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)

19 January 2009

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)*;
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> *(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 seised 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".

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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.

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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.

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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.

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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.

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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.

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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.

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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.

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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.

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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.