DISSENTING OPINION OF JUDGE SEPÚLVEDA-AMOR

Agreement with most of the reasoning and most of the decisions — Regret that Court did not settle issues incontrovertibly characterized by a degree of opacity — Implicit recognition by the Court that a dispute exists — Interpretation of obligation of result as one which requires specific outcome and within reasonable period of time — Failing success, need for alternative and effective means, such as legislative action — Medellín was executed without the required review and reconsideration — The Court finds that the United States has breached its obligations — But there is no determination of the legal consequences flowing from this breach — The Avena *Judgment remains binding.*

Article 36 confers individual rights — Mexico and the United States hold different views — The procedural default rule has not been revised — Non-application of procedural default rule is required to allow review and reconsideration to become operative — Binding force of the Judgment — United States Supreme Court's ruling is at odds with the one provided by Mexico and by the United States — The Court should have settled the issue raised by the conflicting interpretations — Review and reconsideration received by only one Mexican national out of 51 listed in the Avena *Judgment — The obligation falls upon all state and federal authorities — Importance of role played by the judicial system, especially the United States Supreme Court — Mexico has established the existence of a dispute — State responsibility — It engages the action of the competent organs and authorities acting in that State —* LaGrand *found that a United States Governor is under the obligation to act in conformity with United States undertakings — In the present case, all competent organs and all constituent subdivisions must comply with mandated review and reconsideration, as Mexico claims — Interpretation of the dispute by the Court would have rendered an invaluable construction to the clarification of rules and its enforcement.*

1. I am in agreement with most of the reasoning of the Court in the present Judgment, as well as with most of the decisions expressed in the operative clause of the Judgment. It is with regret that I am unable to join the Court in some of its conclusions. My regret stems not only from my disagreement with some of these views, but also from my belief that the Court has missed a splendid opportunity to settle issues calling for interpretation and to construe the meaning or scope of the *Avena* Judgment in certain respects incontrovertibly characterized by a degree of opacity.

2. Before I embark on the process of setting out and explaining my points of disagreement with the Judgment, I believe it useful to revisit some of the important considerations that the Court has found worthy of stating; to a large extent, these follow from an interpretation of the *Avena* Judgment. In the present Judgment, the Court has clearly established what is meant by an obligation of result: it is "an obligation which requires a specific outcome" (Judgment, paragraph 27). It is clear that an obligation falls upon the United States to provide the Mexican nationals named in the *Avena* Judgment who remain on death row with review and reconsideration consistent with paragraphs 138 to 141 of the *Avena* Judgment. But then the Court construes the scope of the obligation:

> "The Court observes that this obligation of result is one *which must be met within a reasonable period of time*. Even serious efforts of the United States should they fall short of providing review and reconsideration consistent with paragraphs 138 to 141 of the *Avena* Judgment, *would not be regarded as fulfilling this obligation of result*." (Paragraph 27; emphasis added.)

3. If the obligation of result is one which "must be met within a reasonable period of time", then there has been a failure by the United States to comply with it. According to Mexico, since March 2004, when the *Avena* Judgment was issued,

> "at least 33 of the 51 Mexican nationals named in the Court's Judgment have sought review and reconsideration in United States state and federal courts.
>
> To date, only one of these nationals — Osbaldo Torres Aguilera — has received review and reconsideration consistent with this Court's mandate. We should also mention, however, that the State of Arkansas agreed to reduce Mr. Rafael Camargo Ojeda's death sentence to life imprisonment in exchange for his agreement to waive his right to review and reconsideration under the *Avena* Judgment. All other efforts to enforce the *Avena* Judgment have failed." (CR 2008/14, p. 20, paras. 2 and 3 (Babcock).)

Almost five years have elapsed since the *Avena* Judgment was handed down. Since, as the Court considers, time is of the essence and the actual compliance performance has been poor, to say the least, the specific outcome associated with the obligation of result cannot be regarded as having been brought about by the United States.

4. A careful reading of the Court's Judgment in the present case suggests an implicit recognition by the Court that Mexico and the United States have in fact shown themselves as holding opposing views in regard to the meaning and scope of the *Avena* Judgment. It was stated in the Order indicating provisional measures, in paragraph 55, that

> "while it seems both Parties regard paragraph 153 (9) of the *Avena* Judgment as an international obligation of result, the Parties nonetheless apparently hold different views as to the meaning and scope of that obligation of result, namely, whether that understanding is shared by all United States federal and state authorities and whether that obligation falls upon those authorities" (Order, para. 55).

5. Although the Court reaches the conclusion that the matters claimed by Mexico as requiring an interpretation are not matters decided by the Court in its *Avena* Judgment and thus cannot give rise to the interpretation requested by Mexico (Judgment, operative clause, paragraph 59 (1)), the Court accepts that "[o]n the one hand, it could be said that a variety of factors suggest that there is a difference of perception that would constitute a dispute under Article 60 of the Statute" (Judgment, paragraph 31). And then, after reviewing some of Mexico's contentions, the Court "observes that these elements could suggest a dispute between the Parties within the sense of Article 60 of the Statute" (Judgment, paragraph 35). Additionally, the Court indicates — in a paragraph to be examined later, for it gives rise to divergent interpretations — that

> "Mexico did not specify that the obligation of the United States under the *Avena* Judgment was directly binding upon its organs, subdivisions or officials, *although this might be inferred from the arguments it presented, in particular in its further written explanations*." (Judgment, paragraph 41; emphasis added.)

6. The fact is that the Judgment comes close to recognizing that there is a "dispute", "*contestation*", or "*desacuerdo*", as the term is translated in the Spanish version of Article 60 of the Statute. Whether or not Mexico complied with Article 98, paragraph 2, of the Rules of Court, which states that "the precise point or points in dispute as to the meaning or scope of the judgment shall be indicated", is a question requiring further consideration, which it will receive later in this dissenting opinion.

7. In the present Judgment, the Court further construes the meaning and scope of the *Avena* Judgment when it states that

> "*considerations of domestic law which have so far hindered the implementation of the obligation* incumbent upon the United States, cannot relieve it of its obligation. A choice of means was allowed to the United States in the implementation of its obligation and, *failing success within a reasonable period of time through the means chosen, it must rapidly turn to alternative and effective means of attaining that result.*" (Judgment, paragraph 47; emphasis added.)

As the United States Supreme Court has ruled, the alternative and effective means rapidly to implement the obligation of result incumbent on the United States is through legislative action: "The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress" (*Medellín* v. *Texas*, 128 S. Ct. 1346, 1368 (2008), attached as Annex B, p. 60, of Mexico's *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)*).

8. The means available to the United States is essentially legislative action, preferably at the federal level, quickly to attain effective compliance with the obligation. As the Permanent Court of International Justice found

> "a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken" (*Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, P.C.I.J., Series B, No. 10*, p. 20).

The Court has repeatedly affirmed in its jurisprudence that a State cannot invoke its domestic law to justify its failure to perform an international legal obligation. In taking the action required of it under the *Avena* Judgment, the United States "cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force" (*Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44*, p. 24).

9. The Court has clearly established that José Ernesto Medellín Rojas "was executed without being afforded the review and reconsideration provided for by paragraphs 138 to 141 of the *Avena* Judgment, contrary to what was directed by the Court in its Order indicating provisional measures of 16 July 2008" (Judgment, paragraph 52). In the operative clause of the Judgment, the Court has found unanimously that the United States "has breached the obligation incumbent upon it" under the Court's Order (Judgment, paragraph 61 (2)). The Court leaves no doubt in its decision that the obligation upon the United States not to execute the other four Mexican nationals named in the Order of 16 July 2008 "pending review and reconsideration being afforded to them is fully intact by virtue" of the *Avena* Judgment itself (Judgment, paragraph 54). In the operative clause of the Judgment, the Court reaffirms "the continuing binding character of the obligations of the United States of America under paragraph 153 (9) of the *Avena* Judgment" (Judgment, paragraph 61 (3)).

10. The Court has found that the United States is in breach of its obligations for having executed Mr. Medellín in violation of the Order of 16 July 2008. What is missing from the present Judgment is a determination of the legal consequences which flow from the serious failure by the United States to comply with the Order and the *Avena* Judgment.

11. The Court, in its Order of 16 July 2008, placed clear emphasis on certain commitments undertaken by the United States. The Court took note of the following understandings and pledges voiced by the Agent of the United States:

> "the United States has recognized that, were any of the Mexican nationals named in the request for the indication of provisional measures to be executed without the necessary review and reconsideration required under the *Avena* Judgment, that would constitute a violation of United States obligations under international law . . . in particular, the Agent of the United States declared before the Court that '[t]o carry out Mr. Medellín's sentence without affording him the necessary review and reconsideration obviously would be inconsistent with the *Avena* Judgment';
>
> the United States has recognized that 'it is responsible under international law, for the actions of its political sub-divisions', including 'federal, state, and local officials', and that its own international responsibility would be engaged if, as a result of acts or omissions by any of those political subdivisions, the United States was unable to respect its international obligations under the *Avena* Judgment . . . in particular, the Agent of the United States acknowledged before the Court that 'the United States would be responsible, clearly, under the principle of State responsibility for the internationally wrongful actions of [state] officials'" (Order of 16 July 2008, paras. 76 and 77).

12. On 5 August 2008, Mr. Medellín was executed in the State of Texas without having been afforded the required review and reconsideration, and after having unsuccessfully filed an application for a writ of *habeas corpus* and applications for stay of execution and having been refused a stay of execution through the clemency process, as the Judgment indicates in paragraph 52. Yet the Court has not found it necessary even to mention in the present Judgment the commitments assumed by the Agent of the United States through his recognition: that Mr. Medellín's execution would constitute a violation of an international obligation; that it would be inconsistent with the *Avena* Judgment; that the United States was responsible under international law for the actions of its political subdivisions; and that the responsibility of the United States would be engaged, under the principles of State responsibility, for the internationally wrongful acts of federal, state and local officials.

13. It is to be deeply regretted that the Court has decided not to pass judgment on a failure by the United States to discharge an international obligation. It is difficult to understand and accept this forbearance, especially when the United States Agent himself has recognized that a breach of its international obligations entails the responsibility of the State he represents. By refraining from attributing any legal significance to a violation of the *Avena* Judgment and of the Order of 16 July 2008, the Court has let pass an opportunity to further the development of the law of State responsibility and has ignored the need to adjudge the consequences of the internationally wrongful acts of a State and to determine the remedial action required in such circumstances.

14. In spite of this unexplained legal omission, the Court feels the need to "reiterate that its *Avena* Judgment remains binding and that the United States continues to be under an obligation fully to implement it" (Judgment, paragraph 60). It is to be hoped that the United States Congress will enact legislation so as to comply with the decision of the Court. In the absence of federal legislation, the obligations stipulated in the *Avena* Judgment will become a mere abstraction, devoid of any legal substance. In the words of the United States Supreme Court,

> "The *Avena* judgment creates an international law obligation on the part of the United States, but it is not automatically binding domestic law because none of the relevant treaty sources — the Optional Protocol, the U.N. Charter, or the ICJ Statute — creates binding federal law in the absence of implementing legislation and no such legislation has been enacted." (*Medellín* v. *Texas, 128 S. Ct. 1346 (2008), Syllabus*; attached as Annex B to the Application, p. 44.)

I. Dispute/*Contestation*/*Desacuerdo*

15. In order properly to ascertain whether there is a "dispute"/"*contestation*"/"*desacuerdo*" for purposes of Article 60 of the Statute, it is necessary to consider the wider perspective of the litigation between the United States and Mexico. The legal proceedings have involved federal and state authorities, particularly the Executive branches of government at the federal and state levels, as well as federal and state courts.

16. The *Avena* Judgment clearly applies broadly to all Mexican nationals facing severe penalties or prolonged incarceration. Thus the Judgment includes not only the 51 Mexican nationals mentioned therein but also Mexican nationals sentenced to "severe penalties" in the future. The Court found, unanimously, that

> "should Mexican nationals nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 *(b)*, of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention" (*Avena* Judgment, para. 153 (11)).

17. On the basis of this finding of the Court, which is part of the operative clause of the Judgment, it is perfectly legitimate to examine the opposing views propounded to the United States Supreme Court in the *Sanchez-Llamas* v. *Oregon* case, involving a Mexican national sentenced to more than 20 years of imprisonment; though not named in the *Avena* Judgment, he is entitled to the benefit of the judicial remedy mandated therein. It is also instructive to read the views expressed by the United States Supreme Court in the *Sanchez-Llamas* case, views which diverge substantially from Mexico's contentions and from what this Court decided in the *LaGrand* and the *Avena* cases, as will be shown in the following paragraphs.

II. Article 36 confers individual rights

18. In the *Amicus Curiae* Brief in support of Sanchez-Llamas as petitioner for the writ of *certiorari* before the United States Supreme Court, Mexico emphatically stated:

> "the *Avena* Judgment reaffirmed in the clearest possible terms that Article 36 of the Vienna Convention *confers individual rights on all Mexican nationals* who are detained or arrested in the United States" (Brief *Amicus Curiae* of the Government of the United Mexican States in support of Petitioner 3, 4, *Sanchez-Llamas* v. *Oregon*, 126 S. Ct 2669 (2006); emphasis added).

To support its contention, Mexico resorts to paragraph 40 of the *Avena* Judgment: the individual rights of Mexican nationals "are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the United States" (*Judgment, I.C.J. Reports 2004*, p 35, para. 40).

19. To strengthen its argument in the *Sanchez-Llamas* case, Mexico cited what the United States had pleaded before the Court in the *Tehran* case. There, the United States argued that Article 36 "*establishes rights . . . for the nationals of the sending State* who are assured access to consular officers and through them to others" (*United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), I.C.J. Pleadings, 1979*, p. 174; emphasis added).

20. It is clear that the United States holds a different view in the *Sanchez-Llamas* case on the question of individual rights conferred by Article 36 of the Convention. In its Brief to the United States Supreme Court, the United States asserted that the principle that the United States Supreme Court "should give 'respectful consideration' to an international court's interpretation of a treaty *does not lead to the conclusion that Article 36 affords an individual a right* to challenge his conviction and sentence" (Brief for the United States as *Amicus Curiae* Supporting Respondents, p. 28, *Sanchez-Llamas* v. *Oregon*, 126 S. Ct. 2669 (2006); emphasis added).

21. But the *Amicus Curiae* Brief for the United States not only contradicts the Mexican view; it also strongly challenges the interpretations handed down by the International Court of Justice in the *LaGrand* and *Avena* cases. In the words of the Brief,

> "The United States *has no obligation to accept the reasoning underlying the ICJ's Judgments* . . . As we have demonstrated, the ICJ's reasoning is inconsistent with principles of treaty construction . . . Moreover, the weight to be given an ICJ judgment is at its nadir where, as here, the Executive Branch, whose views on treaty interpretation are entitled to at least 'great weight', has considered the ICJ's decisions and determined that its own long standing interpretation of the treaty is the correct one. Notably, *the withdrawal of the United States from the Optional Protocol will ensure that the United States incurs no further international legal obligations to review and reconsider convictions and sentences in light of violations of Article 36 based on the ICJ's interpretation of the Convention.* Under these circumstances and in light of the considerations discussed above, this Court should conclude that Article 36 *does not give criminal defendant a private right to challenge his conviction and sentence on the ground that Article 36 was breached.*" (*Ibid.*, p. 30; emphasis added.)

22. It is to be noted that the Agent of the United States in the present case, who vehemently argued that "in the field of international relations, the United States speaks with one voice through the executive branch" (CR 2008/17, p. 11, para. 15 (Bellinger)), was also responsible, in his capacity as Legal Adviser to the Department of State and together with the United States Solicitor General, for the Brief for the United States to the United States Supreme Court in the *Sanchez-Llamas* case.

23. One of the questions answered by the United States Supreme Court in the *Sanchez-Llamas* case was "whether Article 36 of the Vienna Convention grants rights that may be invoked by individuals in a judicial proceeding". The Court noted:

> "Respondents and the United States as *amicus curiae*, strongly dispute this contention. They argue that '*there is a presumption that a treaty will be enforced through political and diplomatic channels, rather than through the courts . . .*'. Because we conclude that Sanchez-Llamas and Bustillo *are not in any event entitled to relief on their claims*, we find it unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights." (126 S. Ct. 2669, 2677-78 (2006); emphasis added.)

The United States Supreme Court nevertheless decided to affirm the judgment of the Supreme Court of Oregon, to the effect that Article 36 "does not create rights to consular access or notification that are enforceable by detained individuals in a judicial proceeding" (*ibid.*, p. 2676).

24. When the *Medellín* case was argued before the Texas Court of Criminal Appeals, Mexico contended:

> "The very purpose of Article 36 is to permit the nations that signed the Vienna Convention — including Mexico, the United States and 164 other countries — *to protect the interests of their citizens* when they are arrested or otherwise detained while living, working, or traveling abroad. That interest is most acute when *a citizen is facing trial in another country for a cause that may lead to his execution.*" (Brief *Amicus Curiae* of the United Mexican States in Support of José Ernesto Medellín, *ex parte Medellín*, 223 S.W. 3d 315 (Tex. Crim. App. 2006) at ix); emphasis added.))

25. The United States took an opposing view:

> "Medellín contends that, standing alone, the *Avena* decision constitutes a binding rule of federal law that he may privately enforce in this Court. While the United States has an international obligation to comply with the decision of the International Court of Justice in this case under Article 94 of the United Nations Charter, *the text and background of Article 94 make clear that an I.C.J. decision is not, of its own force, a source of privately enforceable rights in court.*" (Brief for the United States as *Amicus Curiae*, *Ex parte Medellín*, 223 S.W. 3d 315 (Tex. Crim. App. 2006); emphasis added.)

26. The Texas Court of Criminal Appeals wrote:

> "while we recognize the competing arguments before us concerning whether Article 36 confers privately enforceable rights, a resolution to that issue is not required for our determination of whether *Avena* is enforceable in this Court. Our decision is controlled by the Supreme Court's recent opinion in *Sanchez-Llamas* v. *Oregon*, and accordingly, we hold that *Avena is not binding federal law.*" (*Ex parte Medellín*, 223 S.W. 315, 330 (Tex. Crim. App. 2006).)

27. In the *Medellín* case argued before the United States Supreme Court, counsel for the United States asserted:

> "Petitioner contends that the *Avena* decision is privately enforceable because the Optional Protocol and the United Nations Charter obligate the United States to comply with the decision . . . Allowing private enforcement, without the President's authorization, would undermine the President's ability to make those determinations."

Those determinations are related to a decision by the President to comply with an International Court of Justice judgment and the measures that should be taken (Brief for the United States as *Amicus Curiae Medellín* v. *Texas*, 128 S. Ct. 1346 (2008), p. 19). Without addressing the issue of individual rights recognized under *LaGrand* and *Avena*, the United States Supreme Court decided in 2008 that the *Avena* Judgment was not directly enforceable as domestic law in state court.

28. This Court, in its *LaGrand* and *Avena* Judgments, has ruled that Article 36, paragraph 1, creates individual rights for those in detention. That pronouncement runs counter to the legal arguments advanced by United States federal authorities and sustained by state and federal courts. In *LaGrand*, the Court stated that it

> "cannot accept the argument of the United States which proceeds, in part, on the assumption that paragraph 2 of Article 36 applies only to the rights of the sending State and not also to those of the detained individual. *The Court has already determined that Article 36, paragraph 1, creates individual rights for the detained person in addition to the rights accorded the sending State*, and that consequently the reference to 'rights' in paragraph 2 must be read as applying not only to the rights of the sending State, *but also to the rights of the detained individual*." (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001,* p. 497, para. 89; emphasis added.)

In the present case, the Court could have better fulfilled its judicial function by dispelling all doubts raised by federal and state authorities in the executive and judicial branches of government in the United States. That should have been done by reaffirming the binding force of the *LaGrand* and *Avena* Judgments and the existence of individual rights under Article 36, even if that had meant acting on its own initiative, in order properly to construe the meaning or scope of the *Avena* Judgment.

III. The procedural default rule

29. In the *Avena* case, Mexico contended that the United States, by applying provisions of its municipal law, had failed to provide meaningful and effective review and reconsideration of convictions and sentences. Specifically, Mexico argued that

> "The United States uses several municipal legal doctrines to prevent finding any legal effect from the violations of Article 36. *First*, despite this Court's clear analysis in *LaGrand*, US courts, at both the state and federal level, continue to invoke default doctrines to bar any review of Article 36 violations — even when the national had been unaware of his rights to consular notification and communication and thus his ability to raise their violation as an issue at trial, due to the competent authorities' failure to comply with Article 36." (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004*, p. 55, para. 109.)

30. The Court found in the *Avena* Judgment that "the procedural default rule has not been revised, nor has any provision been made to prevent its application" (*ibid.*, p. 57, para. 113). Then the Court added:

> "The crucial point in this situation is that, by the operation of the procedural default rule as it is applied at present, the defendant is effectively barred from raising the issue of the violation of his rights under Article 36 of the Vienna Convention . . ." (*ibid.*, p. 63, para. 134).

31. After recalling that the *LaGrand* and *Avena* Judgments were entitled only to "respectful consideration", the United States Supreme Court in the *Sanchez-Llamas* case went on to say:

> "the International Court of Justice concluded that where a defendant was not notified of his rights under Article 36, application of the procedural default rule failed to give 'full effect' to the purposes of Article 36 because it prevented courts from attaching 'legal significance' to the Article 36 violation. *This reasoning overlooks the importance of procedural default rules in an adversary system*, which relies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication . . . The consequence of failing to raise a claim for adjudication at the proper time is generally forfeiture of that claim. *As a result, rules such as procedural default routinely deny 'legal significance' — in the Avena and LaGrand sense — to otherwise viable legal claims*." (*Sanchez-Llamas* v. *Oregon*, 126 S. Ct. 2669, 2685-86 (2006); emphasis added.)

32. The Texas Court of Criminal Appeals, when reviewing Medellín's application for a writ of *habeas corpus*, provided a procedural history of Medellín's case:

> "Medellín filed an initial application for a writ of *habeas corpus*, claiming for the first time, among other things, that his rights under Article 36 of the Vienna Convention had been violated because he had not been advised of his right to contact the Mexican consular official after he was arrested. The district court found that Medellín *failed to object to the violation of his Vienna Convention rights at trial and, as a result, concluded that his claim was procedurally barred from review*.
>
> Medellín appealed to the U.S. Court of Appeals for the Fifth Circuit, which also denied his application. The Fifth Circuit noted the I.C.J. decision in *Avena*, but determined that it was bound by the Supreme Court's decision in *Breard* v. *Greene*, which held that *claims based on a violation of the Vienna Convention are subject to procedural default rules*.
>
> [W]e are bound by the Supreme Court's determination that I.C.J. decisions are not binding on United States courts. As a result, *Medellín . . . cannot show that Avena requires us to set aside Section 5 and review and reconsider his Vienna Convention claim.*" (*Ex parte Medellín*, 223 S.W. 3d 315, 321, 332 (2006); emphasis added.)

33. When submitting the Brief for the United States as A*micus Curiae* before the United States Supreme Court in the *Sanchez-Llamas* case, in his capacity as Legal Adviser to the Department of State, the Agent of the United States in the present case pleaded that

> "The I.C.J. decisions in *LaGrand* and *Avena* are clearly not binding on this Court in this case . . . [T]he United States undertaking under Article 94 of the United Nations Charter to comply with a decision of the I.C.J. in a dispute to which it is a party, is to comply with the I.C.J.'s ultimate resolution of the dispute, *not to accept all the reasoning that leads to that resolution. In this case, the I.C.J.'s reasoning is not persuasive . . .* By that reasoning, any procedural rule that prevented a court from deciding the substance of a Vienna Convention claim — such as a State's statute of limitations for seeking collateral review — would have to be set aside as inconsistent with Article 36 (2)." (Brief for the United States *Amicus Curiae Supporting Respondents*, *Sanchez-Llamas* v. *Oregon*, 126 S. Ct. 2669 (2006); emphasis added.)

34. In principle, only the operative clause of an International Court of Justice judgment has binding force. However, under certain circumstances and in certain cases, the reasoning underlying the conclusions reached in the operative clause is inseparable from them and, because of this link, part of the reasoning in the *Avena* Judgment must also be the subject-matter of interpretation by the Court. I believe that construing the meaning or scope of most of the subparagraphs of paragraph 153, the operative clause of the Judgment, requires resort to the reasoning of the Court, for it is there that an explanation is found as to how the procedural default rule represents a judicial obstacle which renders inoperative and dysfunctional the rights embedded in Article 36 of the Vienna Convention. It is not sufficient to claim that the operative clause has binding force if its provisions become legally ineffective in the face of enforcement by United States federal and state courts of the procedural default rule. Such a domestic doctrine precludes compliance with international obligations, vitiates treaty rights of substance and renders a judgment nugatory.

35. The Court has already had occasion to consider the relationship between the reasoning in a judgment and the operative clause when entertaining requests for interpretation of a judgment. The Court recently explained that

> "any request for interpretation must relate to the operative part of the judgment and cannot concern the reasons for the judgment *except in so far as these are inseparable from the operative part*" (*Request for Interpretation of the Judgment 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. 35, para. 10; emphasis added).

36. In the present case, the Court could have reached beyond the operative clause in the *Avena* case and examined one of the essential foundations for the proper functioning of that judgment: the non-application of the procedural default rule so as to enable the required review and reconsideration of convictions and sentences.

IV. Binding force of the Judgment

37. Mexico has claimed in its Application that the *Avena* Judgment is final and binding as between Mexico and the United States, invoking Article 59 of the Statute of the Court in support of its contention. Mexico asserts that, in spite of the obligation under Article 94, paragraph 1, of the United Nations Charter to comply with decisions of the Court,

> "requests by the Mexican nationals for the review and reconsideration mandated in their cases by the *Avena* Judgment have repeatedly been denied. On 25 March 2008, the Supreme Court of the United States determined in the case of José Ernesto Medellín Rojas, one of the Mexican nationals subject to the *Avena* Judgment, that *the Judgment itself did not directly require US courts to provide review and reconsideration under domestic law* . . . The Supreme Court, while expressly recognizing the United States's obligation to comply with the Judgment under international law, further held that the means chosen by the President of the United States to comply were unavailable under the US Constitution and indicated alternate means involving legislation by the US Congress or voluntary compliance by the State of Texas" (Application, para. 4; emphasis added.).

According to Mexico,

"the obligation to provide review and reconsideration is not contingent on the success of any one means. Mexico understands that in the absence of full compliance with the obligation to provide review and reconsideration, the United States must be considered to be in breach." (*Ibid.*, para. 5.)

38. It is apparent that Mexico and the United States take opposing views on the issue of the automatic application of the *Avena* Judgment in the domestic realm of the United States. Quoting the United States Brief as *amicus curiae* in the last *Medellín* case before the United States Supreme Court, Mexico notes that the United States, while having acknowledged an "international law obligation to comply with the I.C.J.'s decision in *Avena*", contended that the Judgment was not independently enforceable in domestic courts absent intervention by the President. The United States is quoted as follows:

"[W]hile petitioner is entitled to review and reconsideration *by virtue of the President's determination*, such review and reconsideration would not be available to petitioner in the absence of the President's determination." (See Submission of Mexico in Response to the Written Observations of the United States of America, 17 September 2008, p. 2, para. 6; emphasis in the original.)

39. Mexico points out that

"the Supreme Court expressly adopted the United States' argument as to the lack of enforceability of the Judgment in domestic courts. Hence, the Court held that neither the *Avena* Judgment on its own, nor the Judgment in conjunction with the President's determination to comply, constituted directly enforceable federal law that precluded Texas from applying state procedural rules that barred all review and reconsideration of Mr. Medellín's Vienna Convention claim" (*ibid.*, para. 7).

40. The United States Supreme Court in its ruling in the *Medellín* case provided an interpretation which is at odds with those proffered by Mexico and by the United States. The Supreme Court's understanding of the legal significance of Article 94 of the United Nations Charter and of Article 59 of the Court's Statute is expressed in the following terms:

"The Executive Branch contends that the phrase 'undertakes to comply' is not 'an acknowledgement that an I.C.J. decision will have immediate legal effect in the courts of UN members', but rather '*a commitment on the part of UN Members to take* future *action through their political branches to comply with an I.C.J. decision'*. We agree with this construction of Article 94. The Article *is not a directive to domestic courts*. It does not provide that the United States 'shall' or 'must' comply with an I.C.J. decision, nor indicate that the Senate that ratified the United Nations Charter intended to vest I.C.J. decisions with immediate legal effect in domestic courts." (128 S. Ct. 1346, 1358 (2008); emphasis added.)

41. The conclusion by the United States Supreme Court that the *Avena* Judgment does not by itself constitute binding federal law confutes the contention of the United States Executive Branch that,

"while the *Avena* Judgment does not of its own force require domestic courts to set aside ordinary rules of procedural default, that judgment became the law of the land with precisely that effect pursuant to the President's Memorandum and his power 'to establish binding rules of decision that preempt contrary state law'" (*ibid.*, p. 1367).

42. After making clear that unilaterally converting a non-self-executing treaty into a self-executing one is not among the means available to the United States President to enforce an international obligation, the Supreme Court stated:

> "When the President asserts the power to 'enforce' a non-self-executing treaty by unilaterally creating domestic law, he acts in conflict with the implicit understanding of the ratifying Senate." (*Ibid.*, p. 1369.)

43. Three different interpretations are advanced as to the domestic effects of an international obligation. Three different interpretations are advanced as to domestic implementation of the United Nations Charter, the Court's Statute and the *Avena* Judgment. The Court could have made an important contribution to the development of international law by settling the issues raised by these conflicting interpretations.

V. Review and reconsideration

44. It is justifiable to conclude that a dispute arises in the present case out of the fundamentally different views taken by Mexico and the United States on the interpretation to be given to the obligation imposed by the *Avena* Judgment. But there is not only a conflict of legal views and of interests between the two countries. There is a disagreement on several points of law and, also, on the facts.

45. In its oral pleadings, Mexico recalled that the review and reconsideration mandated by the *Avena* Judgment must take place as part of the "judicial process". Mexico pointed out that

> "since March 2004, at least 33 of the 51 Mexican nationals named in the Court's Judgment have sought review and reconsideration in United States State and federal courts.
>
> To date, *only one of these nationals* — Osbaldo Torres Aguilera — *has received review and reconsideration* consistent with the Court's mandate. We should also mention, however, that the State of Arkansas agreed to reduce Mr. Rafael Camargo Ojeda's death sentence to life imprisonment in exchange for his agreement to waive his right to review and reconsideration under the *Avena* Judgment. *All other efforts to enforce the Avena Judgment have failed*." (CR 2008/14, p. 20, paras. 2 and 3 (Babcock); emphasis added.)

46. In contrast, the United States claims that "*several Mexican nationals* named in *Avena* have already received review and reconsideration of their convictions and sentences" (CR 2008/15, p. 56, para. 22 (Bellinger); emphasis added). But only Osbaldo Torres is mentioned as a beneficiary of the remedy.

47. Fifty-one Mexican nationals fell within the scope of the review and reconsideration mandated in the *Avena* Judgment. At present only 50 are on the list, after the execution of José Medellín Rojas by the State of Texas on 5 August 2008 without review and reconsideration of his conviction and sentence. The case of Torres Aguilera has already been mentioned. Seven other cases have been disposed of without recourse to review and reconsideration. Rafael Camargo Ojeda, in Arkansas, under a plea agreement facilitated by *Avena*, waived his right to review and reconsideration in exchange for the reduction of his death sentence to life imprisonment. Juan Caballero Hernández, Mario Flores Urbán and Gabriel Solache Romero had

their sentences commuted by the Governor of Illinois in 2003, a measure which benefited all persons on death row in that state at that time. Martin Raul Soto Fong and Osvaldo Regalado Soriano in Arizona had their sentences commuted after the United States Supreme Court declared unconstitutional the application of a death sentence to those under age at the time they committed the crime. Daniel Angel Plata Estrada in Texas had his death sentence commuted after the United States Supreme Court ruled unconstitutional the execution of a mentally retarded person (source: http://www.internationaljusticeproject.org/nationals-Stats.com and http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us). It is now almost five years since the *Avena* Judgment was handed down and 42 Mexican nationals have yet to receive the relief required by it.

VI. The obligation falls upon all state and federal authorities

48. Mexico contends that the obligation of result falls upon all state and federal authorities and, particularly, upon the United States Supreme Court, taking into account the "judicial process" remedy mandated by *Avena*. The conclusion reached by Mexico on this matter cannot be regarded as anything else but proof of a clash of views — reflecting a disagreement with the United States on a point of law — and therefore a dispute. According to Mexico,

> "the [United States Supreme] Court found that the expression of the obligation to comply in Article 94 (1) somehow *precluded the judicial branch — the authority best suited to implement the obligation imposed by Avena — from taking steps to comply*. There is nothing in the text or object and purpose of Article 94 (1) that suggests such an incongruous result. It is moreover fundamentally inconsistent with the interpretation of the *Avena* Judgment as *imposing an obligation of result incumbent on all constituent organs, including the judiciary. Needless to say, Mexico does not agree with the Supreme Court's interpretation.*" (Submission of Mexico in Response to the Written Observations of the United States of America, 17 September 2008, p. 15, para. 53; emphasis added.)

49. Clearly, this is an issue on which Mexico has indicated "the precise point or points in dispute as to the meaning or scope of the judgment". Mexico's contention is that the United States Supreme Court "does not share Mexico's view of the *Avena* Judgment — that is, *that the operative language establishes an obligation of result reaching all organs, including the federal and state judiciaries, that must be discharged irrespective of domestic law impediments*" (*ibid.*, p. 16, para. 56; emphasis added).

50. In the light of all these considerations, it is obvious that there is a misreading and a misinterpretation in the present Judgment of Mexico's position. The Court's mistaken assumptions are reflected in paragraph 24 of this Judgment:

> "Mexico referred in particular to the actions of the United States federal Executive, claiming that certain actions reflected the United States disagreement with Mexico over the meaning or scope of the *Avena* Judgment. According to Mexico *this difference of views manifested itself in the position taken by the United States Government in the Supreme Court* . . . Mexico maintains that the United States Government's narrow reading of the means for implementing the Judgment led to its failure to take all the steps necessary to bring about compliance by all authorities concerned with the obligation borne by the United States." (Emphasis added.)

51. It is not Mexico's position that the failure to comply with the *Avena* obligation is attributable only to the United States federal Executive. What Mexico has argued is that the definitive determination to deny the judicial review and reconsideration mandated by *Avena* is attributable to the United States Supreme Court for having decided that: "while a treaty may constitute an international commitment, it is not domestic law unless Congress has enacted statutes implementing it"; "the *Avena* Judgment . . . is not automatically domestic law"; "*Avena* does not by itself constitute binding federal law"; "the President's Memorandum does not independently require the States to provide review and reconsideration of the claims of the 51 Mexican nationals named in *Avena* without regard to state procedural default rules".

52. Given these judicial determinations, there can be no doubt that the United States Supreme Court does not share the understanding that the mandate of the *Avena* Judgment is an obligation of result. The same is true of other authorities, and especially federal and state courts, as is evident from decisions adopted by such jurisdictions, including the Supreme Court of Oregon, the Texas Court of Criminal Appeals, the United States Supreme Court, state trial courts, federal district courts and the United States Court of Appeals for the Fifth Circuit.

53. In paragraph 48 of the Order of 16 July 2008, indicating provisional measures, the Court stated:

> "in Mexico's view, the fact that '[n]either the Texas executive, nor the Texas legislature, nor the federal executive, nor the federal legislature has taken any legal steps at this point that would stop th[e] execution [of Mr. Medellín] from going forward . . . reflects a dispute over the meaning and scope of [the] *Avena* [Judgment]".

Mexico reiterated this position in its further written explanations.

54. The United States however submitted in its oral pleadings that

> "the United States agrees that it is responsible under international law for the actions of its political subdivisions. That is not the same, however, as saying that the views of a state court are attributed to the United States for purposes of determining whether there is a dispute between the United States and Mexico as to the meaning and scope of the *Avena* Judgment." (CR 2008/17, p. 11, para. 13 (Bellinger).)

The question of attribution of responsibility for the conduct of State organs will be dealt with at a later stage in this opinion. But what is important at present is to observe that there is undeniably a dispute between Mexico and the United States on this point. Of course, the issue relates not only to the views of a state court, as the United States would have us believe, although those views may also have legal consequences in the implementation of the *Avena* Judgment.

55. The crux of the dispute turns on the decision of the highest federal judicial authority of the United States. The interpretation by the United States Supreme Court is conclusive as a matter of domestic law and binding on all state and federal courts and officials — including the federal executive. Mexico rightly points out that "the views of the Supreme Court as to the scope and meaning of the United States' treaty obligations are relevant for purposes of the objective determination of a dispute" (Submission of Mexico in Response to the Written Observations of the United States of America, 17 September 2008, p. 14, para. 51).

56. In the present Judgment, the Court states, in paragraph 38, that "it is difficult to discern, save by inference, Mexico's position regarding the existence of a dispute as to whether the obligation of result falls on all state and federal authorities". But it is not only by inference that the Mexican position can be discerned. As shown in the preceding paragraphs, there is a dispute: Mexico clearly argues that "each of the Federal Executive, Judiciary, and Legislature have failed to treat the *Avena* Judgment as imposing an obligation of result" (Submission of Mexico in Response to the Written Observations of the United States of America, 17 September 2008, p. 11, para. 40).

57. The United States disputes this contention:

> "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" (Written Observations of the United States of America, 29 August 2008, p. 20, para. 44).

In this statement, it is worth noting that great care has been taken to avoid any mention of state and federal courts and, in particular, the role of the United States Supreme Court. The question is not who speaks for the United States. The question is what is the legal consequence of a decision by the United States Supreme Court interpreting a United States international obligation as not constituting binding federal law without implementing legislation.

58. In its final submissions, to the Court on 17 September 2008, Mexico asked the Court to adjudge and declare

> "*(a)* That *the correct interpretation of the obligation incumbent upon the United States* under paragraph 153(9) of the *Avena* Judgment is *that it is an obligation of result* . . .
>
> and that *pursuant to the interpretation of the foregoing obligation of result*,.
>
> (1) the United States, acting through *all of its competent organs and all its constituent subdivisions, including all branches of government and any official, state or federal, exercising government authority, must take all measures necessary* to provide the reparation of review and reconsideration mandated by the *Avena* Judgment in paragraph 153(9)" (Submission of Mexico in Response to the Written Observations of the United States of America, 17 September 2008, p. 24, para. 86; emphasis added; Judgment, paragraph 10).

59. After a careful reading of this submission, I find it incomprehensible that the Court could conclude that "Mexico did not specify that the obligation of the United States under the *Avena* Judgment was directly binding upon its organs, subdivisions or officials, although this might be inferred from the arguments it presented, in particular in its further written explanations." (See paragraph 40 of this Judgment). All the required specificity is there; there is no need to resort to inferences.

60. In its concluding remarks and submissions, Mexico indicated that it

> "welcomes any good faith attempt to ensure its nationals are provided with effective review and reconsideration that is fully consistent with this Court's mandate in the *Avena* Judgment. Nonetheless, *it is clear that constituent organs of the United States do not share Mexico's view that the* Avena *Judgment imposes an obligation of result.* It is thus clearly established that *there is a dispute between the United States and Mexico* as to the meaning and scope of paragraph 153 (9) of said Judgment" (CR 2008/16, p. 21, para. 2 (Lomónaco); emphasis added).

Contrary to what is stated in paragraph 41 of this Judgment, I do not believe that it can be argued that "Mexico has not established the existence of any dispute between itself and the United States". It is not sufficient to find that the United States claims there is no dispute. The positions and actions taken by various United States federal and state authorities, particularly the federal judiciary, prove otherwise.

VII. State responsibility

61. In 1999 the Court decided that the international responsibility of a State was engaged by the actions of the competent organs and authorities of that State, whatever they may be. Thus in the *LaGrand* case, when the Court ordered the provisional measures to be taken by the United States, it concluded that

> "Whereas the international responsibility of a State *is engaged by the action of the competent organs and authorities acting in that State*, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order *falls within the jurisdiction of the Governor of Arizona*; whereas *the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor*; whereas the *Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States*" (*LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 16, para. 28; emphasis added).

62. It is crystal clear in its final submissions (see paragraph 10 of the Judgment) that Mexico has taken into account the language used by the Court in the *LaGrand* Order, even employing the same terminology. Mexico asserts that there is an *obligation of result* incumbent upon the United States under the *Avena* Judgment. The international responsibility of the United States is "engaged *by the actions of its competent organs and authorities"*. Thus,

> "the United States, *acting through all of its competent organs and all its constituent subdivisions*, including all branches of government and any official, state or federal, exercising government authority, *must* take all measures necessary to provide the reparation of review and reconsideration mandated by the *Avena* Judgment in paragraph 153 (9)" (emphasis added).

63. Article 4 of the International Law Commission's Articles on State Responsibility provides:

> "1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization, and whatever its character as an organ of the central government or of the territorial unit of the State." (United Nations General Assembly, Supplement No. 10 (A/56/10).)

64. In its Commentary to Article 4, the International Law Commission holds that the "reference to a 'State organ' covers all the individual and collective entities which make up the organization of the State and *act on its behalf*". It adds that "the State is responsible for the conduct of its own organs, *acting in that capacity*", something that has long been recognized in international judicial decisions. The Commission also points out that

> "the 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 of whatever kind or classification*, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level." (International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries Ch. II, art. 4, *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two.)

65. It is obvious that Mexico's final submission, in keeping with the *LaGrand* Order and with what is indicated in the Articles on State Responsibility, asserts that there is an obligation of result falling upon the United States and its competent organs and constituent subdivisions. These must be understood to include *inter alia* the State of Texas, the Supreme Court of the State of Oregon, the United States federal courts, the United States Government, and the United States Supreme Court. Clearly, the wrongful conduct must be attributed to the United States, as a political entity under international law, a political entity that must necessarily act through its competent organs, its constituent subdivisions and all officials exercising government authority.

66. When these considerations are kept in mind, it is extremely difficult to understand the scope of paragraph 41 of this Judgment. The Court contends that it could be argued that Mexico's final submission "does not say that there is an obligation of result falling upon the various competent organs, constituent subdivisions and public authorities, but only that the United States will act through these in itself fulfilling the obligations incumbent on it under paragraph 153 (9)". Contrary to what the Court states, a reading of Mexico's final submissions shows that it asserts that there is an obligation of result, in Mexico's interpretation, and that pursuant to such obligation the United States, acting through any and all organs of the State, must take all necessary measures to provide the *Avena* remedy.

VIII. Conclusion

67. I have done my utmost to demonstrate in this dissenting opinion that there is a dispute between Mexico and the United States, a dispute which is ongoing. In my view, a dispute exists as to the meaning or scope of the *Avena* Judgment, in the sense of Article 60 of the Statute of the Court, since it is clear that Mexico and the United States have fundamentally different views on the interpretation of the obligation imposed by the *Avena* Judgment. But it is my understanding that it is not only a dispute/*contestation*/*desacuerdo* under Article 60. There is also a dispute in the sense of Article 38, paragraph 1, since there is a disagreement on several points of law and on the facts. I

am convinced that there is a conflict of legal views and of interests between Mexico and the United States on the substance of the obligations incumbent upon the United States under the *Avena* Judgment.

68. Had it interpreted the scope and meaning of the *Avena* Judgment, the Court could have made an invaluable contribution to the settlement of a dispute which runs the risk of self-perpetuation. The Court had at its disposal all the necessary elements to identify the precise point or points in dispute as to the meaning or scope of the *Avena* Judgment. It decided otherwise and the consequence is that the international legal order has been deprived of an enlightened construction of its fundamental rules and principles and, equally important, guidance in enforcing them.

(Signed) Bernardo SEPÚLVEDA-AMOR.

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