JOINT DISSENTING OPINION OF JUDGES OWADA, TOMKA AND KEITH

1. To our great regret we find ourselves unable to support the Order for provisional measures adopted by the Court (para. 80 II *(a)*). Humanitarian considerations which clearly underlie the decision cannot override the legal requirements of the Statute of the Court. In our view Mexico has not demonstrated in its Application for interpretation that there is "a difference of opinion between the Parties as to those points in question in the judgment in question which have been decided with binding force" (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 11).

2. The Order of the Court of today adds no additional protection, additional to that already provided by the Court in its 2004 *Avena* Judgment to those Mexican nationals whose rights under Article 36 (1) of the Vienna Convention on Consular Relations were breached by the United States and who are thus entitled to receive review and reconsideration of their convictions and sentences.

3. There can be no doubt that if any of the 51 Mexican nationals, mentioned in the *Avena* Judgment, is executed without receiving the review and reconsideration of his conviction and sentence, the United States will be in breach of its international obligation as determined by this Court in paragraph 153 (9) of its Judgment.

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4. The Court in its Judgment in *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*, ruled

> "that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) above, by taking account both of the violation of the rights set forth in Article 36 of the [Vienna] Convention [on Consular Relations] and of paragraphs 138 to 141 of this Judgment" (*I.C.J. Reports 2004 (I)*, p. 72, para. 153 (9)).

In those paragraphs the Court, among other things, emphasizes that the review and reconsideration should be effective and, accordingly, should take account of the violation of the rights set forth in the Convention and

of the possible prejudice caused by the violation; further, full weight must be given to the violation of the treaty rights, whatever may be the outcome of the review and reconsideration.

5. The United States acknowledges without reservation the international obligation arising from the Judgment. The President of the United States made that clear in his memorandum of 28 February 2005. He "determined . . . that the United States will discharge its international obligations under [the *Avena* Judgment] by having state courts give effect to the decision". Before the Court, the Agent of the United States emphasized the obligation the United States has to comply with the Judgment.

6. As the Agent also recognized, however, the efforts of the United States Government to ensure compliance have so far not been successful, except, as Mexico informed the Court, in the case of one of the 51 Mexican nationals a state court concluded that the petitioner had been prejudiced in the sentencing phase, but not at trial, by the lack of consular notification, and the death penalty was commuted, and in the case of a second, this time without court process, the state Governor commuted the death sentence in exchange for the offender's agreement to waive his right to review and reconsideration under the *Avena* Judgment. The attempt to achieve compliance in respect of all the other Mexican nationals by way of the President's determination was however found to be unsuccessful by a decision of the Supreme Court of the United States given on 25 March 2008: it held that neither this Court's Judgment nor the President's Memorandum constitutes directly enforceable federal law overriding limitations imposed by state law (*Medellín* v. *Texas*, 128 S. Ct. 1346 (2008)).

7. In the three months following the failure of that proposed means of achieving compliance with the Judgment, the United States executive has adopted a more specific approach, particularly to the Governor and Attorney General of Texas, in respect both of Mr. Medellín, whose execution has been set by a District Court in Texas for 5 August this year, and more generally of other Mexican nationals. Two days before the hearing in the current proceeding began, the Attorney General and the Secretary of State of the United States sent a joint letter to the Governor of Texas in which they say that "the United States seeks the help of the State of Texas" to give effect to the *Avena* Judgment. The letter concludes as follows:

> "We continue to seek a practical and timely way to carry out our nation's international legal obligation, a goal that the United States needs the assistance of Texas to achieve. In this connection, we respectfully request that Texas take the steps necessary to give effect to the *Avena* decision with respect to the convictions and sentences addressed therein. We would appreciate the opportunity to discuss possible mechanisms for compliance with the *Avena* decision with you or your representatives."

The Agent of the United States assured the Court, at the hearing on 19 June 2008, that the discussions referred to in the last sentence had already begun.

8. It is clear that if those and other efforts to achieve an effective means of review and reconsideration fail and one of the Mexican nationals is executed before that review and reconsideration is undertaken and completed, the United States would be in breach of its international obligation under the *Avena* Judgment. The Agent clearly acknowledged that at the hearing.

9. We too earnestly trust that effective ways of implementing the *Avena* Judgment will be found by the federal and relevant state authorities of the United States with the result that the Mexican nationals receive the effective review and reconsideration of their convictions and sentences as required by the Judgment. In that we are completely at one with all the other Members of the Court.

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10. This request for the indication of provisional measures was filed by Mexico along with its Application requesting interpretation of paragraph 153 (9) (set out in paragraph 4 above) of the Judgment in the *Avena* case. The provisional measures sought by Mexico and ordered by the Court have exactly the object we have just stated — that none of the five Mexican nationals is to be put to his death unless his conviction and sentence have been effectively reviewed and reconsidered as required by the 2004 *Avena* Judgment. The provisional measure indicated in the Court's Order reads as follows:

> "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)*." (Para. 80 II *(a)*.)

11. That Order is subject to a time-limit which is inherent in its provisional character: the measures have effect only until the Court has given its judgment on the Application for interpretation. The Order is also limited to the five named Mexican nationals. The international obligation arising from the *Avena* Judgment and set out in paragraph 1 above, by contrast, is not subject to either limit. It continues until the convictions and sentences of all 51 Mexican nationals have been effectively reviewed and reconsidered.

12. In our opinion, provisional measures are not available in this case because we consider, for reasons we give later, that Mexico has not demonstrated on any standard that its Application requesting interpretation is capable of falling within Article 60 of the Statute of the Court. It has not demonstrated even on a provisional basis that there may be a dispute about the meaning or scope of paragraph 153 (9) of the Judgment, the subject of the Application for interpretation. Accordingly, the Application requesting interpretation should be dismissed at this stage as inadmissible. There would then be no pending proceeding and no rights under that proceeding to be preserved as required by Article 41 of the Statute, and the request for provisional measures made under that provision would as a consequence have to be dismissed.

13. Article 60 provides 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."

In its Application requesting interpretation, Mexico contends that a "dispute" has arisen between it and the United States about whether the obligation stated in paragraph 153 (9) of the *Avena* Judgment is an obligation of result — as it, Mexico, contends — or an obligation of means, which is how, in Mexico's view, the United States understands the obligation (Application, paras. 5, 52, 57 and 59). It is for the Applicant, in its Application requesting interpretation, to indicate, in terms of Article 98 (2) and (3) of the Rules of Court, "the precise point or points in dispute as to the meaning or scope of the judgment" and its supporting contentions. In its Application for interpretation, under the heading *The Interpretation Requested*,

> "59. 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';
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> and that, pursuant to the foregoing obligation of result,
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> 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."

That proposed interpretation, we observe, does not differ in any essential

element from what the Judgment expressly states as the obligation of the United States in paragraph 153 (9) (para. 4 above).

14. The obligation of result imposed by the Judgment, according to Mexico, means that the United States must take any and all steps necessary to provide the review and reconsideration mandated by the Judgment. The Agent and counsel of the United States made it clear before the Court that the United States understands its obligation in exactly those terms, and as an obligation of result. The correspondence before the Court, both preceding and following the Application requesting interpretation, shows the United States as continuing to be engaged, as it was earlier when it promulgated the President's determination and participated in the related court proceedings based on it in Texas and the United States Supreme Court, in attempting to establish effective review and reconsideration. The United States has not contested and does not contest in any way its obligation to achieve that result of effective review and reconsideration. It is plain that, the Presidential determination having failed to achieve the intended result, the United States is obliged to continue to pursue other possibilities. Mexico has proposed some possible methods but the decision of the United States not to pursue those possibilities indicates no more than differences about methods of implementation. It is striking that the correspondence between the Parties is all about various ways of implementing or giving effect to the obligation. We cannot see any showing at all in that correspondence or elsewhere that the Parties are in dispute over the meaning or scope of the obligation stated in paragraph 153 (9).

15. In its Application, Mexico also calls attention to the failure of the Texas courts to provide the required effective review and reconsideration. That failure has culminated so far in the scheduling by a Texas court of the date and time for the putting to death of Mr. Medellín. According to Mexico,

> "Texas, a constituent state of the United States, does not recognize that the obligation to comply subjects its own law to that of binding international law."

In its oral submissions, Mexico, contending, by reference to Article 4 of the International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts that in international law the conduct of the Texas authorities was to be treated as an act of the United States, stated as follows:

> "Texas is the United States. And by scheduling Mr. Medellín's execution before he has received the remedy mandated by this Court in *Avena*, Texas has unmistakably communicated its disagreement with Mexico's interpretation of the Judgment. Texas clearly does not believe that it has an obligation of result . . ."

That amounts to a dispute, Mexico says, between it and the competent organs and authorities in the State of Texas.

16. The proposition of law on which Mexico relies is not relevant in this context. It helps to determine the existence or not of the international responsibility of a State for a breach of international law when the breach is committed by an organ exercising public functions, whatever position that organ holds in the organization of the State. Undoubtedly, as the United States accepts, if the Texas authorities go ahead and put Mr. Medellín to death before the required review and reconsideration is carried out, the United States will be in breach of its international obligations. But it does not follow that Mexico and the United States are in dispute about the meaning or scope of the *Avena* Judgment simply because the Texas authorities have so far not given effect to the obligation of the United States under the 2004 Judgment.

17. For the purposes of Article 60 of the Statute of the Court, as generally in international law and practice, it is the Executive of the State that represents the State and speaks for it at the international level. Other organs, whether part of the central government or of a territorial unit, unless otherwise authorized, do not. Since Mexico must found its Application on a dispute with the United States Executive about the scope or meaning of the Judgment at the international level, it cannot depend in that respect on any position taken by the authorities of Texas. It must point to a dispute with the United States Executive and it has failed to do that.

18. The Court in its Order states that, while it seems that both Parties regard paragraph 153 (9) of the *Avena* Judgment as an international obligation of result, they nevertheless apparently hold differing 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). We disagree with this finding, which appears to be essential to the reasoning supporting the Order, for two reasons. First, whether the understanding is shared by all federal and state authorities is a matter of fact and does not give rise to any matter of interpretation. Second, the issue whether the obligation "falls upon those authorities" is not one of interpretation which was raised by Mexico in exchanges with the United States or in its Application; it accordingly has not become the subject of dispute with the United States. We would also note that the obligation stated in paragraph 153 (9) is stated as "an obligation of the United States of America", completely in accordance with principle and consistent practice, reflected for instance in subparagraphs (4), (5), (6), (7) and (8) as well as (9) of paragraph 153.

19. We turn to differences in the wording of provisions of the Statute which in the English text uses the word "dispute". The French text of Articles 36 (6) and 60 of the Statute uses the word "contestation" while,

by contrast, Article 36 (2) about the jurisdiction of the Court and Article 38 about its function use "différend", with the English text using "dispute" in all four provisions. We note that "contestation" is also used in Article 36 (6) concerning "disputes" (the word used in English) about jurisdiction. The Spanish text uses three expressions, "las controversias", in both Articles 36 (2) and 38, "disputa" in Article 36 (6) and "desacuerdo" in Article 60. The Chinese text uses the one word, "zhēngduān", meaning dispute in all four provisions. And the Russian text uses the one word, "spor" meaning dispute, in all four. Given those differences between the equally authentic texts of the Statute we do not see the differences between the particular English and French words as significant.

20. We are however prepared to accept the argument that in the context of Article 60 the requirement of "dispute [or "contestation"] as to the meaning or scope of the judgment" as compared with "all legal disputes" or "such disputes" in Articles 36 (2) and 38 has a wider connotation. As the Permanent Court of International Justice indicated in 1927, less may be required by Article 60 in terms of any formal manifestation of the dispute. But the Parties still in fact have to show themselves as holding opposite views in regard to the meaning or scope of the Judgment of the Court. Further, as the Permanent Court, reading Article 60 in the context of Article 59, went on to say:

> "The natural inference to be drawn is that the second sentence of Article 60 was inserted in order, if necessary, to enable the Court to make quite clear the points which had been settled with binding force in a judgment, and, on the other hand, that a request which has not that object does not come within the terms of this provision. In order that a difference of opinion should become the subject of a request for an interpretation under Article 60 of the Statute, there must therefore exist a difference of opinion between the Parties as to those points in the judgment in question which have not been decided with binding force." (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p.11, applied by the Court in *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, pp. 217-218, para. 46.)

As this Court said in 1950, a dispute, in the sense of Article 60, "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, Judgment, I.C.J. Reports 1950*, p. 403). As those cases make clear and

principle dictates, it is for the Court, and not for one of the Parties, to decide whether dispute or contestation exists; see also e.g., *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 27. The Parties, in the circumstances of this case, cannot on any basis be seen as "holding opposite views in regard to the meaning or scope" of paragraph 153 (9) of the 2004 Judgment.

21. We conclude that Mexico has not satisfied that requirement of Article 60 of the Statute that it demonstrate the existence of a dispute about the meaning or scope of the Judgment.

22. It follows that in our opinion the Application requesting interpretation should be dismissed. As a consequence, the request for provisional measures which is designed to protect rights asserted in that Application would no longer have a purpose and should also be dismissed. We accordingly voted against subparagraphs I and II *(a)* of the operative clause of the Order (para. 80).

23. We have voted in favour of subparagraphs II *(b)* and III, on the basis that the Court has made the two primary decisions and the other two are consequential on them.

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24. We conclude with two comments. First, on the decision of Mexico to initiate these proceedings, we cannot fail to record our full understanding of the great concern of the Government of Mexico and the people it represents, a concern manifested in its good faith attempts, including its bringing of the proceedings, to protect its nationals.

25. Second, we repeat our earnest trust that effective ways of implementing the *Avena* Judgment will be found by the federal and relevant state authorities of the United States with the result that the Mexican nationals receive the effective review and reconsideration of their convictions and sentences as required by the Judgment.

(Signed) Hisashi OWADA.
(Signed) Peter TOMKA.
(Signed) Kenneth KEITH.