

173. 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)

Judgment of 19 January 2009

On 19 January 2009, the International Court of Justice rendered its Judgment 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 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. 61) of the Judgment reads as follows:

“... ”

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.”

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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.

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History of the proceedings and submissions of the Parties (paras. 1-10)

The Court recalls that, 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”), which reads as follows:

“153. For these reasons,

The Court, . . .

(9) By fourteen votes to one,

Finds 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 Convention and of paragraphs 138 to 141 of this Judgment”.

On 5 June 2008, after filing its Application, Mexico 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 seised of the matters” which form the subject of the Order (paragraph 80 (III)).

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. By a letter dated 1 August 2008, 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. By a letter dated 28 August 2008, 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”.

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

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.

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.”

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 16 July 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.”

Request for interpretation of the Avena Judgment

Jurisdiction of the Court in respect of interpretation (paras. 11-20)

The Court recalls that 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.”

The Court points out that its Order of 16 July 2008 on provisional measures “was not made on the basis of prima facie jurisdiction” and notes that it has already stated, in that Order, 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). It also recalls that it has already indicated 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).

The Court notes that, in its Order of 16 July 2008, it had observed in particular 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). The Court then indicates that “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”. It states that it “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”.

Question of the existence of a dispute between the Parties (paras. 21-47)

- *No dispute on the nature of the obligation laid down in paragraph 153 (9)* (paras. 21-28)

Having examined the written pleadings of the Parties, the Court finds that there is no dispute between them as to whether paragraph 153 (9) lays down an obligation of result. It 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.”

- *Question of the existence of a dispute as to those upon whom the obligation of result specifically falls* (paras. 29-42)

After emphasizing that “[i]t 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)”, the Court considers the possibility that the Parties hold different views “as to the meaning and scope of that obligation of result”. The Court observes that whether 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.

On the one hand, it examines a variety of arguments put forward by Mexico which “suggest that there is a difference of perception that would constitute a dispute” as to those upon whom the obligation of result specifically falls. The Court notes in particular that, according to Mexico, the interpretation given by the United States Supreme Court in the *Medellín v. Texas* case (*Supreme Court Reporter*, vol. 128, 2008, p. 1346) – namely that the judgments of the International Court of Justice are not, as such, directly applicable in the domestic legal order of the United States – “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”.

On the other hand, the Court sets out “factors that suggest, on the contrary, that there is no dispute between the Parties” as to those upon whom the *Avena* Judgment specifically falls. The Court notes firstly “– 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.” The Court adds that 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”. The Court further 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’”. It observes that Mexico has had the opportunity to indicate the precise points in dispute on several occasions, but “nonetheless remain[s] very non-specific as to what the claimed dispute precisely is”. The Court observes finally that “[w]hether 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”, and 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”.

- *Question of the direct effect of the obligation established in paragraph 153 (9) of the Avena Judgment* (paras. 43-47)

In the view of the Court, the Parties’ different stated perspectives reveal “different contentions as to whether paragraph 153 (9) . . . envisages that a direct effect is to be given to the obligation contained therein”. 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”. It notes that “[t]he *Avena* Judgment nowhere lays down or implies that the courts in the United States are required

to give direct effect to paragraph 153 (9)”; and the Court observes that, according to its settled jurisprudence, a question which was not decided in an initial Judgment “cannot be submitted to it for interpretation” in this Judgment under Article 60 of the Statute.

The Court adds that “Mexico’s argument, as described in paragraph 31 [of the present Judgment], 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”. It considers that “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).”

The Court concludes from the above that it “cannot accede to Mexico’s Request for interpretation”.

However, 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”. It points out that “[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”.

Additional claims made by Mexico in the context of the proceedings (paras. 48-60)

The Court then turns to the three additional claims presented by Mexico, which takes the view that by executing Mr. José Ernesto Medellín Rojas on 5 August 2008 without having provided him with the review and reconsideration required under the *Avena* Judgment, the United States has (1) breached the Order indicating provisional measures of 16 July 2008; (2) breached the *Avena* Judgment itself; and (3) must provide guarantees of non-repetition.

On the first point, the Court “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”.

The Court dismisses Mexico’s second claim, noting that “the only basis of jurisdiction relied upon for this claim in the present proceedings is Article 60 of the Statute, and . . . that Article does not allow it to consider possible violations of the Judgment which it is called upon to interpret”.

Lastly, the Court reiterates that “its *Avena* Judgment remains binding and that the United States continues to be under an obligation fully to implement it”; taking note of the undertakings given by the United States of America in these proceedings, it dismisses the third of the additional claims.

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Declaration of Judge Koroma

In a declaration appended to the Judgment clarifying his understanding as to the application of Article 60 of the Statute in this case, Judge Koroma expresses the view that 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: the Parties take a different perspective both as to whether the *Avena* Judgment required that the review and reconsideration it ordered be effective, as well as whether the obligations it created are subject to domestic jurisdiction in their implementation.

Referring to the Court’s conclusion that “[t]he 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”, he notes that this wording is not entirely clear and interprets it to mean 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.

Judge Koroma then offers an approach by which the Court could have found the Request for interpretation admissible in a manner consistent with its jurisprudence. He observes that, if it were to have done so, the Court in interpreting its Judgment could have concluded that the United States has a choice of means as to how to implement its obligation under the Judgment, but that the efforts to carry out review and reconsideration must be effective in order to be in compliance with the *Avena* Judgment.

He concludes that, by reiterating the obligation of the Respondent in respect of the individuals named in *Avena*, the Court has upheld the object and purpose of Article 60 of the Statute. He emphasizes that 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.

Declaration of Judge Abraham

In a declaration appended to the Judgment, Judge Abraham explains that he voted against subparagraph (3) of the operative clause for the reason that the statements therein exceed the scope of the Court’s jurisdiction under Article 60 of its Statute, as they do not relate to interpretation of the *Avena* Judgment but to compliance with it.

Dissenting opinion of Judge Sepúlveda-Amor

In his dissenting opinion, Judge Sepúlveda-Amor states that although he is in agreement with most of the reasoning of the Court, he cannot join in some of the Court’s conclusions. He believes that the Court has missed an opportunity to settle issues calling for interpretation and to construe the meaning or scope of the *Avena* Judgment. He sets out the following points of disagreement with the Court’s Judgment:

1. By refraining from passing judgment on the United States failure to discharge its international obligation to comply with the *Avena* Judgment, the Court has ignored the need to adjudge the consequences of internationally wrongful acts of a State.

2. It is to be regretted that the Court did not find it necessary to determine the legal consequences which flow from the failure of the United States to comply with the Court's Order indicating provisional measures and with the *Avena* Judgment. The international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State. Mexico has shown that the United States has an obligation of result 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. The Court decided not to adjudge on the effects of the United States breach of its international obligations.

3. The Court should have reaffirmed the binding force of its *LaGrand* and *Avena* Judgments and the existence of individual rights under Article 36 of the Vienna Convention in order to dispel all doubts that have been raised by federal and state authorities in the executive and judicial branches of government in the United States.

4. It is insufficient to claim that the operative clause of the *Avena* Judgment has binding force if its provisions become legally ineffective in the face of enforcement of the procedural default rule in United States courts. In construing the meaning and scope of paragraph 153 of the *Avena* Judgment, the Court should have considered the underlying reasoning of the Judgment that the procedural default rule represents a judicial obstacle that renders inoperative and dysfunctional the rights embedded in Article 36 of the Vienna Convention.

5. An ongoing dispute exists between Mexico and the United States, not only in the sense of their Article 60 dispute over the interpretation of the obligation imposed by *Avena*, but also in the sense of an Article 38 (1) dispute over several points of law and on the facts.

6. Mexico and the United States have opposing views on the domestic effects of international obligations. The Court could have advanced the development of international law by settling the issues raised by these conflicting interpretations.

7. The Court relies on a misreading of Mexico's position in deciding that a dispute between the Parties does not exist. Mexico does not contend that the failure to comply with the *Avena* obligation is attributable only to the United States federal Executive; Mexico has argued that the definitive determination to deny the judicial review and reconsideration mandated by *Avena* is attributable to the United States Supreme Court. The Parties have a dispute as to the legal consequence of a decision by the United States Supreme Court that an international obligation does not constitute binding federal law without implementing legislation.