170. 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)

Order of 16 July 2008

On 16 July 2008, the International Court of Justice gave its decision on the request for the indication of provisional measures submitted by Mexico in the case concerning the *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America).* The Court indicated that the United States of America shall take "all measures necessary" to ensure that five Mexican nationals are not executed pending its final judgment.

The Court was composed as follows: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Buergenthal, Owada, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Registrar Couvreur.

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The operative paragraph (para. 80) reads as follows:
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The Court,

I. By seven votes to five,

Finds that the submission by the United States of America seeking the dismissal of the Application filed by the United Mexican States can not be upheld;
IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Abraham, Sepúlveda-Amor, Bennouna;
AGAINST: Judges Buergenthal, Owada, Tomka, Keith, Skotnikov;

II. *Indicates* the following provisional measures:

(*a*) By seven votes to five,
The United States of America shall take all measures necessary to ensure that Messrs. José Ernesto Medellín Rojas, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending judgment on the Request for interpretation submitted by the United Mexican States, unless and until these five Mexican nationals receive review and reconsideration consistent with paragraphs 138 to 141 of the Court's Judgment delivered on 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*;
IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Abraham, Sepúlveda-Amor, Bennouna;
AGAINST: Judges Buergenthal, Owada, Tomka, Keith, Skotnikov;

(*b*) By eleven votes to one,
The Government of the United States of America shall inform the Court of the measures taken in implementation of this Order;
IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Owada, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov;
AGAINST: Judge Buergenthal;

III. By eleven votes to one,

Decides that, until the Court has rendered its judgment on the Request for interpretation, it shall remain seised of the matters which form the subject of this Order.
IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Owada, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov;
AGAINST: Judge Buergenthal."

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Judge Buergenthal appended a dissenting opinion to the Order of the Court; Judges Owada, Tomka and Keith appended a joint dissenting opinion to the Order of the Court; Judge Skotnikov appended a dissenting opinion to the Order of the Court.

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The Court begins by recalling that, on 5 June 2008, the United Mexican States (hereinafter "Mexico"), filed an Application instituting proceedings whereby, referring to Article 60 of the Statute and Articles 98 and 100 of the Rules of Court, it requested the Court to interpret paragraph 153 (9) of the Judgment delivered by the Court on 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America)* (hereinafter "the *Avena* Judgment").

The Court notes that, in its Application, Mexico states that in paragraph 153 (9) of the *Avena* Judgment the Court found "that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals" mentioned in the Judgment, taking into account both the violation of the rights set forth in Article 36 of the Vienna Convention on Consular Relations (hereinafter "the Vienna Convention") and paragraphs 138 to 141 of the Judgment. It observes that Mexico alleges that "requests by the Mexican nationals for the review and reconsideration mandated in their cases by the *Avena* Judgment have repeatedly been denied".

The Court indicates that in its Application, Mexico refers to Article 60 of the Statute of the Court which provides that "[i]n the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party" and that it contends, citing the Court's case law, that the Court's jurisdiction to entertain a request for interpretation of its own judgment is based directly on this provision.

The Court observes that Mexico understands the language of paragraph 153 (9) of the *Avena* Judgment as establishing “an obligation of result”, while, according to Mexico, it follows from the conduct of the United States that the latter understands that “paragraph 153 (9) imposes only an obligation of means”.

The Court recalls that, on 5 June 2008, Mexico also submitted a request for the indication of provisional measures, asking that, pending judgment on its Request for interpretation, the Court indicate:

“(*a*) that the Government of the United States take all measures necessary to ensure that José Ernesto Medellín, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending the conclusion of the proceedings instituted [on 5 June 2008];

(*b*) that the Government of the United States inform the Court of all measures taken in implementation of subparagraph (a); and

(*c*) that the Government of the United States ensure that no action is taken that might prejudice the rights of Mexico or its nationals with respect to any interpretation this Court may render with respect to paragraph 153 (9) of its *Avena* Judgment.”

The Court notes that Mexico asks that its request for the indication of provisional measures be treated as a matter of the greatest urgency “in view of the extreme gravity and immediacy of the threat that authorities in the United States will execute a Mexican national [a Texas court has scheduled Mr. Medellín’s execution for 5 August 2008, and four more Mexican nationals are ‘in imminent danger of having execution dates set by the State of Texas’] in violation of obligations the United States owes to Mexico”.

The Court then summarizes the arguments put forward by the Parties during the public hearings held on 19 and 20 June 2008.

It indicates that Mexico restated the position set out in its Application and in its request for the indication of provisional measures, affirming that the requirements for the indication by the Court of such measures had been met, while the United States claimed that there existed no dispute between itself and Mexico as to “the meaning or scope of the Court’s decision in *Avena*” because the United States “entirely agree[d]” with Mexico’s position that the *Avena* Judgment imposed an international legal obligation of “result” and not merely of “means”. In the United States view, the Court was being “requested by Mexico to engage in what [was] in substance the enforcement of its earlier judgments and the supervision of compliance with them” and, given the fact that the United States had withdrawn from the Optional Protocol to the Vienna Convention on Consular Relations on 7 March 2005, a proceeding on interpretation was “potentially the only jurisdictional basis” for Mexico to seise the Court in matters involving the violation of that convention.

The Court notes that at the end of the hearings, Mexico made the following request:

“(*a*) that the United States, acting through all its competent organs and all its constituent subdivisions, including all branches of government and any official,

state or federal, exercising government authority, take all measures necessary to ensure that José Ernesto Medellín, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending the conclusion of the proceedings instituted by Mexico on 5 June 2008, unless and until the five Mexican nationals have received review and reconsideration consistent with paragraphs 138 through 141 of this Court's *Avena* Judgment; and

(*b*) that the Government of the United States inform the Court of all measures taken in implementation of subparagraph (a)."

The United States, for its part, requested that the Court reject the request of Mexico for the indication of provisional measures of protection and not indicate any such measures, and that the Court dismiss Mexico's Application for interpretation on grounds of manifest lack of jurisdiction.

The Court begins its reasoning by observing that its 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. It follows that, even if the basis of jurisdiction in the original case lapses, the Court, nevertheless, by virtue of Article 60 of the Statute, may entertain a request for interpretation.

The Court goes on to say that in the case of a request for the indication of provisional measures made in the context of a request for interpretation under Article 60 of the Statute, it has to consider whether the conditions laid down by that Article for the Court to entertain a request for interpretation appear to be satisfied.

The Court states that according to Mexico, paragraph 153 (9) of the *Avena* Judgment "establishes an obligation of result that obliges the United States, including all its component organs at all levels, to provide the requisite review and reconsideration irrespective of any domestic impediment", and that the "obligation imposed by the *Avena* Judgment requires the United States to prevent the execution of any Mexican national named in the Judgment unless and until that review and reconsideration has been completed and it has been determined whether any prejudice resulted from the Vienna Convention violations found by this Court". It adds that, in Mexico's view, the fact that "[n]either the Texas executive, nor the Texas legislature, nor the federal executive, nor the federal legislature [of the United States] 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. According to Mexico, "the United States understands the Judgment to constitute merely an obligation of means, not an obligation of result".

The Court recalls that the United States has argued that Mexico's understanding of paragraph 153 (9) of the *Avena* Judgment as an "obligation of result . . . is precisely the interpretation that the United States holds concerning the paragraph in question" (emphasis in the original) and that, while admitting that, because of the structure of its Government and its domestic law, the United States faces substantial obstacles in implementing its obligation under the *Avena* Judgment, the United States confirmed that "it has clearly accepted that the obligation

to provide review and reconsideration is an obligation of result and it has sought to achieve that result". The Court indicates that, in the United States view, in the absence of a dispute with respect to the meaning and scope of paragraph 153 (9) of the *Avena* Judgment, Mexico's claim does not fall within the provisions of Article 60 and that the Court lacks "jurisdiction *ratione materiae*" to entertain Mexico's Application and accordingly lacks "the prima facie jurisdiction required for the indication of provisional measures".

Examining the French and English versions of Article 60 of the Statute, the Court observes that they are not in total harmony: the French text uses the term "contestation", which has a wider meaning than the term used in the English text ("dispute"), although in their ordinary meaning, both terms in a general sense denote opposing views. The Court notes that Article 60 of its Statute is identical to that of its predecessor, the Permanent Court of International Justice, and goes on to explain that the drafters of the Statute of the Permanent Court chose to use the term "contestation" (rather than "différend") in Article 60. It observes that the term "contestation" is wider in scope, does not require the same degree of opposition and that its underlying concept is more flexible in its application to a particular situation. The Court then looks at the way the Permanent Court and itself addressed the question of the meaning of the term "dispute" ("contestation") in their jurisprudence. It indicates that "the manifestation of the existence of the dispute in a specific manner, as for instance by diplomatic negotiations, is not required" for the purposes of Article 60, nor is it required that "the dispute should have manifested itself in a formal way". It adds that recourse could be had to the Permanent Court as soon as the interested States had in fact shown themselves as holding opposing views in regard to the meaning or scope of a judgment of the Court, and that this reading was confirmed by the ICJ in a 1985 Judgment in the case concerning *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya).*

The Court then explains that it needs to determine whether there appears to be a dispute between the Parties as to the meaning or scope of the *Avena* Judgment. Recalling the arguments of the Parties, it finds 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.

It points out that, in the light of the positions taken by the Parties, there appears to be a difference of opinion between them as to the meaning and scope of the Court's finding in paragraph 153 (9) of the operative part of the Judgment and thus recourse could be had to the Court under Article 60 of the Statute. The Court finds that it may, under Article 60 of the Statute, deal with the Request for interpretation, that the submission of the United States, that the Application of Mexico be dismissed *in limine* "on grounds of manifest lack of jurisdiction", cannot be upheld, and that it may address the request for the indication of provisional measures.

Turning to Mexico's request for the indication of provisional measures, the Court states that, when considering such a request, it "must be concerned to preserve . . . the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent". The Court adds that a link must be established between the alleged rights the

protection of which is the subject of the provisional measures being sought, and the subject of the principal request submitted to the Court.

After recalling the arguments of the Parties thereon, the Court notes that Mexico seeks clarification of the meaning and scope of paragraph 153 (9) of the operative part of the 2004 Judgment in the *Avena* case, whereby the Court found that the United States is under an obligation to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals, taking into account both the violation of the rights set forth in Article 36 of the Vienna Convention and paragraphs 138 to 141 of the Judgment. The Court observes that it is the interpretation of the meaning and scope of that obligation, and hence of the rights which Mexico and its nationals have on the basis of paragraph 153 (9) that constitutes the subject of the proceedings before the Court on the Request for interpretation, and that Mexico filed a request for the indication of provisional measures in order to protect these rights pending the Court's final decision. The Court thus finds that the rights which Mexico seeks to protect by its request have a sufficient connection with the Request for interpretation.

The Court goes on to say that its power to indicate provisional measures under Article 41 of its Statute "presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings" and that it will be exercised only if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before the Court has given its final decision.

The Court notes that Mexico claims that there indisputably is urgency, while the United States argues that, as there are no rights in dispute, "*none* of the requirements for provisional measures are met" (emphasis in the original).

The Court points out that the execution of a national, the meaning and scope of whose rights are in question, before the Court delivers its judgment on the Request for interpretation "would render it impossible for the Court to order the relief that [his national State] seeks and thus cause irreparable harm to the rights it claims". It finds that it is apparent from the information before it that Mr. José Ernesto Medellín Rojas, a Mexican national, will face execution on 5 August 2008 and four other Mexican nationals, Messrs. César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos, are at risk of execution in the coming months; that their execution would cause irreparable prejudice to any rights, the interpretation of the meaning and scope of which is in question, and that it could be that the said Mexican nationals will be executed before the Court has delivered its judgment on the Request for interpretation and therefore there undoubtedly is urgency. The Court accordingly concludes that the circumstances require that it indicate provisional measures to preserve the rights of Mexico, as Article 41 of its Statute provides.

The Court indicates that it is fully aware that the federal Government of the United States has been taking many diverse and insistent measures in order to fulfil the international obligations of the United States under the *Avena* Judgment. It notes that the United States has recognized that, were any of the Mexican nationals named in the request for the indication of provisional measures to be executed without the necessary review and reconsideration required under the *Avena* Judgment, that fact would constitute a violation of United States obligations

under international law. It recalls, in particular, that 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 Court further notes that the United States has recognized that "it is responsible under international law for the actions of its political subdivisions", including "federal, state, and local officials", and that its own international responsibility would be engaged if, as a result of acts or omissions by any of those political subdivisions, the United States was unable to respect its international obligations under the *Avena* Judgment. It observes that, 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".

The Court finally underscores that it regards it as in the interest of both Parties that any difference of opinion as to the interpretation of the meaning and scope of their rights and obligations under paragraph 153 (9) of the *Avena* Judgment be resolved as early as possible, and that it is therefore appropriate that it ensure that a judgment on the Request for interpretation be reached with all possible expedition.

The Court concludes by pointing out that the decision given on the request for the indication of provisional measures in no way prejudges any question that it may have to deal with relating to the Request for interpretation.

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Dissenting opinion of Judge Buergenthal

1. In his dissenting opinion, Judge Buergenthal notes that he voted in favour of the *Avena* Judgment, where the Court determined that the United States had violated the Vienna Convention on Consular Rights with regard to a group of Mexican nationals incarcerated in the United States and ordered the United States to provide review and reconsideration of the convictions and sentences of those individuals. According to Judge Buergenthal, the continuing binding character of the *Avena* Judgment is not in issue in this case; what is in issue is the Court's jurisdiction to adopt the present Order. In his view, the Court lacks that jurisdiction and should have dismissed the request for interpretation.

2. In the *Avena* case, the Court's jurisdiction was based on the Protocol to the Vienna Convention from which the United States regrettably withdrew. The Protocol can therefore no longer provide the requisite jurisdiction for the present Order. That is why Mexico invokes Article 60 of the Statute of the Court, which provides in part that "[i]n the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party". But for Article 60 to apply to this case and, hence, for the Court to have jurisdiction to issue the Order, Mexico must show, albeit only on a preliminary basis, that there exists a dispute between the parties regarding the meaning or scope of the *Avena* Judgment. That, according to Judge Buergenthal, Mexico has not been able to show.

3. Mexico argues that there is a dispute because the Parties disagree regarding the meaning or scope of paragraph 153 (9) of the *Avena* Judgment. That paragraph reads as follows:

"[The Court] [f]inds 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 [the Judgment], by taking account both of the violation of the rights set forth in Article 36 of the Convention and paragraphs 138 to 141 of this Judgment" *(Avena and Other Mexican Nationals (Mexico* v. *United States of America), I.C.J. Reports 2004*, p. 72, para. 153 (9)).

4. According to Mexico, paragraph 153 (9) of the Judgment established an obligation of result, whereas it asserts that the United States believes that it only has an obligation as to means. The United States denies Mexico's contention and agrees with Mexico that the paragraph in question imposes an obligation of result. In Judge Buergenthal's view, Mexico has presented no evidence whatsoever to support its contention that the Parties are in a disagreement regarding the meaning or scope of that paragraph of the *Avena* Judgment. Here there is a claim by one of the Parties only regarding the existence of a dispute that is not supported by any relevant evidence before the Court. Judge Buergenthal concludes, therefore, that the Court's determination that there "appears" to be a dispute within the meaning of Article 60 is not borne out by the evidence. The Court consequently lacks jurisdiction to issue this Order. That Order, moreover, adds nothing to the obligations the United States continues to have under paragraph 153 (9) of the *Avena* Judgment, namely, not to execute any of the Mexican nationals unless they have been provided the review and reconsideration pursuant to that Judgment.

5. Judge Buergenthal believes, furthermore, that by issuing the present Order on the facts of this case, the Court opens itself up to the future misuse for jurisdictional purposes of the Article 60 interpretation route which, it should be noted, imposes no time-limits for the introduction of requests for interpretation.

Joint dissenting opinion of Judges Owada, Tomka and Keith

In their dissenting opinion, Judges Owada, Tomka and Keith express their great regret that they are unable to support the Court's Order indicating provisional measures. Humanitarian considerations which may underlie the decision cannot override the legal requirements of the Statute of the Court.

The judges conclude that Mexico has not established, as required by Article 60 of the Statute, that there is a dispute between it and the United States about the meaning or scope of the 2004 *Avena* Judgment. Accordingly the Application for interpretation, the principal proceeding before the Court, should be dismissed. The request for provisional measures should also be dismissed since there would be no pending proceeding to which it would be related.

The judges also observe that the Order made by the Court today adds no additional protection, additional to that already provided by the Court in its 2004 *Avena* Judgment, to the Mexican nationals whose rights under the Vienna Convention on Consular Relations had been breached by the United States and who are entitled to review and reconsideration of their convictions and sentences in accordance with the 2004 Judgment of the Court.

There is no doubt, the judges say, that if any of the 51 Mexican nationals mentioned in that Judgment is executed without receiving the review and reconsideration of his conviction and sentence, required by the 2004 Judgment, the United States will be in breach of its international obligation as determined by the Court.

Judges Owada, Tomka and Keith conclude by expressing their earnest trust that effective review and reconsideration of the convictions and sentences of the Mexican nationals, as required by the 2004 Judgment, will be provided.

Dissenting opinion of Judge Skotnikov

Judge Skotnikov fully shares Mexico's concerns regarding the scheduled execution of a Mexican national and its frustration with the United States being so far unable to take measures which would ensure its compliance with the *Avena* Judgment. However, he is critical of the Court's Order indicating provisional measures. He believes that the Court should have proceeded differently in order to support Mexico's ultimate goal of enforcement of the *Avena* Judgment.

In his view, the Court should have taken judicial notice of the United States position that it agrees without reservations with the interpretation of the *Avena* Judgment requested by Mexico. There is no lack of clarity as to the meaning or scope of the binding provisions of the *Avena* Judgment. Mexico insists and the United States accepts that no death penalties should be carried out unless and until the time the Mexican nationals in question receive review and reconsideration in accordance with the *Avena* Judgment. This is the result which the United States must achieve, "by means of its own choosing" (para. 153 (9) of the *Avena* Judgment), to comply with its obligations under the *Avena* Judgment. There is no ambiguity. There is no disagreement. There is nothing for the Court to interpret. Consequently, the Court should have concluded that Mexico's Request for interpretation does not fall within the scope of Article 60 of the Statute of the Court, which is applicable only where a dispute exists with respect to the meaning or scope of a judgment of the Court.

Furthermore, the Court should have used its inherent powers to request the United States to take all measures necessary, acting through its competent organs and authorities, state or federal, to ensure its compliance with the *Avena* Judgment.

Instead of thus reminding the United States of its obligations, the Court has chosen to decide that the *Avena* Judgment might require clarification and has ordered provisional measures.

Judge Skotnikov notes that these measures add nothing to the obligations of the United States under the Judgment and therefore serve no purpose. Moreover, these measures are to have effect only until the Court has given its decision on the interpretation of the *Avena* Judgment. Consequently, the Court's Order is not only redundant, it also contains a temporal limit which is absent from the Judgment itself. This result is a clear indication that the Court has taken a wrong route.

Judge Skotnikov believes that the real issue is compliance with the Judgment rather than its interpretation. The United States admits that, because of internal difficulties, it has so far been unable to put in place a legal framework necessary to ensure compliance with the *Avena*

Judgment. That is deeply regrettable. The United States must act to comply with the *Avena* Judgment.

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