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Introductory Note to International Court of Justice: Decision on the Request for Interpretation of the Avena Judgment

Chiara Giorgetti

University of Richmond, cgorget@richmond.edu

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INTRODUCTORY NOTE TO INTERNATIONAL COURT OF JUSTICE: DECISION ON THE REQUEST
FOR INTERPRETATION OF THE AVENA JUDGMENT (MEX. V. U. S.)
BY CHIARA GIORGETTI*
[February 19, 2009]
+Cite as 48 ILM 199 (2009)+

On 19 January 2009, the International Court of Justice (“ICJ” or “the Court”) issued its *Judgment On the Request for the Interpretation of the Avena Judgment* (“Judgment”) denying Mexico’s request for interpretation, and holding that the matters claimed by Mexico “are not matters which ha[d] been decided by the Court in its Judgment,” and thus could not give rise to an interpretation as requested by Mexico.¹ This is probably the last step in a complex and lengthy litigation between Mexico and United States,² which began on January 9, 2003, when Mexico instituted proceedings at the ICJ against the U.S. for violations of the 1963 Vienna Convention on Consular Relations (“Vienna Convention” or “the Convention”).

The decision is important for at least three reasons: first, it provides guidance on the availability and scope of interpretation proceedings under Article 60 of the Statute of the Court, an issue seldom addressed by the Court. Second, it confirms again the Court’s strong stand on the mandatory nature of its orders and judgments. Finally, it provides some finality to the legal dispute between the two litigants on several controversial issues. In the *Case Concerning Avena and Other Mexican Nationals* (“Avena”),³ Mexico had challenged the trials and convictions of 51 Mexican nationals who were sentenced to severe penalties, including the death penalty. Mexico claimed that the U.S. had failed to advise the Mexican nationals of their right to access Mexican consular authorities, a right guaranteed to them by the Vienna Convention. The ICJ held in favor of Mexico in its March 31, 2004 Judgment, finding that the U.S. had breached its obligations under the Convention by failing to inform the detainees without delay of their rights to contact their Consular authorities, by failing to notify the appropriate Mexican authorities of the detention of Mexican nationals, thus denying Mexico the right to render assistance to its nationals, and by failing to allow Mexican Consular authorities to communicate and have access to its nationals, including the right to visit them in detention and to arrange for legal representation.⁴ The Court concluded, in ¶ 153 (9) of its Judgment, that the appropriate reparation in the *Avena* case consisted “in the obligation of the United States to provide by means of its own choosing, review and reconsideration of the convictions and sentences” of the 51 named Mexican nationals. Following the delivery of the *Avena* Judgment, the United States withdrew from the Optional Protocol to the Vienna Convention.

On June 5, 2008 Mexico filed a *Request for Interpretation of the Judgment*⁵ asking the Court to interpret its *Avena* judgment as there appeared to be a difference in interpretation between the two parties regarding U.S.’s obligations resulting from the Court’s Judgment.⁶ Mexico’s main complaint related to the correct interpretation of ¶ 153 (9) of the *Avena* judgment, specifically whether it constituted an “obligation of results” for the United States, including ensuring that no Mexican national entitled to review and consideration under the ICJ judgment is executed unless and until he has been afforded a review and reconsideration of his conviction.⁷ In their observations, the United States agreed that *Avena* imposed an “obligation of results,” and thus argued that the Court had nothing to adjudicate. Instead, the U.S. asked the Court to dismiss the request.⁸

Mexico based its request for interpretation on Article 60⁹ of the Statute of the Court, which provides that, in the event of a “dispute as to the meaning and scope” of the judgment, the Court may “construe it upon the request of one of any of the Party.” Prior practice of the ICJ (and its predecessor the Permanent Court of International Justice) regarding the application of Article 60 is scarce. Interpretations of judgments have been requested only three times at the ICJ, and none was successful.¹⁰ This judgment is the fourth unsuccessful attempt to obtain an interpretation by the Court, demonstrating the Court’s strict requirements for obtaining an interpretation of its judgments.

In finding that it had jurisdiction to hear the case, the Court noted that under Article 60 its jurisdiction was not preconditioned by the existence of any other basis of jurisdiction as between the parties to the original case.¹¹ Furthermore, the Court emphasized that U.S.’s withdrawal from the Optional Protocol to the Vienna Convention had no bearing on the Court’s jurisdiction.¹²

* Foreign attorney, White and Case, Washington D.C. and Adjunct Professor, Georgetown Law Center, Washington, D.C.

The Court went on to analyze whether a dispute within the meaning of Article 60 indeed existed.¹³ The Court concluded that whether that was a dispute under Art. 60 could be perceived in two ways, which it analyzed in some detail.¹⁴ On the one hand, it examined a variety of arguments put forward by Mexico, which could suggest that there is a difference of perception that would constitute a dispute upon whom the obligation of result specifically falls. On the other hand, the Court set out other factors that suggest, on the contrary, that there is no dispute between the Parties. Without clearly stating its conclusion, the Court concluded that, be that as it may, there was another obstacle to granting the request from Mexico, even if a dispute was indeed found. This additional burden centered on the issue of whether the obligations specified in ¶ 153 (9) of the *Avena* Judgment had to be given direct effect by the U.S.

Analyzing this issue the Court clearly concluded that the *Avena* judgment did not lay down or imply that the courts in the U.S. were required to give direct effects to ¶ 153 (9). The Court reiterated that the obligation set out in ¶ 153 (9) was an obligation of result which clearly had to be performed unconditionally, as its non-performance would constitute an internationally wrongful conduct. However, *Avena* left it to the U.S. to choose the means of implementation, including through the introduction of appropriate legislation as needed, or through direct enforceability. The Court concluded that this question was not decided in *Avena* and therefore the issue could not be submitted to the Court for interpretation under Article 60 of the Statute.¹⁵

The Court further explained that Mexico's argument concerned the general question of the effect of the Court's judgment in the American domestic legal order, not the "meaning and scope" of the judgment as required by Article 60.¹⁶ The Court thus rejected Mexico's request for interpretation, but reminded the U.S. that although a choice of means was given to it in the implementation of its obligations, failing success within a reasonable time period of the means it had chose, it must rapidly turn to alternative and effective means of attaining the required result.¹⁷

Next, the Court addressed the other three additional claims presented by Mexico. First, it agreed with Mexico and found that the U.S. had not discharged its obligations under the Court's Order of July 16, 2008, in the case of Mr. Medellín Rojas, when it allowed his execution in the state of Texas without review and revision of his judgment.¹⁸ Second, it denied Mexico's request to declare that the U.S. had violated the *Avena* judgment because the request was based on Article 60, which did not allow the Court to consider possible violations of the underlying Judgment.¹⁹ Similarly, the Court dismissed Mexico's request for a guarantee of non-repetition because the remedy was not available in interpretation proceedings.²⁰ The Court, however, found it sufficient to reiterate that its *Avena* judgment remained binding and that the U.S. continued to be under an obligation to fully implement it.²¹

Judges Koroma and Abraham appended declarations to the Judgment of the Court. Judge Sepúlveda-Amor appended a dissenting opinion to the Judgment of the Court

ENDNOTES

- 1 Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), (Judgment of Jan. 19, 2009), 47 I.L.M. 726 (2008), available at <http://www.icj-cij.org/docket/files/139/14939.pdf?PHPSESSID=94e28db370598fd1783180df60632c8e> (last visited Feb. 26, 2009), ¶ 61 (1) [hereinafter Judgment].
- 2 In fact, prior to the case brought by Mexico in 2003, Paraguay and Germany had both brought cases to the ICJ complaining of the U.S.'s failure to provide consular notification under the Vienna Convention. The ICJ was requested, and had granted, provisional measures in both cases. See Application of the Government of Paraguay (Apr. 3, 1998), available at <http://www.icj-cij.org/docket/files/99/7183.pdf> (last visited Feb. 26, 2009); Case Concerning the Vienna Convention on Consular Relations (Para v. U.S.) 1998 I.C.J. 248 (Apr. 9); Request for Provisional Measures, 1998 I.C.J. Rep. 11 (Apr. 9); Application Instituting Proceedings Submitted by the Federal Republic of Germany (Mar. 2, 1999), available at <http://www.icj-cij.org/docket/files/104/7153.pdf> (last visited Feb. 26, 2009); and *LaGrand* (Ger. v. U.S.), 2001 I.C.J. 466 (June 27).
- 3 Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), (Judgment of Mar. 31, 2004), 2004 I.C.J. 12 [hereinafter *Avena*].
- 4 *Id.* ¶ 153.
- 5 See Judgment, *supra* note 1.
- 6 Mexico requested, on June 5, 2008, and obtained by Order of the Court of July 16, 2008, preliminary measures requesting the U.S. to ensure that certain named individuals were not executed pending the judgment on the Request for Interpretation. See Request for Interpretation (Mex. v. U.S.), (Order of July 16, 2008), available at <http://www.icj-cij.org/docket/files/139/14639.pdf> (last visited Feb. 26, 2009); see also comment by author in 47 I.L.M. 723 (2008).

- 7 Judgment, *supra* note 1, ¶ 9.
- 8 *Id.* ¶ 10.
- 9 The full text of Article 60 states “The Judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.” The Statute of the Court is available at www.icj-cij.org.
- 10 In the *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case*, 1950 I.C.J. 395 (Nov. 27), the Court held that the interpretation requested went beyond the limits of the original judgment. In the *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunis v. Libya)*, 1985 I.C.J. 192 (Dec. 10), the Court concluded that the request was inadmissible in the relevant parts. Finally, in the *Request for Interpretation of the Judgment of June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria*, 1999 I.C.J. 31 (Mar. 25), the Court concluded that no interpretation was needed. See K. Oellers-Frahm, *Interpretation of Judgments of International Courts and Tribunals*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2009).
- 11 Judgment, *supra* note 1, ¶ 15.
- 12 *Id.*
- 13 *Id.* ¶ 29.
- 14 *Id.* ¶¶ 30–42.
- 15 *Id.* ¶ 44.
- 16 *Id.* ¶ 45.
- 17 *Id.* ¶¶ 46–47.
- 18 *Id.* ¶ 53.
- 19 *Id.* ¶ 57.
- 20 *Id.* ¶ 59.
- 21 *Id.* ¶ 60.

INTERNATIONAL COURT OF JUSTICE: DECISION ON THE REQUEST FOR INTERPRETATION OF
THE AVENA JUDGEMENT (MEX. V. U.S.)*
[February 19, 2009]
+Cite as 48 ILM 202 (2009)+

INTERNATIONAL COURT OF JUSTICE
YEAR 2009

2009
19 January
General List
No. 139

19 February 2009

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)

Article 60 of the Statute of the Court — Independent basis of jurisdiction.

Conditions on the exercise of jurisdiction to entertain a request for interpretation — Question of the existence of a dispute as to the meaning or scope of paragraph 153 (9) of the Judgment of 31 March 2004 — For the Court to determine whether a dispute exists — No dispute as to whether paragraph 153 (9) lays down an obligation of result.

Question of the existence of a dispute as to those upon whom the obligation of result specifically falls — Two possible approaches based on the Parties' positions — Possible existence of a dispute as to those upon whom the obligation specifically falls — Possible absence of a dispute on this point failing a sufficiently precise indication.

Question of the direct effect of the obligation established in paragraph 153 (9) — No decision in the Judgment of 31 March 2004 as to the direct effect of the obligation — Question of direct effect therefore cannot be the subject of a request for interpretation — Reiteration of the principle that considerations of domestic law cannot in any event relieve the parties of obligations deriving from judgments of the Court.

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Question of breach by the United States of its legal obligation to comply with the Order indicating provisional measures of 16 July 2008 — Court's jurisdiction to rule on this question in proceedings on a request for interpretation — Question of possible violation by the United States of the Judgment of 31 March 2004 — Lack of jurisdiction of the Court to consider this question in proceedings for interpretation.

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Mexico's request for the Court to order the United States to provide guarantees of non-repetition — Binding character of the Judgment of 31 March 2004 — Undertakings already given by the United States.

JUDGMENT

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

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In the case concerning the Request for interpretation of the Judgment of 31 March 2004,

between

the United Mexican States,

represented by

H.E. Mr. Juan Manuel Gómez-Robledo, Ambassador, Under-Secretary for Multilateral Affairs and Human Rights, Ministry of Foreign Affairs of Mexico,

H.E. Mr. Joel Antonio Hernández García, Ambassador, Legal Adviser, Ministry of Foreign Affairs of Mexico,

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

as Agents,

and

the United States of America,

represented by

Mr. John B. Bellinger, III, Legal Adviser, United States Department of State,

as Agent;

Mr. James H. Thessin, Deputy Legal Adviser, United States Department of State,

as Co-Agent,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 5 June 2008, the United Mexican States (hereinafter “Mexico”) filed in the Registry of the Court an Application instituting proceedings against the United States of America (hereinafter “the United States”), whereby, referring to Article 60 of the Statute and Articles 98 and 100 of the Rules of Court, it requests the Court to interpret paragraph 153 (9) of the Judgment delivered by the Court on 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)* (I.C.J. Reports 2004, p. 12) (hereinafter “the Avena Judgment”).
2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was immediately transmitted to the Government of the United States by the Registrar; and, pursuant to Article 40, paragraph 3, all States entitled to appear before the Court were notified of the Application.
3. On 5 June 2008, after filing its Application, Mexico, referring to Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court, filed in the Registry of the Court a request for the indication of provisional measures in order “to preserve the rights of Mexico and its nationals” pending the Court’s judgment in the proceedings on the interpretation of the *Avena* Judgment.

By an Order of 16 July 2008, the Court, having rejected the submission by the United States seeking the dismissal of the Application filed by Mexico (paragraph 80 (I)) and its removal from the Court’s General List, indicated the following provisional measures (paragraph 80 (II)):

“(a) 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)*;

(b) The Government of the United States of America shall inform the Court of the measures taken in implementation of this Order."

It also decided that, "until the Court has rendered its judgment on the Request for interpretation, it shall remain seized of the matters" which form the subject of the Order (paragraph 80 (III)).

4. By letters dated 16 July 2008, the Registrar informed the Parties that the Court, pursuant to Article 98, paragraph 3, of the Rules of Court, had fixed 29 August 2008 as the time-limit for the filing of written observations by the United States on Mexico's Request for interpretation.

5. By a letter dated 1 August 2008 and received in the Registry the same day, the Agent of the United States, referring to paragraph 80 (II) (b) of the Order of 16 July 2008, informed the Court of the measures which the United States "ha[d] taken and continue[d] to take" to implement that Order.

6. By a letter dated 28 August 2008 and received in the Registry the same day, the Agent of Mexico, informing the Court of the execution on 5 August 2008 of Mr. José Ernesto Medellín Rojas in the State of Texas, United States of America, and referring to Article 98, paragraph 4 of the Rules of Court, requested the Court to afford Mexico the opportunity of furnishing further written explanations for the purpose, on the one hand, of elaborating on the merits of the Request for interpretation in the light of the written observations which the United States was due to file and, on the other, of "amending its pleading to state a claim based on the violation of the Order of 16 July 2008".

7. On 29 August 2008, within the time-limit fixed, the United States filed its Written Observations on Mexico's Request for interpretation.

8. By letters dated 2 September 2008, the Registrar informed the Parties that the Court had decided to afford each of them the opportunity of furnishing further written explanations, pursuant to Article 98, paragraph 4, of the Rules of Court, and had fixed 17 September and 6 October 2008 as the time-limits for the filing by Mexico and the United States respectively of such further explanations. These were filed by each Party within the time-limits thus fixed.

*

9. In the Application, the following requests were made by Mexico:

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

and that, pursuant to the foregoing obligation of result,

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

10. In the course of the proceedings, the following submissions were presented by the Parties:

On behalf of Mexico,

in the further written explanations submitted to the Court on 17 September 2008:

“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 of 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 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.”

On behalf of the United States,

in its Written Observations submitted on 29 August 2008:

“On the basis of the facts and arguments set out above, the Government of the United States of America requests that the Court adjudge and declare that the application of the United Mexican States is dismissed, but if the Court shall decline to dismiss the application, that the Court adjudge and declare an interpretation of the *Avena* Judgment in accordance with paragraph 62 above.” (Para. 63.)

Paragraph 60 of the Written Observations of the United States includes the following:

“And the United States *agrees* with Mexico’s requested interpretation; it agrees that the *Avena* Judgment imposes an ‘obligation of result’. There is thus nothing for the Court to adjudicate, and Mexico’s application must be dismissed.”

Paragraph 62 of the Written Observations of the United States includes the following:

“the United States requests that the Court interpret the Judgment as Mexico has requested — that is, as follows:

[T]he obligation incumbent upon the United States under paragraph 153 (9) of the *Avena* Judgment constitutes an obligation of result as it is clearly stated in the Judgment by the

indication that the United States must provide ‘review and reconsideration of the convictions and sentences’ but leaving it the ‘means of its own choosing’”;

in the further written explanations submitted to the Court on 6 October 2008:

“On the basis of the facts and arguments set out above and in the United States’ initial Written Observations on the Application for Interpretation, the Government of the United States of America requests that the Court adjudge and declare that the application of the United Mexican States for interpretation of the *Avena* Judgment is dismissed. In the alternative and as subsidiary submissions in the event that the Court should decline to dismiss the application in its entirety, the United States requests that the Court adjudge and declare:

(a) that the following supplemental requests by Mexico are dismissed:

- (1) that the Court declare that the United States breached the Court’s July 16 Order;
- (2) that the Court declare that the United States breached the *Avena* Judgment; and
- (3) that the Court order the United States to issue a guarantee of non-repetition;

(b) an interpretation of the *Avena* Judgment in accordance with paragraph 86 (a) of Mexico’s Response to the Written Observations of the United States.”

*

* *

11. The Court recalls that in paragraph 153 (9) of the *Avena* Judgment the Court had found that:

“the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) above, by taking account both of the violation of the rights set forth in Article 36 of the [Vienna] Convention [on Consular Relations] and of paragraphs 138 to 141 of this Judgment”.

12. Mexico asked for an interpretation as to whether paragraph 153 (9) expresses an obligation of result and requested that the Court should so state, as well as issue certain orders to the United States “pursuant to the foregoing obligation of result” (see paragraph 9 above).

13. Mexico’s Request for interpretation of paragraph 153 (9) of the Court’s Judgment of 31 March 2004 was made by reference to Article 60 of the Statute. That Article provides that “[t]he judgment is final and without appeal. In the event of dispute [‘contestation’ in the French version] as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.”

14. The United States informed the Court that it agreed that the obligation in paragraph 153 (9) was an obligation of result and, there being no dispute between the Parties as to the meaning or scope of the words of which Mexico requested an interpretation, Article 60 of the Statute did not confer jurisdiction on the Court to make the interpretation (see para. 41 of the Order of 16 July 2008). In its written observations of 29 August 2008, the United States also contended that the absence of a dispute about the meaning or scope of paragraph 153 (9) rendered Mexico’s Application inadmissible.

15. The Court notes that its Order of 16 July 2008 on provisional measures was not made on the basis of prima facie jurisdiction. Rather, the Court stated that “the Court’s jurisdiction on the basis of Article 60 of the Statute is not preconditioned by the existence of any other basis of jurisdiction as between the parties to the original case” (Order, para. 44).

The Court also affirmed that the withdrawal by the United States from the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes since the rendering of the *Avena* Judgment had no bearing on the Court’s jurisdiction under Article 60 of the Statute (*ibid.*, para. 44).

16. In its Order of 16 July 2008, the Court had addressed whether the conditions laid down in Article 60 “for the Court to entertain a request for interpretation appeared to be satisfied” (*ibid.*, para. 45), observing that “the Court may entertain a request for interpretation of any judgment rendered by it provided that there is a ‘dispute as to the meaning or scope of [the said] judgment’” (*ibid.*, para. 46).

17. In the same Order, the Court pointed out that “the French and English versions of Article 60 of the Statute are not in total harmony” and that the existence of a dispute/“contestation” under Article 60 was not subject to satisfaction of the same criteria as that of a dispute (“différend” in the French text) as referred to in Article 36, paragraph 2, of the Statute (Order, para. 53). The Court nonetheless observed that “it seems both Parties regard paragraph 153 (9) of the *Avena* Judgment as an international obligation of result” (*ibid.*, para. 55).

18. However, the Court also observed that

“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” (*ibid.*, para. 55).

19. The Court stated that the decision rendered on the request for the indication of provisional measures “in no way prejudices any question that the Court may have to deal with relating to the Request for interpretation” (*ibid.*, para. 79).

20. Accordingly, in the present procedure it is appropriate for the Court to review again whether there does exist a dispute over whether the obligation in paragraph 153 (9) of the *Avena* Judgment is an obligation of result. The Court will also at this juncture need to consider whether there is indeed a difference of opinion between the Parties as to whether the obligation in paragraph 153 (9) of the *Avena* Judgment falls upon all United States federal and state authorities.

21. As is clear from the settled jurisprudence of the Court, a dispute must exist for a request for interpretation to be admissible (*Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v. Peru)*, Judgment, I.C.J. Reports 1950, p. 402; *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1985, pp. 216-217, para. 44; see also *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections (*Nigeria v. Cameroon*), Judgment, I.C.J. Reports 1999 (I), p. 36, para. 12).

22. As recalled above in paragraphs 4 and 8, by letters dated 16 July 2008 and 2 September 2008, the Registrar informed the Parties that the Court had afforded the United States and Mexico the opportunity of furnishing written observations and further written explanations pursuant to Article 98, paragraphs 3 and 4, of the Rules of Court.

23. The Court has duly considered the observations and further written explanations of the Parties regarding the existence of any dispute requiring interpretation as to whether the obligation to provide judicial review and reconsideration of the convictions and sentences of the Mexican nationals referred to in the *Avena* Judgment is an obligation of result.

24. Mexico referred in particular to the actions of the United States federal Executive, claiming that certain actions reflected the United States disagreement with Mexico over the meaning or scope of the *Avena* Judgment. According to Mexico, this difference of views manifested itself in the position taken by the United States Government in the Supreme Court: that the *Avena* Judgment was not directly enforceable under domestic law and was not binding on domestic courts without action by the President of the United States; and further that the obligation under Article 94 of the United Nations Charter to comply with judgments of the Court fell solely upon the political branches of the States parties to the Charter. In Mexico’s view, “the operative language [of the *Avena* Judgment] establishes an obligation of result reaching all organs of the United States, including the federal and state judiciaries, that must be discharged irrespective of domestic law impediments”. Mexico maintains that the United States Government’s narrow reading of the means for implementing the Judgment led to its failure to take all the steps necessary to bring about compliance by all authorities concerned with the obligation borne by the United States. In particular, Mexico noted that the United States Government had not sought to intervene in support of Mr.

Medellín's petition for a stay of execution before the United States Supreme Court. This course of conduct is alleged to reflect a fundamental disagreement between the Parties concerning the obligation of the United States to bring about a specific result by any necessary means. Mexico further argues that the existence of a dispute is also shown by the fact that the competent executive, legislative and judicial organs at the federal and Texas state levels have taken positions in conflict with Mexico's as to the meaning or scope of paragraph 153 (9) of the *Avena* Judgment.

25. The United States has, in its written observations of 29 August 2008 and its further written explanations of 6 October 2008, insisted that each of the matters brought to the attention of the Court by Mexico concerns not a dispute regarding whether the Parties perceive the obligations of paragraph 153 (9) as an obligation of result, but Mexico's dissatisfaction with the implementation to date of that obligation by the United States. The United States claims that it has consistently agreed with Mexico's interpretation of paragraph 153 (9) of the *Avena* Judgment. Specifically, it concurs that subparagraph 9 requires it to take all necessary steps to ensure that no Mexican national named in the Judgment is executed without having received the prescribed review and reconsideration and without a determination having been made that he has suffered no prejudice from the violation of the Convention. In particular, the United States contends that, in accordance with the discretion left to the United States by the Court as to the choice of means of compliance with the Judgment, the President elected to comply by, *inter alia*, determining that the state courts were to give effect to the Judgment, as set out in a Memorandum of 28 February 2005 to the Attorney General of the United States. The executive branch thus argued in the case *Medellín v. Texas* in the Supreme Court that the President's determination was lawful and binding on the state courts. According to the United States, no finding as to the existence of a difference of views between the Parties can be inferred from the controversy before the Supreme Court as to whether or not the Court's judgments are self-executing, because that is strictly a matter of United States domestic law. The Supreme Court found that the *Avena* Judgment created an international obligation incumbent upon the United States. Further, the United States argues that positions taken by other governmental officials in the United States cannot provide any basis for a finding of a divergence of views between the Parties in respect of the interpretation of the *Avena* Judgment; it points out that Mexico's argument in this regard is founded on positions taken by organs without the authority to express the State's official position on the international plane. The fact that Texas, or any other constituent part of the United States, may hold a different interpretation of the Court's Judgment is therefore irrelevant to the question before the Court.

26. The United States on several occasions reiterated that the relevant obligation was one of result, and that while the *Avena* Judgment allowed it a choice of means, it was certain that the obligation had to be complied with.

27. In its Order of 16 July 2008 the Court observed that "it seems both Parties regard paragraph 153 (9) as an international obligation of result" (Order, para. 55). Its observations on the matter being provisional, the Court has reviewed the contentions of the Parties in the written observations of 29 August 2008 and the further written explanations of 17 September and 6 October 2008 as to whether they both accept that the obligation in paragraph 153 (9) is one of result — that is to say, an obligation which requires a specific outcome. This means, in the particular case, the obligation upon the United States to provide review and reconsideration consistent with paragraphs 138 to 141 of the *Avena* Judgment to those Mexican nationals named in the *Avena* Judgment who remain on death row without having had the benefit of such review and reconsideration. In addition, Messrs. José Ernesto Medellín Rojas, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos were the subject of the Order on provisional measures relating to that obligation issued by the Court on 16 July 2008. The Court observes that this obligation of result is one which must be met within a reasonable period of time. Even serious efforts of the United States, should they fall short of providing review and reconsideration consistent with paragraphs 138 to 141 of the *Avena* Judgment, would not be regarded as fulfilling this obligation of result.

28. The United States has insisted that it fully accepts that paragraph 153 (9) of the *Avena* Judgment constitutes an obligation of result. It therefore continues to assert that there is no dispute over whether paragraph 153 (9) expresses an obligation of result, and thus no dispute within the meaning of the condition in Article 60 of the Statute. Mexico contends, making reference to certain omissions of the federal government to act and of certain actions and statements of organs of government or other public authorities, that in reality the United States does not accept that it is under an obligation of result; and that therefore there is indeed a dispute under Article 60.

29. It is for the Court itself to decide whether a dispute within the meaning of Article 60 of the Statute does indeed exist (see *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment No. 11, 1927, P.C.I.J., Series A, No. 13, p. 12).

To this end, the Court has in particular examined the written observations and further written explanations of the Parties to ascertain their views in the light of the comments of the Court in paragraph 55 of the Order that they

“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”.

30. The Court observes that whether, by reference to the elements described above, there is a dispute under Article 60 of the Statute, the resolution of which requires an interpretation of the provisions of paragraph 153 (9) of the *Avena* Judgment, can be perceived in two ways.

31. On the one hand, it could be said that a variety of factors suggest that there is a difference of perception that would constitute a dispute under Article 60 of the Statute.

Mexico observes that, in *Medellín v. Texas* (*Supreme Court Reporter*, Vol. 128, 2008, p. 1346), “the Federal Executive argued [in the United States Supreme Court] that Article 94 (1) [of the United Nations Charter] was directed only to the political branches of States Party . . . rather than to the State Party as a whole”, and adds that “[t]here is no support for that reading of Article 94 (1) in either its text, its object and purpose, or principles of general international law”. Mexico maintains that it was on the basis of this “erroneous interpretation” that “the [Supreme] Court found that the expression of the obligation to comply in Article 94 (1) . . . precluded the judicial branch — the authority best suited to implement the obligation imposed by *Avena* — from taking steps to comply”, the Supreme Court being of the view that the Charter provision referred to “a commitment on the part of U.N. Members to take future action through their political branches to comply with an ICJ decision” (*ibid.*, p. 1358). In Mexico’s contention, it thus follows that the highest judicial authority in the United States has understood the Judgment in *Avena* as not laying down an obligation of result binding on all constituent organs of the United States, including the federal and state judicial authorities. From this perspective, not only is the obligation in paragraph 153 (9) not really regarded as an obligation of result, but, argues Mexico, such an interpretation puts to one side the finding in the *Avena* Judgment that:

“in cases where the breach of the individual rights of Mexican nationals under Article 36, paragraph 1 (b), of the [Vienna Convention on Consular Relations] has resulted, in the sequence of judicial proceedings that has followed, in the individuals concerned being subjected to prolonged detention or convicted and sentenced to severe penalties, the legal consequences of this breach have to be examined and taken into account in the course of review and reconsideration. The Court considers that it is the judicial process that is suited to this task.” (*Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, pp. 65-66, para. 140.)

Further, Mexico contends that this understanding by the Supreme Court is inconsistent with the interpretation of the *Avena* Judgment as imposing an obligation of result incumbent on all constituent organs of the United States, including the judiciary.

32. From this viewpoint, the wording in Mexico’s concluding submissions — wording introduced in its further written explanations of 17 September 2008 — was directed to affirming that the obligation in paragraph 153 (9) of the *Avena* Judgment is incumbent on all the constituent organs to be seen as comprising the United States (see paragraph 10 above).

Mexico moreover rejects the argument of the State of Texas that Mr. Medellín had, prior to his execution, received the review and reconsideration required by paragraph 153 (9) of the *Avena* Judgment from state and federal courts.

33. According to Mexico, the United States, by word and deed, has contradicted its avowed acceptance of review and reconsideration as an obligation of result. Reference is made to the choice of the United States Government not to appear at the Supreme Court hearings on Mr. Medellín’s petition for a stay of execution.

Mexico also points to the very tardy attempts to engage Congress in ensuring that all constituent elements do indeed act upon this obligation.

34. Further, Mexico contends that the Supreme Court found that the obligation within paragraph 153 (9) could not be directly enforced by the judiciary on the basis of a Presidential memorandum nor otherwise without intervention of the legislature. In Mexico's view, this necessarily means that the obligation is not really regarded as one of result — a viewpoint not shared by the United States.

35. The Court observes that these elements could suggest a dispute between the Parties within the sense of Article 60 of the Statute.

36. On the other hand, there are factors that suggest, on the contrary, that there is no dispute between the Parties. The Court notes — without necessarily agreeing with certain points made by the Supreme Court in its reasoning regarding international law — that the Supreme Court has stated that the *Avena* Judgment creates an obligation that is binding on the United States. This is so notwithstanding that it has said that the obligation has no direct effect in domestic law, and that it cannot be given effect by a Presidential Memorandum.

37. Referring to the Court's statement in its Order of 16 July 2008 that there seemed to be a dispute as to the scope of the obligation in paragraph 153 (9), and upon whom precisely it fell, the United States reiterated in its written observations of 29 August 2008 that the federal government both "spoke for" and had responsibility for all organs and constituent elements of governmental authority. While that statement seems to be directed at matters different from what the Court perceived as the possible dispute in paragraph 55 of its Order of 16 July 2008, it could be said that Mexico addressed this question only somewhat indirectly in its further written explanations of 17 September 2008.

38. The Court notes that Article 98 (2) of the Rules of Court stipulates that when a party makes a request for interpretation of a judgment, "the precise point or points in dispute as to the meaning or scope of the judgment shall be indicated".

Mexico has had the opportunity to indicate the precise points in dispute as to the meaning or scope of the *Avena* Judgment, first in its Application of 5 June 2008 and then in the submissions made at the conclusion of its further written explanations of 17 September 2008.

The Application made reference to a dispute about whether the obligation in paragraph 153 (9) of the *Avena* Judgment was one of result; the United States rapidly signalled its agreement that the obligation incumbent upon it was an obligation of result. The matters emphasized by Mexico seemed particularly directed to the question of implementation by the United States of the obligations incumbent upon it as a consequence of the *Avena* Judgment. The various passages in the further written explanations of Mexico of 17 September 2008, while referring to certain actions and statements of the constituent organs of the United States and perceived failures to act in certain regards by the federal government, nonetheless remain very non-specific as to what the claimed dispute precisely is. Further, it is difficult to discern, save by inference, Mexico's position regarding the existence of a dispute as to whether the obligation of result falls upon all state and federal authorities and as to whether they share an understanding that it does so fall.

39. The Court observes that, in its Application of 5 June 2008, Mexico simply asked that the Court affirm that the obligation incumbent upon the United States paragraph 153 (9) constitutes an obligation of result.

When Mexico formulated its submissions in the oral hearings on the request for the indication of provisional measures, it submitted:

- “(a) that the United States, acting through all its competent organs and all its constituent subdivisions, including all branches of government and any official, state or federal, exercising government authority, take all measures necessary to ensure that José Ernesto Medellín, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending the conclusion of the proceedings instituted by Mexico on 5 June 2008, unless and until the five Mexican nationals have received review and reconsideration consistent with paragraphs 138 through 141 of this Court's *Avena* Judgment;”

40. Mexico had a further opportunity to indicate the precise points it regarded as in dispute when it reformulated its concluding submissions in paragraphs 86 (a) (1) and (2) of its further written explanations of 17 September 2008 (see paragraph 32 above).

41. The Court observes it could be argued that the claim in paragraph 86 (a) (1) that the United States “acting through all its competent organs . . . must take all measures necessary to provide the reparation of review and reconsideration” does not say that there is an obligation of result falling upon the various competent organs, constituent subdivisions and public authorities, but only that the United States will act through these in itself fulfilling the obligations incumbent on it under paragraph 153 (9).

The same wording of “the United States, acting through all its competent organs and all its constituent subdivisions” appears in paragraph 86 (a) (2) of Mexico’s concluding submissions. Whether in terms of meeting the requirements of Article 98 (2) of the Rules, or more generally, it could be argued that in the end Mexico has not established the existence of any dispute between itself and the United States. Moreover, the United States has made clear that it can agree with the first concluding submission (point (a)) of Mexico, requesting in its own concluding submissions, as a subsidiary submission, that the Court adjudge and declare “(b) an interpretation of the *Avena* Judgment in accordance with paragraph 86 (a) of Mexico’s Response to the Written Observations of the United States”.

Mexico did not specify that the obligation of the United States under the *Avena* Judgment was directly binding upon its organs, subdivisions or officials, although this might be inferred from the arguments it presented, in particular in its further written explanations.

* *

42. The Court notes that, having regard to all these elements, two views may be discerned as to whether or not there is a dispute within the meaning of Article 60 of the Statute.

* *

43. Be that as it may, the Court considers that there would be a further obstacle to granting the request of Mexico even if a dispute in the present case were ultimately found to exist within the meaning of Article 60 of the Statute. The Parties’ different stated perspectives on the existence of a dispute reveal also different contentions as to whether paragraph 153 (9) of the *Avena* Judgment envisages that a direct effect is to be given to the obligation contained therein.

44. The *Avena* Judgment nowhere lays down or implies that the courts in the United States are required to give direct effect to paragraph 153 (9). The obligation laid down in that paragraph is indeed an obligation of result which clearly must be performed unconditionally; non-performance of it constitutes internationally wrongful conduct. However, the Judgment leaves it to the United States to choose the means of implementation, not excluding the introduction within a reasonable time of appropriate legislation, if deemed necessary under domestic constitutional law. Nor moreover does the *Avena* Judgment prevent direct enforceability of the obligation in question, if such an effect is permitted by domestic law. In short, the question is not decided in the Court’s original Judgment and thus cannot be submitted to it for interpretation under Article 60 of the Statute (*Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v. Peru)*, Judgment, I.C.J. Reports 1950, p. 402).

45. Mexico’s argument, as described in paragraph 31 above, concerns the general question of the effects of a judgment of the Court in the domestic legal order of the States parties to the case in which the judgment was delivered, not the “meaning or scope” of the *Avena* Judgment, as Article 60 of the Court’s Statute requires. By virtue of its general nature, the question underlying Mexico’s Request for interpretation is outside the jurisdiction specifically conferred upon the Court by Article 60. Whether or not there is a dispute, it does not bear on the interpretation of the *Avena* Judgment, in particular of paragraph 153 (9).

46. For these reasons, the Court cannot accede to Mexico's Request for interpretation.

* *

47. Before proceeding to the additional requests of Mexico, the Court observes that considerations of domestic law which have so far hindered the implementation of the obligation incumbent upon the United States, cannot relieve it of its obligation. A choice of means was allowed to the United States in the implementation of its obligation and, failing success within a reasonable period of time through the means chosen, it must rapidly turn to alternative and effective means of attaining that result.

*

* *

48. In the context of the proceedings instituted by the Application requesting interpretation, Mexico has presented three additional claims to the Court. First, Mexico asks the Court to adjudge and declare that the United States breached the Order indicating provisional measures of 16 July 2008 by executing Mr. Medellín on 5 August 2008 without having provided him with the review and reconsideration required under the *Avena* Judgment. Second, Mexico also regards that execution as having constituted a breach of the *Avena* Judgment itself. Third, Mexico requests the Court to order the United States to provide guarantees of non-repetition.

49. The United States argues that the Court lacks jurisdiction to entertain the supplemental requests made by Mexico. As regards Mexico's claim concerning the alleged breach of the Order of 16 July 2008, the United States is of the opinion, first, that the lack of a basis of jurisdiction for the Court to adjudicate Mexico's Request for interpretation extends to this ancillary claim. Second, and in the alternative, the United States suggests that such a claim, in any event, goes beyond the jurisdiction of the Court under Article 60 of the Statute. Similarly, the United States submits that there is no basis of jurisdiction for the Court to entertain Mexico's claim relating to an alleged violation of the *Avena* Judgment. Finally, the United States disputes the Court's jurisdiction to order guarantees of non-repetition.

* *

50. Concerning Mexico's claim that the United States breached the Court's Order indicating provisional measures of 16 July 2008 by executing Mr. Medellín, the Court observes that in that Order it found that "it appears that the Court may, under Article 60 of the Statute, deal with the Request for interpretation" (Order, para. 57). The Court then indicated in its Order that:

"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)*." (*Ibid.*, para. 80 (II) (a).)

51. There is no reason for the Court to seek any further basis of jurisdiction than Article 60 of the Statute to deal with this alleged breach of its Order indicating provisional measures issued in the same proceedings. The Court's competence under Article 60 necessarily entails its incidental jurisdiction to make findings about alleged breaches of the Order indicating provisional measures. That is still so even when the Court decides, upon examination of the Request for interpretation, as it has done in the present case, not to exercise its jurisdiction to proceed under Article 60.

52. Mr. Medellín was executed in the State of Texas on 5 August 2008 after having unsuccessfully filed an application for a writ of *habeas corpus* and applications for stay of execution and after having been refused a stay

of execution through the clemency process. Mr. Medellín was executed without being afforded the review and reconsideration provided for by paragraphs 138 to 141 of the *Avena* Judgment, contrary to what was directed by the Court in its Order indicating provisional measures of 16 July 2008.

53. The Court thus finds that the United States did not discharge its obligation under the Court's Order of 16 July 2008, in the case of Mr. José Ernesto Medellín Rojas.

54. The Court further notes that the Order of 16 July 2008 stipulated that five named persons were to be protected from execution until they received review and reconsideration or until the Court had rendered its Judgment upon Mexico's Request for interpretation. The Court recalls that the obligation upon the United States not to execute Messrs. César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos pending review and reconsideration being afforded to them is fully intact by virtue of subparagraphs (4), (5), (6), (7) and (9) of paragraph 153 of the *Avena* Judgment itself. The Court further notes that the other persons named in the *Avena* Judgment are also to be afforded review and reconsideration in the terms there specified.

55. The Court finally recalls that, as the United States has itself acknowledged, until all of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) of paragraph 153 of the *Avena* Judgment have had their convictions and sentences reviewed and reconsidered, by taking account of Article 36 of the Vienna Convention on Consular Relations and paragraphs 138 to 141 of the *Avena* Judgment, the United States has not complied with the obligation incumbent upon it.

* *

56. As regards the additional claim by Mexico asking the Court to declare that the United States breached the *Avena* Judgment by executing José Ernesto Medellín Rojas without having provided him review and reconsideration consistent with the terms of that Judgment, the Court notes that the only basis of jurisdiction relied upon for this claim in the present proceedings is Article 60 of the Statute, and that that Article does not allow it to consider possible violations of the Judgment which it is called upon to interpret.

57. In view of the above, the Court finds that the additional claim by Mexico concerning alleged violations of the *Avena* Judgment must be dismissed.

* *

58. Lastly, Mexico requests the Court to order the United States to provide guarantees of non-repetition (point (2) (c) of Mexico's submissions) so that none of the Mexican nationals mentioned in the *Avena* Judgment is executed without having benefited from the review and reconsideration provided for by the operative part of that Judgment.

59. The United States disputes the jurisdiction of the Court to order it to furnish guarantees of non-repetition, principally inasmuch as the Court lacks jurisdiction under Article 60 of the Statute to entertain Mexico's Request for interpretation or, in the alternative, since the Court cannot, in any event, order the provision of such guarantees within the context of interpretation proceedings.

60. The Court finds it sufficient to reiterate that its *Avena* Judgment remains binding and that the United States continues to be under an obligation fully to implement it.

*

* *

61. For these reasons,

THE COURT,

(1) By eleven votes to one,

Finds that the matters claimed by the United Mexican States to be in issue between the Parties, requiring an interpretation under Article 60 of the Statute, are not matters which have been decided by the Court in its Judgment

of 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)*, including paragraph 153 (9), and thus cannot give rise to the interpretation requested by the United Mexican States;

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

AGAINST: *Judge Sepúlveda-Amor;*

(2) Unanimously,

Finds that the United States of America has breached the obligation incumbent upon it under the Order indicating provisional measures of 16 July 2008, in the case of Mr. José Ernesto Medellín Rojas;

(3) By eleven votes to one,

Reaffirms the continuing binding character of the obligations of the United States of America under paragraph 153 (9) of the *Avena* Judgment and *takes note* of the undertakings given by the United States of America in these proceedings;

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

AGAINST: *Judge Abraham;*

(4) By eleven votes to one,

Declines, in these circumstances, the request of the United Mexican States for the Court to order the United States of America to provide guarantees of non-repetition;

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

AGAINST: *Judge Sepúlveda-Amor;*

(5) By eleven votes to one,

Rejects all further submissions of the United Mexican States.

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

AGAINST: *Judge Sepúlveda-Amor.*

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

(Signed) Rosalyn HIGGINS,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judges KOROMA AND ABRAHAM append declarations to the Judgment of the Court; Judge SEPÚLVEDA-AMOR appends a dissenting opinion to the Judgment of the Court.

(Initialled) R. H.

(Initialled) Ph. C.

DECLARATION OF JUDGE KOROMA

Article 60 of the Statute — Existence of a dispute concerning whether review and reconsideration must be effective — Existence of a dispute as to whether obligation imposed by Avena paragraph 153 (9) is subject to domestic implementation — Court's Judgment should be interpreted to mean that the subject-matter of these disputes is not addressed in Avena paragraph 153 (9) — Avena Judgment remains binding under Article 94 of the Charter.

1. While I have voted in favour of the operative part of the Judgment, in my view the basis on which the Court has reached its conclusion needs to be clarified. It is for this reason that I have decided to append this declaration, in order to elucidate my understanding as to the application of Article 60 of the Statute regarding this matter.

2. Article 60 provides: “The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.”

3. According to its jurisprudence, the Court will apply Article 60 of the Statute when two parties hold opposite views with regard to the scope and meaning of a judgment. The Court has further elaborated on this by stating that the existence of a dispute under Article 60 is

“limited to whether the difference of views between the Parties which has manifested itself before the Court is ‘a difference of opinion between the Parties as to those points in the judgment in question which have been decided with binding force’, including ‘A difference of opinion as to whether a particular point has or has not been decided with binding force’ (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment No. 11, 1927, P.C.I.J., Series A, No. 13, pp. 11-12)”. (*Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1985, p. 218.)

4. On the basis of these criteria, there are at least two differences between the Mexican and United States positions that could be considered a “dispute” under the terms of Article 60. First, Mexico appears to take the position that the United States has only met its obligations under *Avena* if its efforts to assure review and reconsideration are effective; whereas the United States believes that those efforts are to be prioritized among the “many other pressing priorities” of government. Second, Mexico argues that the obligation of result imposed by *Avena* paragraph 153 (9) automatically and directly “reach[es] all organs, including the federal and state judiciaries”; whereas the United States believes that that obligation is subject to domestic implementation according to domestic law. This is, indeed, very similar to the dispute identified by the Permanent Court of International Justice in the *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)* (Judgment No. 11, 1927, P.C.I.J., Series A, No. 13, pp. 9-15 (finding that a dispute as to interpretation did exist by virtue of the States’ differing views regarding the role of Polish law in implementing Judgments Nos. 7 and 8 of the Permanent Court)).

5. The Court in this Judgment states in paragraph 43 that:

“The Parties’ different stated perspectives on the existence of a dispute reveal also different contentions as to whether paragraph 153 (9) of the *Avena* Judgment envisages that a direct effect is to be given to the obligation contained therein.”

In my view, this paragraph is not entirely clear. It should have been clearly stated that the Request for interpretation is not admissible because the issues in dispute are not within the scope of paragraph 153 (9) of that Judgment, which requires the United States “to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals” mentioned therein. In this regard, the Court should have concluded that paragraph 153 (9) does not address whether review and reconsideration should lead to a specific result; and that paragraph 153 (9) also does not directly address whether the obligation of result it imposes directly reaches all organs, including federal and state judiciaries, or whether it is subject to domestic implementation according to domestic law. It is because neither of these points is clearly within the scope of paragraph 153 (9) that I have voted in favour of the operative paragraph.

6. On the other hand, applying the criteria stated above and for consistency of jurisprudence, the Court could have found the request for interpretation admissible on the basis of either of the two disputes identified above. With respect to the first, concerning whether efforts to assure review and reconsideration must be effective, the

Court's jurisprudence provides that the subject of dispute may also relate to the Court's reasoning to the extent that that reasoning is "inseparable from the operative part" (*Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections (*Nigeria v. Cameroon*), *Judgment, I.C.J. Reports 1999*, p. 35, para. 10). Taking this principle into account, the Court could very well have found the request for interpretation admissible as to this dispute (see *Avena*, para. 138 (emphasizing that review and reconsideration must be "effective"))).

7. Likewise, with regard to the second dispute concerning the question of domestic implementation, the Court could have found this issue to lie within the scope of paragraph 153 (9), because the phrase "by means of its own choosing" could be considered to address the issue of domestic implementation. The Court therefore could have found Mexico's Request for interpretation admissible and proceeded to interpret that paragraph, examining the relatively narrow question of whether paragraph 153 (9) of *Avena* creates a direct obligation on state and local officials in the United States to provide review and reconsideration, or whether it creates an international obligation which is subject to domestic implementation in the United States according to United States law.

8. Furthermore, in interpreting the first dispute, the Court could have agreed that the efforts to carry out review and reconsideration must be effective in order to be in compliance with *Avena*. Indeed, even without reaching the interpretation, the Court does recall in its Judgment that, contrary to what has at times been implied by the United States,

"the United States itself acknowledged, until all of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) of paragraph 153 of the *Avena* Judgment have had their convictions and sentences reviewed and reconsidered, by taking account of Article 36 of the Vienna Convention on Consular Relations and paragraphs 138 to 141 of the *Avena* Judgment, the United States has not complied with the obligation incumbent upon it" (paragraph 55).

The Court has found that the obligation will only be met when the United States, by means of its own choosing, has in fact carried out review and reconsideration of the convictions at issue in *Avena*, and that the United States has not yet met its obligations under the Judgment.

9. With regard to the second dispute, the Court could have reached the conclusion that the obligation of result imposed by paragraph 153 (9) is subject to domestic implementation, as the Court had indicated that the United States should carry out review and reconsideration "by means of its own choosing". This necessarily implies that the United States has a choice of means as to how to implement its obligation under the Judgment.

10. In the light of the above considerations, in this case where the question of whether a dispute exists regarding the scope and meaning of paragraph 153 (9) of *Avena*, and based on the Court's jurisprudence, the Court could have found a dispute to exist between the Parties. However, the Court has found that the Application itself is not predicated on a matter which it had previously decided. Be that as it may, the Judgment, by reiterating the obligation of the Respondent in respect of the individuals named in *Avena*, has upheld the object and purpose of Article 60 of the Statute. First, as stated clearly at the conclusion of the Judgment, the "*Avena* Judgment remains binding and . . . the United States continues to be under an obligation fully to implement it" (paragraph 60). Second, as stated at paragraph 55 of the Judgment and mentioned above, the United States will not have complied with the obligation incumbent upon it under *Avena* until all the Mexican nationals mentioned therein "have had their convictions and sentences reviewed and reconsidered, by taking account of Article 36 of the Vienna Convention on Consular Relations and paragraphs 138 to 141 of the *Avena* Judgment".

11. Thus, while the Court may not be in a position to interpret its *Avena* Judgment, the binding force of that Judgment remains, and certain obligations in that Judgment have not yet been met. Under Article 94 of the Charter — and in this case also fundamental principles of human rights — international law demands nothing less than the full and timely compliance with the *Avena* Judgment for all the Mexican nationals mentioned therein.

(Signed) Abdul G. KOROMA.

DÉCLARATION DE M. LE JUGE ABRAHAM

J'ai voté en faveur de tous les points du dispositif du présent arrêt, sauf un.

Il s'agit du point 3), à propos duquel j'ai dû, à mon grand regret, me singulariser, en ne rejoignant pas l'ensemble de mes collègues.

Je crois devoir expliquer pourquoi, en quelques lignes.

Dans le point 3) du dispositif, la Cour

«[r]éaffirme que les obligations énoncées au point 9) du paragraphe 153 de l'arrêt *Avena* continuent de s'imposer aux Etats-Unis d'Amérique et prend acte des engagements pris par les Etats-Unis d'Amérique en la présente instance».

Naturellement, je ne conteste ni le bien-fondé de la première de ces deux propositions ni l'intérêt de la seconde.

Que les obligations découlant du point 9) du dispositif de l'arrêt *Avena*, à savoir l'obligation d'assurer le réexamen et la revision des condamnations prononcées à l'égard de chacun des cinquante et un ressortissants mexicains visés par l'arrêt, continuent de s'imposer aux Etats-Unis, voilà qui est évident et qui n'a d'ailleurs pas fait l'objet de la moindre contestation entre les Parties. Si l'on met à part le cas de José Ernesto Medellín Rojas, dont l'exécution capitale rend à présent sans objet cette obligation en ce qui le concerne, il est clair que pour les autres condamnés les Etats-Unis restent tenus de se conformer à l'arrêt de la Cour, pour autant qu'ils ne s'y seraient pas déjà conformés dans le cas de certains d'entre eux, question que la Cour n'était pas appelée à trancher et n'a pas entendu trancher. Par ailleurs, il est exact que les Etats-Unis, par la voix de leurs représentants qualifiés devant la Cour, ont réaffirmé leur engagement à tout mettre en œuvre pour que ceux des condamnés qui n'ont pas encore reçu la «réparation appropriée» définie au point 9) du dispositif de l'arrêt *Avena* en bénéficient dans les meilleurs délais, et il n'y a pas de doute que la Cour ne peut qu'en prendre note avec intérêt.

Ce n'est donc pas parce que je serais en désaccord avec le contenu des propositions qui figurent au point 3) que j'ai voté contre. C'est parce que ces énoncés outrepassent manifestement les limites de la compétence que la Cour tient de l'article 60 du Statut, et qu'elle exerce, ou est supposée exercer, en la présente espèce. Cette compétence a pour seul objet l'interprétation de l'arrêt précédemment rendu, et ne saurait englober quelque question que ce soit se rapportant à l'exécution dudit arrêt, soit pour le passé, soit pour l'avenir.

C'est d'ailleurs bien ce que dit la Cour lorsqu'elle rejette la demande du Mexique tendant à ce qu'elle constate que les Etats-Unis ont violé l'arrêt *Avena* en exécutant Medellín. Au paragraphe 56, l'arrêt rappelle les limites de la compétence que l'article 60 confère à la Cour et en déduit que celle-ci ne saurait accueillir ce chef de conclusions. Pourtant, que les Etats-Unis aient violé l'arrêt *Avena* par le comportement en cause peut se déduire logiquement du point 2) du dispositif, qui constate que l'exécution de Medellín a violé l'ordonnance de la Cour du 16 juillet 2008 portant mesures conservatoires. La Cour a accepté de faire droit à la demande du Mexique tendant à ce qu'elle constate la violation de son ordonnance, car celle-ci ayant été rendue «dans le cadre de la même instance» (en interprétation), le titre de compétence que met en œuvre la Cour en l'espèce englobe, incidemment, la question du respect des mesures conservatoires ordonnées par elle (paragraphe 51). En revanche, la Cour refuse, à bon droit, d'accueillir la demande tendant à ce qu'elle constate que le même comportement (l'exécution de Medellín) constitue également une violation de l'arrêt *Avena* — alors même que logiquement les deux propositions ne peuvent être que simultanément vraies — parce que cette demande ne saurait se rattacher, ni directement ni incidemment, à la compétence qu'elle tient de l'article 60.

Le même raisonnement aurait dû conduire la Cour à s'abstenir d'introduire dans le dispositif de l'arrêt des constatations — aussi indiscutables soient-elles — telles que celles qui figurent au point 3).

Une chose est de faire figurer dans les *motifs* d'un arrêt des remarques, constatations ou propositions juridiquement superfétatoires et pouvant apparaître comme dépassant les strictes limites de la compétence qu'exerce la Cour. Ce n'est jamais de très bonne méthode, mais il se peut que la Cour trouve parfois des raisons d'ordre pédagogique de procéder ainsi. Cela peut être acceptable, à condition que ce soit fait avec modération et discernement (comme ici, par exemple, aux paragraphes 54 et 55).

Autre chose, en tout cas, est de faire figurer dans le *dispositif* d'un arrêt des constatations outrepassant les limites de la compétence que la Cour met en œuvre. Car alors que ceux des motifs qui présentent un caractère

surabondant sont dépourvus de l'autorité de la chose jugée, tout ce qui figure dans le dispositif d'un arrêt est en principe *res judicata*. Il peut y avoir des motifs surabondants, il ne devrait pas y avoir de mention surabondante dans un dispositif. Par suite, tout ce qui figure au dispositif doit se tenir strictement dans les limites de la compétence de la Cour.

Tel n'est pas le cas du point 3). La Cour n'y répond aucunement à une demande d'interprétation de l'arrêt *Avena*, aucune des Parties n'ayant jamais évoqué la moindre contestation relative aux effets dans le temps dudit arrêt, qui pût appeler une interprétation.

En réalité, le point 3) apparaît plutôt comme une sorte de préambule au point 4), par lequel la Cour rejette la demande mexicaine tendant à ce que soient exigées des Etats-Unis des garanties de non-répétition (de la violation de l'arrêt *Avena*). C'est à la lumière des constatations du point 3) («dans ces conditions») que la Cour rejette cette demande au point suivant.

Mais à mon avis, ce qui justifie le rejet du chef de conclusions que la Cour écarte, à juste titre, au point 4) du dispositif, ce n'est pas que les Etats-Unis aient pris l'engagement de se conformer pleinement, désormais, à l'arrêt *Avena*, c'est que ce chef de conclusions est lui-même étranger à la compétence découlant de l'article 60 du Statut, la seule invoquée en l'espèce par le Mexique.

Ayant voté contre le point 3), pour les raisons que je viens d'exposer, je n'ai cependant pas cru devoir voter aussi contre le point 4), bien qu'il comporte à mes yeux un renvoi fâcheux au point précédent ; l'essentiel étant, pour moi, qu'il rejette la demande que la Cour ne pouvait accueillir.

J'ajouterai, pour conclure, que les observations qui précèdent ne mettent nullement en cause mon adhésion à l'essentiel de l'arrêt que la Cour vient de rendre et qui se trouve, selon moi, aux paragraphes 29 à 46 des motifs, et au point 1) du dispositif.

(Signé) Ronny ABRAHAM.

DISSENTING OPINION OF JUDGE SEPÚLVEDA-AMOR

Agreement with most of the reasoning and most of the decisions — Regret that Court did not settle issues incontrovertibly characterized by a degree of opacity — Implicit recognition by the Court that a dispute exists — Interpretation of obligation of result as one which requires specific outcome and within reasonable period of time — Failing success, need for alternative and effective means, such as legislative action — Medellín was executed without the required review and reconsideration — The Court finds that the United States has breached its obligations — But there is no determination of the legal consequences flowing from this breach — The Avena Judgment remains binding.

Article 36 confers individual rights — Mexico and the United States hold different views — The procedural default rule has not been revised — Non-application of procedural default rule is required to allow review and reconsideration to become operative — Binding force of the Judgment — United States Supreme Court's ruling is at odds with the one provided by Mexico and by the United States — The Court should have settled the issue raised by the conflicting interpretations — Review and reconsideration received by only one Mexican national out of 51 listed in the Avena Judgment — The obligation falls upon all state and federal authorities — Importance of role played by the judicial system, especially the United States Supreme Court — Mexico has established the existence of a dispute — State responsibility — It engages the action of the competent organs and authorities acting in that State — LaGrand found that a United States Governor is under the obligation to act in conformity with United States undertakings — In the present case, all competent organs and all constituent subdivisions must comply with mandated review and reconsideration, as Mexico claims — Interpretation of the dispute by the Court would have rendered an invaluable construction to the clarification of rules and its enforcement.

1. I am in agreement with most of the reasoning of the Court in the present Judgment, as well as with most of the decisions expressed in the operative clause of the Judgment. It is with regret that I am unable to join the Court in some of its conclusions. My regret stems not only from my disagreement with some of these views, but also from my belief that the Court has missed a splendid opportunity to settle issues calling for interpretation and

to construe the meaning or scope of the *Avena* Judgment in certain respects incontrovertibly characterized by a degree of opacity.

2. Before I embark on the process of setting out and explaining my points of disagreement with the Judgment, I believe it useful to revisit some of the important considerations that the Court has found worthy of stating; to a large extent, these follow from an interpretation of the *Avena* Judgment. In the present Judgment, the Court has clearly established what is meant by an obligation of result: it is “an obligation which requires a specific outcome” (Judgment, paragraph 27). It is clear that an obligation falls upon the United States to provide the Mexican nationals named in the *Avena* Judgment who remain on death row with review and reconsideration consistent with paragraphs 138 to 141 of the *Avena* Judgment. But then the Court construes the scope of the obligation:

“The Court observes that this obligation of result is one *which must be met within a reasonable period of time*. Even serious efforts of the United States should they fall short of providing review and reconsideration consistent with paragraphs 138 to 141 of the *Avena* Judgment, *would not be regarded as fulfilling this obligation of result*.” (Paragraph 27; emphasis added.)

3. If the obligation of result is one which “must be met within a reasonable period of time”, then there has been a failure by the United States to comply with it. According to Mexico, since March 2004, when the *Avena* Judgment was issued,

“at least 33 of the 51 Mexican nationals named in the Court’s Judgment have sought review and reconsideration in United States state and federal courts.

To date, only one of these nationals — Osbaldo Torres Aguilera — has received review and reconsideration consistent with this Court’s mandate. We should also mention, however, that the State of Arkansas agreed to reduce Mr. Rafael Camargo Ojeda’s death sentence to life imprisonment in exchange for his agreement to waive his right to review and reconsideration under the *Avena* Judgment. All other efforts to enforce the *Avena* Judgment have failed.” (CR 2008/14, p. 20, paras. 2 and 3 (Babcock).)

Almost five years have elapsed since the *Avena* Judgment was handed down. Since, as the Court considers, time is of the essence and the actual compliance performance has been poor, to say the least, the specific outcome associated with the obligation of result cannot be regarded as having been brought about by the United States.

4. A careful reading of the Court’s Judgment in the present case suggests an implicit recognition by the Court that Mexico and the United States have in fact shown themselves as holding opposing views in regard to the meaning and scope of the *Avena* Judgment. It was stated in the Order indicating provisional measures, in paragraph 55, 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” (Order, para. 55).

5. Although the Court reaches the conclusion that the matters claimed by Mexico as requiring an interpretation are not matters decided by the Court in its *Avena* Judgment and thus cannot give rise to the interpretation requested by Mexico (Judgment, operative clause, paragraph 59 (1)), the Court accepts that “[o]n the one hand, it could be said that a variety of factors suggest that there is a difference of perception that would constitute a dispute under Article 60 of the Statute” (Judgment, paragraph 31). And then, after reviewing some of Mexico’s contentions, the Court “observes that these elements could suggest a dispute between the Parties within the sense of Article 60 of the Statute” (Judgment, paragraph 35). Additionally, the Court indicates — in a paragraph to be examined later, for it gives rise to divergent interpretations — that

“Mexico did not specify that the obligation of the United States under the *Avena* Judgment was directly binding upon its organs, subdivisions or officials, *although this might be inferred from the arguments it presented, in particular in its further written explanations*.” (Judgment, paragraph 41; emphasis added.)

6. The fact is that the Judgment comes close to recognizing that there is a “dispute”, “*contestation*”, or “*desacuerdo*”, as the term is translated in the Spanish version of Article 60 of the Statute. Whether or not Mexico complied with Article 98, paragraph 2, of the Rules of Court, which states that “the precise point or points in dispute as to the meaning or scope of the judgment shall be indicated”, is a question requiring further consideration, which it will receive later in this dissenting opinion.

7. In the present Judgment, the Court further construes the meaning and scope of the *Avena* Judgment when it states that

“*considerations of domestic law which have so far hindered the implementation of the obligation incumbent upon the United States, cannot relieve it of its obligation. A choice of means was allowed to the United States in the implementation of its obligation and, failing success within a reasonable period of time through the means chosen, it must rapidly turn to alternative and effective means of attaining that result.*” (Judgment, paragraph 47; emphasis added.)

As the United States Supreme Court has ruled, the alternative and effective means rapidly to implement the obligation of result incumbent on the United States is through legislative action: “The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress” (*Medellin v. Texas*, 128 S. Ct. 1346, 1368 (2008), attached as Annex B, p. 60, of Mexico’s *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*)).

8. The means available to the United States is essentially legislative action, preferably at the federal level, quickly to attain effective compliance with the obligation. As the Permanent Court of International Justice found

“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, 1925, P.C.I.J., Series B, No. 10, p. 20*).

The Court has repeatedly affirmed in its jurisprudence that a State cannot invoke its domestic law to justify its failure to perform an international legal obligation. In taking the action required of it under the *Avena* Judgment, the United States “cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force” (*Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44, p. 24*).

9. The Court has clearly established that José Ernesto Medellín Rojas “was executed without being afforded the review and reconsideration provided for by paragraphs 138 to 141 of the *Avena* Judgment, contrary to what was directed by the Court in its Order indicating provisional measures of 16 July 2008” (Judgment, paragraph 52). In the operative clause of the Judgment, the Court has found unanimously that the United States “has breached the obligation incumbent upon it” under the Court’s Order (Judgment, paragraph 61 (2)). The Court leaves no doubt in its decision that the obligation upon the United States not to execute the other four Mexican nationals named in the Order of 16 July 2008 “pending review and reconsideration being afforded to them is fully intact by virtue” of the *Avena* Judgment itself (Judgment, paragraph 54). In the operative clause of the Judgment, the Court reaffirms “the continuing binding character of the obligations of the United States of America under paragraph 153 (9) of the *Avena* Judgment” (Judgment, paragraph 61 (3)).

10. The Court has found that the United States is in breach of its obligations for having executed Mr. Medellín in violation of the Order of 16 July 2008. What is missing from the present Judgment is a determination of the legal consequences which flow from the serious failure by the United States to comply with the Order and the *Avena* Judgment.

11. The Court, in its Order of 16 July 2008, placed clear emphasis on certain commitments undertaken by the United States. The Court took note of the following understandings and pledges voiced by the Agent of the United States:

“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 Court that ‘[t]o carry out Mr. Medellín’s sentence without affording him the necessary review and reconsideration obviously would be inconsistent with the *Avena* Judgment’;

the United States has recognized that ‘it is responsible under international law, for the actions of its political sub-divisions’, including ‘federal, state, and local officials’, and that its own international responsibility would be engaged if, as a result of acts or omissions by any of those political subdivisions, the United States was unable to respect its international obligations under the *Avena* Judgment . . . in particular, the Agent of the United States acknowledged before the Court that ‘the United States would be responsible, clearly, under the principle of State responsibility for the internationally wrongful actions of [state] officials’” (Order of 16 July 2008, paras. 76 and 77).

12. On 5 August 2008, Mr. Medellín was executed in the State of Texas without having been afforded the required review and reconsideration, and after having unsuccessfully filed an application for a writ of *habeas corpus* and applications for stay of execution and having been refused a stay of execution through the clemency process, as the Judgment indicates in paragraph 52. Yet the Court has not found it necessary even to mention in the present Judgment the commitments assumed by the Agent of the United States through his recognition: that Mr. Medellín’s execution would constitute a violation of an international obligation; that it would be inconsistent with the *Avena* Judgment; that the United States was responsible under international law for the actions of its political subdivisions; and that the responsibility of the United States would be engaged, under the principles of State responsibility, for the internationally wrongful acts of federal, state and local officials.

13. It is to be deeply regretted that the Court has decided not to pass judgment on a failure by the United States to discharge an international obligation. It is difficult to understand and accept this forbearance, especially when the United States Agent himself has recognized that a breach of its international obligations entails the responsibility of the State he represents. By refraining from attributing any legal significance to a violation of the *Avena* Judgment and of the Order of 16 July 2008, the Court has let pass an opportunity to further the development of the law of State responsibility and has ignored the need to adjudge the consequences of the internationally wrongful acts of a State and to determine the remedial action required in such circumstances.

14. In spite of this unexplained legal omission, the Court feels the need to ‘reiterate that its *Avena* Judgment remains binding and that the United States continues to be under an obligation fully to implement it’ (Judgment, paragraph 60). It is to be hoped that the United States Congress will enact legislation so as to comply with the decision of the Court. In the absence of federal legislation, the obligations stipulated in the *Avena* Judgment will become a mere abstraction, devoid of any legal substance. In the words of the United States Supreme Court,

“The *Avena* judgment creates an international law obligation on the part of the United States, but it is not automatically binding domestic law because none of the relevant treaty sources — the Optional Protocol, the U.N. Charter, or the ICJ Statute — creates binding federal law in the absence of implementing legislation and no such legislation has been enacted.” (*Medellin v. Texas*, 128 S. Ct. 1346 (2008), *Syllabus*; attached as Annex B to the Application, p. 44.)

I. Dispute/Contestation/Desacuerdo

15. In order properly to ascertain whether there is a “dispute”/“contestation”/“desacuerdo” for purposes of Article 60 of the Statute, it is necessary to consider the wider perspective of the litigation between the United States and Mexico. The legal proceedings have involved federal and state authorities, particularly the Executive branches of government at the federal and state levels, as well as federal and state courts.

16. The *Avena* Judgment clearly applies broadly to all Mexican nationals facing severe penalties or prolonged incarceration. Thus the Judgment includes not only the 51 Mexican nationals mentioned therein but also Mexican nationals sentenced to “severe penalties” in the future. The Court found, unanimously, that

“should Mexican nationals nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (b), of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention” (*Avena* Judgment, para. 153 (11)).

17. On the basis of this finding of the Court, which is part of the operative clause of the Judgment, it is perfectly legitimate to examine the opposing views propounded to the United States Supreme Court in the *Sanchez-Llamas v. Oregon* case, involving a Mexican national sentenced to more than 20 years of imprisonment; though not named in the *Avena* Judgment, he is entitled to the benefit of the judicial remedy mandated therein. It is also instructive to read the views expressed by the United States Supreme Court in the *Sanchez-Llamas* case, views which diverge substantially from Mexico's contentions and from what this Court decided in the *LaGrand* and the *Avena* cases, as will be shown in the following paragraphs.

II. Article 36 confers individual rights

18. In the *Amicus Curiae* Brief in support of *Sanchez-Llamas* as petitioner for the writ of *certiorari* before the United States Supreme Court, Mexico emphatically stated:

“the *Avena* Judgment reaffirmed in the clearest possible terms that Article 36 of the Vienna Convention *confers individual rights on all Mexican nationals* who are detained or arrested in the United States” (Brief *Amicus Curiae* of the Government of the United Mexican States in support of Petitioner 3, 4, *Sanchez-Llamas v. Oregon*, 126 S. Ct 2669 (2006); emphasis added).

To support its contention, Mexico resorts to paragraph 40 of the *Avena* Judgment: the individual rights of Mexican nationals “are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the United States” (*Judgment, I.C.J. Reports 2004*, p 35, para. 40).

19. To strengthen its argument in the *Sanchez-Llamas* case, Mexico cited what the United States had pleaded before the Court in the *Tehran* case. There, the United States argued that Article 36 “*establishes rights . . . for the nationals of the sending State* who are assured access to consular officers and through them to others” (*United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, *I.C.J. Pleadings*, 1979, p. 174; emphasis added).

20. It is clear that the United States holds a different view in the *Sanchez-Llamas* case on the question of individual rights conferred by Article 36 of the Convention. In its Brief to the United States Supreme Court, the United States asserted that the principle that the United States Supreme Court “should give ‘respectful consideration’ to an international court’s interpretation of a treaty *does not lead to the conclusion that Article 36 affords an individual a right* to challenge his conviction and sentence” (Brief for the United States as *Amicus Curiae* Supporting Respondents, p. 28, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006); emphasis added).

21. But the *Amicus Curiae* Brief for the United States not only contradicts the Mexican view; it also strongly challenges the interpretations handed down by the International Court of Justice in the *LaGrand* and *Avena* cases. In the words of the Brief,

“The United States *has no obligation to accept the reasoning underlying the ICJ’s Judgments . . .* As we have demonstrated, the ICJ’s reasoning is inconsistent with principles of treaty construction . . . Moreover, the weight to be given an ICJ judgment is at its nadir where, as here, the Executive Branch, whose views on treaty interpretation are entitled to at least ‘great weight’, has considered the ICJ’s decisions and determined that its own long standing interpretation of the treaty is the correct one. Notably, *the withdrawal of the United States from the Optional Protocol will ensure that the United States incurs no further international legal obligations to review and reconsider convictions and sentences in light of violations of Article 36 based on the ICJ’s interpretation of the Convention.* Under these circumstances and in light of the considerations discussed above, this Court should conclude that Article 36 *does not give criminal defendant a private right to challenge his conviction and sentence on the ground that Article 36 was breached.*” (*Ibid.*, p. 30; emphasis added.)

22. It is to be noted that the Agent of the United States in the present case, who vehemently argued that “in the field of international relations, the United States speaks with one voice through the executive branch” (CR 2008/17, p. 11, para. 15 (Bellinger)), was also responsible, in his capacity as Legal Adviser to the Department of State and together with the United States Solicitor General, for the Brief for the United States to the United States Supreme Court in the *Sanchez-Llamas* case.

23. One of the questions answered by the United States Supreme Court in the *Sanchez-Llamas* case was “whether Article 36 of the Vienna Convention grants rights that may be invoked by individuals in a judicial proceeding”. The Court noted:

“Respondents and the United States as *amicus curiae*, strongly dispute this contention. They argue that ‘*there is a presumption that a treaty will be enforced through political and diplomatic channels, rather than through the courts . . .*’. Because we conclude that *Sanchez-Llamas* and *Bustillo* are not in any event entitled to relief on their claims, we find it unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights.” (126 S. Ct. 2669, 2677-78 (2006); emphasis added.)

The United States Supreme Court nevertheless decided to affirm the judgment of the Supreme Court of Oregon, to the effect that Article 36 “does not create rights to consular access or notification that are enforceable by detained individuals in a judicial proceeding” (*ibid.*, p. 2676).

24. When the *Medellín* case was argued before the Texas Court of Criminal Appeals, Mexico contended:

“The very purpose of Article 36 is to permit the nations that signed the Vienna Convention — including Mexico, the United States and 164 other countries — to protect the interests of their citizens when they are arrested or otherwise detained while living, working, or traveling abroad. That interest is most acute when a citizen is facing trial in another country for a cause that may lead to his execution.” (Brief *Amicus Curiae* of the United Mexican States in Support of José Ernesto Medellín, *ex parte Medellín*, 223 S.W. 3d 315 (Tex. Crim. App. 2006) at ix; emphasis added.)

25. The United States took an opposing view:

“*Medellín* contends that, standing alone, the *Avena* decision constitutes a binding rule of federal law that he may privately enforce in this Court. While the United States has an international obligation to comply with the decision of the International Court of Justice in this case under Article 94 of the United Nations Charter, the text and background of Article 94 make clear that an I.C.J. decision is not, of its own force, a source of privately enforceable rights in court.” (Brief for the United States as *Amicus Curiae*, *Ex parte Medellín*, 223 S.W. 3d 315 (Tex. Crim. App. 2006); emphasis added.)

26. The Texas Court of Criminal Appeals wrote:

“while we recognize the competing arguments before us concerning whether Article 36 confers privately enforceable rights, a resolution to that issue is not required for our determination of whether *Avena* is enforceable in this Court. Our decision is controlled by the Supreme Court’s recent opinion in *Sanchez-Llamas v. Oregon*, and accordingly, we hold that *Avena* is not binding federal law.” (*Ex parte Medellín*, 223 S.W. 315, 330 (Tex. Crim. App. 2006).)

27. In the *Medellín* case argued before the United States Supreme Court, counsel for the United States asserted:

“Petitioner contends that the *Avena* decision is privately enforceable because the Optional Protocol and the United Nations Charter obligate the United States to comply with the decision . . . Allowing private enforcement, without the President’s authorization, would undermine the President’s ability to make those determinations.”

Those determinations are related to a decision by the President to comply with an International Court of Justice judgment and the measures that should be taken (Brief for the United States as *Amicus Curiae Medellín v. Texas*, 128 S. Ct. 1346 (2008), p. 19). Without addressing the issue of individual rights recognized under *LaGrand* and *Avena*, the United States Supreme Court decided in 2008 that the *Avena* Judgment was not directly enforceable as domestic law in state court.

28. This Court, in its *LaGrand* and *Avena* Judgments, has ruled that Article 36, paragraph 1, creates individual rights for those in detention. That pronouncement runs counter to the legal arguments advanced by United States federal authorities and sustained by state and federal courts. In *LaGrand*, the Court stated that it

“cannot accept the argument of the United States which proceeds, in part, on the assumption that paragraph 2 of Article 36 applies only to the rights of the sending State and not also to those of the detained individual. *The Court has already determined that Article 36, paragraph 1, creates individual rights for the detained person in addition to the rights accorded the sending State, and that consequently the reference to ‘rights’ in paragraph 2 must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual.*” (*LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 497, para. 89; emphasis added.)

In the present case, the Court could have better fulfilled its judicial function by dispelling all doubts raised by federal and state authorities in the executive and judicial branches of government in the United States. That should have been done by reaffirming the binding force of the *LaGrand* and *Avena* Judgments and the existence of individual rights under Article 36, even if that had meant acting on its own initiative, in order properly to construe the meaning or scope of the *Avena* Judgment.

III. The procedural default rule

29. In the *Avena* case, Mexico contended that the United States, by applying provisions of its municipal law, had failed to provide meaningful and effective review and reconsideration of convictions and sentences. Specifically, Mexico argued that

“The United States uses several municipal legal doctrines to prevent finding any legal effect from the violations of Article 36. *First*, despite this Court’s clear analysis in *LaGrand*, US courts, at both the state and federal level, continue to invoke default doctrines to bar any review of Article 36 violations — even when the national had been unaware of his rights to consular notification and communication and thus his ability to raise their violation as an issue at trial, due to the competent authorities’ failure to comply with Article 36.” (*Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 55, para. 109.)

30. The Court found in the *Avena* Judgment that “the procedural default rule has not been revised, nor has any provision been made to prevent its application” (*ibid.*, p. 57, para. 113). Then the Court added:

“The crucial point in this situation is that, by the operation of the procedural default rule as it is applied at present, the defendant is effectively barred from raising the issue of the violation of his rights under Article 36 of the Vienna Convention . . .” (*ibid.*, p. 63, para. 134).

31. After recalling that the *LaGrand* and *Avena* Judgments were entitled only to “respectful consideration”, the United States Supreme Court in the *Sanchez-Llamas* case went on to say:

“the International Court of Justice concluded that where a defendant was not notified of his rights under Article 36, application of the procedural default rule failed to give ‘full effect’ to the purposes of Article 36 because it prevented courts from attaching ‘legal significance’ to the Article 36 violation. *This reasoning overlooks the importance of procedural default rules in an adversary system, which relies chiefly on the parties to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication . . . The consequence of failing to raise a claim for adjudication at the proper time is generally forfeiture of that claim. As a result, rules such as procedural default routinely deny ‘legal significance’ — in the Avena and LaGrand sense — to otherwise viable legal claims.*” (*Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2685-86 (2006); emphasis added.)

32. The Texas Court of Criminal Appeals, when reviewing Medellín’s application for a writ of *habeas corpus*, provided a procedural history of Medellín’s case:

“Medellín filed an initial application for a writ of *habeas corpus*, claiming for the first time, among other things, that his rights under Article 36 of the Vienna Convention had been violated because he had not been advised of his right to contact the Mexican consular official after he was arrested. The district court found that Medellín *failed to object to the violation of his Vienna Convention rights at trial and, as a result, concluded that his claim was procedurally barred from review.*

Medellín appealed to the U.S. Court of Appeals for the Fifth Circuit, which also denied his application. The Fifth Circuit noted the I.C.J. decision in *Avena*, but determined that it was bound by the Supreme Court's decision in *Breard v. Greene*, which held that *claims based on a violation of the Vienna Convention are subject to procedural default rules*.

[W]e are bound by the Supreme Court's determination that I.C.J. decisions are not binding on United States courts. As a result, *Medellín . . . cannot show that Avena requires us to set aside Section 5 and review and reconsider his Vienna Convention claim.*" (*Ex parte Medellín*, 223 S.W. 3d 315, 321, 332 (2006); emphasis added.)

33. When submitting the Brief for the United States as *Amicus Curiae* before the United States Supreme Court in the *Sanchez-Llamas* case, in his capacity as Legal Adviser to the Department of State, the Agent of the United States in the present case pleaded that

"The I.C.J. decisions in *LaGrand* and *Avena* are clearly not binding on this Court in this case . . . [T]he United States undertaking under Article 94 of the United Nations Charter to comply with a decision of the I.C.J. in a dispute to which it is a party, is to comply with the I.C.J.'s ultimate resolution of the dispute, *not to accept all the reasoning that leads to that resolution. In this case, the I.C.J.'s reasoning is not persuasive . . .* By that reasoning, any procedural rule that prevented a court from deciding the substance of a Vienna Convention claim — such as a State's statute of limitations for seeking collateral review — would have to be set aside as inconsistent with Article 36 (2)." (Brief for the United States *Amicus Curiae Supporting Respondents, Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006); emphasis added.)

34. In principle, only the operative clause of an International Court of Justice judgment has binding force. However, under certain circumstances and in certain cases, the reasoning underlying the conclusions reached in the operative clause is inseparable from them and, because of this link, part of the reasoning in the *Avena* Judgment must also be the subject-matter of interpretation by the Court. I believe that construing the meaning or scope of most of the subparagraphs of paragraph 153, the operative clause of the Judgment, requires resort to the reasoning of the Court, for it is there that an explanation is found as to how the procedural default rule represents a judicial obstacle which renders inoperative and dysfunctional the rights embedded in Article 36 of the Vienna Convention. It is not sufficient to claim that the operative clause has binding force if its provisions become legally ineffective in the face of enforcement by United States federal and state courts of the procedural default rule. Such a domestic doctrine precludes compliance with international obligations, vitiates treaty rights of substance and renders a judgment nugatory.

35. The Court has already had occasion to consider the relationship between the reasoning in a judgment and the operative clause when entertaining requests for interpretation of a judgment. The Court recently explained that

"any request for interpretation must relate to the operative part of the judgment and cannot concern the reasons for the judgment *except in so far as these are inseparable from the operative part*" (*Request for Interpretation of the Judgment in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections (*Nigeria v. Cameroon*), *Judgment, I.C.J. Reports 1999*, p. 35, para. 10; emphasis added).

36. In the present case, the Court could have reached beyond the operative clause in the *Avena* case and examined one of the essential foundations for the proper functioning of that judgment: the non-application of the procedural default rule so as to enable the required review and reconsideration of convictions and sentences.

IV. Binding force of the Judgment

37. Mexico has claimed in its Application that the *Avena* Judgment is final and binding as between Mexico and the United States, invoking Article 59 of the Statute of the Court in support of its contention. Mexico asserts that, in spite of the obligation under Article 94, paragraph 1, of the United Nations Charter to comply with decisions of the Court,

"requests by the Mexican nationals for the review and reconsideration mandated in their cases by the *Avena* Judgment have repeatedly been denied. On 25 March 2008, the Supreme Court of the United States determined in the case of José Ernesto Medellín Rojas, one of the Mexican

nationals subject to the *Avena* Judgment, that *the Judgment itself did not directly require US courts to provide review and reconsideration under domestic law* . . . The Supreme Court, while expressly recognizing the United States's obligation to comply with the Judgment under international law, further held that the means chosen by the President of the United States to comply were unavailable under the US Constitution and indicated alternate means involving legislation by the US Congress or voluntary compliance by the State of Texas" (Application, para. 4; emphasis added.).

According to Mexico,

"the obligation to provide review and reconsideration is not contingent on the success of any one means. Mexico understands that in the absence of full compliance with the obligation to provide review and reconsideration, the United States must be considered to be in breach." (*Ibid.*, para. 5.)

38. It is apparent that Mexico and the United States take opposing views on the issue of the automatic application of the *Avena* Judgment in the domestic realm of the United States. Quoting the United States Brief as *amicus curiae* in the last *Medellín* case before the United States Supreme Court, Mexico notes that the United States, while having acknowledged an "international law obligation to comply with the I.C.J.'s decision in *Avena*", contended that the Judgment was not independently enforceable in domestic courts absent intervention by the President. The United States is quoted as follows:

"[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." (See Submission of Mexico in Response to the Written Observations of the United States of America, 17 September 2008, p. 2, para. 6; emphasis in the original.)

39. Mexico points out that

"the Supreme Court expressly adopted the United States' argument as to the lack of enforceability of the Judgment in domestic courts. 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" (*ibid.*, para. 7).

40. The United States Supreme Court in its ruling in the *Medellín* case provided an interpretation which is at odds with those proffered by Mexico and by the United States. The Supreme Court's understanding of the legal significance of Article 94 of the United Nations Charter and of Article 59 of the Court's Statute is expressed in the following terms:

"The Executive Branch contends that the phrase 'undertakes to comply' is not 'an acknowledgement that an I.C.J. decision will have immediate legal effect in the courts of UN members', but rather '*a commitment on the part of UN Members to take future action through their political branches to comply with an I.C.J. decision*'. We agree with this construction of Article 94. The Article is not a directive to domestic courts. It does not provide that the United States 'shall' or 'must' comply with an I.C.J. decision, nor indicate that the Senate that ratified the United Nations Charter intended to vest I.C.J. decisions with immediate legal effect in domestic courts.'" (128 S. Ct. 1346, 1358 (2008); emphasis added.)

41. The conclusion by the United States Supreme Court that the *Avena* Judgment does not by itself constitute binding federal law confutes the contention of the United States Executive Branch that,

"while the *Avena* Judgment does not of its own force require domestic courts to set aside ordinary rules of procedural default, that judgment became the law of the land with precisely that effect pursuant to the President's Memorandum and his power 'to establish binding rules of decision that preempt contrary state law'" (*ibid.*, p. 1367).

42. After making clear that unilaterally converting a non-self-executing treaty into a self-executing one is not among the means available to the United States President to enforce an international obligation, the Supreme Court stated:

“When the President asserts the power to ‘enforce’ a non-self-executing treaty by unilaterally creating domestic law, he acts in conflict with the implicit understanding of the ratifying Senate.” (*Ibid.*, p. 1369.)

43. Three different interpretations are advanced as to the domestic effects of an international obligation. Three different interpretations are advanced as to domestic implementation of the United Nations Charter, the Court’s Statute and the *Avena* Judgment. The Court could have made an important contribution to the development of international law by settling the issues raised by these conflicting interpretations.

V. Review and reconsideration

44. It is justifiable to conclude that a dispute arises in the present case out of the fundamentally different views taken by Mexico and the United States on the interpretation to be given to the obligation imposed by the *Avena* Judgment. But there is not only a conflict of legal views and of interests between the two countries. There is a disagreement on several points of law and, also, on the facts.

45. In its oral pleadings, Mexico recalled that the review and reconsideration mandated by the *Avena* Judgment must take place as part of the “judicial process”. Mexico pointed out that

“since March 2004, at least 33 of the 51 Mexican nationals named in the Court’s Judgment have sought review and reconsideration in United States State and federal courts.

To date, *only one of these nationals* — Osbaldo Torres Aguilera — *has received review and reconsideration* consistent with the Court’s mandate. We should also mention, however, that the State of Arkansas agreed to reduce Mr. Rafael Camargo Ojeda’s death sentence to life imprisonment in exchange for his agreement to waive his right to review and reconsideration under the *Avena* Judgment. *All other efforts to enforce the Avena Judgment have failed.*” (CR 2008/14, p. 20, paras. 2 and 3 (Babcock); emphasis added.)

46. In contrast, the United States claims that “*several Mexican nationals* named in *Avena* have already received review and reconsideration of their convictions and sentences” (CR 2008/15, p. 56, para. 22 (Bellinger); emphasis added). But only Osbaldo Torres is mentioned as a beneficiary of the remedy.

47. Fifty-one Mexican nationals fell within the scope of the review and reconsideration mandated in the *Avena* Judgment. At present only 50 are on the list, after the execution of José Medellín Rojas by the State of Texas on 5 August 2008 without review and reconsideration of his conviction and sentence. The case of Torres Aguilera has already been mentioned. Seven other cases have been disposed of without recourse to review and reconsideration. Rafael Camargo Ojeda, in Arkansas, under a plea agreement facilitated by *Avena*, waived his right to review and reconsideration in exchange for the reduction of his death sentence to life imprisonment. Juan Caballero Hernández, Mario Flores Urbán and Gabriel Solache Romero had their sentences commuted by the Governor of Illinois in 2003, a measure which benefited all persons on death row in that state at that time. Martin Raul Soto Fong and Osvaldo Regalado Soriano in Arizona had their sentences commuted after the United States Supreme Court declared unconstitutional the application of a death sentence to those under age at the time they committed the crime. Daniel Angel Plata Estrada in Texas had his death sentence commuted after the United States Supreme Court ruled unconstitutional the execution of a mentally retarded person (source: <<http://www.internationaljusticeproject.org/nationals-Stats.com>> and <<http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us>>). It is now almost five years since the *Avena* Judgment was handed down and 42 Mexican nationals have yet to receive the relief required by it.

VI. The obligation falls upon all state and federal authorities

48. Mexico contends that the obligation of result falls upon all state and federal authorities and, particularly, upon the United States Supreme Court, taking into account the “judicial process” remedy mandated by *Avena*. The conclusion reached by Mexico on this matter cannot be regarded as anything else but proof of a clash of views — reflecting a disagreement with the United States on a point of law — and therefore a dispute. According to Mexico,

“the [United States Supreme] 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." (Submission of Mexico in Response to the Written Observations of the United States of America, 17 September 2008, p. 15, para. 53; emphasis added.)

49. Clearly, this is an issue on which Mexico has indicated "the precise point or points in dispute as to the meaning or scope of the judgment". Mexico's contention is that the United States Supreme 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*" (*ibid.*, p. 16, para. 56; emphasis added).

50. In the light of all these considerations, it is obvious that there is a misreading and a misinterpretation in the present Judgment of Mexico's position. The Court's mistaken assumptions are reflected in paragraph 24 of this Judgment:

"Mexico referred in particular to the actions of the United States federal Executive, claiming that certain actions reflected the United States disagreement with Mexico over the meaning or scope of the *Avena* Judgment. According to Mexico *this difference of views manifested itself in the position taken by the United States Government in the Supreme Court . . .* Mexico maintains that the United States Government's narrow reading of the means for implementing the Judgment led to its failure to take all the steps necessary to bring about compliance by all authorities concerned with the obligation borne by the United States." (Emphasis added.)

51. It is not Mexico's position that the failure to comply with the *Avena* obligation is attributable only to the United States federal Executive. What Mexico has argued is that the definitive determination to deny the judicial review and reconsideration mandated by *Avena* is attributable to the United States Supreme Court for having decided that: "while a treaty may constitute an international commitment, it is not domestic law unless Congress has enacted statutes implementing it"; "the *Avena* Judgment . . . is not automatically domestic law"; "*Avena* does not by itself constitute binding federal law"; "the President's Memorandum does not independently require the States to provide review and reconsideration of the claims of the 51 Mexican nationals named in *Avena* without regard to state procedural default rules".

52. Given these judicial determinations, there can be no doubt that the United States Supreme Court does not share the understanding that the mandate of the *Avena* Judgment is an obligation of result. The same is true of other authorities, and especially federal and state courts, as is evident from decisions adopted by such jurisdictions, including the Supreme Court of Oregon, the Texas Court of Criminal Appeals, the United States Supreme Court, state trial courts, federal district courts and the United States Court of Appeals for the Fifth Circuit.

53. In paragraph 48 of the Order of 16 July 2008, indicating provisional measures, the Court stated:

"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]'".

Mexico reiterated this position in its further written explanations.

54. The United States however submitted in its oral pleadings that

"the United States agrees that it is responsible under international law for the actions of its political subdivisions. That is not the same, however, as saying that the views of a state court are attributed to the United States for purposes of determining whether there is a dispute between the United States and Mexico as to the meaning and scope of the *Avena* Judgment." (CR 2008/17, p. 11, para. 13 (Bellinger).)

The question of attribution of responsibility for the conduct of State organs will be dealt with at a later stage in this opinion. But what is important at present is to observe that there is undeniably a dispute between Mexico and the United States on this point. Of course, the issue relates not only to the views of a state court, as the United

States would have us believe, although those views may also have legal consequences in the implementation of the *Avena* Judgment.

55. The crux of the dispute turns on the decision of the highest federal judicial authority of the United States. The interpretation by the United States Supreme Court is conclusive as a matter of domestic law and binding on all state and federal courts and officials — including the federal executive. Mexico rightly points out that “the views of the Supreme Court as to the scope and meaning of the United States’ treaty obligations are relevant for purposes of the objective determination of a dispute” (Submission of Mexico in Response to the Written Observations of the United States of America, 17 September 2008, p. 14, para. 51).

56. In the present Judgment, the Court states, in paragraph 38, that “it is difficult to discern, save by inference, Mexico’s position regarding the existence of a dispute as to whether the obligation of result falls on all state and federal authorities”. But it is not only by inference that the Mexican position can be discerned. As shown in the preceding paragraphs, there is a dispute: Mexico clearly argues that “each of the Federal Executive, Judiciary, and Legislature have failed to treat the *Avena* Judgment as imposing an obligation of result” (Submission of Mexico in Response to the Written Observations of the United States of America, 17 September 2008, p. 11, para. 40).

57. The United States disputes this contention:

“under established international law, whether Texas, or any other U.S. state, has a different interpretation of the Court’s judgment is irrelevant to the issue before the Court. Similarly irrelevant are any interpretations by officials of other entities of the federal government that are not deemed by international law to speak on behalf of the United States” (Written Observations of the United States of America, 29 August 2008, p. 20, para. 44).

In this statement, it is worth noting that great care has been taken to avoid any mention of state and federal courts and, in particular, the role of the United States Supreme Court. The question is not who speaks for the United States. The question is what is the legal consequence of a decision by the United States Supreme Court interpreting a United States international obligation as not constituting binding federal law without implementing legislation.

58. In its final submissions, to the Court on 17 September 2008, Mexico asked the Court to adjudge and declare

“(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 . . . and that pursuant to the interpretation of the foregoing obligation of result,*

- (1) the United States, acting through *all of 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)*” (Submission of Mexico in Response to the Written Observations of the United States of America, 17 September 2008, p. 24, para. 86; emphasis added; Judgment, paragraph 10).

59. After a careful reading of this submission, I find it incomprehensible that the Court could conclude that “Mexico did not specify that the obligation of the United States under the *Avena* Judgment was directly binding upon its organs, subdivisions or officials, although this might be inferred from the arguments it presented, in particular in its further written explanations.” (See paragraph 40 of this Judgment). All the required specificity is there; there is no need to resort to inferences.

60. In its concluding remarks and submissions, Mexico indicated that it

“welcomes any good faith attempt to ensure its nationals are provided with effective review and reconsideration that is fully consistent with this Court’s mandate in the *Avena* Judgment. Nonetheless, *it is clear that constituent organs of the United States do not share Mexico’s view that the Avena Judgment imposes an obligation of result.* It is thus clearly established that *there is a dispute between the United States and Mexico* as to the meaning and scope of paragraph 153 (9) of said Judgment” (CR 2008/16, p. 21, para. 2 (Lomónaco); emphasis added).

Contrary to what is stated in paragraph 41 of this Judgment, I do not believe that it can be argued that “Mexico has not established the existence of any dispute between itself and the United States”. It is not sufficient to find

that the United States claims there is no dispute. The positions and actions taken by various United States federal and state authorities, particularly the federal judiciary, prove otherwise.

VII. State responsibility

61. In 1999 the Court decided that the international responsibility of a State was engaged by the actions of the competent organs and authorities of that State, whatever they may be. Thus in the *LaGrand* case, when the Court ordered the provisional measures to be taken by the United States, it concluded that

“Whereas the international responsibility of a State *is engaged by the action of the competent organs and authorities acting in that State*, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order *falls within the jurisdiction of the Governor of Arizona*; whereas *the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor*; whereas *the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States*” (*LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 16, para. 28; emphasis added).

62. It is crystal clear in its final submissions (see paragraph 10 of the Judgment) that Mexico has taken into account the language used by the Court in the *LaGrand* Order, even employing the same terminology. Mexico asserts that there is an *obligation of result* incumbent upon the United States under the *Avena* Judgment. The international responsibility of the United States is “engaged by the actions of its competent organs and authorities”. Thus,

“the United States, *acting through all of 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)*” (emphasis added).

63. Article 4 of the International Law Commission’s Articles on State Responsibility provides:

“1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization, and whatever its character as an organ of the central government or of the territorial unit of the State.” (United Nations General Assembly, Supplement No. 10 (A/56/10).)

64. In its Commentary to Article 4, the International Law Commission holds that the “reference to a ‘State organ’ covers all the individual and collective entities which make up the organization of the State and *act on its behalf*”. It adds that “the State is responsible for the conduct of its own organs, *acting in that capacity*”, something that has long been recognized in international judicial decisions. The Commission also points out that

“the reference to a State organ in Article 4 is intended in the most general sense. *It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification*, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level.” (International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries Ch. II, art. 4, *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two.)

65. It is obvious that Mexico’s final submission, in keeping with the *LaGrand* Order and with what is indicated in the Articles on State Responsibility, asserts that there is an obligation of result falling upon the United States and its competent organs and constituent subdivisions. These must be understood to include *inter alia* the State of Texas, the Supreme Court of the State of Oregon, the United States federal courts, the United States Government, and the United States Supreme Court. Clearly, the wrongful conduct must be attributed to the United States, as a political entity under international law, a political entity that must necessarily act through its competent organs, its constituent subdivisions and all officials exercising government authority.

66. When these considerations are kept in mind, it is extremely difficult to understand the scope of paragraph 41 of this Judgment. The Court contends that it could be argued that Mexico's final submission "does not say that there is an obligation of result falling upon the various competent organs, constituent subdivisions and public authorities, but only that the United States will act through these in itself fulfilling the obligations incumbent on it under paragraph 153 (9)". Contrary to what the Court states, a reading of Mexico's final submissions shows that it asserts that there is an obligation of result, in Mexico's interpretation, and that pursuant to such obligation the United States, acting through any and all organs of the State, must take all necessary measures to provide the *Avena* remedy.

VIII. Conclusion

67. I have done my utmost to demonstrate in this dissenting opinion that there is a dispute between Mexico and the United States, a dispute which is ongoing. In my view, a dispute exists as to the meaning or scope of the *Avena* Judgment, in the sense of Article 60 of the Statute of the Court, since it is clear that Mexico and the United States have fundamentally different views on the interpretation of the obligation imposed by the *Avena* Judgment. But it is my understanding that it is not only a dispute/*contestation/desacuerdo* under Article 60. There is also a dispute in the sense of Article 38, paragraph 1, since there is a disagreement on several points of law and on the facts. I am convinced that there is a conflict of legal views and of interests between Mexico and the United States on the substance of the obligations incumbent upon the United States under the *Avena* Judgment.

68. Had it interpreted the scope and meaning of the *Avena* Judgment, the Court could have made an invaluable contribution to the settlement of a dispute which runs the risk of self-perpetuation. The Court had at its disposal all the necessary elements to identify the precise point or points in dispute as to the meaning or scope of the *Avena* Judgment. It decided otherwise and the consequence is that the international legal order has been deprived of an enlightened construction of its fundamental rules and principles and, equally important, guidance in enforcing them.

(Signed) Bernardo SEPÚLVEDA-AMOR.
