International Court of Justice

Written Observations of the United States of America on the Application for Interpretation of the Judgment of 31 March 2004 in the *Case Concerning Avena and Other Mexican Nationals* *(Mexico v. United States of America)*

August 29, 2008

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I. The United States Has Consistently Interpreted the *Avena* Judgment to Impose an "Obligation of Result"[1]

1. The United States has consistently interpreted the *Avena* Judgment to impose an obligation to provide review and reconsideration of the convictions and sentences of the individuals included in the *Avena* Judgment. Like Mexico, we understand this obligation to be one of "result," not merely "means." In addition, the United States has taken actions to implement the *Avena* Judgment consistent with this interpretation, and those actions reflect the seriousness with which we regard our obligation to comply with the Court's decision.

A. The President's Memorandum

2. The United States' efforts to implement the *Avena* Judgment began shortly after the decision. During the time immediately after the decision, the United States undertook a comprehensive review of the options for implementation, including how the federal Executive Branch could best require courts in U.S. states to provide review and reconsideration.

3. In 2005, the President issued a memorandum to the U.S. Attorney General directing that state courts give effect to *Avena*. The memorandum, dated February 28, 2005, stated:

> The United States is a party to the Vienna Convention on Consular Relations (the "Convention") and the Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (ICJ) jurisdiction to decide disputes concerning the 'interpretation and application' of the Convention.
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> I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of

[1] To the extent they are relevant to Mexico's Request for Interpretation and the United States' Written Observations, all facts and points of law previously set forth by the United States, both orally and in writing, in the *Avena* proceedings are incorporated by reference herein.

> the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena)*, 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.[2]

4. The purpose of the President's determination was to provide the Mexican nationals named in the *Avena* Judgment with an avenue to seek review and reconsideration of their claims under the Vienna Convention on Consular Relations ("Vienna Convention") in state courts. State courts were to determine—without regard to procedural default rules—whether the violations of the Convention caused actual prejudice to the defendant at trial or sentencing. The President's determination was an extraordinary attempt to implement *Avena*, requiring states to set aside, if necessary, their own generally applicable procedural rules in order to provide additional legal process to dozens of convicted murderers.

5. After the President issued the memorandum, the U.S. Department of Justice filed an amicus brief in the case of Mr. José Ernesto Medellín Rojas, which was then pending before the U.S. Supreme Court. The brief stated that under the President's determination, the individuals named in *Avena* could file habeas petitions in state courts, and state courts were to recognize the *Avena* decision. In addition, the brief stated that where the President's determination was applicable, "a state court is *required* to review and reconsider the conviction and sentence of the affected individual to determine whether the violations identified by the ICJ caused actual prejudice to the defense at trial or at sentencing."[3]

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[2] George W. Bush, Memorandum for the Attorney General, Compliance with the Decision of the International Court of Justice in *Avena* (Feb. 28, 2005). Attached at Exhibit 1.

[3] Brief for the United States as *Amicus Curiae* at 47 (emphasis added), *Medellín v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928),

6. The Supreme Court deferred decision on the petition to allow Texas courts again to review Mr. Medellín's case. In Texas courts, the United States again filed a brief concerning Mr. Medellín's post-conviction application. We argued that the President's determination entitled Mr. Medellín to review and reconsideration of his conviction and sentence consistent with the *Avena* Judgment.[4] The Texas Court of Criminal Appeals rejected Mr. Medellín's claim, concluding that the President had acted unconstitutionally in seeking to preempt state law, even in order to comply with the international obligation imposed by the *Avena* Judgment.

B. The *Medellín* Decision

7. Mr. Medellín again appealed to the U.S. Supreme Court last year, and again, the United States argued that under the President's determination, state courts must give effect to the *Avena* Judgment. Unfortunately, as the Court knows, in March 2008 the Supreme Court rejected the United States' arguments and refused to treat the President's determination as binding on state courts. The court ultimately concluded that the President lacked both the inherent authority under our Constitution and the requisite authority from Congress to order states to comply with the *Avena* Judgment.[5]

8. The Supreme Court, however, also acknowledged the international law obligation imposed by *Avena*, stating that "[n]o one disputes that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an international law obligation on the part of the United States."[6] The court's holding instead entirely concerned

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available at: http://www.usdoj.gov/osg/briefs/2004/3mer/1ami/2004-5928.mer.ami.pdf.

[4] Brief for United States as *Amicus Curiae* at 13, *Ex parte Medellín*, 223 S.W. 3d 315 (Tex. Crim. App. 2006) (No. AP-75, 207) (available at http://www.debevoise.com/publications/pdf/CCA%20US%20Amicus.PDF).

[5] *Medellín v. Texas*, 552 U.S. __, 128 S.Ct. 1346, 1356 (2008) (attached to Mexico's Application at Annex B).

[6] *Id*. at 8.

U.S. *domestic* law—in particular whether the *Avena* decision was automatically binding domestic law and therefore enforceable in U.S. courts, and if not, whether the President had the authority to direct state courts to comply with the decision. The Supreme Court concluded that this Court's decisions are not automatically enforceable in U.S. courts, but reiterated its position that those decisions are entitled to "respectful consideration" by our courts.

C. Efforts After the *Medellín* Decision

9. If the United States understood *Avena* to impose only an "obligation of means," we would have stopped there. But we did not. Indeed, our actions since the *Medellín* decision clearly belie Mexico's claim that the United States' conduct "confirms its understanding that paragraph 153(9) imposes only an obligation of means."[7]

10. Since the *Medellín* decision, the United States has engaged in numerous high-level discussions regarding alternative approaches to implement the *Avena* Judgment. These have included discussions with our Mexican counterparts about finding a practical solution to implement the "obligation of result" imposed by *Avena*.

11. In June, Secretary of State Rice and Attorney General Mukasey jointly sent a letter to Texas Governor Perry calling attention to the United States' continuing international law obligation and formally asking him for "the assistance of the State of Texas in carrying out an international legal obligation of the United States."[8] In addition, it requested "that Texas take the steps necessary to give effect to the *Avena* decision with respect to the convictions and sentences addressed therein."

12. The letter was intended to start a series of discussions between U.S. and Texas officials about how to

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[7] Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning *Avena and Other Mexico Nationals (Mexico v. United States),* (Mexico v. United States), *Application Instituting Proceedings,* para. 57.

[8] Letter from Condoleezza Rice, U.S. Secretary of State, and Michael Mukasey, U.S. Attorney General, to Rick Perry, Governor of the State of Texas (June 17, 2008). Attached at Exhibit 2.

implement the *Avena* Judgment in the wake of the Supreme Court's *Medellín* decision. Those discussions began shortly after the hearing before the Court on Mexico's request for provisional measures, and they have continued until the present time. During that period, Department of State officials have held several discussions with representatives of the state of Texas on how to ensure review and reconsideration of the convictions and sentences of those Texas defendants included in the *Avena* Judgment, including Mr. Medellín.

13. On July 18, Governor Perry responded to the letter from the Secretary of State and Attorney General. This letter includes an important commitment on the part of the Governor.[9] The letter states that if an *Avena* defendant in Texas custody has not previously received a judicial determination of prejudice resulting from a Vienna Convention violation and seeks such review in a federal habeas proceeding, the state will ask the reviewing court to address the claim of prejudice on the merits. This commitment may enable certain *Avena* defendants incarcerated in Texas to obtain review and reconsideration of their convictions and sentences in light of the Vienna Convention violation.

14. In a parallel effort, the Department of State has pursued discussions with the Texas Board of Pardons and Paroles (the "Board")—a key organ of the Texas government in capital cases. Only upon the positive recommendation of the Board can the Governor grant a commutation of sentence or a reprieve of more than 30 days. These discussions included an exploration of the practice and procedure of the Board as well as the requirements of the *Avena* Judgment. In the *Avena* case, this Court recognized that "appropriate clemency procedures can supplement judicial review and reconsideration, in particular where the judicial system has failed to take due account of the violation of the rights set forth in the Vienna Convention, as has occurred in the case of the three Mexican nationals referred to in

[9] Letter from Rick Perry, Governor of the State of Texas, to Condoleezza Rice, U.S. Secretary of State, and Michael Mukasey, U.S. Attorney General (July 18, 2008). Attached at Exhibit 3.

paragraph 114 above."[10] Among the Mexican nationals mentioned in paragraph 114 are César Roberto Fierro Reyna and Roberto Moreno Ramos, both of whom are incarcerated in Texas and covered by the Court's July 16 Order. This approach to the Board was also in keeping with the Governor's July 18 letter, which stated that "consideration of facts showing actual prejudice as discussed in *Avena* also may be urged by an offender before the Texas Board of Pardons and Paroles in its consideration of any clemency request that comes before it."[11]

15. In addition, in late July, after Mr. Medellín petitioned the Board, State Department Legal Adviser John B. Bellinger, III wrote to the Board's presiding officer about Mr. Medellín's case. The letter asked that the Board carefully consider whether violations of the Vienna Convention resulted in actual prejudice to Mr. Medellín's conviction and sentence and that, in view of the importance of the case, the Board provide "a specific written finding regarding whether the failure to provide Mr. Medellín with consular information and notification pursuant to Article 36 of the Vienna Convention resulted in actual prejudice to his conviction and sentence."[12]

16. We understand from our discussions with Texas officials that when considering a petition, the Board does in fact carefully evaluate all information before it, including claims of the sort presented by Mr. Medellín. The Board's consistent practice, however, is *not* to issue written determinations regarding petitioners' claims, and the Board was unfortunately not willing to depart from that practice in this instance. On August 4, 2008, the Board announced that it had decided not to recommend commutation of the death sentence or the 240-day

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[10] *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004, p. 66,* para. 143.

[11] Letter from Rick Perry, Governor of the State of Texas, to Condoleezza Rice, U.S. Secretary of State, and Michael Mukasey, U.S. Attorney General at 2.

[12] Letter from John B. Bellinger, III, Legal Adviser to the Secretary of State, to Rissie Owens, Presiding Officer of the Texas Board of Pardons and Paroles (July 30, 2008). Attached at Exhibit 4.

reprieve requested by Mr. Medellín.[13] Governor Perry was thus without authority either to commute the death sentence to a lesser sentence or to provide the requested reprieve.

17. While his petition was pending before the Board, Mr. Medellín concurrently pursued actions in Texas courts. He again sought post-conviction relief and a stay of execution from the Texas Court of Criminal Appeals, arguing that the court should allow time for Congress to take up the "*Avena* Case Implementation Act of 2008," a bill introduced by two Members of the U.S. House of Representatives on July 14, 2008.[14] Mr. Medellín's application to the court, presented by two attorneys who also are advocates for Mexico in this case, acknowledged universal agreement that *Avena* imposes an obligation of result:

> Every Member of the United States Supreme Court, the President of the United States, the Secretary of State, the Attorney General, Members of Congress, and, indeed, the State of Texas have confirmed that Applicant José Ernesto Medellín has a right arising under treaty commitments voluntarily made by the United States not to be executed unless and until he receives the review and reconsideration specified by the International Court of Justice in its judgment in the *Avena* case.[15]

18. On July 31, the Texas Court of Criminal Appeals rejected Mr. Medellín's application on state-law procedural grounds.[16] In a concurring opinion, two judges

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[13] Letter from Maria Ramirez, Legal Support Director for the Texas Board of Pardons and Paroles, to Sandra Babcock, Counsel for José Ernesto Medellín Rojas (Aug. 4, 2008). Attached at Exhibit 5.

[14] Application for Stay of Execution at 4, In re José Ernesto Medellín Rojas (Tx. Crim. App.) (No. WR-50, 191-03) [hereinafter "Stay Application"], Excerpt attached at Exhibit 6; Second Subsequent Application for Post-Conviction Writ of Habeas Corpus at 26, In re José Ernesto Medellín Rojas (Tx. Crim. App.) (No. WR-50, 191-03); Avena Case Implementation Act of 2008, H.R. 6481, 110th Cong. (2008).

[15] Stay Application at 1.

[16] Ex parte Medellín, No. WR-50, 191-03 (Tex. Crim. App. July 31, 2008), available at: http://www.cca.courts.state.tx.us/opinions/

specifically addressed Mr. Medellín's claim of prejudice. The judges examined the evidence Mr. Medellín claimed he would have presented had he been informed of his right to seek consular assistance, and concluded that none of it would have resulted in a different sentence. The judges determined that "there is no likelihood at all that the unknowing and inadvertent violation of the Vienna Convention actually prejudiced Medellín."[17]

19. Mr. Medellín again sought review in the U.S. Supreme Court, principally arguing, as he did in Texas courts, that his execution should be stayed until legislation could be considered. In connection with this claim, he contended that the Mexican consulate would have secured more qualified counsel for him if it had been notified of his detention, and accordingly that he was prejudiced in his sentence by the Vienna Convention violations. Texas argued in response that the mere fact that legislation had been introduced was insufficient to warrant a stay of execution and that Mr. Medellín had in any event already received review and reconsideration of his conviction and sentence in earlier proceedings in which state and federal courts determined that there was no prejudice. In addition, Texas's filings noted "the international sensitivities presented by the *Avena* ruling," and reiterated its commitment that, if any individual who has not received review and reconsideration of his Vienna Convention claims "should seek such review in a future federal habeas proceeding, the State of Texas will not only refrain from objecting, but will join the defense in asking the reviewing court to address the claim of prejudice on the merits."[18] The Executive Branch was not asked by the Supreme Court for its views, and did not file a brief in the case.

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pdfopinioninfo2.asp?opinionid=17173&filename=wr-50,191-03%20majority.pdf.

[17] *Id.* at 12 (Cochran and Holcomb, JJ., concurring), available at: http://www.cca.courts.state.tx.us/opinions/pdfopinioninfo2.asp?opinionid=17174&filename=wr-50,191-03%20concurring%20cochran.pdf.

[18] Brief in Opposition, *Medellín v. Texas*, 554 U.S.___ (2008) (Nos. 08-5573, 08A98), available at: http://www.scotusblog.com/wp/wp-content/uploads/2008/08/texas-bio-05-5573.pdf.

20. On August 5, the U.S. Supreme Court denied Mr. Medellín's various requests for relief. The court concluded that Mr. Medellín's arguments seeking to establish that the Vienna Convention violation required invalidation of the state court judgment—including the argument that counsel was inadequate due to the violation—were "insubstantial."[19] After the Supreme Court's decision, Texas carried out Mr. Medellín's sentence.

21. In all, 41 Mexican nationals included in the *Avena* Judgment remain on death row in the United States; nine have already obtained relief from the death penalty. No other individuals included in *Avena* are presently scheduled to be executed by Texas or any other state, and we understand that Texas is unlikely to carry out sentences of such individuals in the next year. During this time, the United States will continue to work to implement the *Avena* Judgment by seeking to ensure review and reconsideration of the convictions and sentences for all individuals covered by *Avena*.

II. Mexico's Application Must Be Dismissed Because There Is No Dispute for the Court to Adjudicate

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[19] *Medellín v. Texas*, 554 U.S.___, 77 U.S.L.W. 3073 (2008), slip op. at 2. Mr. Medellín's claims of prejudice have been reviewed on numerous occasions by federal and state courts. In Mr. Medellín's first state habeas proceeding, the Texas court concluded that Mr. Medellín "fail[ed] to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest for capital murder." *Ex Parte Medellín*, No. 675431-A (Jan. 22, 2001). A federal court subsequently reviewed Mr. Medellín's Vienna Convention claim, and concluded that Mr. Medellín "failed to show prejudice for the Vienna Convention violation." *Medellín v. Cockrell*, CA No. H-01-4078, 2003 U.S. Dist. LEXIS 27339, at *40 (S.D. Tex. June 25, 2003). In March 2008, the U.S. Supreme Court, while noting that it need not decide the issue of prejudice in view of its holding, observed that Mr. Medellín "confessed within three hours of his arrest—before there could be a violation of his Vienna Convention right to consulate notification." *Medellín v. Texas*, 552 U.S. at ____, 128 S.Ct. at 1355 n.1. As indicated above, a concurring opinion of the Texas Court of Criminal Appeals also addressed Medellín's claim that a better lawyer procured by the Mexican Consulate would have introduced sufficient mitigating evidence at sentencing to avoid a death sentence. Ex parte Medellín, No. WR-50, 191-03 at 12 (Tex. Crim. App. July 31, 2008) (Cochran and Holcomb, JJ., concurring).

22. Mexico's application does not present a dispute regarding the "meaning or scope" of the *Avena* Judgment; there is nothing for the Court to adjudicate. This defect is fatal to Mexico's application, and whether it is regarded as an issue of the Court's jurisdiction under Article 60 of the Court's Statute, or of the application's admissibility, the result is the same: Mexico's request for interpretation must be dismissed.

A. The Court Cannot Proceed in the Absence of a Dispute

23. Jurisdiction and admissibility are fundamental requirements, and it is appropriate for those issues to be determined by the Court before it proceeds to the merits.[20] In addition, the Court has made clear that "the admissibility of requests for interpretation of the Court's judgments needs particular attention because of the need to avoid impairing the finality, and delaying the implementation, of these judgments."[21] This is necessary to vindicate Article 60's principle of *res judicata*, "that judgments are 'final and without appeal.'"[22]

24. The Court's July 16, 2008 Order regarding provisional measures (the "July 16 Order") did not finally decide these threshold issues. That ruling was limited only to the issue whether there was a sufficient basis for the Court to indicate provisional measures. The Court declined to dismiss Mexico's application on grounds of a "manifest lack of jurisdiction."[23] In addition, the Court

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[20] *See* II Shabtai Rosenne, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005 § II.214, at 806-808 (4th ed. 2006) (noting the existence of "antecedent issues requiring disposal by the Court *before it can deal with the merits*") (emphasis added).

[21] *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections *(Nigeria v. Cameroon)*, *Judgment*, *I.C.J. Reports 1999*, p. 36, para. 12.

[22] *Id.*

[23] 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, Request for the Indication of Provisional Measures*, para. 57 [hereinafter "July 16 Order"]*; see also* Dissenting Op. of Buergenthal, J., para. 7 (issue is whether Mexico's request is "manifestly

clearly stated that its decision on provisional measures "in no way prejudges *any* question that the Court may have to deal with relating to the Request for interpretation."[24] The Court therefore did not decide whether Mexico's application satisfied the jurisdictional requirements of Article 60 of the Court's Statute or was otherwise inadmissible.

25. In not deciding these threshold issues, the July 16 Order is consistent with the established rule that the Court does not finally determine jurisdiction or admissibility at the provisional measures stage. As explained in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)* (Jurisdiction of the Court and Admissibility of the Application), the Court "does not normally at that stage take a definitive decision on its jurisdiction," but rather "does so only if it is apparent from the outset that there is no basis on which jurisdiction could lie, and that it therefore cannot entertain the case."[25] The Court thus made clear in that case that its provisional measures order "cannot ... amount to an acknowledgement that [the Court] has jurisdiction."[26] So too here: the Court's Order on Mexico's request for the indication of provisional measures did not finally resolve issues of jurisdiction or admissibility. It remains for the Court to decide those threshold issues at this stage of the proceedings.

26. In this case, the issues of jurisdiction and admissibility turn on the same basic question: whether Mexico's application presents a "dispute" between Mexico and the United States regarding the "meaning or scope" of the *Avena* Judgment. The requirement of a dispute derives from two sources. *First*, as the United States

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unfounded"); Dissenting Op. of Owada, Tomka, and Keith, JJ., para. 12 (Mexico "has not demonstrated *even on a provisional basis* that there may be a dispute about the meaning or scope of paragraph 153 (9).") (emphasis added).

[24] July 16 Order, para. 79 (emphasis added).

[25] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Judgment, Jurisdiction of the Court and Admissibility of the Application, I.C.J. Reports 2006*, p. 20, para. 25.

[26] *Id.*

explained in oral proceedings at the provisional measures stage, "the existence of a dispute is the primary condition for the Court to exercise its judicial function."[27] In particular, Article 38 of the Court's Statute states that the function of the Court is "to decide in accordance with international law such disputes as are submitted to it." *Second*, Article 60 of the Statute specifically requires that a request for interpretation involve a dispute as to the "meaning or scope" of the relevant judgment.

27. This Court has consistently stated that a "dispute" requires "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[28] Still, it is not enough to show that as a general matter, "the interests of the two parties to such a case are in conflict."[29] Rather, "[i]t must be shown that the *claim* of one party is positively opposed by the other."[30] In addition, the Court has made clear that a party's own characterization of whether a dispute exists is not dispositive, and that the issue is "a matter for objective determination."[31]

28. Even if "dispute" as used in Article 60 is given a somewhat broader meaning than elsewhere in the Statute, an interpretation case under Article 60 must still satisfy the basic requirement of a "dispute." The Court's

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[27] Request for Interpretation of the Judgment of 31 March 2004, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, (Mexico v. United States of America), *Public Sitting, June 19, 2008, at 3 p.m.,* para. 3 (June 19, 2008) (citing *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 270-71, para. 55, *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58.).

[28] *See e.g. Mavrommatis Palestine Concessions, Judgment No. 2, 1924 P.C.I.J. , Series A, No. 2,* p. 11; *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 18-19, para. 24; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras),* Judgment of 8 October 2007, para. 130.

[29] *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962*: I.C.J. Reports 1962, p. 328.

[30] *Id.* (emphasis added).

[31] *Interpretation of Peace Treaties, Advisory Opinion: I.C.J. Reports 1950*, p. 74.

July 16 Order concluded that a "dispute" ("contestation" in the French text) under Article 60 "does not need to satisfy the same criteria as would a dispute ("différend" in the French text) as referred to in Article 36, paragraph 2, of the Statute."[32] The Court nevertheless applied the established rule that, even under Article 60, interested States must have "in fact shown themselves as holding opposing views in regard to the meaning or scope of a judgment of the Court."[33] The broader latitude afforded by the French term *contestation* may have allowed the Court to discern "opposing views" sufficient for the provisional measures stage.[34] It cannot, however, provide a basis for the Court to proceed once it becomes evident, upon full consideration of the questions of jurisdiction and admissibility, that there is no dispute whatsoever regarding the meaning or scope of the *Avena* Judgment.

29. In addition to the requirement of a "dispute", a request for interpretation under Article 60 of the Statute must satisfy a second condition. As the Court explained in the *Asylum* Case, the "real purpose of the request must be to obtain an interpretation of the judgment."[35] To allow a request to proceed on any other basis "would nullify the provision of the article that the judgment is final and without appeal."[36] Insofar as there is no dispute, Mexico's application must be understood not as a request for clarification, but rather as an effort to enlist the Court in the role of monitoring and enforcing its judgments. As the Court is aware, the UN Charter does not assign that responsibility to the Court, and to the extent the Charter speaks to the issue at all, it allows a party to a judgment to "have recourse to the Security Council" in certain circumstances.[37]

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[32] July 16 Order, para 53.

[33] *Id.*, para. 54; *see also Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, pp. 10-11.

[34] July 16 Order, para 55.

[35] *Request for Interpretation of the Judgment of 20 November1950 in the Asylum Case, Judgment, I.C.J. Reports 1950*, p. 402.

[36] *Id.*

[37] U.N. CHARTER art. 94(2).

30. The import of these principles is clear. If Mexico's application does present a genuine dispute, the Court must define the competing interpretations and decide the merits. If, as we contend, it does not, the Court must dismiss Mexico's application.

B. There Is No Dispute for the Court to Hear

31. As the United States made clear at the provisional measures stage, there is simply no dispute regarding Mexico's requested interpretation. Mexico's application 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
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> (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.[38]

32. As we have said, the United States *agrees* with this interpretation of the *Avena* Judgment. We agree that the Judgment imposes an "obligation of result," and not merely an "obligation of means." In its July 16 Order, the Court appeared to accept that "both Parties regard

[38] 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), *Application Instituting Proceedings*, para. 59.

paragraph 153(9) of the *Avena* Judgment as an international obligation of result."[39]

33. In its concluding remarks on provisional measures, Mexico shifted course, acknowledging the United States' agreement with its requested interpretation and claiming instead that it was not clear that "all of the constituent parts of the United States share the U.S. Administration's stated view regarding the interpretation and scope of the *Avena* Judgment."[40] According to Mexico, by scheduling Mr. Medellín's execution, the state of Texas "unmistakably communicated its disagreement with Mexico's interpretation of the Judgment."[41] It is this asserted disagreement that now appears to form the basis of Mexico's claim of a dispute.

34. In this regard, the Court's July 16 Order concluded that the Parties "apparently hold different views as to the meaning or 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."[42]

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[39] July 16 Order, para. 55. Mr. Medellín's lawyers, who participated in preparing Mexico's case, have agreed there is no dispute. As his case proceeded through Texas and U.S. federal courts, his lawyers stated on more than one occasion that there is general agreement among U.S. state and federal authorities that the United States is obligated under the *Avena* decision to ensure review and reconsideration for the *Avena* defendants. *See, e.g.*, Second Subsequent Application for Post-Conviction Writ of Habeas Corpus at 24, In re José Ernesto Medellín Rojas (Tx. Crim. App.) (No. WR-50, 191-03) ("every federal and state actor agrees that there is a binding international legal obligation to provide [Mr. Medellín review and reconsideration]"); Stay Application at 1 ("Every Member of the United States Supreme Court, the President of the United States, the Secretary of State, the Attorney General, Members of Congress, and, indeed, the State of Texas have confirmed that Applicant José Ernesto Medellín has a right . . . not to be executed unless and until he receives the review and reconsideration specified by the International Court of Justice in its judgment in the *Avena* case.").

[40] 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), *Public Sitting, June 20, 2008, at 10 a.m.,* para. 2.

[41] *Id.* at para. 4.

[42] *July 16 Order,* para. 55.

According to the Order, the existence of these "different views" permitted the Court to "deal with the Request for interpretation" and to address the request for the indication of provisional measures.[43]

35. Mexico's concluding remarks and the Court's Order thus identified two possible grounds for disagreement. The first concerns whether, despite the assurances of the United States in these proceedings, *other* U.S. governmental authorities at the federal or state level agree with Mexico's requested interpretation. The second concerns whether the obligation imposed by the *Avena* Judgment falls upon those other authorities. While these issues may have presented the Court with prima facie jurisdiction sufficient to proceed with provisional measures, upon careful examination it is evident that they do not satisfy the legal requirement of a dispute.

i. International Law Dictates That Executive Officials of the National Government Speak for the State on the International Plane

36. Mexico appears to claim that a dispute within the meaning of Article 60 may arise if it is determined that a constituent state of the United States does not share the interpretation requested by Mexico. That is simply incorrect. It is established under international law that certain officials of the national government have authority to speak for the State on the international plane. This principle is recognized in international treaty law and diplomatic practice, in the Statute of the Court, and in the Court's jurisprudence.

37. The entire conduct of diplomatic relations among States rests on international law and practice recognizing the authority of certain representatives of the national government to speak on behalf of a State in its international affairs. "[I]t is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions, including for the performance,

[43] *Id.* at para. 57.

on behalf of the said State, of unilateral acts having the force of international commitments."[44] It is also established that "[a]mbassadors and other diplomatic agents carry out their duties under [the] authority" of the foreign minister or head of government and their acts are capable of binding the State in appropriate circumstances.[45]

38. The power of heads of State and other appropriate individuals "to act on behalf of the State in its international relations is *universally recognized*, and reflected in, for example, Article 7, paragraph 2(a), of the Vienna Convention on the Law of Treaties."[46] Article 7 of the Vienna Convention on the Law of Treaties (VCLT) regarding full powers sets out who may appropriately represent a State for the purpose of concluding treaties.[47] It expressly identifies those executive officials of the *national* government that are deemed to speak on behalf of the State "for the purpose of performing all acts relating to the conclusion of a treaty"—namely, "Heads of State, Heads of Government and Ministers for Foreign Affairs."[48] These officials are deemed to represent the State "[i]n virtue of their functions." In addition, "certain heads of diplomatic missions and accredited

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[44] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment, Jurisdiction of the Court and Admissibility of the Application, *I.C.J. Reports 2006*, p. 27, para. 46.

[45] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 21, para. 53.

[46] *Application of the Convention on the Prevention of the Crime of Genocide, Provisional Measures, I.C.J. Reports 1993,* p. 11, para. 13 (emphasis added).

[47] Although the United States is not a party to the Vienna Convention on the Law of Treaties, it considers Article 7 of the Convention regarding "full powers" to be reflective of customary international law. Article 2.1(c) of that Convention defines "full powers" to mean "a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or *for accomplishing any other act with respect to a treaty*." (Emphasis added.)

[48] Vienna Convention on the Law of Treaties, adopted May 23, 1969, art. 7(2)(a), 1155 U.N.T.S. 331.

representatives" are "[i]n virtue of their functions" considered as representing their State "for the purpose of adopting the text of a treaty."[49]

39. In addition to the VCLT, other international law authorities recognize the power of heads of State, ministers of foreign affairs, and other officials acting within their area of competence to authoritatively represent their governments in international matters. For example, the Vienna Convention on Diplomatic Relations defines the functions of the diplomatic mission to include "representing the sending State in the receiving State" and "negotiating with the Government of the receiving State."[50] United Nations practice reflects the same principle. The Rules of Procedure for the General Assembly require that credentials for the State representatives specified in Article 9 of the Charter be "issued either by the Head of the State or Government or by the Minister of Foreign Affairs."[51] Indeed, State practice shows that "declarations creating legal obligations for States are quite often made by heads of State or Government or ministers for foreign affairs *without their capacity to commit the State being called into question*."[52]

40. These black-letter principles are reflected in the statute and practice of the Court. Under Article 34 of the Statute, "[o]nly *states* may be parties in cases before the Court."[53] There is no provision for according a governmental sub-entity of the State the status of a party.

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[49] Vienna Convention on the Law of Treaties, art. 7(2)(b).

[50] Vienna Convention on Diplomatic Relations, April 18, 1961, art. 3(1)(a), (c), 23 U.S.T. 3227, 500 U.N.T.S. 95.

[51] Rules of Procedure of the General Assembly, R. 29, U.N. Doc. A/520/Rev. 17 (2008).

[52] *Report of the International Law Commission to the General Assembly*, 61 U.N. GAOR Supp. (No. 10) at 373, commentary, principle 4, para. 2, U.N. Doc. A/61/10 (2006) (emphasis added). Guiding Principle Four specifies that a unilateral declaration can bind the State internationally "only if it is made by an authority vested with power to do so" and that "heads of State, heads of Government and ministers for foreign affairs" are competent to bind the State "by virtue of their functions." *Id.* at 372.

[53] I.C.J. Statute, Art. 34(1) (emphasis added).

In addition, Article 42(1) of the Court's Statue requires parties to appoint an agent to represent them before the Court. Although the choice of an agent is generally a matter for the State, "[t]he Court will regard as competent authority for this purpose one of the high officers of State mentioned in Article 7 of the Vienna Convention on the Law of Treaties of 1969, normally the minister for foreign affairs."[54]

41. The Court's cases have likewise recognized that certain persons or entities should *not* be regarded as speaking for the State in the international sphere. In the *Gulf of Maine* case, for example, the Court rejected Canada's claim that a letter from a mid-level official in the United States Bureau of Land Management regarding a maritime border represented the views of the United States government.[55] Under the circumstances, the Court stated, it was not appropriate for Canada "to rely on the contents of a letter . . . as though it were an official declaration of the United States Government on that country's international maritime boundaries."[56] The underlying reason, of course, is that the letter did not necessarily have the imprimatur of those who *are* deemed to speak with authority on behalf of the State. The same principle applies to Mexico's application: the words or actions of officials of other federal government entities or of a U.S. state cannot be deemed to reflect the official views of the United States government.

42. Two further brief observations are warranted. *First*, in a federal State like the United States, it is generally the national government that determines the State's relations with foreign States. Oppenheim explains:

> When, as happens frequently, a federal state assumes *in every way* the external representation of its member states, so far as international relations are concerned, the member states make no appearance at all. This is

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[54] III Shabtai Rosenne, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005 § III.277, at 1120 (4th ed. 2006).

[55] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 307, para. 139.

[56] *Id.*

> true of the United States of America and all those other American federal states whose constitution is modeled on that of the United States. Here the member states are sovereign too, but only with regard to *internal* affairs. All their external sovereignty being absorbed by the federal state, they are not international persons at all.[57]

43. *Second*, as a matter of international law and practice, it is federal *executive* officials that represent the State on the international plane. "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."[58] The VCLT, of course, deems officials who exercise *executive* functions—"Heads of State, Heads of Government and Ministers for Foreign Affairs"—to represent the State "in virtue of their functions."[59]

44. In short, under established international law, whether Texas, or any other U.S. state, has a different interpretation of the Court's judgment is irrelevant to the issue before the Court. Similarly irrelevant are any interpretations by officials of other entities of the federal government that are not deemed by international law to speak on behalf of the United States. The United States—through its authorized representatives in this Court—has agreed with Mexico's requested interpretation; the *Avena* Judgment, we agree, imposes on the United States an "obligation of result," and not merely an "obligation of means." Officials of Texas, or any other U.S. state, do not speak for the United States on the international plane, and nothing they have said or done can constitute a difference of views as to the meaning or

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[57] OPPENHEIM'S INTERNATIONAL LAW 252 (Sir Robert Jennings & Arthur Watts eds., 9th ed. 1992).

[58] July 16 Order*, Dissenting Op. of Owada, Tomka, and Keith, JJ.,* para. 17.

[59] Vienna Convention on the Law of Treaties, art. 7(2)(a).

scope of the *Avena* Judgment as between the only parties before the Court—Mexico and the United States.

45. Mexico's contrary position—that the actions of officials of any of the 50 U.S. states can call into question the definitive position of the U.S. government regarding the *Avena* Judgment—invites absurd consequences. For one, States would have no basis to rely on the statements of representatives of other States' national governments. No matter that the foreign minister has given her word, purporting to bind the State—it can be undone, or at least undermined, by disagreement expressed by a subordinate local official. Mexico's principle, if applied, would render States' relations with each other inherently unstable. Could the governor of a state in a federal system call into question the national government's commitment to an international treaty, possibly creating by his words alone an actionable dispute? Could the views of a city mayor supplant the President's interpretation of the U.N. Charter? Could a floor statement by a member of a parliament create new international law obligations binding on the nation? Of course not. Likewise, no U.S. state, and no federal entity other than the Executive, can be treated as competent to speak for the United States.

ii. Under U.S. Domestic Law, the President and His Representatives Speak for the United States

46. Under international law, representatives of the President and the Secretary of State are deemed to speak on behalf of the United States, and the Court need not look to U.S. domestic law to resolve that issue. Even so, U.S. domestic law clearly vests the President with the authority to conduct the United States' relations with foreign States.

47. The U.S. Constitution *expressly* assigns authority to conduct the foreign relations of the United States exclusively to the national government, in particular to the President. The U.S. Constitution grants the President the powers to serve as "Commander in Chief of the Army and Navy," "make Treaties" and "appoint Ambassadors [and] other public Ministers and Consuls" with the advice and consent of the Senate, and "receive

Ambassadors."[60] These authorities clearly comprise the power to speak authoritatively on behalf of the United States in international fora.[61]

48. Moreover, the U.S. Constitution specifically *denies* certain foreign affairs powers to the states. Article I, Section 10 of the Constitution states that "[n]o state shall enter into any treaty," and provides further that states may not enter into agreements with other states or with foreign nations without the consent of the federal government.[62] The Constitution also includes restrictions on the states' "laying any Imposts or Duties on Imports or Exports," and "engaging in War."[63]

49. The decisions of the U.S. Supreme Court confirm the national government's authority over foreign affairs, to the exclusion of the states. As the court has explained, "in international relations and with respect to foreign intercourse and trade the people of the United States *act through a single government with unified and adequate national power*."[64] In our system, "[t]he Federal Government ... is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties."[65] It necessarily follows that "power over external affairs *is not shared by the States*."[66]

50. In addition, the U.S. Supreme Court has repeatedly recognized the President's authority to conduct U.S. diplomatic relations. The court has declared that "the President alone has the power to speak or listen as a

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[60] U.S. Const. Art. II, §§ 2, 3.

[61] In addition, certain related powers are assigned to Congress, including the authority to "provide for the common Defence," "regulate Commerce with foreign Nations," "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," and "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." U.S. Const. Art. I, § 8, Cls. 1, 3, 10, 11.

[62] U.S. Const., Art. I, §10.

[63] *Id.*

[64] *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979).

[65] *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941).

[66] *United States v. Pink*, 315 U.S. 203, 233 (1942).

representative of the nation," and that he is "the sole organ of the federal government in the field of international relations."[67] The President is "the constitutional representative of the United States in its dealings with foreign nations."[68] In short, the court has "recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive.'"[69]

51. In this respect, the United States is not unique. Many States assign the power to speak on behalf of the State in international affairs to the federal executive. *See, e.g.*, Coordinated Constitution of the Kingdom of Belgium, Article 167(1) (the King directs international relations); Constitution of the Federative Republic of Brazil, Article 84 VII (the President has exclusive authority to maintain relations with foreign States); Constitution of the French Republic, Article 20 (the executive "determines and conducts the policy of the Nation") ("Le Gouvernement détermine et conduit la politique de la Nation."); Basic Law of the Federal Republic of Germany, Article 32 (Relations with foreign states shall be conducted by the Federation not the Lander or constituent states), Article 59(1) (the President shall represent the Federation in matters of international law); Constitution of the Russian Federation, Article 80(4) ("The President of the Russian Federation, as the Head of State, shall represent the Russian Federation . . . in its international relations"), Article 86 (The President of the Russian Federation shall direct foreign policy); Constitution of the Slovak Republic, Articles 101(1), 102(1)(a) (the President represents the Republic in matters of foreign affairs).

52. In light of the well-established authority of the U.S. federal executive to speak on behalf of the United States, there is no reason to inquire into Congress's or the Supreme Court's understanding of the *Avena* Judgment.

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[67] *United States v. Curtiss-Wright Export Corp., et al.*, 299 U.S. 304, 319-20 (1936).

[68] *United States v. Louisiana*, 363 U.S. 1, 35 (1960).

[69] *Department of Navy v. Egan*, 484 U.S. 518, 529 (1988) (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)).

Neither entity has the power to speak authoritatively for the United States on the international plane. Indeed, it is hard to imagine, as a practical matter, how they *could*. Congress consists of 535 individual members representing various states and local districts throughout the country. If Congress can ever be said to act with one voice, it is generally through legislation—and even then, Congress's actions usually have no legal consequence unless the President approves.[70] Accordingly, even if it were relevant, discerning the understanding of Congress regarding the "meaning or scope" of the *Avena* Judgment would be a virtually impossible task. The nature of the Supreme Court involves different limitations that make it equally unsuited to speak for the United States on the international plane. Most important, the court has authority only to decide particular *cases* that come before it; it has no power to seek out and pronounce on questions of international law in the abstract.

53. Finally, to the extent the Supreme Court's understanding can be discerned, it would have to be regarded as sharing Mexico's requested interpretation. The Supreme Court stated in the *Medellín* decision that "[n]o one disputes that the Avena decision . . . constitutes an international law obligation on the part of the United States," and the decision appeared to take it for granted that the *Avena* decision imposed an obligation of result.[71] As for Congress, nothing can be gleaned from the fact that it has not enacted legislation. There are countless reasons why Congress, or any legislative body, might not act on a particular issue, including the fact that other pressing issues may take priority. In any event, two legislators have offered a bill entitled the "Avena Case Implementation Act of 2008" which would provide a judicial remedy for persons "whose rights are infringed by

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[70] The U.S. Constitution provides that legislation may be enacted over the President's objection if two-thirds of each house of Congress approve. U.S. Const. Art. I, § 7.

[71] *Medellín v. Texas*, 552 U.S. __, 128 S.Ct. 1346, 1355 (Stating that, having found that the United States violated Article 36(1)(b) of the Vienna Convention, "[i]n the ICJ's [*Avena*] determination, the United States was *obligated* 'to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals.'") (emphasis added).

a violation by any nonforeign governmental authority of article 36 of the Vienna Convention on Consular Relations."[72]

C. The Fact That the Actions of U.S. State and Federal Authorities Engage the International Responsibility of the United States Does Not Mean Those Authorities Speak for the United States

54. Despite a mountain of legal authority establishing that the President, the Secretary of State, and their representatives speak authoritatively on behalf of the United States on the international plane, Mexico claims that Texas's understanding of the *Avena* Judgment nevertheless gives rise to a real dispute because the "actions of Texas engage the international responsibility of the United States."[73] That argument confuses the principle of state responsibility with the question of who speaks for the state. Under international law, the question of whose actions implicate a State's international responsibility is clearly distinct from the question of who speaks authoritatively for the State on the international plane.

55. The law of state responsibility dictates that actions of governmental organs may be attributed to the State under international law. As the Commentary to the Draft Articles of State Responsibility states, "the first principle of attribution for the purposes of State responsibility in international law [is] that the conduct of an organ of the State is attributable to that State," and "[t]he principle of the unity of the State entails that the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international responsibility."[74] According to this principle, the United

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[72] H.R. 6481, 110th Cong. (2008).

[73] 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), *Public Sitting, June 20, 2008, at 10 a.m.*, para. 3.

[74] *Commentary to Draft Articles on Responsibility for Internationally Wrongful Acts*, [2001] Y.B. Int'l L. Comm'n 40-41, commentary, art. 4, paras. (1), (5), U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2). As the commentary explains in paragraphs 5 and 6 to Article 4, "The

States' international responsibility is implicated by a U.S. state carrying out the sentence of an *Avena* defendant without that person having received the review and reconsideration mandated by the *Avena* Judgment.

56. This does *not* mean, however, that that same U.S. state represents the United States internationally or speaks for the United States on the international plane. The Commentary to Chapter II of the Draft Articles (Articles 4-11) makes this distinction equally clear: "The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State."[75] "*Such rules have nothing to do with attribution for the purposes of State responsibility*."[76]

57. The judges of this Court who would have dismissed this case for lack of jurisdiction at the provisional measures stage noted this critical distinction. *See* Op. of Buergenthal, J. para. 13 ("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."); Op. of Owada, Tomka, and Keith, JJ., paras. 16, 17 ("The proposition of law on which Mexico relies is not relevant in this context. . . . The issue of attribution is distinct from the question of

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principle of the unity of the State entails that the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international responsibility. . . . [T]he reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government . . . at whatever level in the hierarchy, including those at provincial or even local level. . . ." As relevant to this case, the United States also recognizes that, as provided in Article 3 of the Draft Articles, "[t]he characterization of an act of a State as internationally wrongful is governed by international law . . . [and] is not affected by the characterization of the same act as lawful by internal law."

[75] *Id.* at 39, commentary, Ch. II, para. (5).

[76] *Id.* (emphasis added).

who is authorized to speak for the State."); *see also* Op. of Skotnikov, J., para. 5.

58. Of course, throughout this proceeding, the United States has explicitly recognized that it is internationally responsible for the actions of its political subdivisions. There is no real issue, then, regarding whether the obligation to comply with *Avena* "falls upon all United States federal and state authorities."[77] The international obligation falls on the United States as a whole. And the actions of all U.S. state and federal authorities with respect to that obligation engage the international responsibility of the United States.

59. Mexico's argument—that Texas speaks for the United States because its actions engage U.S. international responsibility—would turn international law on its head. On Mexico's view, a U.S. state or local official whose actions would engage U.S. international responsibility would thereby be deemed to speak for the United States. The local police authorities who failed to comply with the Vienna Convention in cases addressed by *Avena* would be deemed competent to state the official U.S. interpretation of the Convention. Or, in reviewing an asserted violation of a boundary agreement, the Court might look not to the position presented to the Court by the agent of the national government, but rather to the views of the state officials whose actions gave rise to the dispute in the first instance. These are the implications of Mexico's position. It simply cannot be the law.

60. The law, rather, is this: The actions of U.S. states and other government entities engage the international responsibility of the United States, but those entities do not speak for it. The President, Secretary of State, and their representatives are competent to speak authoritatively on behalf of the United States on the international plane, including in this Court. 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.

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[77] July 16 Order, para. 55.

III. The Merits

61. As explained above, there is no basis for the Court to reach the merits in this case. In addition, the U.S. Supreme Court's decisions in the *Medellín* cases and others[78] make clear that any decision reiterating the United States' obligation to comply with *Avena* will not change the domestic U.S. legal situation. A decision on the merits will not be binding U.S. domestic law and therefore will not be directly enforceable in U.S. courts, and it will not provide the President any additional authority to implement *Avena*. As a practical matter, a fresh decision by this Court will again add nothing to the original *Avena* Judgment.

62. Nevertheless, should the Court decide to engage the dispute on the merits, 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."[79]

Consistent with this interpretation, it is the United States' understanding that the *Avena* Judgment requires it to take measures to provide the review and reconsideration mandated by the Judgment, and to ensure that, with respect to any individual included in the Judgment, no sentence is carried out unless and until that individual has received such review and reconsideration.

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[78] *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346-47 (2006); *Breard v. Greene*, 523 U.S. 371, 375-76 (1998).

[79] Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning *Avena and Other Mexico Nationals (Mexico v. United States),* (Mexico v. United States), *Application Instituting Proceedings,* para. 59.

IV. Submissions

63. 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.

Washington, D.C.
29 August 2008

John B. Bellinger, III
Agent of the United States of America

I have the honor to certify that each of the Exhibits is a true and complete copy of the original.

John B. Bellinger, III
Agent of the United States of America

List of Exhibits

1. Memorandum from the President of the United States to the United States Attorney General (February 28, 2005).

2. Letter from Condoleezza Rice, United States Secretary of State, and Michael Mukasey, United States Attorney General, to Rick Perry, Governor of the state of Texas (June 17, 2008).

3. Letter from Rick Perry, Governor of the state of Texas, to Condoleezza Rice, United States Secretary of State, and Michael Mukasey, United States Attorney General (July 18, 2008).

4. Letter from John B. Bellinger III, Legal Adviser to the Secretary of State, to Rissie Owens, Presiding Officer of the Texas Board of Pardons and Paroles (July 30, 2008).

5. Letter from Maria Ramirez, Legal Support Director for the Texas Board of Pardons and Paroles, to Sandra Babcock, Counsel for José Ernesto Medellín Rojas (Aug. 4, 2008).

6. Application for a Stay of Execution, In re José Ernesto Medellín Rojas, Texas Court of Criminal Appeals (July 28, 2008), Excerpted Pages 1-6 (document deposited in full to the Registry).