International Court of Justice

Further 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)*

October 6, 2008

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I. Introduction

1. This case ostensibly concerns a dispute over the interpretation of the Court's 2004 *Avena* Judgment—in particular, about whether the United States agrees that *Avena* imposes what Mexico calls an "obligation of result" or believes that it imposes only an "obligation of means." Mexico claims there is such a dispute, but in its written observations, it does not cite a *single* instance in which the United States has contested Mexico's interpretation of *Avena*. Nor could it: it has been the consistent position of the U.S. government—stated in this Court and elsewhere—that *Avena* obligates the United States to provide review and reconsideration of the convictions and sentences of the individuals included in *Avena*. In addition, Mexico's written observations essentially concede that under international law, the views or statements of U.S. state officials cannot give rise to an interpretive dispute.[1] In short, there is not an interpretive dispute between Mexico and the United States, and there cannot be an interpretive dispute with Texas or any other U.S. state. Mexico's application must therefore be dismissed.

2. Apart from the absence of an underlying interpretive dispute, Mexico's written observations seek to extend this case well beyond the limited and special jurisdiction provided in Article 60 of the Statute. That provision, and the Court's jurisprudence, make clear that such jurisdiction extends only to disputes about *interpretation*—"disputes as to the meaning or scope" of a prior judgment—and not to disputes about compliance with, or enforcement of, the prior judgment. But the latter is exactly what Mexico's written observations seek. Unable to present evidence of a real interpretive dispute, Mexico seeks to have the Court order the United States to comply with the uncontested obligations imposed by *Avena* and to issue guarantees that it will comply in the

[1] *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States),* Submission of Mexico in Response to the Written Observations of the United States of America, paras. 34, 35, 40 [hereinafter "Response to Written Observations"].

future. Those requests fall outside the scope of Article 60 jurisdiction.

3. Mexico's written observations in effect seek to draw this Court further into the role of monitor and enforcer of the *Avena* Judgment—to the serious detriment of the principle that this Court's judgments, once issued, are final and binding on both parties. There is no dispute over the interpretation of *Avena*; Mexico well knows that. It has nevertheless used a non-existent interpretive dispute to assert other claims concerning the United States' conduct—claims that it would have had no jurisdictional basis to assert directly. The Court has spoken clearly in *Avena* regarding the United States' obligations. That decision is "final and without appeal" under Article 60, and there is nothing further for the Court to adjudicate.

II. Mexico Fails to Identify a Genuine Dispute Regarding the Meaning or Scope of *Avena*

4. Before proceeding to the factual and legal reasons why Mexico's position must fail, it first must be noted that Mexico's written observations make several significant concessions. First, Mexico "readily acknowledges" that the issue of whether the actions of a governmental organ involve the United States' international responsibility is distinct from the question of who has authority to speak for the United States.[2] Second, Mexico in effect stipulates that the federal Executive "generally conducts international relations on behalf of the United States."[3] At a minimum, these concessions invite the Court to give dispositive weight to the authoritative pronouncements of the federal Executive in determining whether an interpretive dispute exists.

5. Despite these concessions, and the United States' categorically stated understanding of *Avena*, Mexico argues that the Court should examine "the [Executive's] views and acts in other fora (including the U.S. Supreme Court), as well as the views and acts of other competent

[2] *Id*. at para. 34.

[3] *Id.* at para. 36.

organs of federal and state government."[4] It further contends that the "words and deeds" of the United States reveal a genuine dispute about the "meaning or scope" of the *Avena* Judgment.[5]

6. Mexico's position is factually and legally unsupportable. *First*, Mexico has not identified a single statement by any organ of the U.S. government that contradicts the U.S. position that *Avena* imposes what Mexico calls an "obligation of result." *Second*, this Court has never looked to the conduct of a party to determine whether there exists a dispute regarding *interpretation*, and the speculative inferences Mexico would have the Court draw from the United States' conduct provide no basis for rejecting the United States' firm and longstanding interpretation of *Avena*. *Third*, the United States' actions are consistent with its understanding that *Avena* imposes an obligation on the United States to provide review and reconsideration of the convictions and sentences of the individuals included in *Avena*.

A. The United States Has Consistently Stated That *Avena* Imposes What Mexico Calls an "Obligation of Result"

7. At the outset, it is important to be clear that it is *not* the position of the United States, contrary to Mexico's suggestion, that "only the assurances of its Agent" before the Court bear on whether there is a dispute as to meaning or scope of the *Avena* Judgment.[6] We accept that a State's authoritative out-of-court pronouncements can also be relevant. If the United States were to tell the Court that *Avena* imposes an "obligation of result," but elsewhere were to claim that it imposes only an "obligation of means," the Court could take all the United States' statements into account in determining whether an interpretative dispute exists.

8. But that is not the case here: the United States is not saying one thing in this Court and another thing

[4] *Id.*

[5] *Id.* at para. 35.

[6] *See id.* at para. 2.

elsewhere. Rather, through officials speaking authoritatively on its behalf, the United States has consistently stated that the *Avena* Judgment obligates the United States under international law to ensure review and reconsideration of the convictions and sentences of the individuals included in *Avena*. After many rounds of pleadings in various stages of this case, Mexico has yet to identify a *single* statement by U.S. government officials that is inconsistent with this position.

9. Mexico nevertheless suggests that the U.S. government's position before the U.S. Supreme Court in *Medellín v. Texas (Medellín II)* somehow contradicts its position that *Avena* imposes an obligation of result.[7] In fact, in its brief to the Supreme Court, the United States made absolutely clear what *Avena* requires: "[T]he United States has an international law obligation to comply with the ICJ's decision in *Avena*. That decision requires the United States courts to provide review and reconsideration of the convictions and sentences of the 51 Mexican nationals addressed in that decision."[8] In addition, the arguments made by the United States in *Medellín II* were clearly intended to secure domestic implementation of the international law obligation imposed by *Avena*. The *Avena* Judgment itself made clear that the United States could implement this obligation in its domestic system "by means of its own choosing."[9] The President accordingly determined to implement *Avena* by having U.S. state courts give effect to the *Avena* Judgment.[10] Indeed, in *Medellín II*, the Executive vigorously argued to the Supreme Court that the

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[7] *See* Response to Written Observations, at paras. 41-44; *Medellín v. Texas*, 128 S. Ct. 1346 (2008), slip op. at 8 (available at http://supremecourtus.gov/opinions/pdf/06-984.pdf and Exhibit B of Mexico's Application). This case is referred to herein as "*Medellín II*."

[8] Brief of the United States as *Amicus Curiae*, *Medellín v. Texas*, No. 06-984 (March 2007), at 4 (available at http://www.usdoj.gov/osg/briefs/2006/3mer/1ami/2006-0984.mer.ami.pdf).

[9] *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004,* p. 72, para. 153(9) [hereinafter "*Avena* Judgment"].

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

President's determination was lawful and bound state courts to comply.[11]

10. Mexico quibbles with the United States' choice of legal arguments before the Supreme Court in *Medellín II*, taking issue with the U.S. position that the *Avena* Judgment was not automatically enforceable in U.S. courts without the President's determination.[12] But that issue—which, in U.S. legal parlance, concerns whether the *Avena* Judgment is "self-executing"—is a matter of U.S. domestic law. Mexico's doubts about the United States' best assessment of its options within its *own* domestic legal system and under its Constitution are not relevant to the issues before the Court in this case. Moreover, from the time the President made the decision to implement *Avena* through his determination of February 28, 2005, until proceedings before this Court, Mexico never expressed any claim that the President's determination and the U.S. efforts to implement it evidenced a difference of interpretation with the United States about whether *Avena* imposes an "obligation of result."

11. To be clear, the Supreme Court does not speak for the United States on the international plane.[13] Yet Mexico also claims that the Supreme Court's decision in *Medellín II* is itself "wholly at odds" with Mexico's interpretation of the *Avena* Judgment, because the Supreme Court concluded that the *Avena* Judgment is not self-executing and therefore not automatically binding on U.S. state courts.[14] This is (again) a mischaracterization of *Medellín II*. The Supreme Court clearly explained the issue before it:

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[11] Brief of the United States as *Amicus Curiae*, *Medellín v. Texas*, No. 06-984 (March 2007), at 4-7.

[12] *See* Response to Written Observations, at paras. 41-44.

[13] The United States argued in its earlier written submission that under principles of international law, the federal Executive—not U.S. states and not other organs of the federal government—speaks authoritatively for the United States on the international plane. Written Observations of the United States of America, August 29, 2008, paras. 36-53.

[14] Response to Written Observations, *supra*, at section III(B)(2).

> No 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. But not all international law obligations automatically constitute binding federal law enforceable in United States courts. The question we confront here is whether the *Avena* judgment has automatic *domestic* legal effect such that the judgment of its own force applies in state and federal courts.[15]

In other words, the issue for the Supreme Court was not whether *Avena* imposed an international law obligation on the United States, but rather whether, under principles of U.S. domestic law, the nature of certain international obligations the United States had entered into—here, the Optional Protocol to the Vienna Convention on Consular Relations (the "Vienna Convention") and the UN Charter (of which the ICJ Statute is an integral part)—rendered the *Avena* judgment automatically enforceable in U.S. courts. The Supreme Court concluded that it did not, because—as a matter of U.S. domestic law—none of the treaties at issue "creates binding [U.S.] federal law in the absence of implementing legislation."[16]

12. Mexico finds much to disagree with in the Supreme Court's analysis of U.S. law, but it has not cited a single statement by the Court that the United States does not have an international law obligation to provide appropriate review and reconsideration for the individuals included in *Avena*. Instead, Mexico cites a difference of views with the Supreme Court about Article 94 of the *UN Charter* and what it entails for the status of *Avena* under U.S. domestic law.[17] But the meaning of Article 94 was plainly not at issue in the *Avena* Judgment, and insofar as Mexico seeks to introduce the

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[15] *Medellín II, supra*, slip op. at 8.

[16] *Id.* at 10. In reaching this conclusion, the Supreme Court also observed that "neither Medellín nor his amici have identified a single nation that treats ICJ judgments as binding in domestic courts." *Id.* at 21.

[17] Response to Written Observations, *supra*, at paras. 52-56.

issue now, it is clearly beyond the scope of a request for interpretation. Indeed, the issue has nothing to do with the case before the Court: *Avena* could at once impose an "obligation of result" on the United States as a matter of international law and still remain, absent domestic legislation, unenforceable in U.S. courts under U.S. law.

13. In sum, Mexico's arguments about *Medellín II* are an elaborate misdirection. For one, as Mexico acknowledges, it is the federal Executive that speaks authoritatively for the United States on the international plane. But even if the views of the Supreme Court are considered, the fact of the matter is that the entire dispute in *Medellín II* was premised on the understanding—accepted by the State of Texas, the United States, and the Supreme Court itself—that *Avena* requires the United States to provide review and reconsideration of the convictions and sentences of the individuals included in *Avena*.[18] There is accordingly no basis for Mexico's contention that *Medellín II* is inconsistent with the United States' stated interpretation of *Avena*.

B. Speculative Inferences Regarding the United States' Conduct Cannot Negate Its Unequivocally Stated Interpretation of *Avena*

14. Having failed to cite a single inconsistent U.S. statement, Mexico argues that the Court can somehow infer a different interpretation from the United States' conduct—specifically, its decision to pursue certain means of implementing *Avena* over others. Mexico's argument has no merit.

15. For one thing, the Court has never in an interpretation case looked to the conduct of a party to determine whether a dispute exists. There is a good reason for this: An interpretive dispute necessarily involves opposing legal understandings regarding the meaning or scope of a prior judgment—it "requires a divergence of *views* between the parties on *definite*

[18] *Medellin II, supra,* slip op. at 8.

points."[19] Those views and understandings are revealed by a party's statements before the Court and elsewhere, and cannot readily be discerned by the mute facts of a party's conduct. The fact that a party may be unable to fulfill an international obligation simply does not mean that it has a different interpretation of what that obligation is.

16. The situation is different in a dispute about the *application* of legal obligations to a party's conduct. For this reason, Mexico's reliance on the Court's decision in the *Headquarters Agreement Case* is misplaced.[20] That case arose after the UN Secretary General requested that the United States enter into arbitration under the Headquarters Agreement, claiming that the U.S. violated the agreement by implementing a newly-enacted domestic law barring the Palestine Liberation Organization (PLO) from maintaining an observer mission at the United Nations. At the time of the Court's decision, the President had signed the relevant provision into law; the U.S. Attorney General had notified the PLO's Permanent Observer that maintaining the mission would be unlawful when the law became effective; and, when the PLO failed to comply with the law, the United States had brought suit in U.S. federal court to compel compliance.[21]

17. The question for the Court was whether these actions gave rise to a dispute under the Headquarters Agreement, triggering a provision of the agreement requiring such disputes to be referred to arbitration.[22] The United Nations contended that there was indeed such a dispute. The position of the United States was that it "had not yet concluded that a dispute existed . . . because the legislation in question had not yet been

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[19] *Request for Interpretation of the Judgment of November 20th, 1950, in the Asylum Case, Judgment of November 27th, 1950: I.C.J. Reports 1950*, p. 403 [hereinafter "Asylum Case"].

[20] *Applicability of the Agreement to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p.12.

[21] *Id.* at pp. 15-16, paras. 9-10.

[22] *Id.* at p. 13, para. 1.

implemented."[23] In its written statement to the Court, the United States argued that it "did not believe arbitration would be appropriate or timely," because it intended to refrain from taking action against the PLO mission while litigation in U.S. courts was pending.[24] The Court rejected the U.S. position, stating that the existence of a dispute "in no way requires that any contested decision must already have been carried into effect."[25] In other words, the Court determined that it was not required to wait until actual closure of the PLO mission before finding a dispute about compliance with the Headquarters Agreement; the actions of the U.S. directed at closing the mission were sufficient to give rise to a dispute.

18. Critically, the Court then proceeded to state that the dispute at issue concerned the *application* of the Headquarters Agreement. The Court observed that, on the main interpretive question, the United States did not dispute the United Nations' claim that U.S. actions were contrary to the Headquarters Agreement.[26] Rather, the Court said, there existed "a dispute between the United Nations and the United States concerning the *application* of the Headquarters Agreement."[27]

19. The *Headquarters Agreement Case* demonstrates an important difference between cases strictly about interpretation of legal obligations and cases that involve application of those obligations. In cases involving application, a party's conduct is indicative of how it applies or implements a treaty. In an interpretation case, however, a party's conduct is not by itself determinative of how it understands its obligations: it is, after all, possible that a State can be in violation of its international obligations even when the State has no disagreement over the scope of those obligations. Because the Headquarters Agreement required the parties to arbitrate disputes

[23] *Id.* at p. 23, para. 39 (quoting the report of the Secretary General to the General Assembly (A/42/915, para. 6)).

[24] *Id.*

[25] *Id.* at p. 29, para. 42.

[26] *Id.* at p. 32, para. 49 (emphasis added).

[27] *Id.*

regarding *application* of the agreement, the United States' conduct was relevant in determining jurisdiction. Article 60, on the other hand, provides jurisdiction only as to disputes concerning *interpretation* of a prior judgment. While consideration of the United States' conduct would be relevant to whether the United States has complied with its obligations under *Avena*, that conduct cannot, by itself, reveal how the United States understands those obligations.

C. The United States' Conduct Is In Fact Consistent With Its Stated Position That *Avena* Imposes What Mexico Calls an "Obligation of Result"

20. The United States has stated, unequivocally, that *Avena* imposes an obligation of result, and there is no reason to second-guess that position on the basis of speculative inferences about the United States' conduct. Even so, the United States' actions since the *Avena* decision make clear that it regards the decision as imposing an obligation to provide review and reconsideration of the convictions and sentences of the individuals included in *Avena*. Those actions are detailed at length in the United States' oral pleadings on provisional measures, in its August 1, 2008 letter to the Court, and in its August 29, 2008 filing.[28]

21. Mexico, however, picks out what the United States has *not* done, and argues on the basis of these "acts and omissions" that the Court should ignore the United States' stated position that it is bound to implement *Avena*.[29] In particular, Mexico argues that the United States disagrees with Mexico's interpretation because it

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[28] *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States), Public Sitting, June 19, 2008, at 3 p.m.,* paras. 6-27; Letter to the President of the Court, H.E. Judge Rosalyn Higgins, August 1, 2008; Written Observations of the United States of America, August 29, 2008, paras. 2-15.

[29] Response to Written Observations, paras. 40-49. Notably, almost all the "acts or omissions" cited by Mexico occurred *since* Mexico filed its application. This further calls into question the strength of Mexico's application and its argument that there is a dispute under Article 60.

(1) did not make filings in the latest round of litigation concerning José Ernesto Medellín Rojas, and (2) "took no steps to support legislation proposed in Congress that would implement *Avena*."[30] In addition, Mexico contends that Congress's failure to enact legislation evinces an interpretive dispute.[31] These contentions are meritless.

22. *First*, as we have previously informed the Court, the United States has sought practical and effective ways to implement the *Avena* Judgment. We have accordingly engaged Texas officials with a view to securing review and reconsideration for individuals included in the *Avena* decision. While we did not achieve what we hoped in Mr. Medellín's case, our efforts have yielded results. As the Court is aware, in a letter to Secretary of State Condoleezza Rice, Texas Governor Rick Perry made an important commitment 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.[32] Texas's filings in the Supreme Court in *Medellín III* confirmed this commitment.[33] We have recently been able to confirm a similar oral commitment from Nevada, another U.S. state with a Mexican national subject to *Avena*. The United States' actions in this regard are entirely consistent with its stated understanding that *Avena* imposes what Mexico calls an "obligation of result."

23. The fact that the United States, in implementing *Avena*, eschewed particular avenues that it judged unlikely to succeed or arguments that it viewed as inconsistent with existing rulings of the U.S. Supreme Court as a matter of U.S. domestic law does not mean

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[30] *Id.* at paras. 45-47.

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

[32] 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).

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

that the United States has a different view of its international legal obligation under *Avena*. With respect to Mr. Medellín's last round of litigation, the Supreme Court's decision in *Medellín II* had previously made clear that Mr. Medellín could not obtain relief on the basis of the *Avena* Judgment or the President's directive to States to provide review and reconsideration to Mexican nationals covered by that Judgment.[34] In addition, it was apparent from *Medellín II* that this Court's July 16, 2008 Order Indicating Provisional Measures (the "July 16 Order") could provide no additional legal ground on which Mr. Medellín could seek relief. We can appreciate Mexico's frustration with respect to the recent litigation involving Mr. Medellín, but the United States' decisions with respect to that litigation do not mean that it has a different understanding of the *Avena* Judgment.

24. *Second*, despite Mexico's insistent focus on the issue, legislation is not an especially promising avenue for implementing *Avena* at this time. It is true that a bill was introduced by two members of one house of Congress, but no committee, much less the full Congress, took any action on the bill before Congress adjourned.[35] Moreover, as the United States made clear in its first written submissions, the fact that Congress has not enacted legislation is irrelevant to whether the United States interprets *Avena* to impose an "obligation of result."[36] Mexico also complains that the federal Executive has not pushed the legislation. But it is up to U.S. officials to decide how best—legally and politically—to ensure compliance with *Avena*. The fact that the Executive did not push for legislation in a short legislative session occupied with many other pressing priorities obviously is no basis for the Court to second-guess the United States' stated interpretation of the *Avena* Judgment.

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[34] *Medellin II, supra,* slip op. at 2.

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

[36] Written Observations of the United States of America, August 29, 2008, para. 53.

III. The Court Lacks Jurisdiction to Entertain Mexico's Request for a Declaration of Breach of the Provisional Measures Order

25. The Court lacks jurisdiction to rule on the merits of Mexico's supplemental request that the Court declare the United States in breach of the Court's July 16 Order.

26. The Court's jurisdiction to determine whether a party has breached a provisional measures order is derived from its jurisdiction to adjudicate the underlying dispute.[37] *LaGrand* is instructive. In that case, Germany sought to add to its Vienna Convention claims a claim for breach of the Court's provisional measures order. The Court determined that it had jurisdiction over the additional claim because it "concerns issues that arise directly out of the dispute between the Parties before the Court over which the Court has already held that it has jurisdiction [and] *are thus covered by Article I of the Optional Protocol* [to the Vienna Convention]."[38] In other words, the Court held that it could hear the provisional measures claim because it rested on the same jurisdictional basis—Article I of the Optional Protocol—as Germany's Vienna Convention claims.

27. Here, relying on *LaGrand*, Mexico argues that the Court has jurisdiction over its claim of breach of the provisional measures order because the Court has jurisdiction over its request for interpretation.[39] That argument is unavailing, for two reasons.

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[37] *See LaGrand (Germany v. U.S.), Judgment, I.C.J. Reports 2001*, p. 466.

[38] *Id*. at p. 484, para. 45. (emphasis added).

[39] *See* Response to Written Observations, at para. 62. As an initial matter, Mexico claims that the Court's September 2, 2008 letter to the parties "granted" Mexico's August 28, 2008 request to amend its pleadings to state a claim based on the violation of the Court's provisional measures order. *Id*. at para. 62, n. 5. That is not what the Registrar's letter says. Rather, it says only that "the Court has decided to afford the Parties the opportunity of furnishing short further written explanations, as provided for in Article 98, paragraph 4, of the Rules of the Court." In addition, if the Court's letter was in fact addressed to the jurisdictional question, the United States was afforded insufficient opportunity to reply to Mexico's request.

28. *First*, because the Court has no basis to adjudicate Mexico's request for interpretation, it also has no basis to address an ancillary claim founded entirely on that application. The principle here, closely related to the Court's reasoning in *LaGrand*, is that where the Court does not have jurisdiction to decide a case, it lacks jurisdiction to rule on ancillary submissions. Consistent with this principle, the Court has carefully distinguished its power to indicate provisional measures under the "special provision" in Article 41 of the ICJ Statute from its authority to entertain the merits of a case.[40] In *Anglo-Iranian Oil Co.*, the Court's jurisdiction to hear the merits was governed by "the general rules laid down in Article 36 of the Statute," which the Court made clear "are wholly different from the special provisions of Article 41 . . . [and] are based on the principle that the jurisdiction of the Court to deal with and decide a case on the merits depends on the will of the Parties."[41] Article 41 authorizes the Court only to indicate provisional measures to preserve the rights of the parties while the case is pending; the Court requires a separate jurisdictional basis to hear a case on the merits. Here, the Court's jurisdiction to entertain the merits is governed by Article 60, not Article 36, but the same principle holds: the limited power granted by Article 41 to indicate provisional measures does not provide jurisdiction to examine the question of breach of the provisional measures order.

29. There are sound reasons for this approach. Provisional measures are intended only to preserve the status quo pending the Court's resolution of the rights of the parties as they existed at the time of the application.[42] But once the Court determines that it has no basis to adjudicate that application, it serves no purpose to

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[40] *See, e.g., Anglo-Iranian Oil Co. case (jurisdiction), Judgment of July 22nd, 1952: I.C.J. Reports 1952*, p. 102-03.

[41] *Id.*

[42] *See Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, pp. 295-96, para. 35 [hereinafter "*Land and Maritime Boundary Case*"]; Shabtai Rosenne, PROVISIONAL MEASURES IN INTERNATIONAL LAW 3 (2005).

inquire whether the parties have maintained the status quo with respect to a claim that is now only theoretical.

30. Where the Court lacks jurisdiction, a declaration of non-compliance with provisional measures would seriously undermine the consensual basis of the Court's jurisdiction.[43] This concern is real enough when the Court indicates provisional measures before finally establishing its jurisdiction. As Professor Rosenne observes, "prima facie jurisdiction can make serious inroads into the traditional consensual basis of the Court's jurisdiction."[44] In such situations, it may be that the risk of imposing obligations on a State without its consent is warranted if the preliminary measures are necessary for the Court to perform its adjudicatory function. But once the Court has determined that it lacks jurisdiction—in effect, a finding that one of the parties has *not* consented to the Court's intervention–there is no justification for declaring that party's legal obligations.

31. *Second*, even if the Court has jurisdiction over the request for interpretation, Article 60 does not provide jurisdiction for Mexico's provisional measures claim. The Court's jurisdiction in the present proceedings is defined by Article 60, which limits jurisdiction to disputes as to the "meaning or scope" of the *Avena* judgment. Mexico's claim that the United States breached the Court's provisional measures order is not a dispute as to the "meaning or scope" of the *Avena* Judgment and is thus beyond the Court's Article 60 jurisdiction.

32. *LaGrand*, of course, was different. There, the Court had jurisdiction under the Optional Protocol over *all* "disputes arising out of the interpretation or application of the [Vienna Convention]."[45] Even if a case had not been already pending before the Court, there would have been jurisdiction under the Optional Protocol

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[43] S*ee East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 101, para. 26 ("[O]ne of the fundamental principles of [the ICJ] Statute is that it cannot decide a dispute between States without consent of those States to its jurisdiction").

[44] Rosenne, PROVISIONAL MEASURES IN INTERNATIONAL LAW, *supra*, at 123.

[45] *LaGrand, supra*, at para. 36.

for Germany to bring a separate claim that the execution of the LaGrand brothers violated the United States' Vienna Convention obligations. Germany's claim that the LaGrand executions violated the provisional measures order was simply another aspect of its Vienna Convention claims. For this reason, in concluding that it had jurisdiction, the Court noted that the provisional measures claim also concerned issues that were "covered by Article I of the Optional Protocol."[46]

33. That is not true here. The question of whether the United States has *complied* with *Avena* is distinct from the question of how to interpret *Avena*. The merits of the interpretive question would require the Court to parse the *Avena* Judgment with a view to determining what it means. The issue of breach would not only involve the Court in questions well beyond whether *Avena* imposes what Mexico calls an "obligation of result," but would also require the Court to pass on the lawfulness of actions subsequent to the *Avena* Judgment, including whether Mr. Medellín received adequate review and reconsideration.[47] That would take the Court far afield from the question of what the *Avena* Judgment meant. It would also run counter to the basic rule that in

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[46] *Id*. at para. 45.

[47] As noted in the United States' initial written observations, 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).

interpretation cases, the Court "cannot take into account facts not discussed in the original proceedings nor any development that took place after the original judgment."[48] In short, Mexico's claim for breach of provisional measures clearly does not "arise[] directly out" of its interpretation request under Article 60.[49]

34. The Court has repeatedly stated that it will not address new claims that would transform a case "into another dispute which is different in character."[50] Mexico's provisional measures claim would undoubtedly transform the nature of the present proceedings and remove them from Article 60 special jurisdiction. The Court has no basis to entertain it.

IV. The Court Has No Basis to Consider Mexico's Remaining Claims

A. The Court Lacks Jurisdiction To Rule That The United States Breached The *Avena* Judgment

35. In addition to its provisional measures claim, Mexico requests that the Court declare the United States in breach of the *Avena* Judgment.[51]

36. As has been the United States' position throughout these proceedings, there is no dispute between the United States and Mexico as to the meaning or scope of the *Avena* Judgment and thus no basis to address Mexico's request for interpretation. There accordingly is no

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[48] Andreas Zimmerman and Tobias Thienel, Article 60, in *The Statute of the International Court of Justice: A Commentary*, 1276-77, 1283 (Andreas Zimmerman *et. al.*, eds., 2006).

[49] *LaGrand, supra,* at para. 45.

[50] *Société Commerciale de Belgique, P.C.I.J., Series A/B, No. 78*, p. 173 (1939); *see also Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), Jurisdiction and Admissibility, Judgment*, *I.C.J. Reports 1984*, p. 392, para. 80 (stating that it will not permit a new claim that would "transform the dispute brought before the Court by the application into another dispute which is different in character").

[51] Response to Written Observations, *supra,* at para. 79.

jurisdiction to address any additional requests Mexico attempts to attach thereto.[52]

37. Even if the Court had jurisdiction over Mexico's request for interpretation, the claim that the United States breached the *Avena* Judgment must fail, for the special jurisdiction provided by Article 60 is limited to questions about the "meaning or scope of the judgment."[53] Far from adhering to the principle that the real purpose of a request for interpretation "must be *solely* to obtain clarification of the meaning or scope of what the Court has decided with binding force," Mexico's request seeks to transform an interpretation case into a case about the United States' compliance with the Court's judgment.[54] The Court must dismiss that request.[55]

38. There is a clear distinction between proceedings in interpretation of judgments and questions of compliance with judgments. In this regard, Professor Rosenne notes:

> By Article 60 of the Statute the Court has compulsory jurisdiction to construe its judgment upon the request of any party in the event of a dispute as to its meaning or scope. . . . Furthermore, a dispute concerning the execution of the judgment, *not being a dispute as to its*

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[52] *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58 ("the existence of a dispute is the primary condition for the Court to exercise its judicial function").

[53] *Interpretation of Judgment No. 3 (Treaty of Neuilly, Art. 179, Annex, para. 4) (Bulgaria/Greece), 1925, P.C.I.J., Series A, No. 4*, pp. 3, 7 [hereinafter "*Interpretation of Judgment No. 3*"]; *Asylum Case*, *supra*, at 402. *See also* Shabtai Rosenne, INTERPRETATION, REVISION AND OTHER RECOURSE FROM INTERNATIONAL JUDGMENTS AND AWARDS 93 (2007) ("[T]he important and long-term normative ruling of [the Interpretation of Judgment No. 3] is that an interpretation made under Article 60 of the Statute cannot go beyond the limits of the judgment being interpreted.").

[54] *Asylum Case*, *supra*, at 402 (emphasis added).

[55] Andreas Zimmerman and Tobias Thienel, Article 60, in *The Statute of the International Court of Justice: A Commentary*, 1276-77, 1283 (Andreas Zimmerman *et. al.*, eds., 2006) ("[I]t is evident that interpretation cannot extend beyond what has been already decided in the original judgment. . . . Since the Court is therefore bound by the limits of its previous judgment, it cannot take into account facts not discussed in the original proceedings nor any development that took place after the original judgment.").

> *meaning or scope*, may be justiciable in accordance with the normal practice of the Court.[56]

This "normal practice" refers to the Court's authority to hear disputes under Article 36 of the Statute. The adjudication of such disputes requires a new and independent basis of jurisdiction because, unlike Article 60 jurisdiction, jurisdiction over questions of compliance "is not automatically given by the jurisdiction in the original proceedings."[57]

39. The *Asylum Case* demonstrates this distinction in practice.[58] There, the Court determined that Colombia's grant of asylum to a Peruvian national, Víctor Raúl Haya de la Torre, was not in conformity with the Havana Convention.[59] Colombia then initiated interpretation proceedings to ascertain whether the Court's Judgment required Colombia to surrender Mr. de la Torre to Peru. Finding that the Judgment did not address the question of surrender, the Court dismissed Colombia's request because it was a new question "which cannot be decided by means of interpretation."[60] Colombia subsequently brought a new case, *Haya de la Torre*, under Article 36 of the Statute requesting that the Court rule whether surrender was required under Article 2 of the Havana Convention.[61]

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[56] Shabtai Rosenne, I THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005 § I.44, at 211 (4th ed. 2006) (emphasis added); Constanze Schulte, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 38 (2004) (citing W.M. Reisman, *The Enforcement of International Judgments*, 63 AM. J. INT'L L. 1, 27 (1969) ("As concerns the violation of the obligation to comply with a judgment, the creditor might take this issue to the Court again by way of new proceedings, *provided that there is a valid jurisdictional link*.") (emphasis added).

[57] Schulte, *supra*, at 38.

[58] *Asylum Case, supra*, at 395.

[59] *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 288.

[60] *Asylum Case, supra*, at 403.

[61] *Haya de la Torre Case, Judgment of June 13th, 1951: I.C.J. Reports 1951,* p. 71.

40. Mexico's request for a declaration of breach presents a new question outside the scope of interpretation proceedings. Although an amendment to broaden Article 60 to encompass disputes concerning compliance with judgments has been proposed in the legal literature, these two types of proceedings remain distinct.[62] Mexico cannot introduce its claim of breach in these proceedings.

41. In addition, there is no valid jurisdictional basis upon which Mexico could make a request for a declaration of breach in a *new* proceeding before the Court. While the original *Avena* case was brought under the Optional Protocol to the Vienna Convention, the United States has since withdrawn its consent to compulsory jurisdiction over claims arising under the Convention. As a result, the Optional Protocol cannot serve as the basis for a new case in this Court.

42. Mexico's request for a declaration of breach must be dismissed. It does not state a dispute as to the meaning or scope of the *Avena* Judgment, nor is its purpose to obtain a clarification of that judgment. There is also no alternate basis of jurisdiction upon which Mexico could properly bring its request for a declaration of breach before the Court. Mexico's claim that it is entitled to a declaration of breach of the *Avena* Judgment must be dismissed.

B. There is No Basis for the Court to Order Guarantees of Non-Repetition with Respect to the *Avena* Judgment

43. Mexico's written observations claim that it is entitled to "guarantees" of non-repetition, and ask the Court to require the United States to "guarantee that no other Mexican national entitled to review and reconsideration under the *Avena* Judgment is executed unless and until that review and reconsideration is completed and it is determined that no prejudice resulted

[62] Schulte, *supra*, at n. 95 (citing Reisman, 63 AM. J. INT'L L. at 27). Reisman recommended the addition of Article 60a to the Statute with the following text: "In the event of any dispute as to the fact or manner of compliance, either party may apply to the Court."

from the violation."[63] The Court has no basis to entertain Mexico's request.

44. *First*, as explained, the Court has no basis to hear Mexico's request for interpretation, and therefore no basis to consider *any* of Mexico's ancillary remedial requests. Just as issuing a declaration of breach of a judgment is outside the Court's jurisdiction in an interpretation proceeding, so too is requiring guarantees of non-repetition. In this regard, *LaGrand* again does not help Mexico. There, the Court determined that a dispute as to remedies for a violation of an international agreement required no jurisdictional basis independent from that of the main proceedings. But *LaGrand* was brought under Article 36(1) of the Statute.[64] Unlike Article 36 jurisdiction, and in recognition of the fundamental principle of the finality of judgments, the Court's inherent jurisdiction over interpretation cases arising under Article 60 is considerably more limited.

45. *Second*, even if the Court has a basis to consider the merits of the request for interpretation, Mexico's request for guarantees of non-repetition is plainly inadmissible, for it goes well beyond the issue of the "meaning or scope" of the *Avena* Judgment.[65] In particular, Mexico's request asks the Court to rule on whether facts subsequent to the *Avena* Judgment warrant an order requiring the United States to guarantee that it will comply with the Judgment. That has nothing to do with interpreting the *Avena* Judgment—an exercise that "cannot extend beyond what has been already decided in the original judgment" and in which the Court "cannot take into account facts not discussed in the original proceedings nor any development that took place after the original judgment."[66] To require the United States to

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[63] Response to Written Observations, *supra*, at para. 86(b).

[64] *LaGrand*, *supra*, at p. 485, para. 48. This same is true of the other previous cases in which guarantees of non-repetition have been sought. *See Avena Judgment, supra,* at p. 17, para. 1; *Land and Maritime Boundary Case, supra*, at p. 312, para. 1.

[65] *See Interpretation of Judgment No. 3, supra*, at pp. 3, 7; *Asylum Case, supra*, at p. 402.

[66] Zimmerman and Thienel, *supra*, at pp. 1276-77, 1283. *Application for Revision and Interpretation of the Judgment of 24 February 1982*

issue a guarantee of non-repetition in this case would amount to an amendment of the *Avena* Judgment to, in effect, impose a greater obligation on the United States than the *Avena* Judgment itself. Such an action is clearly outside the scope of the Court's powers in an interpretation proceeding.[67]

46. Mexico's request for guarantees of non-repetition is especially inappropriate here, given that *Avena* itself *already* declined to grant Mexico's request for guarantees of non-repetition. In *Avena*, the Court determined that the United States' considerable efforts, detailed in *LaGrand*, to comply with the Vienna Convention's consular notification requirements satisfied Mexico's request for a guarantee of non-repetition.[68] To revisit that ruling in the context of Mexico's request for interpretation would completely undermine the principle of *res judicata*. Mexico's renewed request for guarantees of non-repetition amounts to nothing more than an appeal from a Judgment that, by the strictures of Article 60, is "final and without appeal."[69]

47. *Finally*, an order requiring guarantees of non-repetition is, at best, an extraordinary remedy under international law. Indeed, this Court has *never* ordered guarantees of non-repetition. *LaGrand* did not ultimately

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in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985,* p. 228, paras. 65-66.

[67] *Asylum Case, supra*, at p. 403 ("Interpretation can in no way go beyond the limits of the Judgment, fixed in advance by the Parties themselves in their submissions.").

[68] *Avena Judgment*, *supra*, at pp. 69, 73, paras. 150, 153(10).

[69] Furthermore, there is no ground for distinguishing between guarantees of non-repetition with respect to the Vienna Convention and guarantees of non-repetition with respect to the *Avena* Judgment. They are effectively the same thing. The *Avena* Judgment declares what the Vienna Convention requires, and the substantive obligations announced in *Avena* are obligations under the Vienna Convention itself. *See* Shabtai Rosenne, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 38 (5th ed. 1995) ("The International Court is not a legislative body established to formulate new rules of law…. The Court, like all courts, applies the existing law. It does not 'create' new rules of law either for the parties to a given dispute or for the international community at large.").

involve a request for "guarantees" of non-repetition, but rather for a "general assurance of non-repetition."[70] Moreover, the Court in *LaGrand* did *not* grant Germany's request; it merely noted that Germany's request was met by the United States' commitment to implement specific measures in relation to its obligations under Article 36 of the Vienna Convention. The Court concluded: "If a State, in proceedings before this Court, repeatedly refers to substantial activities which it is carrying out in order to achieve compliance with certain obligations under a treaty, then this expresses a commitment to follow through with the efforts in this regard."[71]

48. Even if Mexico could properly request guarantees of non-repetition in this case, it has offered little evidence that such an order is necessary in light of the United States' repeated statements that it is attempting to implement *Avena* and its continuing actions to do so. Guarantees of non-repetition are measures of "rather exceptional character" which, even when requested by a party, should be afforded only when evidence establishes that the circumstances require anticipatory measures to prevent likely reoccurrences of the violation.[72]

49. Mexico asserts that following the execution of Mr. Medellín, "the United States has offered no assurance that it will take the requisite action" in the future to prevent breach of the *Avena* Judgment. That is simply incorrect. The United States, in its August 29, 2008 filing before this Court, committed that it "will continue to work to implement the *Avena* Judgment by seeking to ensure review and reconsideration of the convictions and

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[70] *LaGrand, supra*, at p. 516, para. 128(6). In fact, Germany amended its claim during oral proceedings from a claim for "guarantees" to a claims for a "general assurance." *LaGrand*, *(Germany v. U.S.),* Public Sitting, Nov. 16, 2000, at 10 a.m., p. 56.

[71] *LaGrand*, *supra*, at p. 512, para. 124.

[72] *Commentary to Draft Articles on Responsibility for Internationally Wrongful Acts*, [2001] Y.B. Int'l L. Comm'n 91, commentary, art. 30, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2). Given this "rather exceptional character" the text of Article 30 and the Commentary denote the limited role foreseen for guarantees of non-repetition. Dina Shelton, *Symposium: The ILC's State Responsibility Articles: Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT'L L. 833, 847 (2002).

sentences for all individuals covered by *Avena*."[73] The United States' recent submission to the Court also informed the Court that no individuals "included in *Avena* are presently scheduled to be executed by Texas or any other state, and . . . Texas is unlikely to carry out sentences of such individuals in the next year."[74] In addition, Texas Governor Perry has committed to support federal habeas petitions for judicial determinations of prejudice resulting from Vienna Convention violations—a commitment confirmed in Texas's filings in *Medellín III*. Officials from the State of Nevada have made a similar commitment.

50. In addition, in light of its statement "that there remains a possibility that implementing legislation will be enacted before any other Mexican national subject to the *Avena* Judgment is scheduled for execution," Mexico has not established a likelihood of future acts that warrant an order of guarantees of non-repetition.[75] Accordingly, not only is such an order unavailable in this interpretation proceeding, it is also unnecessary.[76]

51. The United States remains committed to achieving the result of review and reconsideration of the convictions and sentences of all individuals included in the *Avena* Judgment. The United States continues to work to fully implement the Judgment consistent with its terms.

52. In sum, Mexico's request that the Court order guarantees of non-repetition, with its requests for findings of breach of the provisional measures order and breach of the *Avena* Judgment, improperly seek to expand these proceedings beyond the circumscribed jurisdictional grant contained in Article 60 of the Statute. For that reason and for the other reasons set forth above, the Court should reject those requests.

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[73] *Public Sitting, June 19, 2008, at 3 p.m.,* at para. 21.

[74] *Id.*

[75] Response to Written Observations, at para. 57.

[76] *Commentary to Draft Articles on Responsibility for Internationally Wrongful Acts*, [2001] Y.B. Int'l L. Comm'n 89-91; James Crawford, Jacqueline Peel & Simon Olleson, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading*, 12 EUR. J. INTL. L. 963, 987 (2001).

V. Submissions

53. On the basis of the facts and arguments set out above and in the United States' initial Written Observations on the Application for Interpretation, the Government of the United States of America requests that the Court adjudge and declare that the application of the United Mexican States for interpretation of the *Avena* Judgment is dismissed. In the alternative and as subsidiary submissions in the event that the Court should decline to dismiss the application in its entirety, the United States requests that the Court adjudge and declare:

(a) that the following supplemental requests by Mexico are dismissed:

> (1) that the Court declare that the United States breached the Court's July 16 Order;
>
> (2) that the Court declare that the United States breached the *Avena* Judgment; and
>
> (3) that the Court order the United States to issue a guarantee of non-repetition.

(b) an interpretation of the *Avena* Judgment in accordance with paragraph 86(a) of Mexico's Response to the Written Observations of the United States.[77]

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[77] Mexico's written observations modify its original request for interpretation in two ways. First, the new request no longer refers to the *Avena* Judgment "leaving the United States the 'means of its own choosing.'" *Compare Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States),* Application Instituting Proceedings, para. 59 *with* Response to Written Observations, at para. 86. Second, the new request adds a requirement that the United States must "act[] through all its competent organs and all its constituent subdivisions, etc." in implementing the *Avena* Judgment. Neither change has any bearing on whether *Avena* imposes what Mexico calls an "obligation of result." In addition, to the extent Mexico's revised request may seek to have the Court revisit matters already decided by the *Avena* Judgment (e.g., that portion of the Judgment providing that the United States is to implement its obligations "by means of its own choosing") or to address matters not within the scope of the Judgment, it is inadmissible.

Washington, D.C.
6 October 2008

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Agent of the United States of America