissenting).

To allow an execution to proceed in these circumstances, before a U.S. court can consider his claims, cannot be said to be "based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (opinion of Stevens, J.) ("[D]eath is a different kind of punishment from any other which may be imposed in this country" and it is thus "of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."). Although the nature of the death penalty alone does not justify a stay in every instance, "a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding." *Barefoot v. Estelle*, 463 U.S. at 888.

B. The Balance of Equities Strongly Weigh In Favor of A Stay of Execution.

Here, the balance of equities could not be stronger in favor of a stay of execution. There can be no doubt that the paramount interest in human life is at stake here and that that interest would be irreparably harmed if Mr. Medellín were to be executed without

having received the review and reconsideration to which he is entitled. In that event, Mr. Medellín would forever be deprived of the opportunity to vindicate his rights. *See, e.g., Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) ("[T]hat irreparable harm will result if a stay is not granted . . . is necessarily present in capital cases."). But Mr. Medellín's execution would go far beyond the confines of his individual case; his case raises unique circumstances implicating the public interest that make the grant of a stay imperative not only to maintain the standing of the United States in its international relations, but also to protect the lives of countless Americans living, working and traveling abroad.

First, Mr. Medellín would suffer the gravest possible form of irreparable injury were he to be put to death before having a chance to be afforded the protections to which he is undisputedly entitled by virtue of the treaty obligations of the United States. Members of the House of Representatives have taken the first step towards compliance by proposing the "Avena Implementation Act of 2008," which would confer on Mr. Medellín the right to raise in domestic courts what all entities agree is an undisputed international legal obligation. This Court interpreted the scheme of Article 94 of the United Nations Charter to preserve to the political branches the "option of noncompliance"—specifically, their ability "to determine whether and how to comply with an ICJ judgment." *Medellin v. Texas*, 128 S. Ct. at 1360. Texas should not be allowed to deprive the Executive and Congress of the opportunity to comply by rushing to execute Mr. Medellín before they have been able to act and thereby placing the United States in irreparable breach. As a result of the irreparable injury not only to Mr. Medellín,

but also to the institutional interests of both the Executive and Congress, the equities weigh heavily in favor of a stay.

Second, compared with the irremediable loss of a human life and the paramount federal interests at stake, any prejudice that Texas might suffer due to a delay in Mr. Medellín's execution would be inconsequential. Mr. Medellín would remain incarcerated on death row, as he has been for over fourteen years. While Texas has a legitimate interest in implementing its criminal laws, a further delay equal to the length of time needed to implement the *Avena* Judgment could hardly constitute a hardship to Texas.

Indeed, far from harming Texas, a stay of execution is apt given Texas's role in the treaty violation itself. As Justice Stevens stated in *Medellin v. Texas*, "Texas' duty [to protect the honor and integrity of the Nation] 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." *Medellin v. Texas*, 128 S. Ct. at 1374 (Stevens, J., concurring). "Having already put the Nation in breach of one treaty," Justice Stevens wrote, "it is now up to Texas to prevent the breach of another." *Id.*

Third, the repercussions of Mr. Medellín's execution in violation of the *Avena* Judgment would be felt far beyond the borders of Texas, damaging the United States's relations with its treaty partners, eroding our allies' confidence in the ability of the United States to live up to its international commitments, and potentially endangering thousands of Americans overseas who require the assistance of U.S. consulates. The public interest in affording Congress the opportunity to effect compliance with *Avena* is thus profound.

The President, who shoulders the primary responsibility for our nation's foreign relations, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), has set forth the critical U.S. interests at stake in this case. In an amicus brief submitted to the Court, the United States cited two principal foreign policy considerations prompting the President's 2005 decision to direct state courts to provide review and reconsideration: "the need for the United States to be able to protect Americans abroad" and the need to "resolve a dispute with a foreign government by determining how the United States will comply with a decision reached after the completion of formal dispute-resolution procedures with that foreign government." Br. for the United States as Amicus Curiae Supporting Respondent at 43, 45, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). In light of these objectives, the President considered it in the "paramount interest of the United States" to achieve "prompt compliance with the ICJ's decision with respect to the 51 named individuals" including Mr. Medellín. *Id.* at 41.

All nine Justices of this Court recognized that the United States has a vital public interest in complying with its obligations under the *Avena* Judgment. Writing for the majority, Chief Justice Roberts noted that

> In this case, the President seeks to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law. These interests are plainly compelling.

Medellin v. Texas, 128 S. Ct. at 1367. In a concurring opinion, Justice Stevens agreed that "the costs of refusing to respect the ICJ's judgment are significant." *Id.* at 1375. And Justice Breyer, joined by Justices Souter and Ginsburg, observed in his dissenting

opinion that noncompliance with the *Avena* Judgment would exact a heavy toll on the United States by "increase[ing] the likelihood of Security Council *Avena* enforcement proceedings, [] worsening relations with our neighbor Mexico, [] precipitating actions by other nations putting at risk American citizens who have the misfortune to be arrested while traveling abroad, or [] diminishing our Nation's reputation abroad as a result of our failure to follow the 'rule of law' principles that we preach." *Id.* at 1391.

As noted, the rights and obligations set forth in Article 36 of the Vienna Convention are entirely reciprocal in nature. And the risks of noncompliance, well-known to those entrusted with carrying out the nation's foreign relations, are severe. As Ambassador Jeffrey Davidow, who holds the rank of Career Ambassador (the highest rank available to diplomats) and served as an ambassador for the United States in the administrations of Presidents Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush, observed:

> 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 …. 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.

99a, ¶ 3.

For these reasons, failure to comply with the *Avena* Judgment "would significantly impair the ability of American diplomats to advance critical U.S. foreign policy." *Id.* The importance of the United States's compliance to the United States's treaty partners is dramatically illustrated here by the submission in 2007 of amicus briefs from *sixty countries* urging compliance in *Medellin v. Texas*. *See* Br. of Amici Curiae the European Union and Members of the Int'l Community in Support of Petitioner, *Medellin v. Texas*, 128 S. Ct. 1346 (No. 06-984) (forty seven nations and the European Union); Br. Amicus Curiae of the Government of the United Mexican States in Support of Petitioner José Ernesto Medellín, *Medellin v. Texas*, 128 S. Ct. 1346 (No. 06-984) (Mexico); Br. of Foreign Sovereigns as Amici Curiae in Support of Petitioner José Ernesto Medellín, *Medellin v. Texas*, 128 S. Ct. 1346 (No. 06-984) (twelve nations); *see also* 101a-122a.

There can be no doubt, moreover, that the consular rights afforded by the Vienna Convention are critical to the safety and security of Americans who travel, live and work abroad: missionaries, Peace Corps volunteers, tourists, business travelers, foreign exchange students, members of the military, U.S. diplomats, and countless others. Timely access to consular assistance is crucially important whenever individuals face prosecution under a foreign and often unfamiliar legal system. The United States thus insists that other countries grant Americans the right to prompt consular access.[2] For

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[2] U.S. consulates provide arrested Americans with a list of qualified local attorneys, explain local legal procedures and the rights accorded to the accused, ensure contact with family and friends, protest any discriminatory or abusive treatment, and monitor their well-being throughout their incarceration. *See* U.S. Department of State, Assistance to U.S. Citizens Arrested Abroad, http://travel.state.gov/travel/tips/emergencies/emergencies_1199.html.

example, in 2001, when a U.S. Navy spy plane made an emergency landing in Chinese territory after colliding with a Chinese jet, the State Department cited the Vienna Convention in demanding immediate consular visits to the plane's crew. *See* State Department Daily Press Briefing, April 2, 2001, *available at* http://www.state.gov/r/pa/prs/dpb/2001/1889.htm. Chinese authorities granted consular visits to the crew members, who were detained in China for eleven days. During the tense standoff, the U.S. Ambassador to China emphasized that these rights of immediate and unobstructed consular access to detained American citizens are "the norms of international law," *China grants U.S. access to spy plane crew*, CNN, April 3, 2001, while the President warned that the failure of the Chinese government "to react promptly to our request is inconsistent with standard diplomatic practice and with the expressed desire of both our countries for better relations[,]" Statement by the President on American Plane and Crew in China, The White House, April 2, 2001, *available at* http://www.whitehouse.gov/news/releases/2001/04/20010402-2.html.

The business community is similarly concerned about the consequences of noncompliance with the *Avena* Judgment. In a letter to House Speaker Nancy Pelosi urging Congress to pass legislation implementing *Avena*, Peter M. Robinson, President and CEO of the United States Council for International Business observed that

> 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 . . . . 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.

123a. Accordingly, Mr. Robinson wrote: "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." 124a.

Key international observers have likewise observed the importance to the United States of achieving compliance with *Avena*. In particular, Professor Phillip Alston, who serves as the United Nations Human Rights Council Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, recently singled out the lack of compliance with the *Avena* Judgment as an issue of particular concern:

> 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.

128a. Professor Alston further noted that non-compliance with *Avena* threatens to undermine other treaty regimes involving such varied subjects as trade, investment and the environment. "Why," he queried, "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." 127a-128a.

Simply put, if Texas places the United States in breach of its treaty obligations, the risk that our treaty partners will suspend compliance with their obligations under those same treaties increases dramatically. Such a response could compromise, among other things, the crucial rights of consular notification and assistance of all American citizens abroad. With thousands of Americans arrested or detained abroad every year, *see* 100a, ¶ 4, that risk is palpable. Indeed, "[i]f 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." *Id.* Allowing Mr. Medellín's execution to proceed in contravention of the United States's obligations under the *Avena* Judgment, when steps to implement that obligation consistent with this Court's guidance are in process, would also send the message that the United States is indifferent not only to the rule of law but to human life itself.

C. The Court Should Grant a Stay in the Interest of Comity.

The ICJ is currently considering Mexico's Request for Interpretation of the *Avena* Judgment. In conjunction with its Request for Interpretation, Mexico also requested that the ICJ grant provisional measures of protection in respect of Mr. Medellín and four other Mexican nationals named in the *Avena* Judgment who are currently on Texas's death row. The ICJ granted Mexico's request for provisional measures on July 16, 2008, directing

the United States to "take all measures necessary to ensure that Messrs. José Ernesto Medellín Rojas [and the four other Mexican nationals] 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 [*Avena*] Judgment." 38a, ¶ 80(a). The ICJ has set an accelerated briefing schedule in the case, reflecting its appreciation of all parties' interest in a speedy resolution of Mexico's request. The United States's pleadings are currently due on August 29, and the ICJ will likely issue a decision on the merits before the end of 2008.

The Court should stay Mr. Medellín's execution both out of respect for the ICJ's order of provisional measures and to allow the ICJ an opportunity to consider and resolve Mexico's Request for Interpretation. The United States led the effort to create the ICJ, and has not hesitated to avail itself of the Court, initiating ten cases as an applicant or by special agreement with another state. *See* International Court of Justice, Contentious cases ordered by countries involved, United States of America, http://www.icj-cij.org/docket/index.php?p1=3&p2=3&p3=1&p=US. Indeed, the United States was the first State to invoke the Optional Protocol, when it sued Iran in 1979 on claims, among others, of breach of the Vienna Convention. *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7 (Provisional Measures Order of Dec. 15); 1980 I.C.J. 3 (Judgment of May 24).

This Court now has repeatedly held that the decisions of the ICJ are entitled to "respectful consideration." *Medellin v. Texas*, 128 S. Ct. at 1361 n.9 (quoting *Breard v.*

Greene, 523 U.S. 371, 375 (1998)); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 355-56 (2006).[3] But to execute Mr. Medellín when the ICJ is still considering the merits of Mexico's request would convey nothing but disrespect for the tribunal's professionalism and competence. The interest of Mr. Medellín, as an individual whose very life is at stake, in enforcing his procedural rights, and the public interest in preserving the commitment of the United States to the rule of law in a sensitive matter involving relations with one of our closest neighbors, provide compelling reasons to extend comity to the ICJ's proceedings.[4]

Comity is likewise due to the Inter-American Commission on Human Rights, which recently adjudicated a petition filed by Mr. Medellín on November 21, 2006,

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[3] Mr. Medellin recognizes that in *Breard v. Greene*, 523 U.S. 371, 378 (1998) and *Fed. Republic of Germany v. United States*, 526 U.S. 111, 111 (1999), this Court declined to stay executions in cases in which the International Court of Justice had issued provisional measures. In neither of those cases, however, had the ICJ reached a final judgment prescribing relief, and in neither of those cases had the President determined that the United States should comply or had Congress begun steps to effect compliance.

[4] As the Court explained in *Hilton v. Guyot*, 159 U.S. 113 (1895), comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Id.* at 163-64. Under the principle of comity and similar doctrines, the Court has repeatedly counseled respect for the competence of international or foreign courts and the efficacy of their proceedings. *See*, *e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985) (agreement to arbitrate before foreign arbitral tribunal enforced); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22, 257-61 (1981) (action dismissed in favor of foreign court under doctrine of forum non conveniens); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8-9 (1972) (agreement to litigate before foreign court enforced); *Ritchie v. McMullen*, 159 U.S. 235, 243 (1895) (foreign judgment enforced under Hilton comity rule).

raising the violation of his consular rights and several violations of the 1948 Declaration of the Rights and Duties of Man. As discussed above, the Commission issued precautionary measures calling upon the United States to take all measures necessary to preserve Mr. Medellín's life pending the Commission's investigation of the allegations raised in his petition. At a March 7, 2008 hearing before the Commission in Washington, D.C., representatives of the U.S. Department of State noted that the United States was complying with those precautionary measures.

The Commission has now issued its findings, making it the first adjudicative body to consider whether Mr. Medellín was prejudiced in his 1994 trial by the violation of his rights to consular notification and assistance under a standard consistent with that mandated by the ICJ.[5] The Commission concluded that he was prejudiced, and recommended that the United States vacate his death sentence and provide him with a new trial. 65a, ¶ 128; 72a, ¶ 160. In addition, the Commission reinstated the precautionary measures it had issued, calling upon the United States to preserve Mr. Medellín's life pending the implementation of its recommendations. 71a, ¶ 159.

This Court should stay Mr. Medellín's execution in the interest of comity to permit the United States to give effect to the Commission's recommendations and the precautionary measures issued in respect thereof. To disregard the finding of prejudice by an esteemed body of experts, whose authority the United States fully recognizes, on

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[5] As discussed in Mr. Medellín's Second Subsequent Application, the alternative prejudice findings made by the trial court and adopted by this Court in connection with Mr. Medellín's initial habeas application failed to independently analyze the Vienna Convention violation. *See* Second Subsequent Application at Part II.A.

the basis of facts never before considered on the merits by any domestic court would signal profound disrespect for the Commission and Mr. Medellín's inalienable right not to be deprived of his life without due process of law.

CONCLUSION

For the foregoing reasons, Mr. Medellín respectfully requests that this Court grant him (a) a stay of execution, now scheduled for August 5, 2008, pending resolution of his petition for a writ of certiorari and, if the writ is granted, further order of the Court, or (b) in the alternative, an order temporarily enjoining respondent Texas officials from carrying out the execution subject to the same terms.

Respectfully submitted,

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Dated: July 31, 2008

Nos. 08-5573, 08-5574, 08A98 & 08A99

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

In re JOSÉ ERNESTO MEDELLÍN,

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS AND ON PETITION FOR WRIT OF HABEAS CORPUS

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AND TO RESPONSE TO PETITION FOR HABEAS CORPUS, MOTION TO RECALL AND STAY MANDATE, AND APPLICATION FOR STAY OF EXECUTION

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Texas focuses on the unfinished state of the legislative process of implementing *Avena* and argues that Mr. Medellín has made no showing of a constitutional right. Texas, in particular, argues that Mr. Medellín's petition would mean that "a single member of the House of Representatives" could obtain a stay of execution merely by introducing legislation. BIO at 8-9. Texas argues that Mr. Medellín is no different from any other prisoner who might benefit from prospective legislation. BIO at 10.

But Texas wholly overlooks that the United States has an existing legal obligation to comply with the *Avena* judgment, and that this Court recently made clear that Congressional action is the mechanism for compliance with the judgment. Remarkably, Texas attaches no significance whatsoever to the ICJ's judgment in *Avena* adjudicating the international legal obligation of the United States. Nor does Texas attach any importance to the treaty ratified by the President and Senate making compliance with the judgment an international legal obligation, to the federal Executive's recognition that that judgment creates a binding international legal obligation, or to this Court's recognition that compliance with that undisputed international legal obligation is a "compelling" federal interest. *Medellín v. Texas*, 128 S. Ct. 1346, 1367 (2008). Texas also dismisses, as irrelevant, the action by the President declaring that it was in the paramount interest of the United States to comply with its treaty obligation to abide by the *Avena* judgment, the efforts by the Executive to urge Texas to comply voluntarily in the wake of this Court's decision in *Medellín v. Texas*, and the actions by members of the Congressional leadership—including the chairpersons of the House Judiciary Committee and House Foreign Relations Committee—seeking to implement the *Avena* judgment through domestic legislation

once this Court made clear in *Medellín v. Texas* that legislation was necessary before the courts would enforce the treaty in domestic law.

At its most basic, due process guarantees to a criminal defendant a right not to be deprived of "fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236 (1941). Contrary to what Texas suggests, Mr. Medellín's due process right not to be executed before a mechanism for implementing the *Avena* judgment is in place not only is consistent with this Court's opinion in *Medellín v. Texas*; it is a direct consequence of it. In *Medellín v. Texas*, this Court held that the Constitution requires that the implementation of the United States's undisputed treaty obligation under Article 94(1) should come from Congress. *See* 128 S. Ct. at 1356, 1366, 1368-71. In direct response to this Court's decision, which held for the first time that such legislative implementation was necessary as to the *Avena* judgment, members of the leadership of the House of Representatives have introduced the Avena Case Implementation Act of 2008, H.R. 6481, 110th Cong., 2d Sess (5a-6a). The stated purpose of that legislation is 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." *Id.*, long title (5a).

Texas is proposing, for the first time in our Nation's history, to proceed with an execution that is undisputedly illegal under a binding international legal obligation of the United States.[1] Because significant "difficulties attend[] the notion that due process of law can be embodied in fixed rules," *United States v. Russell*, 411 U.S. 423, 431 (1973), the Court must look to basic principles of fundamental fairness in explicating the scope of due process in these novel

[1] By contrast, in *Breard v. Greene*, 523 U.S. 371 (1998), and *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999), the ICJ had not yet rendered a final judgment, and the United States disputed that the type of ICJ order at issue in those cases was legally binding.

circumstances. *See Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) ("fundamental fairness" is the "touchstone of due process"); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."). "'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961), in turn quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 162-163 (1951) (Frankfurter, J., concurring)).

In these circumstances, it would violate Mr. Medellín's right not to be deprived of his life without due process of law were he to be executed as scheduled on August 5. Texas's attempt to reduce the argument to one about possible future legislation ignores that the obligation to comply with *Avena* is a real, existing, legal obligation binding on the United States, which this Court only recently held falls to Congress to implement. To allow Texas to execute Mr. Medellín now, when the enforcement mechanism identified by this Court in his own case has not yet been given even a chance to work, would run counter to the requirement of fundamentally fair procedure that forms the core of the Fourteenth Amendment's due process clause.

II. Texas Ignores Entirely the U.S. Constitutional Scheme for Congressional Enforcement of Article 94(1) of the United Nations Charter as Expounded by This Court in *Medellín v. Texas*.

Texas argues that to grant relief to Mr. Medellin would be contrary to this Court's holding in *Medellin v. Texas*, 128 S. Ct. 1346 (2008). Texas is wrong. To the contrary, Texas's unseemly rush to execution can only be described as open defiance of—and an attempt to frustrate—the constitutional process of legislative treaty implementation that this Court prescribed in *Medellín v. Texas.* In that decision, this Court emphasized that the possibility that a treaty "might not automatically become domestic law hardly means the underlying treaty is 'useless'" because "Congress is up to the task of implementing non-self-executing treaties." *Id.*

at 1365-66. The Court also held that Congress has authority to implement ICJ judgments either judgment by judgment or on a blanket basis. *Id.* at 1365. Although Texas argues that some significance should be attributed to the absence of Congressional action in the four years since the *Avena* judgment, Congress in fact had no reason to believe implementing legislation was necessary until this Court issued its recent decision in *Medellín v. Texas.*

Indeed, just three days ago, on August 1, 2008, the leadership of the Committee on the Judiciary—including its Chairman and the respective Chairmen of the Subcommittees on the Constitution, Civil Rights, and Liberties and on Crime, Terrorism, and Homeland Security—appealed to Texas Governor Rick Perry to stay Mr. Medellín's execution while Congress works "to implement procedures to effectuate our treaty obligations." Supplemental Appendix, 139a-140a. Their letter made clear that the Avena Case Implementation Act of 2008 was introduced in response to the decision in *Medellin v. Texas*, wherein "the Supreme Court determined that Congress has the legislative authority to authorize the judicial review directed [in the *Avena* Judgment], and to ensure compliance with this legal obligation across the United States." *Id.* The letter further affirmed the observation, made by this Court and many others, that "compliance with the Vienna Convention is a critical aspect of national security and foreign policy, including the reciprocal treatment of U.S. persons overseas." *Id.* And, as previously noted, Secretary of State Rice and Attorney General Mukasey also urged Texas to abide by the international-law obligations of the United States to comply with the *Avena* judgment.

Yet, far from acknowledging the need to stay its hand to allow Congress to act, Texas filed its brief in this Court today, arguing that it should be allowed to proceed to Mr. Medellín's execution. The State would have this Court conclude that the "momentum of the death machine in Texas," *Ex parte Alba*, 2008 Tex. Crim. App. LEXIS 691, at *28 (June 9, 2008) (Price, J.,

dissenting), must not yield even to allow Congress a reasonable opportunity to act where paramount national interests and fundamental constitutional rights hang in the balance. Texas, however, does not act in isolation when the international obligations of the United States are involved; the United States as a whole is responsible for the consequences. *See, e.g., Chy Lung v. Freeman*, 92 U.S. 275, 279-80 (1876) (United States government is answerable internationally for treaty breaches by the states, and the consequences of such breaches fall upon not just one state but "all the Union"). This Court's decision in *Medellín v. Texas* does not question the long-settled principle that international relations is exclusively a federal responsibility, *see, e.g., United States v. Belmont*, 301 U.S. 324, 331 (1937), *Chy Lung*, 92 U.S. at 280, but merely clarifies the allocation of that responsibility among the federal executive, judicial and legislative branches.

Particularly given the shortened legislative calendar this year as a result of the upcoming party conventions, Congress has not yet had a reasonable opportunity to perform its constitutionally assigned function as explicated by this Court in *Medellín v. Texas.* Petitioner requests that, in these circumstances, the mandate in his case be stayed for a period of one year to allow Congress an opportunity to enact implementing legislation in the next session of Congress that would implement the international obligations of the United States in accordance with this Court's decision.

III. Texas's Argument That Mr. Medellín Has Already Received Review and Reconsideration, If Accepted, Would Leave the United States in Breach of Its International Obligations.

Texas argues that the state trial court on collateral review already complied with *Avena* because Mr. Medellín raised a Vienna Convention claim in 2001, before *Avena* was decided, and the trial court rejected it. *See* BIO Appx. A. Texas's position, however, misstates both the state trial court's decision and the requirements that the ICJ set forth in *Avena*.

The state trial court decision to which Texas refers concluded that any violation of Article 36 of the Vienna Convention in Mr. Medellín's case did not "impact on the validity of his conviction and sentence" under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution. BIO Appx. A, Conclusions of Law, ¶ 17. The *Avena* judgment, however, requires that the Article 36 violation must be reviewed on its own terms and must not be required to also qualify as a violation of a constitutional right. *Avena* ¶¶ 122, 134, 138-40. The review must be capable of effectively "examin[ing] the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." *Id.* ¶ 122. But the state court did not take account of whether the Article 36 violation prejudiced Mr. Medellín in his conviction or sentence, because it focused solely on whether it resulted in a violation of his U.S. constitutional rights.

Indeed, the *Avena* Judgment itself rejected Texas's contention: the ICJ was well aware of the state trial court's review of Mr. Medellín's Vienna Convention claim, as the trial court's findings of fact and conclusions of law were submitted to the ICJ and discussed by both parties in their briefing. *See* Brief Amicus Curiae of the Government of the United Mexican States at 23-24, *Medellín v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). On this record, the ICJ rejected the argument of the United States that it was already in compliance with the required remedy. *Avena* ¶¶ 130-134, 153(9).

As a result, the United States has recognized—as it must—that the existing record does not suffice to comply with *Avena*. The United States pointed out at oral argument in the Texas Court of Criminal Appeals that the prior state-court review did not comply with *Avena*'s review and reconsideration requirement, because the prior review "d[id] not give full and independent weight to the treaty violation, which is what *Avena* requires." Exhibit 14 in the court below, at

49: 8-11. And just a few weeks ago, the United States represented to the ICJ that "[t]here is no question that if a death sentence were carried out in any of these cases [including Mr. Medellín's] without the required review and reconsideration, this would be inconsistent with the *Avena* judgment," 92a ¶ 27, and that steps remained to be taken to give effect to the *Avena* judgment in these cases, 90a ¶ 4. In effect, Texas is seeking to impeach the United States government's representations to the Texas Court of Criminal Appeals and the ICJ, expressing the considered and consistent view of the United States government, despite this Court's holding that "[i]t is well settled that the United States' interpretation of a treaty 'is entitled to great weight.'" *Medellín v. Texas*, 128 U.S. at 1361.

Not surprisingly, the Texas Court of Criminal Appeals does not even suggest, in its 2005 or 2008 decision, that the earlier state collateral review proceeding might constitute the "review and reconsideration" that *Avena* requires, even though Texas made essentially the same argument in the 2005 proceedings that it makes here. Judge Cochran of that court, in a concurring statement cited by Texas, argued that review and reconsideration was likely to lead to a finding of no prejudice, and pointed to earlier decisions rejecting Mr. Medellín's constitutional claim of ineffective assistance of counsel, but she did not conclude that the review and reconsideration required by *Avena* had already occurred. Similarly, this Court's footnote in *Medellín v. Texas* noted some arguments that Texas could raise in opposition to a finding of prejudice, but expressly declined to "consider whether Medellin was prejudiced in any way by the violation of his Vienna Convention rights," and did not suggest that Mr. Medellín had previously received a determination as to prejudice in compliance with *Avena*. *Medellín v. Texas*, 128 S. Ct. at 1355 n.1. Texas has also previously argued to this Court that Mr. Medellín already received the review and reconsideration required by *Avena*, and this Court, like the Texas Court

of Criminal Appeals, has ever endorsed that view. As noted, any suggestion that such prior review might comply with *Avena* is foreclosed by the fact that the ICJ specifically held in *Avena* that Mr. Medellín had not received the review and reconsideration that would be required to remedy the Vienna Convention violation in his case.

Finally, Texas's speculation that review and reconsideration would show that Mr. Medellín was not prejudiced by the Vienna Convention violation in his case not only is irrelevant to the legal obligation to provide review and reconsideration but is contradicted by the facts in the record. Resp't Br. at 12-16. Mr. Medellín did not know, nor did anyone attempt to inform him, of his right to consular assistance. *See* Second Subsequent Application for Post-Conviction Writ of Habeas Corpus, Ex. 19, ¶¶ 3-5, *In re Medellin*, No. WR-50,191-03 (Tex. Crim. App. July 28, 2008). It is unquestioned that Mexico would have provided substantial assistance to Mr. Medellín, as it has for many Mexican nationals in his position, had the consulate been aware of his case. *Id.* Ex. 21, ¶¶ 25-34.

In lieu of careful review and reconsideration of the entire record, however, Texas would have this Court assume prejudice based on the incorrect standard and incomplete record that characterized the state and federal post-conviction findings. Yet the record as it stands now establishes that Mr. Medellín was represented at trial by a lawyer whose performance, even in the pantheon of ineffective lawyers known to this Court, was grossly deficient. It is not contested that Mr. Millin continued to represent Mr. Medellín while suspended from the practice of law, that Mr. Millin was occupied with defending himself against criminal charges when he should have been preparing to defend Mr. Medellín, that Mr. Millin was suffering from serious health problems that resulted in his death shortly after Mr. Medellín's trial, and that only four hours were spent on investigation prior to the commencement of jury selection. *See id.* at 40-41

& Ex. 30, ¶ 24. Indeed, the record before the court below documents in excruciating detail how Mr. Millin repeatedly violated the terms of his suspension, was booked into jail on contempt charges, and spent years trying to defend his license and keep himself from serving additional jail time. Around this time, he was diagnosed with a cancer that led to his death two years later. Not surprisingly, Mr. Millin was not focused on defending his client against capital murder charges. He presented only the most perfunctory penalty phase case; the highlight was a psychologist who had never before met Mr. Medellín.

The evidence also shows that if the Mexican Consulate had been involved at the time of the trial, it would have monitored Mr. Millin's performance and provided him assistance in investigating Mr. Medellín's case or retained different counsel for Mr. Medellín upon perceiving his deficiencies. *See id.* at 38-39, 45-47. It goes without saying that the quality of counsel is the single most important fact in determining whether a defendant receives the death penalty. But Mexico would have done more than that: it would have ensured that counsel had funds to retain experts and investigators, it would have served as a liaison to Mr. Medellín's Spanish-speaking relatives, it would have made every effort to gather and present life history evidence that has, in countless cases, convinced a jury to spare the accused's life – even in cases involving highly aggravated crimes. These facts alone – which deserve consideration by a court empowered to conduct the review and reconsideration mandated by ICJ – provide ample support for a finding of prejudice.

IV. Texas Does Not Dispute The Authority of This Court to Recall the Mandate in *Medellin v. Texas* in the Interest of Justice and to Preserve the Integrity of Its Judgment.

Texas concedes that this Court has authority to stay its decision in order to permit legislative action. *See* BIO at 11 (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458

U.S. 50, 88 & n. 40 (1988); *Buckley v. Valeo*, 424 U.S. 1, 143 (1976)).[2] Texas merely argues that the present circumstances are not sufficiently compelling to warrant such a recall and stay.[3]

Texas is wrong. Specifically, Texas cites to *Calderon v. Thompson*, 523 U.S. 538, 558 (1998), supposedly for the proposition that recall of mandate requires a showing of actual innocence or fraud on the court. What *Calderon v. Thompson* actually holds, however, is that the "general rule" is that "where a federal court of appeals *sua sponte* recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner, the court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence." *Id.* But here, the Court not acting *sua sponte*, and Mr. Medellín is not asking the Court "to revisit the merits of an earlier decision." *Id.* Rather, Mr. Medellín is asking this Court to recall and stay the mandate in order to give effect to merits of its decision by allowing Congress sufficient time to act.[4]

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[2] Likewise, state supreme courts have stayed their mandates for a year or more to permit state legislatures a reasonable opportunity to act in accordance with their rulings. *See*, *e.g.*, *Lake View Sch. Dist. No. 25 of Phillips County v. Huckabee*, 91 S.W.3d 472, 511 (Ark. 2002) (staying mandate for approximately thirteen months to give state legislature and executive branch "time to correct constitutional disability" occasioned by determination that public school funding system was unconstitutional); *Derolph v. State*, 677 N.E.2d 733, 747 (Ohio 1997) (staying effect of decision for twelve months and remanding to trial court for retention of jurisdiction until legislation in conformity with opinion is enacted and put into effect); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1360 (N.H. 1997) (staying all further proceedings until end of upcoming legislative session and further order of the court to permit the legislature a reasonable time to address issues involved in the case); *see also*, *e.g.*, *Brigham v. State*, 692 A.2d 384, 398 (Vt. 1997) (remanding case so that jurisdiction could be retained until valid legislation was enacted and put into effect); *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 816 (Ariz. 1994) (directing trial court to "retain jurisdiction to determine whether, within a reasonable time, legislative action has been taken").

[3] Similarly, Texas does not question this Court's jurisdiction to issue an original writ of habeas corpus, but only whether it should exercise its discretion to do so.

[4] Texas also cites *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244-245 (1944), but that case merely holds that a final judgment may be set aside to remedy fraud or injustice. It does not address the question of recall of the mandate to allow for legislative action.

In any event, in these extraordinary and unprecedented circumstances, Texas has no basis to insist that this Court follow the "general rule" that the Court has set forth to guide the federal courts of appeals in exercising their discretion in more ordinary cases. Petitioner is not asking for an indefinite opportunity for Congress to act, but a reasonable one, to allow Congress the option of enacting implementing legislation in its next session.

V. Texas's Position Would Confer on Each State the Authority to Prevent the United States from Complying with Its International Legal Obligations.

In *Medellín v. Texas*, the Court interpreted the obligation to comply with an ICJ judgment under Article 94 of the U.N. Charter to be non-self-executing, in order to "preserve the option of noncompliance." 128 S. Ct. at 1360. But if the United States's word in entering into an international agreement is to mean anything, the option of *compliance* must be even more carefully protected. By simply assuming that Congress never wanted the United States to comply with its obligations—and self-assuredly predicting there is "no prospect" of Congress passing implementing legislation, BIO at 10—Texas indulges the most cynical assumptions about the intentions of the United States in entering into treaties. An honorable nation does not enter into binding international legal commitments with the intent of breaching them. Nor, for that matter, does a pragmatic nation, which recognizes that the reciprocal observance of international legal obligations is crucial to the protection of its own interests abroad, enter into treaties that it means to breach. As this Court observed, "Congress has not hesitated to pass implementing legislation for treaties that in its view require such legislation," *id.* at 1366 n.12; but Congress only recently learned of this Court's conclusion that this treaty requires such legislation to be effective.

If, as this Court held in *Medellín*, separation of powers prevents the courts or the President from requiring the United States to comply with a treaty absent action from Congress,

it is at least equally true that state courts and executive officials cannot require the United States to irrevocably *breach* a treaty before Congress has had a chance to act. If the Supremacy Clause is to mean anything, it is that one State cannot, acting alone, subordinate the Nation's ability to negotiate and implement treaties—self-executing or otherwise—to the State's own parochial interests. The Constitution has given the federal government exclusive power to conduct foreign relations, yet Texas would have this Court suppose that "the Constitution, which provides for this, [has] done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while . . . not prohibit[ing] to the States the acts for which [the United States] is held responsible." *Chy Lung*, 92 U.S. at 280.

And to be clear, it is not even the highest executive, legislative, or judicial officials of Texas who stand to place the Nation in breach of its international obligations. In Texas, unlike most states, no action by the Governor is needed to set an execution date. Rather, it is a single District Attorney, with the rubber-stamp approval of a single Texas trial court judge, who exercised the authority to set an execution date for Mr. Medellín despite the pendency of efforts to comply with *Avena*. At the May 5, 2008 hearing convened on the Assistant District Attorney's motion to schedule an execution date, Judge Caprice Cosper of the 339th Judicial District Court of Harris County, Texas, refused to hear the testimony of an international law expert and denied the request of a Mexican ambassador to present the views of Mexico, stating "I did not intend to hold a lengthy hearing. I intend to set an execution date." 167a. And as three judges of the Texas Court of Criminal Appeals pointed out in concurrence, that court has no authority to stay executions; even in the most compelling circumstances, "the Court's hands are tied." *Ex parte Medellin*, No. WR-50,191-03, 2008 Tex. Crim. App. LEXIS 851, at *25, 29

(Tex. Crim. App. July 31, 2008) (Price, J., concurring, joined by Holcomb and Cochran, JJ.). Judge Price, writing for himself, further stated that executing Mr. Medellín in these circumstances would be "an embarrassment and a shame to the people of Texas and the rest of the country," but concluded that "the [Texas] judicial branch [was] powerless to rectify an obvious and manifest injustice." *Id.* at *32-33 (Price, J., concurring).

CONCLUSION

If this execution goes forward tomorrow, the world—including the nearly 200 other countries who reciprocally agreed with the United States to abide by ICJ judgments in cases to which they were party—will have every reason to question the value of that commitment and of the United States's treaty commitments generally. This Court, the highest judicial organ of the United States under our Constitution, has confirmed that the United States has an international legal obligation to provide Mr. Medellin review and reconsideration. The President, the authority exclusively responsible for our international relations under our Constitution, has come to the same conclusion and, at the same time, emphasized the importance of complying with that obligation. The Congress, the highest legislative authority and the organ that, this Court has just ruled, is entrusted under our Constitution with the decision whether and how to comply with the obligation, has now begun to take steps to comply. Yet Texas is about to execute Mr. Medellín anyway, taking the decision out of Congress's hands and placing the United States irrevocably in breach. That course of affairs is fundamentally inconsistent with the holding and rationale of this Court decision in *Medellín v. Texas*.

In considering the constitutional design settled by the Court in *Medellin v. Texas*, it is important to be specific about how Texas has come to the decision to execute Mr. Medellín tomorrow, August 5. Because the Board of Pardons and Paroles has today declined to recommend any relief (171a), the Governor has authority under Texas law to grant no more than

a reprieve of thirty days. The court below held it lacked power to interfere with the execution. As a result, the decision to breach the treaty has effectively been made by the District Attorney of Harris County, Texas, who, with the approval of a state trial-court judge, set an execution date at the earliest point allowed under Texas law. It in no way disparages the diligence, competence, or integrity of those local and state officials, attuned as they understandably are to state and local interests, to suggest that they should not be left with the discretion to decide whether the United States should breach an international commitment made by the President and Senate on behalf of the United States as a whole. We respectfully submit that this Court's decision in *Medellín v. Texas* was never intended to lead to such a result without giving Congress a reasonable opportunity to act.

This afternoon, the United States Court of Appeals for the Fifth Circuit held that it has no authority to grant a stay. *Medellín v. Quarterman*, No. 08-20495, slip op. at 4 (5th Cir. Aug. 4, 2008) (unpublished). For the foregoing reasons, this Court should grant a writ of certiorari or a writ of habeas corpus or recall and stay its mandate in *Medellin v. Texas*, 128 S. Ct. 1346 (2008). In addition the Court should stay the execution of José Ernesto Medellín to allow the competent political actors a reasonable opportunity to implement the international law obligations of the United States reflected in the Judgment of the International Court of Justice.

Respectfully submitted,

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August 4, 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
F I L E D
August 4, 2008
Charles R. Fulbruge III
Clerk

No. 08-20495

JOSE ERNESTO MEDELLIN

Petitioner-Appellant

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division

Respondent-Appellee

On Motion for Authorization to File
Successive Petition for Writ of Habeas
Corpus in the United States District Court
Before the Southern District of Texas, Houston

Before JONES, Chief Judge, JOLLY and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

Petitioner Jose Ernesto Medellin, convicted of capital murder and sentenced to death, is scheduled to be executed August 5, 2008. Through counsel, on August 1, 2008, Petitioner filed a motion for authorization to file a

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

successive petition pursuant to 28 U.S.C. § 2244(b) and a motion for stay of execution.[1]

Pursuant to 28 U.S.C. § 2244(b)(1), "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." Additionally, pursuant to section 2244(b)(2):

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

During Petitioner's initial federal habeas proceedings, he filed a motion for a Certificate of Appealability (COA) in this Court, arguing, among other things, that the State violated the Vienna Convention by failing to notify him of his right to contact the Mexican consul. While his motion for COA was pending in this Court, the International Court of Justice issued its decision in the *Case Concerning Avena and Other Mexican Nationals (Mex.v.U.S.)*, 2004 I.C.J. 12

[1] We note that, consistent with our local rules, counsel filed a statement providing a detailed explanation under oath detailing the reason for the late filing. See Fifth Circuit Local Rule 8.10 (requiring such an explanation if permission to file a successive petition is filed within 5 days of the scheduled execution).

(Judgment of Mar. 31) (Avena). In *Avena,* the ICJ held that because of the violations of the Vienna Convention, the named Mexican nationals were entitled to review and reconsideration of their state-court convictions and sentences in the United States. *Id.*; *see Medellin v. Texas,* 128 U.S. 1346, 1352 (2008). The ICJ also decreed that this right was not subject to any forfeiture under state rules with respect to challenges to criminal convictions. *Id.*; *see Medellin,* 128 U.S. at 1352.

Subsequently, this Court denied a COA, holding that the Vienna Convention claim was procedurally defaulted and that our prior precedent constrained us to hold that the Vienna Convention did not confer an individually enforceable right. *Medellin v. Dretke,* 371 F.3d 270, 279 (5th Cir. 2004) (per curiam).

As set forth above, § 2244(b)(1) provides that "[a] claim presented in a second or successive habeas corpus application under section 2254 that *was presented in a prior application shall be dismissed*." (emphasis added). Because Petitioner previously raised the instant Vienna Convention violation in his initial habeas proceedings, § 2244(b)(1) requires that it be dismissed.

Nonetheless, in his motion for authorization to file a successive petition, Petitioner attempts to fall under the requirements of § 2244(b)(2)(A). Specifically, Petitioner contends that the Supreme Court's decision in *Medellin* constituted a new rule, "namely the requirement that implementation of the treaty obligation to comply with the Avena judgment is a task for Congress." Motion at 26 (citing *Medellin v. Texas*, 128 S.Ct. at 1368-69).

In *Medellin,* the Supreme Court determined that the ICJ's decision in *Avena* was not binding domestic law unless Congress enacted implementing statutes. 128 S.Ct. at 1357. The Supreme Court further rejected the claim that President Bush's determination independently required states to provide review of the claims in *Avena* despite any state procedural default rules. *Medellin,* 128

S.Ct. at 1267-71. Petitioner now contends that because legislative officials have begun the process of implementing the decision in *Avena,* he has satisfied the requirements for a successive petition. We have recently rejected this particular claim.

In *In re Fierro,* the movant argued that, despite the adverse decision in *Medellin,* there was "substantial reason to continue to stay consideration of his request for authorization to file a successive habeas petition, because . . . work is underway to introduce a bill in Congress that would make the *Avena* judgment enforceable in the domestic courts." 2008 WL 2330965 *1 (5th Cir. June 2, 2008) (internal citation marks omitted). We found that Fierro had not made a prima facie showing that his claim relied on a new rule of constitutional law as required by § 2244(b)(2)(A). Likewise, here, we are unpersuaded that Petitioner has made a prima facie showing that his claim constitutes a new rule of constitutional law as required under § 2244(b)(2)(A).

In conclusion, after considering the arguments of Petitioner, the response of the Respondent, and the Supreme Court's decision in *Medellin v. Texas,* 128 S.Ct. 1346 (2008), we deny leave to file the successive petition. Because habeas relief is not available, we must deny the motion for stay of execution. *See Lackey v. Scott,* 52 F.3d 98, 100 (5th Cir. 1995) (explaining that a court may stay an execution based on a second or successive federal habeas petition only when substantial grounds exist upon which relief may be granted).

DENIED.

Medellin v. Texas
Only the Westlaw citation is currently available.Jose Ernesto MEDELLIN,
v.
TEXAS.
In re Jose Ernesto MEDELLIN.
Nos. 06-984, 08-5573, 08-5574.

Aug. 5, 2008.

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James C. Ho, Counsel of Record, Greg Abbott, Kent C. Sullivan, Eric J.R. Nichols, Edward L. Marshall, Kristopher S. Monson, Tina J. Miranda, Attorneys for Respondent.
Donald Francis Donovan, Counsel of Record, Carl Micarelli, Catherine M. Amirfar, Bruce W. Klaw, Jill Van Berg, Emma C. Prete, Debevoise & Plimpton LLP, New York, New York, for Petitioner.
Greg Abbott, Attorney General of Texas, Kent C. Sullivan, First Assistant Attorney General, Eric J.R. Nichols, Deputy Attorney General for Criminal Justice, R. Ted Cruz, Solicitor General, Counsel of Record, Sean D. Jordan, Deputy Solicitor General, Kristofer S. Monson, Daniel L. Geyser, Adam W. Aston, Assistant Solicitors General, Office of the Attorney General, Austin, Texas, for Respondent.
PER CURIAM.
***1** [1] Petitioner seeks a stay of execution on the theory that either Congress or the Legislature of the State of Texas might determine that actions of the International Court of Justice (ICJ) should be given controlling weight in determining that a violation of the Vienna Convention on Consular Relations is grounds for vacating the sentence imposed in this suit. Under settled principles, these possibilities are too remote to justify an order from this Court staying the sentence imposed by the Texas courts. And neither the President nor the Governor of the State of Texas has represented to us that there is any likelihood of congressional or state legislative action.

[2] It is up to Congress whether to implement obligations undertaken under a treaty which (like this one) does not itself have the force and effect of domestic law sufficient to set aside the judgment or the ensuing sentence, and Congress has not progressed beyond the bare introduction of a bill in the four years since the ICJ ruling and the four months since our ruling in *Medellín v. Texas*, 552 U.S. ---- (2008). This inaction is consistent with the President's decision in 2005 to withdraw the United States' accession to jurisdiction of the ICJ with regard to matters arising under the Convention.

The beginning premise for any stay, and indeed for the assumption that Congress or the legislature might seek to intervene in this suit, must be that petitioner's confession was obtained unlawfully. This is highly unlikely as a matter of domestic or international law. Other arguments seeking to establish that a violation of the Convention constitutes grounds for showing the invalidity of the state court judgment, for instance because counsel was inadequate, are also insubstantial, for the reasons noted in our previous opinion. *Id.*, at ---- (slip op., at 5).

The Department of Justice of the United States is well aware of these proceedings and has not chosen to seek our intervention. Its silence is no surprise: The United States has not wavered in its position that petitioner was not prejudiced by his lack of consular access.

The application to recall and stay the mandate and for stay of execution of sentence of death, presented to Justice SCALIA, and by him referred to the Court, is denied. The application for stay of execution of sentence of death, presented to Justice SCALIA, and by him referred to the Court, is denied. The petition for a writ of habeas corpus is denied.

It is so ordered.

Justice STEVENS, dissenting.
Earlier this Term, in *Medellín v. Texas*, 552 U.S. ---- (2008), we concluded that neither the President nor the International Court of Justice (ICJ) has the authority to require Texas to determine whether its violation of the Vienna Convention prejudiced petitioner. Although I agreed with the Court's

judgment, I wrote separately to make clear my view that Texas retained the authority-and, indeed, the duty as a matter of international law-to remedy the potentially significant breach of the United States' treaty obligations identified in the President's Memorandum to the Attorney General. Because it appears that Texas has not taken action to address the serious national security and foreign policy implications of this suit, I believe we should request the views of the Solicitor General, who argued on behalf of the Executive Branch in earlier proceedings in the suit, before allowing Texas to proceed with the execution.

As I explained in my separate opinion in March, the cost to Texas of complying with the ICJ judgment "would be minimal, particularly given the remote likelihood that the violation of the Vienna Convention actually prejudiced" this petitioner. 552 U.S., at ---- (slip op., at 5) (STEVENS, J., concurring in judgment)."On the other hand, the costs of refusing to respect the ICJ's judgment are significant. The entire Court and the President agree that breach will jeopardize the United States' 'plainly compelling' interests in 'ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law.'"*Ibid.* Given these stakes, and given that petitioner has been under a death sentence for 14 years, waiting a short time to guarantee that the views of the Executive have been given respectful consideration is only prudent. Balancing the honor of the Nation against the modest burden of a short delay to ensure that the breach is unavoidable convinces me that the application for a stay should be granted.

***2** Accordingly, I respectfully dissent.

Justice SOUTER, dissenting.
I joined the dissent in *Medellín v. Texas,* 552 U.S. ---- (2008) (BREYER, J., dissenting), and invoke the rule that it is reasonable to adhere to a dissenting position throughout the Term of Court in which it was announced. See *North Carolina v. Pearce*, 395 U.S. 711, 744 (1969) (Harlan, J., concurring in part and dissenting in part). The only chance to apply the treaty provisions the dissent would have held presently enforceable is now through action by the other branches of the Government. A bill on the subject has been introduced in the Congress, Avena Case Implementation Act of 2008, H.R. 6481, 110th Cong., 2d Sess. (2008), and the Government has represented to the International Court of Justice it will take further steps to give effect to that court's judgment pertinent to Medellín's conviction, among others, *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.),* 2008 I.C.J. No. 139, ¶ 37 (Order of July 16). I would therefore enter the requested stay of execution for as long as the remainder of the 2007 Term, to allow for a current statement of the views of the Solicitor General and for any congressional action that could affect the disposition of petitioner's filings. I would defer action on the petition for a writ of certiorari to the Court of Criminal Appeals of Texas, the petition for an original writ of habeas corpus, and the motion to recall and stay the mandate in *Medellin v. Texas,supra*.

Justice GINSBURG, dissenting.
I would grant the application for a stay of execution. Before the International Court of Justice, in response to Mexico's request for provisional measures, the United States represented: "[C]ontrary to Mexico's suggestion, the United States [does] not believe that it need make no further effort to implement this Court's *Avena* Judgment, and ... would 'continue to work to give that Judgment full effect, including in the case of Mr. Medellín.'"*Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.),* 2008 I.C.J. No. 139, ¶ 37 (Order of July 16). I would invite the Solicitor General's clarification of that representation very recently made to the international tribunal. Pending receipt and consideration of the Solicitor General's response, I would defer action on Medellín's submissions.

Justice BREYER, dissenting.
***3** The International Court of Justice (ICJ) has held that a treaty that the United States has signed, namely, the Vienna Convention on Consular Relations (Vienna Convention), Apr. 24, 1963, [1970] 21 U.S.T. 77, T.I.A.S. No. 6820, does not permit execution of this defendant without a further hearing concerning whether Texas' violation of the Vienna Convention's obligation to notify the defendant of his right to consult Mexico's consul constituted harmless error. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.),* 2004

I.C.J. 61-64 (Judgment of Mar. 31). The United States has agreed that the ICJ's judgments will have "binding force ... between the parties and in respect of [a] particular case."United Nations Charter, Art. 59, 59 Stat. 1062, T.S. No. 993 (1945). The President of the United States has concluded that domestic courts should enforce this particular ICJ judgment. Memorandum to the Attorney General (Feb. 28, 2005), App. to Pet. for Cert. in *Medellín v. Texas*, No. 06-984, p. 187a.

In *Medellín v. Texas*, 552 U.S. ---- (2008) (six to three vote), this Court, while recognizing that the United States was bound by treaty to follow the ICJ's determination as a matter of *international* law, held that that determination did not *automatically* bind the courts of the United States as a matter of *domestic law* in the absence of further congressional legislation.*Id.*, at ----.In reaching this conclusion the majority, as well as the dissent, recognized that, without the further hearing that the ICJ found necessary, the execution would violate our international treaty commitments. See *id.*, at ----.

Petitioner, who is scheduled to be executed this evening, now asks us to delay the execution in order to give Congress an opportunity to act to cure the legal defect that the Court found in *Medellín*. In my view, several factors counsel in favor of delay.*First*, since this Court handed down *Medellín*, Mexico has returned to the ICJ requesting this Nation's compliance with its international obligations; and the ICJ has asked that the United States "take all measures necessary to ensure that [the Mexican nationals] are not executed" unless and until they "receive review and reconsideration consistent" with the ICJ's earlier *Avena* decision. See *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2008 I.C.J. No. 139, ¶ 80 (Order of July 16).

Second, legislation has been introduced in Congress seeking to provide the legislative approval necessary to transform our international legal obligations into binding domestic law. See Avena Case Implementation Act of 2008, H.R. 6481, 110th Cong., 2d Sess. (2008) (referred to committee, July 14, 2008).

Third, prior to *Medellín*, Congress may not have understood the legal need for further legislation of this kind. That fact, along with the approaching election, means that more than a few days or weeks are likely necessary for Congress to determine whether to enact the proposed legislation.

***4** *Fourth*, to permit this execution to proceed forthwith places the United States irremediably in violation of international law and breaks our treaty promises.

Fifth, the President of the United States has emphasized the importance of carrying out our treaty-based obligations in this case; this fact, along with the President's responsibility for foreign affairs, makes the Executive's views of the matter pertinent.

Sixth, different Members of this Court seem to have very different views of what this case is about. In my view, the issue in this suit-what the majority describe as the "beginning premise"-is not whether a confession was unlawfully obtained from petitioner. Cf. *ante*, at ----.Rather, the question before us is whether the United States will carry out its international legal obligation to enforce the decision of the ICJ. That decision requires a further hearing to determine whether a conceded violation of the Vienna Convention (Texas' failure to inform petitioner of his rights under the Vienna Convention) was or was not harmless. Nor do I believe the majority is correct insofar as it implies that Congress has had *four years to consider the matter*. See *ibid.*("Congress has not progressed beyond the bare introduction of a bill in the four years since the ICJ ruling and the four months since our ruling in *Medellín v. Texas*"). To the contrary, until this Court's decision in *Medellín* a few months ago,a member of Congress might reasonably have believed there was no need for legislation because the relevant treaty provisions were self-executing. It is not realistic to believe Congress could act to provide the necessary legislative approval in only a few weeks' time.

In my view, we should seek the views of the Solicitor General (which may well clarify these matters), and we should grant a stay of sufficient length for careful consideration of those views, along with the other briefs and materials filed in this suit. A sufficient number of Justices having voted to secure those views (four), it is particularly disappointing that no

Member of the majority has proved willing to provide a courtesy vote for a stay so that we can consider the Solicitor General's view once received. As it is, the request will be mooted by petitioner's execution, which execution, as I have said, will place this Nation in violation of international law.

For the reasons set forth, I respectfully dissent.

U.S.Tex.,2008.
Medellin v. Texas
--- S.Ct. ----, 2008 WL 3821478 (U.S.Tex.), 77 USLW 3073

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