SEPARATE OPINION OF JUDGE PARRA-ARANGUREN

Article I of the Optional Protocol — Existence of a dispute as an essentially preliminary question — Definition of a dispute — There is no dispute between the Parties as to the breach by the United States of Article 36, paragraph 1 (b), *of the Vienna Convention — No jurisdiction of the Court on this point — The claim made by Germany in its third submission does not arise out of the interpretation of the Vienna Convention but of Article 41 of the Court's Statute — No jurisdiction of the Court to decide this matter under Article I of the Optional Protocol.*

1. I have voted against operative paragraph 128 (1), (2) *(a)*, (2) *(c)* and (5) of the Judgment for the following reasons:

I

2. The Court bases its jurisdiction on Article I of the Optional Protocol concerning Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations of 24 April 1963 (hereinafter referred to as the "Optional Protocol").

3. Article I of the Optional Protocol prescribes that

> "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by a written application made by any party to the dispute being a Party to the present Protocol."

II

4. The existence of a dispute is a condition *sine qua non* established by Article I of the Optional Protocol for the compulsory jurisdiction of the Court. It is also required by the Statute of the Court. Article 38, paragraph 1, of the Statute states that the function of the Court in contentious cases "is to decide in accordance with international law such disputes as are submitted to it". Article 36, paragraph 2, and paragraph 1 of Article 40 also refer to the dispute between the Parties. Accordingly, the Court has stated that the existence of a dispute is an "essentially preliminary" question and that it is "the primary condition for the Court to

exercise its judicial function" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974,* p. 260, para. 24; pp. 270-271, para. 55).

5. The first submission of the Federal Republic of Germany (hereinafter referred to as "Germany") requests the Court to adjudge and declare *inter alia*

> "(1) that the United States, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36 subparagraph 1 *(b)* of the Vienna Convention on Consular Relations . . ., violated its international legal obligations to Germany, in its own right . . ., under Articles 5 and 36 paragraph 1 of the said Convention."

6. The first sentence of the first submission of the United States of America (hereinafter referred to as the "United States") requests the Court to adjudge and declare that

> "(1) There was a breach of the United States obligation to Germany under Article 36 (1) *(b)* of the Vienna Convention on Consular Relations, in that the competent authorities of the United States did not promptly give to Karl and Walter LaGrand the notification required by that Article . . ."

7. As recognized in many paragraphs of the Judgment, for example the first sentence of paragraph 39, the Parties agree that the United States did not inform the LaGrand brothers without delay following their arrest of their rights under Article 36, paragraph 1 *(b)*, of the Vienna Convention, thus violating that provision. Paragraph 39 of the Judgment adds that the United States did not deny that such violation "has given rise to a dispute between the two States".

8. However, the Court explained in its Judgment of 11 June 1998 that

> "'in the sense accepted in its jurisprudence and that of its predecessor, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties . . .' (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, pp. 99-100, para. 22); and that '[i]n order to establish the existence of a dispute, "It must be shown that the claim of one party is positively opposed by the other" (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328); and further, "Whether there exists an international dispute is a matter for objective determination" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74)' (*I.C.J. Reports 1995*, p. 100)." (*Land and Maritime Boundary between Cameroon*

and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 314-315, para. 87).

9. The Court has also stated that

> "it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict." (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.)

10. On the basis of these criteria, even assuming that the United States had not denied the existence of a dispute, it has not been shown objectively to the Court that the Parties maintain positively opposed positions on this point. On the contrary, as it appears from the submissions quoted above, they agree on the breach by the United States of its violation of Article 36, paragraph 1 *(b)*, of the Vienna Convention. Therefore, in my opinion, the Court does not have jurisdiction under Article I of the Optional Protocol to decide whether the United States breached Article 36, paragraph 1 *(b)*, when arresting the LaGrand brothers. Nor can the Court exercise its functions under Article 38, paragraph 1, of its Statute. For this reason I voted against operative paragraph 128 (1) and (2) *(a)* of the Judgment.

11. A different problem is the consequences of the violation by the United States of Article 36, paragraph 1 *(b)*, of the Vienna Convention. The Parties disagree upon them. Therefore the Court has jurisdiction to decide that dispute under Article I of the Optional Protocol.

III

12. Germany's third submission requests the Court to adjudge and declare

> "(3) that the United States, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice on the matter, violated its international legal obligation to comply with the Order on provisional measures issued by the Court on 3 March 1999, and to refrain from any action which might interfere with the subject matter of a dispute while judicial proceedings are pending".

13. Germany, advancing the arguments summarized in the Judgment (paragraph 93), maintains that the measures indicated by the Court pursuant to Article 41 of its Statute are obligatory. This contention is disputed by the United States (paragraph 91 of the Judgment).

14. The majority of the Court states:

> "The dispute which exists between the Parties with regard to this point essentially concerns the interpretation of Article 41, which is worded in identical terms in the Statute of each Court (apart from the respective references to the Council of the League of Nations and the Security Council). These difficulties have been the subject of extensive controversy in the literature. The Court will therefore now proceed to the interpretation of Article 41 of the Statute." (Paragraph 99 of the Judgment.)

15. As the Judgment acknowledges, the dispute between Germany and the United States on this point arises out of the interpretation of Article 41 of the Court's Statute. Therefore, it is not a dispute arising out of the interpretation of the Vienna Convention as required by the Optional Protocol, which is the basis for the jurisdiction of the Court in the present case. Consequently, in my opinion, the Court does not have jurisdiction to decide Germany's third submission. For this reason I have voted against operative paragraph 128 (1), (2) *(c)* and (5) of the Judgment.

(Signed) Gonzalo PARRA-ARANGUREN.
