DECLARATION OF JUDGE KOROMA

Article 60 of the Statute — Existence of a dispute concerning whether review and reconsideration must be effective — Existence of a dispute as to whether obligation imposed by Avena *paragraph 153 (9) is subject to domestic implementation — Court's Judgment should be interpreted to mean that the subject-matter of these disputes is not addressed in* Avena *paragraph 153 (9) —* Avena *Judgment remains binding under Article 94 of the Charter.*

1. While I have voted in favour of the operative part of the Judgment, in my view the basis on which the Court has reached its conclusion needs to be clarified. It is for this reason that I have decided to append this declaration, in order to elucidate my understanding as to the application of Article 60 of the Statute regarding this matter.

2. Article 60 provides: "The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party."

3. According to its jurisprudence, the Court will apply Article 60 of the Statute when two parties hold opposite views with regard to the scope and meaning of a judgment. The Court has further elaborated on this by stating that the existence of a dispute under Article 60 is

> "limited to whether the difference of views between the Parties which has manifested itself before the Court is 'a difference of opinion between the Parties as to those points in the judgment in question which have been decided with binding force', including 'A difference of opinion as to whether a particular point has or has not been decided with binding force' (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, pp. 11-12)". (*Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 218.)

4. On the basis of these criteria, there are at least two differences between the Mexican and United States positions that could be considered a "dispute" under the terms of Article 60. First, Mexico appears to take the position that the United States has only met its obligations under *Avena* if its efforts to assure review and reconsideration are effective; whereas the United States believes that those efforts are to be prioritized among the "many other pressing priorities" of government. Second, Mexico argues that the obligation of result imposed by *Avena* paragraph 153 (9) automatically and directly "reach[es] all organs, including the federal and state judiciaries"; whereas the United States believes that that obligation is subject to domestic implementation according to domestic law. This is, indeed, very similar to the dispute identified by the Permanent Court of International Justice in the *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)* (*Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, pp. 9-15 (finding that a dispute as to interpretation did exist by virtue of the States' differing views regarding the role of Polish law in implementing Judgments Nos. 7 and 8 of the Permanent Court)).

5. The Court in this Judgment states in paragraph 43 that:

> "The Parties' different stated perspectives on the existence of a dispute reveal also different contentions as to whether paragraph 153 (9) of the *Avena* Judgment envisages that a direct effect is to be given to the obligation contained therein."

In my view, this paragraph is not entirely clear. It should have been clearly stated that the Request for interpretation is not admissible because the issues in dispute are not within the scope of paragraph 153 (9) of that Judgment, which requires the United States "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals" mentioned therein. In this regard, the Court should have concluded that paragraph 153 (9) does not address whether review and reconsideration should lead to a specific result; and that paragraph 153 (9) also does not directly address whether the obligation of result it imposes directly reaches all organs, including federal and state judiciaries, or whether it is subject to domestic implementation according to domestic law. It is because neither of these points is clearly within the scope of paragraph 153 (9) that I have voted in favour of the operative paragraph.

6. On the other hand, applying the criteria stated above and for consistency of jurisprudence, the Court could have found the request for interpretation admissible on the basis of either of the two disputes identified above. With respect to the first, concerning whether efforts to assure review and reconsideration must be effective, the Court's jurisprudence provides that the subject of dispute may also relate to the Court's reasoning to the extent that that reasoning is "inseparable from the operative part" (*Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary Objections *(Nigeria* v. *Cameroon), Judgment, I.C.J. Reports 1999*, p. 35, para. 10). Taking this principle into account, the Court could very well have found the request for interpretation admissible as to this dispute (see *Avena*, para. 138 (emphasizing that review and reconsideration must be "effective")).

7. Likewise, with regard to the second dispute concerning the question of domestic implementation, the Court could have found this issue to lie within the scope of paragraph 153 (9), because the phrase "by means of its own choosing" could be considered to address the issue of domestic implementation. The Court therefore could have found Mexico's Request for interpretation admissible and proceeded to interpret that paragraph, examining the relatively narrow question of whether paragraph 153 (9) of *Avena* creates a direct obligation on state and local officials in the United States to provide review and reconsideration, or whether it creates an international obligation which is subject to domestic implementation in the United States according to United States law.

8. Furthermore, in interpreting the first dispute, the Court could have agreed that the efforts to carry out review and reconsideration must be effective in order to be in compliance with *Avena*. Indeed, even without reaching the interpretation, the Court does recall in its Judgment that, contrary to what has at times been implied by the United States,

> "the United States itself acknowledged, until all of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) of paragraph 153 of the *Avena* Judgment have had their convictions and sentences reviewed and reconsidered, by taking account of Article 36 of the Vienna Convention on Consular Relations and paragraphs 138 to 141 of the *Avena* Judgment, the United States has not complied with the obligation incumbent upon it" (paragraph 55).

The Court has found that the obligation will only be met when the United States, by means of its own choosing, has in fact carried out review and reconsideration of the convictions at issue in *Avena*, and that the United States has not yet met its obligations under the Judgment.

9. With regard to the second dispute, the Court could have reached the conclusion that the obligation of result imposed by paragraph 153 (9) is subject to domestic implementation, as the

Court had indicated that the United States should carry out review and reconsideration "by means of its own choosing". This necessarily implies that the United States has a choice of means as to how to implement its obligation under the Judgment.

10. In the light of the above considerations, in this case where the question of whether a dispute exists regarding the scope and meaning of paragraph 153 (9) of *Avena*, and based on the Court's jurisprudence, the Court could have found a dispute to exist between the Parties. However, the Court has found that the Application itself is not predicated on a matter which it had previously decided. Be that as it may, the Judgment, by reiterating the obligation of the Respondent in respect of the individuals named in *Avena*, has upheld the object and purpose of Article 60 of the Statute. First, as stated clearly at the conclusion of the Judgment, the "*Avena* Judgment remains binding and . . . the United States continues to be under an obligation fully to implement it" (paragraph 60). Second, as stated at paragraph 55 of the Judgment and mentioned above, the United States will not have complied with the obligation incumbent upon it under *Avena* until all the Mexican nationals mentioned therein "have had their convictions and sentences reviewed and reconsidered, by taking account of Article 36 of the Vienna Convention on Consular Relations and paragraphs 138 to 141 of the *Avena* Judgment".

11. Thus, while the Court may not be in a position to interpret its *Avena* Judgment, the binding force of that Judgment remains, and certain obligations in that Judgment have not yet been met. Under Article 94 of the Charter — and in this case also fundamental principles of human rights — international law demands nothing less than the full and timely compliance with the *Avena* Judgment for all the Mexican nationals mentioned therein.

(Signed) Abdul G. KOROMA.