

DECLARATION OF VICE-PRESIDENT RANJEVA

[Translation]

Rejection of distinction between burden of proof and burden of evidence — Factual analysis of the production of evidence — Non-application of the maxim nemo contra se edere tenetur — Article 62 of Rules of Court — Corfu Channel case and refusal to produce evidence — Justification of the factual analysis.

Diplomatic protection — Individual rights — Vienna Convention on Consular Relations — Interrelationship of such rights — Article 36 and identification of holders of the rights there defined — Interrelationship of rights under the Article 36 system: combination of sending State's right of initiative and non-refusal by its national.

1. Whilst agreeing with the Court's findings and reasoning, I wish to make my own proposed interpretation clear in regard to the issue of evidence and the relationship between diplomatic protection and individual rights.

2. The Judgment declines to adopt the distinction proposed by the United States, between the burden of proof and the burden of evidence (para. 56), retaining solely the classic concept of burden of proof. Whilst that decision merits approval, the Judgment fails to give an appropriate explanation on this point. The distinction proposed by the Respondent is somewhat subtle and perhaps arises from specific concepts of United States law; the fact remains that those are institutions of domestic law, whereas the Court is bound to apply international law and its categories. It is sufficient to recall a basic truth, namely that the categories of domestic law have their inherent limitations; they are too directly dependent on the legal and institutional history of a given system to have universal value and to be directly valid in international law.

3. The reasoning of the Judgment in paragraph 57 is well fashioned, consisting simply in a factual review of the Parties' propositions and conduct, and producing a conclusion which is thus self-evident. The demonstration would have been more convincing had the factual analysis been linked with the issue of the production of evidence in cases before the Court. The Court responds to the Respondent's complaints of lack of co-operation on the part of the Applicant by indicating the conduct it expected of the latter.

4. On reflection, it is apparent that the United States objection raises a question of principle. Can a complaint be made that the other party has failed to produce evidence if the Court has not previously requested it to do so? Traditionally, in the context of procedural law, the basic principle was enshrined in the maxim *nemo contra se edere tenetur* (no one is

bound to give evidence against himself). However, in terms of the Rules of Court, this principle does not appear to have been construed strictly. Article 62, paragraph 1, of the Rules confers on the Court full discretionary powers in respect of evidence gathering. If the Court decides to grant a respondent's request, it may order the other party to produce evidence. The following precedent provides support for this interpretation:

“the PCIJ responded favourably to an Agent who requested the Court to ask the other party to produce an administrative document in support of the interpretation of a certain conception of administrative law which he had expounded before the Court. The Court, after deliberation, decided to comply with this request.” (Geneviève Guyomar, *Commentaire du Règlement de la Cour internationale de Justice*, 1983, p. 411, referring to *P.C.I.J., Series E, No. 8*, p. 268.)

5. It should be noted, however, that the Court cannot impose any sanction for failure to produce evidence, other than the inferences it may draw from such abstention or refusal. In the *Corfu Channel* case, the evidence requested by the Court was refused by the party in question:

“It is not therefore possible to know the real content of these naval orders. The Court cannot, however, draw from this refusal to produce the orders any conclusions differing from those to which the actual events gave rise.” (*Merits, Judgment, I.C.J. Reports 1949*, p. 32.)

6. In the absence of any obligation capable of impugning the freedom of action of the parties in relation to the production of evidence, the Court's only means of establishing the truth is its own power of determination. That limitation explains the purely factual nature of the analysis in paragraphs 56 and 57.

7. With respect to paragraph 40, I would like to give my interpretation. The problem arises out of Mexico's wholesale espousal of Germany's argument in the *LaGrand (Germany v. United States of America)* case, as set out in paragraph 75 of the 2001 Judgment; that strategy by Mexico is explicable: it was seeking to obtain the benefit of the *LaGrand* jurisprudence pertaining to the protection of the “individual rights” of its nationals. On closer examination, however, the two claims — German and Mexican — appear quite different in terms of their subject-matter. Germany joined together its claims in its own right and those concerning the protection of the individual rights of the *LaGrand* brothers. In the present case, the Mexican claim is a complex one: the Applicant first acts in its own name; secondly, it acts in the exercise of its right to ensure the protection of its nationals; and lastly — a point that should be emphasized — implementation of the individual rights of the Mexican nationals is situated in the context of the United States judicial system. Both Ger-

many and Mexico sailed their entire forensic strategy under the flag of diplomatic protection.

8. In terms of legal characterization, the reference to diplomatic protection is misconceived. Traditionally, diplomatic protection is essentially an institution of general or customary international law:

“It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. 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.”
(*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 12.*)

9. In other words, the protection consists in the right of a State to bring an international claim against another State when one of its nationals has been injured by an internationally wrongful act. In light of the terms used by the Permanent Court of International Justice, there is one clear conclusion: diplomatic protection is a right belonging to the State. Hence, in matters concerning the protection of individual rights of nationals, the question is whether there is a place for diplomatic protection.

10. From a purely practical standpoint, reliance on the notion of diplomatic protection and the rule of the exhaustion of local remedies may have perverse effects: the procedural default rule can make compliance with the procedural obligation to exhaust local remedies a futile exercise; no one has yet found a way of bringing an executed prisoner back to life.

11. On a theoretical level, reading the provisions of the Vienna Convention in conjunction with the reasoning in the *LaGrand* Judgment prompts the following observations: first, the 1963 Convention enumerates the rights that it seeks to protect for the purpose of facilitating the exercise of the consular function, for the benefit both of the sending State and of its nationals; secondly, the *LaGrand* Judgment describes the components of the consular protection system as being interrelated (*I.C.J. Reports 2001*, p. 492, para. 74); and lastly, according to paragraph 77 of that Judgment:

“the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person”
(*I.C.J. Reports 2001*, p. 494, para. 77).

12. If I have understood them correctly, those propositions contemplate the direct grant of individual rights but do not impose any prior

condition for States seeking to invoke violations of the rights of their nationals. Thus, looking beyond the scope of diplomatic protection and the obligation to exhaust local remedies, the question to be determined is the significance of the interrelationship between the components of the consular protection system.

13. The notion of interrelationship was used by the Court in 2001 to characterize the interdependence of the rights enumerated in Article 36, paragraph 1. The *raison d'être* or focus of that relationship is to seek to facilitate consular protection. However, the manner in which the various rights are defined consists in stating their content and how they are to be apportioned as between the sending State and the detainee; in other words, the 1963 Convention sought to identify the holders of the rights that it created, with individual rights being those belonging to the detained nationals. In these circumstances, the interrelationship contemplated by the 2001 Judgment concerns neither the nature nor the scope of the rights in question; it pertains to the effective implementation of the protection system. The effective exercise by a State of its right to provide for the protection of its nationals, who derive their rights from Article 36, paragraph 1 (*b*), is only possible if the detained national does not refuse such an initiative. The discretionary power of the sending State is thus confined to a right of initiative to activate the protection mechanism. And that right of initiative effectively arises "as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national" (Judgment, para. 88).

(Signed) Raymond RANJEVA.