

SEPARATE OPINION OF JUDGE TOMKA

[Translation]

Diplomatic protection — Distinction between rights of the State and individual rights — Invocation of individual rights before an international court by State of nationality — Objection based on non-exhaustion of local remedies.

Interpretation of the obligation to provide information under Article 36, paragraph 1 (b).

Obligation of cessation — Whether wrongful act is of a continuing nature — Pendency of individual cases before domestic courts and form of reparation not pertinent to obligation of cessation.

1. Having voted in favour of the operative part of this Judgment, I nonetheless wish to clarify my position on certain points of law mentioned in the Court's reasoning.

I. DIPLOMATIC PROTECTION

2. In bringing this case before the Court, Mexico seeks to assert its own rights, which it claims to have been violated by the United States, as well as its right to diplomatic protection of its 52 nationals, whose individual rights are also alleged to have been violated by the United States.

3. The United States raised two objections to the admissibility of the Mexican claims based on the exercise of diplomatic protection. The first objection, that which concerns us here, was that the Mexican claim should be held inadmissible by the Court on the ground that local remedies had not been exhausted and were still available in the 52 cases.

4. It would appear from paragraph 40 of the Judgment that the Court accepts the United States objection to the admissibility of Mexico's claim based on the exercise of its right of diplomatic protection. In that paragraph, the Court observes that

“the individual rights of Mexican nationals under paragraph 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”.

The Court concludes:

“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.”

In other words, Mexico's claim based on diplomatic protection could be regarded as inadmissible and the United States objection based on the failure to exhaust local remedies might appear to have succeeded. The Court nonetheless rejects the objection on a different ground.

5. The Court rejects the objection because such an objection does not apply to the claim submitted by Mexico in its own name (although I doubt whether the United States objection was directed at Mexico's claim in its own name).

6. In order to be able to rule on the alleged violations by the United States of its obligations to Mexican nationals under Article 36, paragraph 1, of the Vienna Convention, the Court relies on what is in my view a novel doctrine, without citing any prior jurisprudence in support thereof. The Court explains that, in the special circumstances of interdependence of the rights of the State and of individual rights, the State (in this case 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 its nationals under Article 36, paragraph 1 (*b*).

7. In the present case, in my view, the Court could only reach the conclusion that the individual rights of Mexican nationals had been violated if it accepted Mexico's claim that that State was exercising its right to diplomatic protection. In order for a violation of individual rights (the rights of individual nationals), to be established, such rights have to be pleaded before an international court. When the State invokes the rights of its nationals, it acts in its own name on their behalf, on account of the wrong done to them: in other words, that State exercises diplomatic protection. Mexico's main reason for bringing the case before the Court was the alleged wrong done to its nationals. It is its nationals — and their fate — with which Mexico is primarily concerned. In order to give them a final chance within the United States judicial system, it was vital to establish violations by the United States of its obligations to Mexican nationals under the Vienna Convention, and the resultant injury to them. In my view, it is the violation of the rights of an individual and the wrong done to that individual, rather than the violation of a right of Mexico and the resultant injury to that State, that may have a certain role to play in the context of criminal proceedings in the United States.

8. If this case is viewed in the context of diplomatic protection, we cannot simply ignore the United States objection that the Mexican nationals have failed to exhaust local remedies.

9. Faced with this argument on the part of the United States, Mexico

maintains that the majority of the Mexican nationals concerned did file appeals in the United States, unsuccessfully. It adds that, in any event, the doctrine of procedural default prevented most of them from asserting their claims, since the matters on which they relied had not been submitted at an earlier stage of the proceedings — precisely because the American authorities had failed to inform those concerned of their rights, as they had an obligation to do under Article 36, paragraph 1.

As for their other nationals, Mexico claims that the United States presented the obligation to exhaust local remedies incorrectly by implying that it is an absolute rule. Mexico relies on the separate opinion of Judge Tanaka in the *Barcelona Traction* case, according to which: "The rule does not seem to require from those concerned a clearly futile and pointless activity, or a repetition of what has been done in vain." (*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 145.) According to Mexico, a foreign national seeking a judicial remedy on the ground of a breach of Article 36 would never succeed in the United States, since the United States courts hold either that Article 36 does not create an individual right, or that a foreign national who has been denied his Article 36 rights but given his constitutional and statutory rights, cannot establish prejudice and therefore cannot get relief. Mexico further contends that the rule of exhaustion of local remedies is restricted to judicial remedies, and that the admissibility of an application to the Court is not subject to the precondition of exhausting clemency procedures.

10. The International Law Commission, which is currently preparing draft articles on diplomatic protection, has framed four exceptions to the local remedies rule. Only the first of these concerns us here. Under this exception, there is no need to exhaust local remedies when they provide no reasonable possibility of effective redress. It is for the claimant to prove

"that in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of an effective redress" (Report of the International Law Commission, 2003, United Nations doc. A/58/10, p. 93, para. 3).

11. Mexico claims that no single court in the United States has ever granted a judicial remedy for a violation of Article 36 of the Vienna Convention.

12. Although the United States maintains that almost all of the 52 cases put in issue by Mexico before the Court (save for three, leaving 49) remain pending, many of them not yet having gone beyond the first direct appeal of the conviction, it has on the other hand failed to refute Mexico's criticism of the practice of the United States courts of con-

sistently refusing any form of relief for the violation of an obligation under Article 36 of the Vienna Convention.

13. It would thus have been possible for the Court to conclude that Mexico has shown that the condition of exhaustion of local remedies did not apply in the present case to its claim under the head of diplomatic protection.

II. INTERPRETATION *RATIONE TEMPORIS* OF THE OBLIGATION TO INFORM UNDER ARTICLE 36, PARAGRAPH 1 (*b*)

14. I have misgivings as to the interpretation by the Court of Article 36, paragraph 1 (*b*). According to that interpretation, which is set out in paragraph 63 of the Judgment, the obligation under this subparagraph to provide information to the individual arises only once it is realized by the arresting authorities that the person is a foreign national, or once there are grounds to think that person is probably a foreign national.

I consider that this interpretation is not well founded. Were such an approach to the interpretation of the norms of international law to be applied more widely, there is a danger that it might weaken the protection accorded to certain subjects (for example, children) under the procedures for safeguarding human rights or under international humanitarian law.

15. The obligation laid on the receiving State by Article 36 of the Vienna Convention does not depend on the authorities of the said State knowing that the person arrested is a foreigner. The obligation to provide information arises as soon as a foreigner is detained. Such an arrest constitutes an objective fact sufficient in itself to activate the receiving State's obligation.

16. Knowledge of the facts plays no role, either in respect of the existence or applicability of the obligation to provide information under Article 36, paragraph 1 (*b*), or in respect of the violation of that obligation. Ignorance is not a circumstance precluding wrongfulness. *Ignorantia non excusat*. The State authorities must show due diligence in the exercise of their powers, and there is nothing to prevent them from making enquiry, as soon as the arrest is made, in regard to the nationality of the person detained. If that person claims to be a national of the country in which he has been arrested, he can no longer rely on the fact that he was not informed of his rights under Article 36, paragraph 1, of the Vienna Convention. Informing a person in custody that the Vienna Convention accords him certain rights if he is a national of another State is undoubtedly the best way of avoiding any breach of the obligations incumbent upon the authorities of the receiving State under Article 36

of the Convention. But those authorities cannot justify their omissions by relying on their own mistakes or errors of judgment.

III. CESSATION

17. The Court states that it cannot uphold Mexico's claim requiring the United States to cease its violations of Article 36 of the Vienna Convention with regard to Mexico and its 52 nationals, since Mexico has not established that the violations by the United States of its obligations under Article 36 are continuing (Judgment, para. 148).

18. I share the Court's conclusion here. Yet the Court adds a further element, observing:

"inasmuch as these 52 individual cases are at various stages of criminal proceedings before the United States courts, they are in the state of *pendente lite*; and the Court has already indicated in respect of them what it regards as the appropriate remedy, namely review and reconsideration by reference to the breach of the Vienna Convention".

19. I consider that the fact that individual cases are still pending before the United States courts is not pertinent to the obligation of cessation. It is the continuing nature or otherwise of the violation which determines whether the obligation of cessation exists. The Court can only order the cessation of a wrongful act if that act continues.

20. The reference to the fact that the cases are still pending before domestic courts might cause confusion by giving the impression that Mexico's claim requiring cessation cannot be upheld by the Court because the failure to exhaust local remedies in the United States either makes the claim premature, and hence inadmissible, or else precludes the Court from finding that the obligation concerned has already been violated. Yet this second hypothesis must clearly be rejected, since the Court, in the same paragraph 148, confirms that what constitutes the appropriate remedy is review and reconsideration by reference to the breach of the Vienna Convention (a breach which first has to be established).

21. By the same token, the nature of the appropriate remedy (or form of reparation) is not pertinent to the obligation of cessation.

(Signed) Peter TOMKA.