

SEPARATE OPINION OF JUDGE VERESHCHETIN

Two heads of the Mexican claims — Treatment by the Court of the rule of exhaustion of local remedies — “Mixed” claims in the jurisprudence of the Court and in the ILC Draft Articles on Diplomatic Protection — Reasons for the application of “preponderance” standard and for non-application of the local remedies requirement in the special circumstances of the case.

I voted in favour of the Judgment. However, I should like to put on record my disagreement with that part of the Court’s reasoning where it deals with the issues concerning the law of diplomatic protection and the related rule of the exhaustion of local remedies (paragraph 40 of the Judgment).

1. In the present case, Mexico has requested the Court to adjudge and declare that the United States “violated its international legal obligation to Mexico *in its own right and in the exercise of its right to diplomatic protection of its nationals*” (emphasis added). The United States contends that Mexico’s claims are inadmissible because in all the individual cases referred to by Mexico local remedies remain available and therefore the right of diplomatic protection on behalf of any Mexican national cannot be exercised before this Court. In deciding this dispute, the Court, in order to show that the rule of exhaustion of local remedies cannot preclude the admissibility of the Mexican claims, has resorted to reasoning which, in my view, amounts to a highly problematic new legal proposition in respect of the law of diplomatic protection.

2. The Court, without denying the obvious fact that Mexico brought its claims under two heads, namely direct injury to the State and in the exercise of its right of diplomatic protection of its nationals, and having also noted that the individual rights of the 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”, thereafter makes an unexpected U-turn and states that, “in the special circumstances of interdependence of the rights of the State and of individual rights” under the Vienna Convention, Mexico may, prior to the exhaustion of local remedies,

“request the Court to rule on the violation of rights which it claims to have suffered both directly *and through the violations of the indi-*

vidual rights, conferred on Mexican nationals under Article 36, paragraph 1 (b) [of the Vienna Convention]" (emphasis added).

The Court further specifically observes that in the present case the duty to exhaust local remedies does not apply and that the Court does not have to deal with the Mexican claim of violations "under a distinct heading of diplomatic protection".

3. In support of its argument regarding the "special circumstances of interdependence of the rights of the State and individual rights" under the Vienna Convention, the Court relies (a) on the finding in the *LaGrand* case that "Article 36, paragraph 1, creates individual rights [for the national concerned], which . . . may be invoked in this Court by the national State of the detained person" (*LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 494, para. 77), and (b) on its statement that "violations of the rights of the individual under Article 36 may entail violations of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual".

4. The Court, however, fails to recall that in the *LaGrand* case, in which Germany also brought its claims under the two heads, the Court does not say that in invoking individual rights of its nationals the State may avoid the rule of exhaustion of local remedies or, for that matter, that in case of such invocation the claims fall outside the scope of the law of diplomatic protection. As to the Court's statement that violations of the rights of the individual may entail violations of the rights of the State and vice versa, this circular reasoning can be assessed in the light of the jurisprudence of the Court on diplomatic protection and of the work of the International Law Commission (ILC), which recently formulated Draft Articles on Diplomatic Protection. Unfortunately, neither of these is even mentioned in the Judgment.

5. To use the terminology of the ILC, Mexico has brought a so-called "mixed" claim alleging both direct injury to the State and indirect injury to the same State through the wrong done to its nationals. In its Commentary to Article 9 [11] of the said Draft the ILC, basing itself on several judgments of this Court dealing with diplomatic protection cases and related issues of the exhaustion of local remedies (*Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959; United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980; Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*), stated:

"In the case of a mixed claim it is incumbent upon the tribunal to examine the different elements of the claim and to decide whether the direct or the indirect element is preponderant . . . If a claim is preponderantly based on injury to a national this is evidence of the fact that the claim would not have been brought but for the injury to

the national . . . The principal factors to be considered in making this assessment are the subject of the dispute, the nature of the claim and the remedy claimed." (United Nations, Report of the International Law Commission, Fifty-fifth Session (5 May-6 June and 7 July-8 August 2003), *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10 (A/58/10)*, pp. 90-91.)

Article 9 [11], to which the above-cited Commentary refers, reads as follows:

"Local remedies shall be exhausted where an international claim, or request for a declaratory judgment related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in article 7 [8]." [Article 7 [8] deals with stateless persons and refugees.] (*Ibid.*, p. 89.)

It should be noted that the cited Article of the ILC Draft does not make any exception for treaty-based claims.

6. As was just mentioned, the ILC was guided by the jurisprudence of the International Court of Justice. The *ELSI* Chamber rejected a United States argument that the exhaustion of local remedies did not apply as regards treaty-based claims where the treaty in question was silent as to whether such rule applied. While the Chamber recognized that the parties to a treaty can explicitly agree that the local remedies rule shall or shall not apply to claims based on that treaty, such "an important principle of customary international law" would not be held to have been "tacitly dispensed with, in the absence of any words making clear an intention to do so" (*Elettronica Sicula S.p.A. (ELSI)*, Judgment, *I.C.J. Reports 1989*, p. 42, para. 50). Thus, the Chamber stated that, as regards treaty-based claims, local remedies must be exhausted prior to the institution of an international claim unless there is explicit language to the contrary. In the same case, the Chamber refused to separate the claim for direct injury alleged by the United States from the diplomatic protection claim based on injury to the United States nationals. The Chamber thus determined that where the same factual basis exists for claims based both on direct injury to a State and indirect injury through a national of that State, local remedies must be exhausted when the claims are preponderantly based upon the injury to the national of the State.

7. In the case before the Court now, we are faced with a similar situation: the factual basis for both elements of Mexico's claim is the same; the remedies sought focus on injuries to the nationals concerned. To use the "preponderance" standard, referred to above, the claim would not have been brought before the Court but for Mexico's desire to protect specific nationals. This clearly shows that the mixed Mexican claim is

preponderantly a diplomatic protection claim, in which Mexico espouses before the Court the claims of its nationals. Direct injury to Mexico could arise only after the violations of the rights of its nationals provided for in Article 36, paragraph 1 (*b*), of the Vienna Convention.

8. In effect, such a finding is corroborated by the Judgment's overall reasoning. Thus, the Court invokes the violations of the rights of Mexican nationals not merely as evidence of the violations of the rights of Mexico as a State. It scrupulously examines and identifies the concrete violations of the rights of Mexican nationals in each and every one of 50-plus individual cases brought by Mexico under the head of diplomatic protection. The Court identifies by name the specific individuals and the specific injuries caused to them (see, for example, paragraph 106 of the Judgment).

9. And yet, at the very beginning of this exercise, the Court states that it is not dealing with the Mexican claims as a diplomatic protection case and that the rule of exhaustion of local remedies does not apply to the Mexican request because of the special circumstances of interdependence of the rights of the State and of individual rights under the Vienna Convention.

10. I share the view of the majority that Mexico's claims are admissible and that the duty to exhaust local remedies does not apply to this case. However, my perception of the nature of the "special circumstances" in issue is quite different from that expounded in paragraph 40 of the Judgment. In my view, the special circumstances that, for the purposes of this Judgment, exempt this particular case from the local remedies requirement do not lie in the special character of Article 36 of the Vienna Convention, but rather in the particular factual circumstances of the specific case before the Court, as will be explained further below. Contrary to what the Court says in paragraph 40 of the Judgment, in invoking the rights of individuals under the Vienna Convention before this Court, the State, *as a general rule*, is not exempt from the duty to exhaust local remedies, subject to certain exceptions as those specified in Article 10 [14] of the ILC Draft. As the *ELSI* Chamber observed with regard to this rule, such "an important principle of customary international law" would not be held to have been "tacitly dispensed with, in the absence of any words making clear an intention to do so" (*Elektronika Sicula S.p.A. (ELSI)*, Judgment, *I.C.J. Reports 1989*, p. 42, para. 50).

11. The individual rights of Mexican nationals under paragraph 1 (*b*) of Article 36 of the Vienna Convention are, indeed, rights "which are to be asserted, at any rate in the first place, within the domestic legal system of the United States" (para. 40 of the Judgment). In principle, only when that process is completed and the remedies for the violations are finally unavailable, could Mexico take up the case in the form of an espousal of individual claims before this Court. However, the *LaGrand* case showed

that the wide range of possible local remedies in criminal justice procedures in the United States tend to be exhausted only a short time before the execution of individuals under sentence of death. In consequence, there is a risk that applications based on diplomatic protection with regard to such individuals will be filed with this Court in circumstances where the latter would be unable usefully to address them.

12. *In the special circumstances of the present case*, at the time when the Application was filed, all the Mexican nationals concerned were already on death row and therefore human lives were at stake. In these circumstances, to demand that all the local remedies for the alleged violation of Article 36, paragraph 1, should have been completely exhausted before Mexico could exercise its right of diplomatic protection of these nationals could lead to the absurd result of this Court having to rule at a point in time when its ruling could have no practical effect. That is why, exactly because most of the cases in question had not yet reached the final stage in the United States criminal proceedings, and in the hope that this Court would clarify the matter from the standpoint of international law, Mexico could bring its claims both in its own right and in the exercise of its right of diplomatic protection of its nationals.

13. To conclude, the Court should have applied the "preponderance" standard to the "mixed" Mexican claims brought under the heads both of Mexico's own rights and of its right of diplomatic protection of its nationals, thus remaining consistent with its former jurisprudence on the law of diplomatic protection. Having found that the claims were essentially those of diplomatic protection, the Court should have held that the rule of exhaustion of local remedies was inapplicable not because Article 36 of the Vienna Convention on Consular Relations impliedly differs *in kind* from other treaty provisions creating rights of individuals, but rather because of the very special circumstances of the case at hand, as explained above.

(Signed) Vladlen S. VERESHCHETIN.
