SEPARATE OPINION OF JUDGE PARRA-ARANGUREN

The consent of the United States not to raise preliminary objections — Mexico did not discharge its burden of proving the Mexican nationality of the 52 persons indicated in its Memorial — Multiple nationality cases — The exhaustion of local remedies rule — Obligation to reply to all the questions as stated by Mexico in its final submissions — Final considerations.

1. My vote in favour of subparagraphs (2), (3), (10) and (11) of paragraph 153 does not mean that I share each and every part of the reasoning followed by the Court in reaching its conclusions. Time constraints to present this separate opinion within the period fixed by the Court do not permit me to make a complete explanation of my disagreement with the remaining subparagraphs of paragraph 153. However I wish to advance some of my main reasons for voting against them.

I

2. Operative paragraph 153 (1) of the Judgment:

> "*Rejects* the objection by the United Mexican States to the admissibility of the objections presented by the United States of America to the jurisdiction of the Court and to the admissibility of the Mexican claims."

3. In my opinion, the contention of the United Mexican States (hereinafter "Mexico") should have been upheld, because the Parties agreed to a single round of pleadings and nothing was said about preliminary objections. The United States of America (hereinafter "the United States") thus gave its consent not to raise preliminary objections, and consequently its objections were not to be examined as such. This reason explains my vote against paragraph 153, subparagraph (1), where the Court rejects Mexico's contention that it should disregard the preliminary objections raised by the United States against Mexico's claims based on violations by the United States of Article 36 of the 24 April 1963 Vienna Convention on Consular Relations (hereinafter "the Vienna Convention").

4. However, it is to be kept in mind that in any case the Court has to be satisfied of its jurisdiction and therefore the Court may examine it at any time, before rendering judgment on the merits, either ex officio or at the request of any of the parties (*Appeal Relating to the Jurisdiction of*

the ICAO Council (India v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 52, para. 13; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 622, para. 46). Furthermore, as Mexico acknowledges, the inadmissibility objections presented by the United States as preliminary objections "overlap the arguments on the merits to a large extent" (CR 2003/24, p. 23, para. 59, Gómez-Robledo).

II

5. The first of Mexico's final submissions requests the Court to adjudge and declare, *inter alia*, that the United States has "violated its international legal obligations to Mexico, *in its own right* and in the exercise of its right of diplomatic protection of its nationals" by failing to comply with Article 36, paragraph 1, of the Vienna Convention (Judgment, para. 13; emphasis added). It also indicates that the Court need not "re-examine and redetermine the facts and reweigh the evidence" in each of the 52 cases, because there are only two factual issues to be resolved. The first relates to the Mexican nationality of the individuals concerned and the second to the violations of Article 36, paragraph 1 *(b)* (CR 2003/24, p. 27, para. 83, Babcock).

6. Mexico expressly acknowledges that, since the United States "has chosen to vehemently deny any wrongdoing", it is for Mexico to demonstrate in all 52 cases the alleged violations of Article 36, paragraph 1 *(b)*, of the Vienna Convention (CR 2003/24, pp. 29-30, para. 94, Babcock); and it claims it has met this burden by providing to the Court the birth certificates of these individuals, and declarations from 42 of them stating their Mexican nationality.

7. Mexico maintained in the oral proceedings that all of them automatically acquired *jure soli* Mexican nationality under Article 30 of its Constitution. However Mexico did not present any evidence to demonstrate the contents of such Article 30.

8. It was for Mexico to discharge this burden of proof because, as Judge John E. Read recalled, "municipal laws are merely facts which express the will and constitute the activities of States" indicating that this rule had been established by the Permanent Court of International Justice in a long series of decisions and the following in particular:

> "*Polish Upper Silesia* — Series A, No. 7, page 19.
> *Serbian Loans* — Series A, Nos. 20/21, page 46.
> *Brazilian Loans* — Series A, Nos. 20/21, page 124.
> *Lighthouses Case* (France/Greece) — Series A/B, No. 62, page 22.

Panevezys-Saldutiskis Railway Case — Series A/B, No. 76, page 19." (*Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 36, dissenting opinion of Judge Read.)

9. Moreover it is a generally accepted principle. *Oppenheim's International Law* explains:

> "From the standpoint of international law, a national law is generally regarded as a fact with reference to which rules of international law have to be applied, rather than as a rule to be applied on the international plane as a rule of law; and insofar as the International Court of Justice is called upon to express an opinion as to the effect of a rule of national law it will do so by treating the matter as a question of fact to be established as such rather than as a question of law to be decided by the court." (*Oppenheim's International Law*, 9th ed., edited by Sir Robert Jennings, Q.C., and Sir Arthur Watts, K.C.M.G., Q.C., Vol. I, "Peace", Introduction and Part 1, 1996, p. 83, para. 21.)

10. This notwithstanding, paragraph 57 of the Judgment states:

> "The Court finds that it is for Mexico to show that the 52 persons listed in paragraph 16 above held Mexican nationality at the time of their arrest. The Court notes that to this end Mexico has produced birth certificates and declarations of nationality, whose contents have not been challenged by the United States."

11. It is difficult for me to agree with this conclusion because Mexico has not discharged its burden of proof. The declarations from 42 of all the persons concerned are *ex parte* documents, which cannot, by themselves, demonstrate Mexican nationality; and the birth certificates presented by Mexico for each of the 52 individuals undoubtedly demonstrate that they were born in Mexico, but do not prove their Mexican nationality because Mexico did not provide the text of Article 30 of the Mexican Constitution. In view of this omission it cannot be established, from the evidence presented by Mexico, that the 52 persons identified in its Memorial automatically acquired Mexican nationality at the time of their birth by virtue of the *jus soli*. For this reason, unless I were to rely on extralegal considerations, as the Judgment itself does, I had no alternative but to conclude that the claims presented by Mexico against the United States cannot be upheld since the Mexican nationality of the 52 persons concerned was not demonstrated and this is, in the present case, a necessary condition for the application of Article 36 of the Vienna Convention and for Mexico's exercise of its right to diplomatic protection of its nationals. Therefore, in my opinion, subparagraphs (4), (5), (6), (7), (8) and (9) of paragraph 153 were to be rejected.

III

12. Among the persons identified in Mexico's Memorial, the United States provided proof that Enrique Zambrano was a United States national. Then Mexico amended its submissions on 28 November 2003 to withdraw the claim presented in its own name and in exercise of its right of diplomatic protection, explaining that it did not contest, for the purpose of this litigation, that dual nationals have no right to be advised, under Article 36, paragraph 1 *(b)*, of their rights to consular notification and access (CR 2003/24, p. 28, para. 87, Babcock). The withdrawal was not objected to by the United States, as indicated in paragraph 7 of the Judgment, and for this reason the case of Mr. Enrique Zambrano was not examined.

13. Even though the question was not disputed between the Parties, it is to be observed that the reasons given by Mexico for withdrawal in the case of Mr. Enrique Zambrano find no support in the conclusions reached by the International Law Commission in its recently prepared Draft Articles on Diplomatic Protection. Article 6 thereof prescribes that

> "A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the time of the injury and at the date of the official presentation of the claim."

14. The International Law Commission explains that the solution adopted in Article 6 follows the position adopted in arbitral decisions, in particular by the Italian-United States Conciliation Commission, the Iran-United States Claims Tribunal and the United Nations Compensation Commission established by the Security Council to provide for compensation for damages caused by Iraq's occupation of Kuwait. Moreover, the International Law Commission indicates that it is consistent with developments in international human rights law, which accords legal protection to individuals even against a State of which they are nationals. It also specifies that the negative language used in the provision "is intended to show that the circumstances envisaged by article 6 are to be regarded as exceptional", making it clear "that the burden of proof is on the claimant State to prove that its nationality is predominant" (United Nations, Report of the International Law Commission, Fifty-fourth Session (29 April-7 June and 22 July-16 August 2002), *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 169-187).

15. Therefore, Draft Article 6 would have entitled Mexico to exercise

diplomatic protection on behalf of Enrique Zambrano, upon presenting evidence that he was a Mexican national and that his Mexican nationality predominated his United States nationality.

IV

16. Paragraph 40 of the Judgment examines the application of the rule of exhaustion of local remedies when dealing with the second preliminary objection to admissibility presented by the United States.

17. It indicates:

> "The Court would first observe that the individual rights of Mexican nationals under subparagraph 1 *(b)* of Article 36 of the Vienna Convention are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the United States. Only when that process is completed and local remedies are exhausted would Mexico be entitled to espouse the individual claims of its nationals through the procedure of diplomatic protection."

18. Paragraph 40 adds:

> "In the present case Mexico does not, however, claim to be acting solely on that basis. It also asserts its own claims, basing them on the injury which it contends that *it has itself suffered, directly and through its nationals*, as a result of the violation by the United States of the obligations incumbent upon it under Article 36, paragraph 1 *(a)*, *(b)* and *(c)*."

19. Then paragraph 40 recalls the *LaGrand* Judgment, where it was recognized that Article 36, paragraph 1 *(b)*, of the Vienna Convention creates individual rights of the foreign national concerned which may be invoked in this Court by the national State of the detained person (*I.C.J. Reports 2001*, p. 494, para. 77). Paragraph 40 further observes

> "that violations of the rights of the individual under Article 36 may entail a violation 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. In these special circumstances of interdependence of the rights of the State and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under Article 36, paragraph 1 *(b)*."

20. Paragraph 40 of the Judgment concludes:

> "The duty to exhaust local remedies does not apply to such a request. Further, for reasons just explained, the Court does not find it necessary to deal with Mexico's claims of violation under a distinct heading of diplomatic protection. Without needing to pronounce at this juncture on the issues raised by the procedural default rule, as explained by Mexico in paragraph 39 above, the Court accordingly finds that the second objection by the United States to admissibility cannot be upheld."

21. In my opinion, this conclusion is misleading. Paragraph 40 should have stated that the local remedies requirement does not apply when the injury is claimed to have been done directly to the rights of Mexico and not that it is not applicable to the claim made by Mexico in its own name. Now, the claims presented by Mexico in the exercise of diplomatic protection of its nationals are claims of Mexico in its own right, as was acknowledged in the well-known dictum of the 30 August 1924 Judgment of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case, where it was specified that

> "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights — its right to ensure, in the person of its subjects, respect for the rules of international law." (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 12.)

22. This principle is generally accepted and has recently been reproduced in Article 1, paragraph 1, of the Draft Articles on Diplomatic Protection prepared by the International Law Commission, indicating that:

> "Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State."

23. Therefore, in the present case, the relevant element in deciding whether local remedies had to be exhausted is whether Mexico was directly injured by the actions of the United States. As the International Law Commission explains

> "The exhaustion of local remedies rule applies only to cases in which the claimant State has been injured 'indirectly', that is, through its national. It does not apply where the claimant State is directly injured by the wrongful act of another State, as here the

State has a distinct reason of its own for bringing an international claim."

24. Consequently Article 9 of its Draft Articles on Diplomatic Protection provides that

"[l]ocal 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]".

25. However the International Law Commission also observes that

"In practice it is difficult to decide whether the claim is 'direct' or 'indirect' where it is 'mixed', in the sense that it contains elements of both injury to the State and injury to the nationals of the State . . . 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 . . . Closely related to the preponderance test is the sine qua non or 'but for' test, which asks whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national. If this question is answered negatively, the claim is an indirect one and local remedies must be exhausted. There is, however, little to distinguish the preponderance test from the 'but for' test. 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. In these circumstances the Commission preferred to adopt one test only — that of preponderance." (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. 89-90).

26. In the present case Mexico has advanced, in its own right, a claim against the United States. However, the application of the exhaustion of local remedies rule depends not on whether Mexico presents the claim in its own right, but on whether Mexico was directly injured by the alleged actions of the United States.

27. Mexico maintains that there was a breach by the United States of the Vienna Convention, an unlawful act in the relations between the two States, on each occasion the United States authorities did not inform the Mexican nationals arrested of their rights under Article 36, paragraph 1 *(b)*. Consequently, Mexico's claim is a "mixed" claim, to use the terminology of the International Law Commission, as recognized in paragraph 40 of the Judgment where it is stated that there are "special circumstances of interdependence of the rights of the State and

of individual rights". Therefore, it was for the Court to determine whether Mexico's claim was preponderantly based on injury to a national and would not have been brought but for the injury to its national.

28. In my opinion, Mexico would not have presented its claim against the United States but for the injury suffered by its nationals. Consequently the local remedies rule applies to the claims "in its own right" submitted by Mexico in its first final submission and therefore the Court should have examined each of the individual cases to determine whether the local remedies had been exhausted, which do not include "approach to the executive for relief in the exercise of its discretionary powers . . . remedies as of grace or those whose 'purpose is to obtain a favour and not to vindicate a right' ". If that was not case, the claims presented by Mexico in the exercise of diplomatic protection of its nationals were to be dismissed, unless covered by any of the customarily accepted exceptions to the local remedies rule, taking into consideration Article 10 of the Draft Articles on Diplomatic Protection prepared by the International Law Commission (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. 88, 92-102). Therefore, it is not possible for me to agree with the conclusion reached in paragraph 40 of the Judgment.

V

29. On 14 February 2002, the Court stated:

> "The Court would recall the well-established principle that 'it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions' (*Asylum, Judgment, I.C.J. Reports 1950*, p. 402). While the Court is thus not entitled to decide upon questions not asked of it, the *non ultra petita* rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning." (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, pp. 18-19, para. 43.)

30. In my opinion this statement supports the following observations on the Judgment in the present case.

31. In its first final submission Mexico requests the Court to adjudge and declare:

"That the United States of America, in arresting, detaining, trying, convicting, and sentencing the 52 Mexican nationals on death row described in Mexico's Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals, by failing to inform, without delay, the 52 Mexican nationals after their arrest of their right to consular notification and access under Article 36 (1) *(b)* of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) *(a)* and *(c)* of the Convention." (Judgment, para. 14 (1).)

32. Subparagraphs (4), (5), (6), (7) and (8) of paragraph 153, in a rather sophisticated way, adjudge and declare that "the United States breached the obligations incumbent upon it" under Article 36, paragraph 1 *(b)* (subparas. (4) and (5)); that "the United States breached the obligations incumbent upon it under Article 36, paragraph 1 *(a)* and *(c)* of the Convention" (subpara. (6)); that "the United States . . . breached the obligations incumbent upon it under Article 36, paragraph 1 *(c)* of the Convention" (subpara. (7)); and that "the United States breached the obligations incumbent upon it under Article 36, paragraph 2, of the Convention" (subpara. (8)). However, that is not an answer to the first final submission presented by Mexico, where Mexico asks the Court to adjudge and declare that the United States violated "its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection". Therefore, in my opinion, the operative part of the Judgment should have responded to the request made by Mexico in its first final submission.

33. In its second final submission Mexico requests the Court to adjudge and declare:

"That the obligation in Article 36 (1) of the Vienna Convention requires notification of consular rights and a reasonable opportunity for consular access before the competent authorities of the receiving State take any action potentially detrimental to the foreign national's rights." (Judgment, para. 14 (2).)

34. In my opinion, the second final submission of Mexico should have been expressly decided in the operative part of the Judgment and not only considered in its reasoning.

VI

35. Finally it seems appropriate to me to mention that Mexico has insistently requested *restitutio in integrum* as a remedy for the alleged violations of Article 36 of the Vienna Convention by the United States, because it considers that depriving a foreign national facing criminal proceedings of the right to consular notification and assistance renders those proceedings fundamentally unfair (Judgment, para. 30). Mexico has also reminded the Court throughout the present proceedings of the facts of the *LaGrand* case. However, it did not mention that in the *LaGrand* case the question of fair trial was not originally raised by the highest State organs of Germany with their United States counterparts, as is evidenced by the following documents:

(a) The German Minister of Justice wrote to the United States Attorney General on 27 January 1999 acknowledging that

> "nor are there any doubts about the fact that the proceedings were conducted under the Rule of Law — ultimately leading to imposition of the death penalties with final and binding effect — before the courts of the State of Arizona and before the Federal Courts" (Memorial of Germany, Vol. II, Ann. 20, pp. 539-542).

(b) In his letter of 5 February 1999 to the former President of the United States, the German President, acting as Head of State, indicates that "[i]n no way do I doubt the legitimacy of the conviction nor the fairness of the procedure before the courts of the State of Arizona and the federal courts" (Memorial of Germany, Vol. II, Ann. 14, pp. 509-512).

(Signed) Gonzalo PARRA-ARANGUREN.