DECLARATION OF JUDGE ABRAHAM

[Translation]

I have voted in favour of all but one of the points in the operative clause of the present Judgment.

The point in question is the third one, on which, much to my regret, I have had to stand apart from all my colleagues.

I believe it necessary to explain why in a few lines.

In point (3) of the operative clause the Court

> "*[r]eaffirms* the continuing binding character of the obligations of the United States of America under paragraph 153 (9) of the *Avena* Judgment and *takes note* of the undertakings given by the United States of America in these proceedings".

I do not of course contest either the validity of the first statement or the significance of the second.

It is self-evident that the obligations arising under point (9) of the operative clause in the *Avena* Judgment, i.e., the obligation to provide review and reconsideration of the convictions and sentences of all 51 Mexican nationals referred to in that Judgment, continue to be binding on the United States; nor, moreover, has there been any dispute between the Parties as to this. The case of José Ernesto Medellín Rojas apart, his execution having now rendered this obligation moot in his regard, it is clear that the United States remains under an obligation in respect of the convicted Mexican nationals to comply with the Court's Judgment, save in so far as it may have done so already in some of their cases, this last question being one which the Court was not called upon to decide and did not seek to decide. It is also true that the United States, speaking through its authorized representatives before the Court, reaffirmed its undertaking to take all necessary steps to ensure prompt receipt of the "appropriate reparation" defined in point (9) of the operative clause in the *Avena* Judgment by those convicted Mexican nationals who have not yet obtained it, and the Court clearly cannot but so note with interest.

Thus, my motive in voting against point (3) of the operative clause was not any disagreement with its content. It was that the statements made there are patently beyond the scope of the Court's jurisdiction under Article 60 of the Statute, which is what it is exercising, or supposed to exercise, in the present case. This jurisdiction has as its sole subject-matter the interpretation of the Judgment previously rendered and it cannot extend to any question of compliance, past or future, with that Judgment.

This is moreover just what the Court says in dismissing Mexico's claim asking the Court to declare that the United States breached the *Avena*

Judgment by executing Medellín. In paragraph 56 of the Judgment, the limits on the jurisdiction conferred on the Court by Article 60 are described, leading to the conclusion that the Court cannot uphold this claim. Yet, as a matter of logic, it can be inferred from point (2) of the operative clause, in which Medellín's execution is found to be a violation of the Court's Order of 16 July 2008 indicating provisional measures, that the United States violated the *Avena* Judgment by taking the action in question. The Court has seen fit to grant Mexico's request for a finding that the Order has been violated: this is because the title of jurisdiction here exercised by the Court incidentally covers the question of compliance with the provisional measures ordered by the Court, as the Order was "issued in the same proceedings" (for interpretation) (paragraph 51). On the other hand, the Court refuses, and rightly so, to uphold the claim asking it to find that the same action (executing Medellín) constituted a violation of the *Avena* Judgment as well — even though, logically, the two propositions must simultaneously both hold true — because this claim cannot be brought, either directly or incidentally, within the jurisdiction vested in the Court under Article 60.

The same logic should have led the Court to refrain from incorporating in the operative clause of the Judgment such observations — incontrovertible though they may be — as those appearing in point (3).

It is one thing to include in the *reasoning* of a judgment legally superfluous comments, observations or propositions apparently beyond the scope proper of the jurisdiction exercised by the Court. This is never particularly advisable, but the Court may on occasion have reasons for doing so by way of explanation. Where done judiciously and in moderation (as, for example, in paragraphs 54 and 55 here), this can be acceptable.

It is in any case another to include in the *operative clause* of a judgment observations falling outside the scope of the jurisdiction being exercised by the Court. The reason for this is that, while superabundant elements in the reasoning have no force as *res judicata*, everything in the operative clause of a judgment is in principle *res judicata*. Superfluous points in the reasoning may be permissible; superfluous statements in the operative clause are not. It follows that each and every part of the operative clause must fall strictly within the scope of the Court's jurisdiction.

That is not true in respect of point (3). There the Court is not responding to a request for an interpretation of the *Avena* Judgment, neither Party having ever raised any issue concerning the Judgment's effects over time and calling for an interpretation.

In fact, point (3) appears instead to be a preamble, as it were, to point (4), in which the Court declines Mexico's request that the United States be ordered to provide guarantees of non-repetition (of the violation of the *Avena* Judgment). It is in the light of the observations made in point (3) ("in these circumstances") that the Court in the following subparagraph declines this request.

But, in my view, what justifies the denial of the submission rightly

rejected by the Court in point (4) of the operative clause is not the fact that the United States has given an undertaking henceforth to comply fully with the *Avena* Judgment, but rather that this submission itself is extrinsic to the jurisdiction deriving from Article 60 of the Statute, the only jurisdiction invoked by Mexico in the present case.

While I voted against point (3), for the reasons just set out, I did not feel the need to vote against point (4) too, even though it contains what I think is an unfortunate cross-reference to the preceding point. In my view, what is important is that point (4) rejects the request, which the Court was in no position to grant.

I shall add in conclusion that the preceding comments do not cast any doubt on my agreement with the crux of the Judgment just delivered by the Court, which, to my thinking, is found in paragraphs 29 to 46 of the reasoning and point (1) of the operative clause.

(Signed) Ronny ABRAHAM.