DISSENTING OPINION OF JUDGE BUERGENTHAL

1. I agreed with and voted in favour of the Court's Judgment in the *Avena* case (*Avena and Other Mexican Nationals (Mexico* v. *United States of America)*). In that case, the Court held that the United States had violated the Vienna Convention on Consular Relations with regard to various Mexican nationals incarcerated in the United States. I found that Judgment sound as a matter of law and policy, and I continue to support it without any reservations. The same is not true of the present Order. Although I consider that the United States has an obligation to ensure, in accordance with this Court's determination in *Avena*, that the Mexican nationals mentioned in that case not be executed without being accorded the review and reconsideration of their convictions and sentences, I believe that the Court lacks the jurisdiction necessary to adopt the Order it issues today. At the same time, of course, I would expect the United States to comply fully with its obligations under the *Avena* Judgment.

2. In the *Avena* case, the Court ordered the United States:

> "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), Judgment, I.C.J. Reports 2004 (I)*, p. 72, para. 153 (9)).

3. Today the Court orders 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)*." (Order, para. 80 II *(a)*.)

4. Of course, I agree that the above-mentioned individuals must not be executed unless they are granted the review and reconsideration of their

convictions and sentences to which they are entitled under the *Avena* Judgment. But that precisely is what the *Avena* Judgment ordered, in addition to making it clear that the obligation set out in that Judgment extended not only to the five individuals identified in today's Order, but to all Mexican nationals listed in the *Avena* Judgment.

5. The soundness or continuing binding character of the *Avena* Judgment is not in issue in the present case. What is in issue here is the right of Mexico to the Order granting provisional measures and the power of the Court to issue that Order. I believe that the Court lacks that power and that, by adopting it on the basis of Mexico's unfounded jurisdictional allegations, the Court establishes a dangerous precedent as far as concerns its jurisdiction under Article 60.

6. In the *Avena* case, we held that the United States had violated the Vienna Convention on Consular Relations with regard to the 51 Mexican individuals on death row in various states of the United States. We also held that the United States was under an obligation to provide these individuals with "review and reconsideration" of their convictions and sentences in the appropriate courts of the United States. It follows from the holding in the *Avena* case, and that is not disputed by either Party to the present case, that the United States would be in breach of its international obligations as set forth in the *Avena* case, if any one of the named Mexicans, including Mr. Medellín, were to be executed without having been provided with the review and reconsideration mandated by this Court in *Avena*. That obligation is unreservedly acknowledged by the United States, which has demonstrated before the Court that it is fully committed to and actively engaged in seeking to bring about the enforcement of the *Avena* Judgment.

7. The principal issue in the present case is whether Mexico, by invoking Article 60 of the Statute of the Court, has provided the Court with the requisite jurisdiction to issue the requested provisional measures. That jurisdiction depends upon the admissibility of Mexico's Request for the interpretation of the *Avena* Judgment. This is so because the regrettable withdrawal of the United States from the Protocol to the Vienna Convention for Consular Relations has deprived the Court in the present case of the jurisdiction it had when it decided the *Avena* case. But since Article 60 provides the Court with an independent or special jurisdictional basis for the interpretation of its judgments, Mexico relies on that jurisdiction to sustain its request for provisional measures. This approach can, however succeed only if Mexico shows that its Request for the interpretation of the *Avena* Judgment under Article 60 is not manifestly unfounded. But if the Request is manifestly unfounded, it would have to be dismissed, leaving the Court without jurisdiction to deal with Mexico's request for provisional measures.

8. Article 60 of the Statute of the Court reads as follows:

> "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."

9. Given the language of Article 60, Mexico must show that there is a dispute between it and the United States regarding "the meaning or scope" of the *Avena* Judgment. To this end Mexico seeks an interpretation of paragraph 153 (9) of the *Avena* Judgment by claiming that such a dispute exists regarding the meaning or scope of that paragraph (for the text, see para. 2, above). Mexico considers that the paragraph establishes an obligation of result, whereas it asserts that the United States views the obligation as one of means only.

10. The United States denies that a dispute within the meaning of Article 60 exists in the present case. It agrees with Mexico that the *Avena* Judgment imposes an obligation of result. It claims that it recognizes that the United States has an obligation under *Avena* to ensure that the individuals covered by the *Avena* Judgment are provided "review and reconsideration" of their convictions and sentences. In support of this assertion, the United States points to the President's Proclamation, the position the United States took before the United States Supreme Court in the *Medellín* case, the decision of the Supreme Court itself, the letter written by the Secretary of State and Attorney General to the Governor of Texas, the efforts of the Executive Branch before the Texas courts, and the correspondence between the United States and Mexico, which were all steps taken to bring about full compliance with the *Avena* Judgment.

11. At this preliminary stage of the proceedings, it is sufficient for Mexico to establish that its claim regarding the existence of the dispute relating to the meaning or scope of paragraph 153 (9) of the *Avena* Judgment is not manifestly unfounded. This means that Mexico must provide at least some minimal evidence to support its contention. That it has failed to do.

12. While Mexico does not deny that the steps listed in paragraph 10 above were taken by the United States, it points to the pending execution order issued by a Texas judge in the case of Mr. Medellín and to the earlier Texas court decisions relating to Medellín, which refused to give effect to the *Avena* Judgment. Mexico also makes reference to similar positions taken by Texas courts in other cases involving the Mexicans named in the *Avena* Judgment. According to Mexico, the position of the Texas courts is imputable to the United States and indicates that these courts, by refusing to give effect to the *Avena* Judgment, do not agree with Mexico that that Judgment requires the United States to provide the requisite review and reconsideration. Mexico also relies on the failure of the United States Executive Branch to seek legislation from the United States Congress to give effect to the *Avena* Judgment. Mexico argues further that the imminent execution of Mr. Medellín demonstrates that

not all United States governmental authorities agree that *Avena* imposes obligations of result.

13. None of the arguments advanced by Mexico meets the minimal requirements necessary to demonstrate the existence of a dispute that would make Mexico's request for interpretation under Article 60 admissible. First, Mexico has not been able to provide any evidence that the United States claims that its obligation under the *Avena* Judgment is one of means rather than result. True, the Texas courts have failed to comply with the *Avena* Judgment because they do not believe that they are required to do so. But Texas does not speak for the United States on the international plane. The United States would, of course, be liable under international law for the failure of Texas or, for that matter, any other state of the United States to comply with the *Avena* Judgment, but only the United States Government is authorized under domestic law and international law to speak for the United States on the international plane. It follows that the position of Texas regarding the meaning, scope or nature of the obligations of the United States under the *Avena* Judgment is not imputable to the United States. What Texas does or thinks is, therefore, irrelevant to the determination of the existence of a dispute under Article 60.

14. Second, the fact that the Executive Branch of the United States has thus far not asked the United States Congress to adopt legislation implementing the *Avena* Judgment, does not prove that the Executive Branch considers that it has no obligation to give effect to that Judgment or that the Congress does not share the views of the Executive Branch that the United States has that obligation. Instead of seeking legislation, the President of the United States issued the Proclamation of 28 February 2005, ordering all the states of the United States holding any of the Mexicans named in the *Avena* Judgment to be provided with review and reconsideration. Until the Supreme Court rendered the *Medellín* decision on 25 March 2008, ruling that the President lacked the power to issue that order, the Executive Branch could reasonably assume that the Supreme Court would uphold the President's Proclamation; that would have made congressional implementing of legislation unnecessary. The Proclamation route, moreover, had the advantage of speed over the legislative route, which tends to be slow and cumbersome in the United States. Once the Supreme Court declined to uphold the President's Proclamation and failed to give direct effect to the *Avena* Judgment, the Executive Branch focused its efforts on dealing with the Texas courts by trying, first, to get them to delay the execution order of Mr. Medellín and, second, seeking to make it possible for him to obtain the review and reconsideration to which he is entitled. These were and continue to be the most urgent steps that need to be taken to avoid an imminent breach by the United States of its obligations under the *Avena* Judgment.

15. Third, Mexico points to the President's Proclamation in which he orders the state courts to "give effect to the *[Avena]* decision in accordance with general principles of comity". It argues that the reference to "general principles of comity" indicates that the United States does not believe that it has any international law obligations to give effect to the *Avena* Judgment. This argument overlooks the express wording of the Proclamation in which the President makes the formal declaration that "I have determined . . . that the United States will discharge its international obligations under the decision of the International Court of Justice" in the *Avena* case. That language amounts to a clear recognition by the United States that it has an international legal obligation to comply with the *Avena* Judgment.

16. Fourth, Mexico also asserts that the judgment of the United States Supreme Court in the *Medellín* case indicates that it does not consider that the *Avena* Judgment imposes an obligation of result on the United States. In support of that contention, Mexico points to the determination of the Supreme Court that the *Avena* Judgment is not directly enforceable in the United States without implementing legislation and that the President lacked the constitutional authority to order the states to comply with the Judgment. Mexico's argument fails to take account of the fact that the Supreme Court expressly recognized in the *Medellín* decision that "the ICJ's Judgment in *Avena* creates an international law obligation on the part of the United States" (*Medellín* v. *Texas*, 128 S. Ct. 1346 (2008), *slip op.*, at 57). It should not be forgotten, moreover, that the *Avena* Judgment allows the United States to give effect to the Judgment by "means of its own choosing". That language was chosen by this Court to indicate that the United States was free to comply with its obligations under the *Avena* Judgment either by giving it automatic or direct effect, or by means of implementing legislation or whatever other measures that would produce the review and reconsideration to which the Mexicans named in the *Avena* Judgment are entitled. The finding of the Supreme Court that the Executive Branch, when acting without Congressional support, lacks the power under the Constitution of the United States to issue the order the President sought to promulgate in his Proclamation thus in no way denied the international obligation of the United States to give full effect to the *Avena* Judgment.

17. The various arguments advanced by Mexico thus do not permit the conclusion, even on a preliminary basis, that there is a dispute between the Parties, as that term is understood by Article 60, regarding the meaning or scope of the *Avena* Judgment. Mexico has failed to present the minimal evidence required to show that the United States has denied or acted in a manner inconsistent with its obligation under the *Avena* Judgment to provide the review and reconsideration to which the

Mexicans named in that Judgment are entitled. Accordingly, Mexico's Request for the interpretation it seeks under Article 60 of the Court's Statute is manifestly unfounded and should be dismissed as inadmissible. That being the case, the Court lacks jurisdiction to deal with Mexico's provisional measures request under Article 41 of the Court's Statute. But as I have already emphasized, the dismissal of that request would not affect or weaken the obligation the United States has to fully comply with the *Avena* Judgment, nor would granting it strengthen that obligation.

18. To find the requisite jurisdiction for its Order in the present case, the Court points out that the English text of Article 60 speaks of "dispute", whereas *"contestation"* is used in the French text of that provision. The Court also notes that in two other provisions of the Statute — Article 36, paragraph 2, and Article 38 — the English "disputes" is rendered as *"différends"* in French. This difference in the uses of the term "dispute" prompted the Permanent Court of International Justice to conclude that, given the wording of Article 60,

> "[the Court] cannot require that the dispute should have manifested itself in a formal way . . . it should be sufficient if the two Governments have in fact shown themselves as holding opposite views in regard to the meaning or scope of a judgment of the Court" (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 11).

19. I agree with the conclusion of the Permanent Court of International Justice on which this Court relies, that the "disputes" referred to in Articles 36 and 38 of the Statute call for a greater degree of formality to establish the existence of a dispute than is required under Article 60. This does not mean, however, that the unsubstantiated claim by one party regarding the existence of a dispute, which is what we have here, will satisfy the requirements of Article 60, whether or not we rely on its French or English text. That very point was emphasized by this Court as far back as 1950, when it declared:

> "Obviously, one cannot treat as a dispute, in the sense of that provision [Article 60], the mere fact that one Party finds the judgment obscure when the other considers it to be perfectly clear. A dispute requires a divergence of views between the parties on definite points . . ." (*Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia/Peru), Judgment, I.C.J. Reports 1950*, p. 403.)

20. I have already shown above that Mexico has presented no evidence to support the conclusion, even on a preliminary basis, that one or more federal authorities of the United States do not share the view of the

Executive Branch that paragraph 153 (9) imposes an obligation of result on the United States. The finding by the Supreme Court that the *Avena* Judgment is not directly applicable law without implementing legislation and that the President lacks the authority without Congressional action to order the States to comply with the *Avena* Judgment concerns principles of United States constitutional law relating to the allocation of power between the three branches of the United States. They have no bearing as such on the compliance or non-compliance by the United States with its international obligations. In the *Avena* Judgment, moreover, the Supreme Court expressly declared that Judgment to be an obligation of the United States under international law.

21. The fact that the United States Congress has not yet been asked by the Executive Branch to adopt legislation for the reasons spelled out in paragraph 16 above, does not prove even on a preliminary basis that this body does not share the view of the Executive Branch that the *Avena* Judgment requires the United States to comply with that Judgment.

22. In short, Mexico has presented not a scintilla of evidence showing that the federal authorities of the United States do not share the view of the Executive Branch regarding the obligation imposed on the United States by the *Avena* Judgment.

23. It is true, of course, that Texas courts have thus far failed to give effect to the *Avena* Judgment and that Texas authorities do not believe that they are bound to do so. But while local authorities of unitary or federal states that violate international law can by their conduct subject the national authorities to breaches of international law, they do not speak for their national authorities on the international plane, nor can their views, if they conflict with those of the national authorities, have any bearing on the existence or non-existence of a dispute between the Parties within the meaning of Article 60.

24. Hence, when the Court declares that the Parties

> "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),

the Court reaches two conclusions that have no valid basis in law or fact. The first conclusion is based on the erroneous assumption that one or more United States federal authorities do not share the view of the Executive Branch regarding the nature of the obligation *Avena* imposes. No evidence whatsoever is before the Court to support that claim. The second conclusion flows from the Court's decision that the views of

Texas, a state of the United States which does not and cannot speak for the United States on the international plane, are relevant in determining whether there exists a dispute between the United States and Mexico within the meaning of Article 60. The latter conclusion has no basis in international law and appears to establish a novel and dangerous precedent regarding the legal consequences of positions espoused by local governmental entities that conflict with the views of national authorities concerning the nation's international obligations and policies.

25. No showing has been made in the present case to support the conclusion, even on a preliminary basis, that there exists a difference of opinion between the Parties as to the meaning or scope of the Court's finding in paragraph 153 (9) of the *Avena* Judgment. What we have here instead is a claim by only one of the Parties regarding the existence of a dispute that is not supported by any relevant evidence before the Court. Mexico's Request for interpretation under Article 60 should therefore be dismissed, leaving the Court without the prima facie jurisdiction it needs to adopt the present Order. By nevertheless issuing this Order, the Court also 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.

26. To reiterate, my conclusion that the Court lacks the requisite jurisdiction to issue this Order does not affect the continuing obligation of the United States under the *Avena* Judgment to ensure that the Mexican nationals identified in that case not be executed unless they have been accorded the review and reconsideration mandated by that Judgment.

(Signed) Thomas BUERGENTHAL.