SEPARATE OPINION OF VICE-PRESIDENT SHI

Operative paragraph 128 (3) of the Judgment — Whether Article 36, paragraph 1 (b), *of the Vienna Convention creates individual rights — The Court's interpretation of the subparagraph — Clarity of text and "rules of interpretation" — Text of Article 36, paragraph 1* (b), *in the context and in light of the object and purpose of the Convention —* Travaux préparatoires *of Article 36, paragraph 1* (b) *— The Court's interpretation of Article 36, paragraph 2 — Explanation of my vote on operative paragraph 128 (7) of the Judgment.*

1. It was with a certain reluctance that I voted in favour of operative paragraph 128 (3) and (4) of the Court's Judgment. The main reason for this is my belief that the Court's findings in these two paragraphs were based on a debatable interpretation of Article 36 of the Vienna Convention on Consular Relations (hereinafter called "the Convention").

2. In operative paragraph 128 (3), the Court finds that

> "by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, paragraph 1 *(b)*, of the Convention, and by thereby depriving the Federal Republic of Germany of the possibility, in a timely fashion, to render the assistance provided for by the Convention to the individuals concerned, the United States of America violated its obligations to the Federal Republic of Germany and to the LaGrand brothers under Article 36, paragraph 1".

I fully agree with the Court that the United States violated its obligations to Germany under Article 36, paragraph 1, of the Convention. However, I have doubts as to the Court's finding that the United States also violated its obligations to the LaGrand brothers. The Court's decision is a consequence of its interpretation of Article 36, paragraph 1, in particular subparagraph *(b)*, of the Convention, regarding the differences between the Applicant and the Respondent as to whether that subparagraph creates individual rights in addition to the rights appertaining to the States parties.

Germany claimed that:

> "the right to be informed upon arrest of the rights under Art. 36 (1) *(b)* of the Vienna Convention does not only reflect a right of the sending State (and home State of the individuals involved) towards the receiving State but also is an individual right of every national of a foreign State party to the Vienna Convention

entering the territory of another State party" (Memorial of Germany, Vol. I, p. 116, para. 4.91).

Whereas the United States contended that

"rights of consular notification and access under the Vienna Convention in any event are rights of States, not individuals. Clearly they can benefit individuals by permitting — not requiring — States to offer them consular assistance, but the Convention's role is not to articulate or confer individual rights" (Counter-Memorial of the United States, p. 81, para. 97).

3. In paragraph 77 of the Judgment, the Court, basing its interpretation of the subparagraph on the clarity of meaning of the text of the provision read in context, upheld that claim by Germany. I can readily accept this finding of the Court only if its interpretation of Article 36, paragraph 1 *(b)*, is appropriate in the present case. Undoubtedly, the Court's interpretation is consistent with the well-known jurisprudence of this Court and of its predecessor that, if the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter and there is no need to resort to other methods of interpretation (*Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 8). However, in my view, indiscriminate reliance on such a dictum in any circumstances may not always be dependable or helpful in determining the true intention of the parties to a treaty. It can happen that for one reason or another — e.g., hasty or careless drafting, last-minute compromise in negotiations — the meaning clearly apparent from the text does not necessarily reflect that which the parties intended it to bear. Recourse to customary rules of interpretation as reflected in Article 31 of the Vienna Convention on the Law of Treaties may seem superfluous when the normal meaning of the text appears to be clear, but it does serve as a double check to prevent any possibility of misinterpretation. In fact, in the case concerning the *Arbitral Award of 31 July 1989 (Guinea Bissau* v. *Senegal)* the Court, while affirming its dictum in its Advisory Opinion referred to above, stated that the rule of interpretation according to the natural and ordinary meaning of the words employed is not an absolute one and referred to a pronouncement in the case concerning *South West Africa* as follows:

"Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it." *(Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 336).

It may also be relevant to quote the following passage from *Oppenheim's International Law* (9th ed., 1992, Vol. I, p. 1267):

> "The purpose of interpreting a treaty is to establish the meaning of the text which the parties must be taken to have intended it to bear in relation to the circumstances with reference to which the question of interpretation has arisen. It is frequently stated that if the meaning of a treaty is sufficiently clear from its text, there is no occasion to resort to 'rules of interpretation' in order to elucidate the meaning. Such a proposition is, however, of limited usefulness. The finding whether a treaty is clear or not is not the starting point but the result of the process of interpretation. It is not clarity in the abstract which is to be ascertained, but clarity in relation to particular circumstances and there are few treaty provisions for which circumstances cannot be envisaged in which their clarity could be put in question."

4. In the present case, both the Applicant and the Respondent had no divergence of views as to the normal meaning of the words of Article 36, paragraph 1 *(b)*. However, the Parties reached differing conclusions on the interpretation of the subparagraph. In these circumstances I wonder whether it is proper for the Court, in approaching the issue, to place so much emphasis on the purported clarity of language of the provision, putting aside altogether the customary rules of interpretation. In my view it is not unreasonable for the United States to contend that the rights of nationals of the sending State under detention or arrest to consular notification and access under paragraph 1 *(b)* are not independent of, but rather are derived from, the right of the State party to protect and assist its nationals under the Convention, if the subparagraph is read, as the United States reads it, in context and in the light of the object and purpose of the Convention.

5. In the first place, the very title of the Convention is none other than the "Vienna Convention on Consular Relations". And the object and purpose of the conclusion of an international convention on consular relations as indicated in the preamble is to "contribute to the development of friendly relations among nations". Nowhere in the Preamble of the Convention is reference made to the creation of rights of individuals under the Convention.

6. Secondly, Article 36, which bears the title "Communications and contact with nationals of the sending State", begins with the words: "With a view to facilitating the exercise of consular functions relating to nationals of the sending State". This clause serves as the *chapeau* governing all the paragraphs of the Article, including paragraph 1 *(b)*, where "rights" of the concerned nationals of the sending State are provided. Clearly, the effect of this clause is to limit the scope of Article 36 to facilitation of the exercise of consular functions relating to nationals of the sending State. It is unfortunate that paragraph 77 of the Judgment made

no mention of the *chapeau* of the Article, as if it were irrelevant to the context of paragraph 1 *(b)*.

7. Thirdly, according to Article 5 of the Convention, consular functions consist *inter alia* in "protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law" (Art. 5 *(a)*) and "helping and assisting nationals, both individuals and bodies corporate, of the sending State" (Art. 5 *(e)*). Article 36, paragraph 1, and specifically subparagraph *(b)*, has to be read in the context of these consular functions provided for in Article 5. It is obvious that there cannot be rights to consular notification and access if consular relations do not exist between the States concerned, or if rights of the sending State to protect and assist its nationals do not exist.

8. Finally, it is clear, as the United States has contended, that the *travaux préparatoires* of the 1963 Vienna Conference on Consular Relations do not confirm that Article 36, paragraph 1 *(b)*, is intended to create individual rights (Counter-Memorial of the United States, pp. 82-84, paras. 99-100). Indeed, during the negotiating sessions of Article 36, the delegation of Venezuela objected to the opening statement of paragraph 1 *(a)* of the International Law Commission draft, concerning the right of nationals of the sending State to communicate with and to have access to the competent consulate, contending that it was inappropriate in a convention on consular relations, and that "foreign nationals in the receiving State should be under the jurisdiction of that State and should not come within the scope of a convention on consular relations" (*United Nations Conference on Consular Relations*, 1963, Vol. I, p. 331, para. 32). In the end, on the motion of Venezuela, Ecuador, Spain, Chile and Italy, the Second Committee of the Conference decided to reverse the original order of Article 36, paragraph 1 *(a)*, of the International Law Commission draft, so that the subparagraph refers first to the right of consular officers to communicate with and to have access to nationals of the sending State, and secondly to the right of nationals of the sending State to have the same freedom with respect to communication with and access to consular officers of the sending State (*ibid.*, p. 334, para. 2, and p. 336, para. 22).

9. This reversal of order in Article 36, paragraph 1 *(a)*, confirms the interpretation of that subparagraph in the context and in the light of the object and purpose of the Convention. Thus, there are good grounds for the contention by the United States in its Counter-Memorial that

> "That reversal underscores the fundamental point, that the position of the individual under the Convention derives from the right of the State party to the Convention, acting through its consular officer, to communicate with its nationals. The treatment due to individuals

is inextricably linked to and derived from the right of the State." (Counter-Memorial of the United States, p. 84, para. 100.)

10. Furthermore, the original International Law Commission draft Article 36, paragraph 1 *(b)*, makes mandatory the obligation of the receiving State to inform the competent consulate of the sending State in case of detention of a national of that State. It reads:

> "*(b)* The competent authorities shall, without undue delay, inform the competent consulate of the sending State, if within its district, a national of that State is committed to prison or to custody pending trial or is detained in any other manner. Any communications addressed to the consulate by the person in prison, custody or detention shall also be forwarded by the said authorities without undue delay." (*Yearbook of the International Law Commission*, 1961, Vol. II, p. 112.)

11. During the negotiating sessions of the Vienna Conference, a number of delegations stressed the importance of the draft subparagraph. Thus, the delegation of Tunisia stated that it

> "regarded paragraph 1 *(b)* as one of the most important in the draft. It was related to article 5 (Consular functions), . . . Detention (and he agreed with the French representative that arrest should also be included) was a serious infringement of the freedom and dignity of the individual. It was therefore unthinkable that the consul of the sending State should not be notified, and the obligation of the receiving State to notify him should be firmly established, for it was possible that in certain circumstances the foreign national might be unable to inform the consul and ask him for help and protection." (*United Nations Conference on Consular Relations*, 1963, Vol. I, p. 339.)

The delegation of the United Kingdom also stated that

> "The rights of communication and contact with the nationals of sending States defined in article 36 were especially important for the persons under detention referred to in sub-paragraph *(b)*. Such persons were obviously in very special need of consular help and the notification stipulated in sub-paragraph *(b)* was in many cases a necessary condition for providing it." *(Ibid.)*

12. However, during the negotiating sessions, this draft provision mainly aroused two different reactions. Quite a number of States, though in agreement with the formulation of the principle in the draft, were much concerned about the heavy burden that the mandatory consular notification would impose on the receiving State, particularly on those States on whose territories there are a sizeable number of resident aliens

and foreign tourists or other short-term visitors. There were also some delegations, at least partly motivated by the then Cold War mentality, who would have liked the subparagraph to reflect the free will of the detained or arrested person to state whether or not he or she wished to be approached by consular officials of his or her country.

13. In these circumstances, a seventeen-States amendment to paragraph 1 *(b)* was put forward before the Conference. The delegation of Tunisia, representing the sponsors of the amendment, stated that

> "As far as sub-paragraph *(b)* was concerned, the sponsors had introduced the initial proviso 'unless he expressly opposes it', thereby relieving the receiving State of the automatic duty to inform the consul of the arrest of the person concerned. The reason for that proviso was the need to take into consideration the prisoner's own freedom of choice. It had been argued that in some cases a prisoner might not wish the consul to know that he had been in prison. The sponsors had hesitated at first; they had, however, ultimately agreed to take that point into account, but with appropriate safeguards. It was for that reason that the proviso was so drafted that the duty to notify would exist unless the person concerned explicitly stated that he did not wish the consul to be advised." (*United Nations Conference on Consular Relations,* 1963, Vol. I, p. 82, para. 56.)

14. In response to this proposed amendment, the delegation of the United Arab Republic introduced a twenty-States joint amendment which would replace in paragraph 1 *(b)* the words "unless he expressly opposes it" by the words "if he so requests". Explaining the amendment, the delegation of the United Arab Republic stated that

> "The purpose of the amendment was to lessen the burden on the authorities of receiving Sates, especially those which had large numbers of resident aliens or which received many tourists and visitors. The language proposed in the joint amendment would ensure that the authorities of the receiving State would not be blamed if, owning to pressure of work or to other circumstances, there was a failure to report the arrest of a national of the sending State." (*United Nations Conference on Consular Relations,* 1963, Vol. I, p. 82, para. 62.)

15. The result of the debate was the adoption of the 20 States' amendment with the insertion of the words "if he so requests" at the beginning of the subparagraph. The last sentence of Article 36, paragraph 1 *(b)*, i.e. the provision that the competent authorities of the receiving State "shall inform the person concerned without delay of his rights" (*United Nations Conference on Consular Relations,* 1963, Vol. 1, pp. 336-343) was inserted belatedly as a compromise between the aforesaid two opposing views.

Thus, it is not possible to conclude from the negotiating history that Article 36, paragraph 1 *(b)*, was intended by the negotiators to create individual rights. Moreover, if one keeps in mind that the general tone and thrust of the debate of the entire Conference concentrated on the consular functions and their practicability, the better view would be that no creation of any individual rights independent of rights of States was envisaged by the Conference.

16. With respect to operative paragraph 128 (4) of the Judgment, the Court's finding is a consequence of its interpretation of Article 36, paragraph 2, of the Convention.

Article 36, paragraph 2, of the Convention provides:

> "The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

In the Court's view, since Article 36, paragraph 1, creates individual rights for the detained person in addition to the rights accorded the sending State, the reference in paragraph 2 of the Article to rights referred to in paragraph 1 of this Article "must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual" (paragraph 89 of the Judgment).

As I have shown above, the view that Article 36, paragraph 1, specifically subparagraph *(b)*, creates individual rights is at the very least a questionable one. It follows that the Court's finding in regard to the reference to "rights" in paragraph 2 is also questionable.

17. Finally, I should like to make it clear that it was not for reasons relating to the legal consequences of the breach of Article 36, paragraph 1 *(b)*, that I voted in favour of operative paragraph 128 (7) of the Judgment. This operative paragraph is of particular significance in a case where a sentence of death is imposed, which is not only a punishment of a severe nature, but also one of an irreversible nature. Every possible measure should therefore be taken to prevent injustice or an error in conviction or sentencing. Out of this consideration, I voted in favour.

(Signed) SHI Jiuyong.
