MEMORIAL OF PARAGUAY

MÉMOIRE DU PARAGUAY

CHAPTER 1

INTRODUCTION

1.1 The Republic of Paraguay instituted proceedings in this Court in order to prevent the execution of a national who, the United States conceded, had been convicted and sentenced in violation of the provisions of the Vienna Convention on Consular Relations governing consular notification and access. After hearing the parties' submissions on Paraguay's Request for an Indication of Provisional Measures, the Court ordered the United States to take all measures at its disposal to halt the execution.

1.2 The United States chose not to do so. The federal Executive deferred to the Governor of Virginia and successfully urged the United States Supreme Court to do the same. Relying on the advice of the United States that the Order was not binding, the Governor went forward with the execution. In a press release issued on the night of the execution, the Governor stated that he had not granted a reprieve in order to eliminate the possibility that this Court's eventual judgment might prevent that execution.

1.3 As a result, the case returns to this Court in a fundamentally different posture than it had at the time Paraguay filed its Application. The United States' violation of the Order has rendered it impossible for the Court to grant Paraguay *restitutio in integrum* in the form of a new trial for Mr. Breard or, in the alternative, reconveyance of the plea offer. Paraguay must therefore seek other, infinitely less adequate forms of reparation.

1.4 In addition, the United States' violation of the Order gives rise to a distinct claim for breach of its obligations under the Vienna Convention. By that claim, Paraguay calls upon the Court to confirm the binding character of the obligation undertaken by a State Party that agrees to submit a dispute to this Court.

1.5 Thus, on the present submissions, Paraguay makes three claims. *First*, Paraguay claims that the United States breached Article 36(1) of the Vienna Convention by denying to both Paraguay and its national their rights of consular notification and access during the course of a criminal proceeding by which Mr. Breard was sentenced to death. Paraguay originally sought *restitutio in integrum* — that is, the restoration of the situation that existed prior to the breach. Given the impossibility of that remedy in light of the execution, Paraguay seeks a declaration and alternative forms of reparation.

1.6 The United States acknowledges the violation of Article 36(1), but contended at the provisional measures hearing that no prejudice to Mr. Breard could be established as a result of the breach of Paraguay's right to provide consular assistance. The United States' position is without merit. Under international law, no prejudice need be shown to engage the responsibility of a State that has breached a treaty obligation. In any event, the record before the Court abounds with evidence of grave prejudice to the rights of Paraguay and its national.

1.7 *Second*, Paraguay claims that the United States breached Article 36(2) of the Vienna Convention by applying the municipal-law doctrine of procedural default to prevent Mr. Breard from seeking relief from his conviction and sentence on the ground of the conceded violation. Specifically, the United States courts held that, because Mr. Breard had not raised his Vienna Convention claim during the course of his trial or post-conviction proceedings in state court, he could not raise the claim in his federal *habeas corpus* petition.

1.8 It is uncontested, however, that the reason that Mr. Breard did not raise a Vienna Convention claim prior to the federal *habeas* proceeding is that, because of the United States' breach, he had been unaware of his rights under the Convention prior to that time. Given that the very purpose of the consular notification provisions of Article 36(1) is to ensure that a detained national in the position of Mr. Breard is made aware of his right to contact his consul, the application of the procedural default doctrine to bar Mr. Breard from raising his claim violated Article 36(2). That Article requires municipal laws and regulations to be applied in a manner that allows

"full effect" to be given to "the purposes for which the rights accorded under this Article are intended."

1.9 *Finally*, Paraguay claims that the United States breached a binding Order of this Court when it failed to take the steps necessary to stop the execution of Mr. Breard. The United States contends that, by virtue of restraints imposed by United States law, it could do nothing more to halt the execution than have the Secretary of State request the Governor of Virginia not to go forward. While that contention misstates the plenary power of the federal government in matters of foreign relations and international obligations, it is also wholly irrelevant as a matter of international law. The Governor of Virginia, a responsible official whose acts are attributable to the United States, had full control over whether to carry out the execution, and he determined that it should go forward despite the Court's Order.

1.10 In opposing Paraguay's application to the United States Supreme Court to enforce the Order, the United States advised that court that an indication of provisional measures under Article 41 of this Court's Statute is merely precatory. That position is wrong. Particularly when read in the context of the Statute of the Court, the terms employed, by their ordinary meaning, describe a binding order. The "power to indicate" measures that "ought to be taken" in order to "preserve the respective rights" of the parties can only be understood to carry a corresponding obligation of the parties to comply. Moreover, the object and purpose of Article 41 is to preserve the rights of the parties pending a binding final judgment, and that of the Statute as a whole is to provide for the binding, judicial resolution of disputes. These objects and purposes would be utterly frustrated if the parties retained a right to act prior to the final judgment in a manner that the Court has indicated will prevent it from rendering an effective judgment. Finally, the binding character of provisional measures under Article 41 is confirmed by the general rule that parties to a judicial proceeding must refrain from any step that might prejudice the court's capacity to provide relief. Simply put, the United States' undisputed obligation under Article 94(1) of the United Nations Charter to abide by a judgment of this Court that a new trial be granted Mr. Breard, or the plea offer be reconveyed, cannot be squared with the United States' suggestion that, in the meantime, it

was free decisively to destroy the Court's capacity to provide that relief.

1.11 This Memorial has five further Chapters. In Chapter 2, Paraguay sets forth the facts underlying its three claims. In Chapter 3, it supplies the basis for this Court's jurisdiction over its claims under the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations, as well as under principles of inherent jurisdiction. In Chapter 4, it sets out its claims under Articles 36(1) and 36(2), respectively, of the Vienna Convention. In Chapter 5, it sets out its claim for breach of the Order of Provisional Measures. Finally, in Chapter 6, Paraguay prays for remedies of, first, several specified declarations; second, an order of non-repetition; and third, reparation in the form of both compensation and moral damages.

CHAPTER 2

FACTS

The Arrest and Failure of Notification

2.1 On 1 September 1992, officials of Arlington, Virginia, arrested Angel Francisco Breard on suspicion of murder and attempted rape. Arlington police officers searching Mr. Breard's apartment around the time of arrest found Mr. Breard's Paraguayan passport[1] and were aware that he was a Paraguayan national.[2] However, as the United States has advised this Court, the "'competent authorities'" who arrested Mr. Breard and placed him in custody "did not inform Breard that, as a national of Paraguay, he was entitled to have Paraguay's consul notified of his arrest."[3]

2.2 The competent authorities also did not inform the Paraguayan consular post for the district embracing Arlington,

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1. Affidavit of Armenia Guibi Vda. de Breard (26 Sept. 1998), para. 10, Annex 1.

2. Stipulation, para. 2, *Breard v. Angelone* (E.D. Va. 1996) (No. 3:96CV366), Annex 2; *see also* United States Department of State, *Consular Notification and Access* (1998), pp. 1 & 4 (in the absence of other information, "all federal, state, or local officials who may, in the performance of their official functions, have contact with a foreign national in a situation triggering a requirement to notify the foreign national's consular officials" are to assume that a foreigner is a national of "the country on whose passport or other travel document the foreign national travels"), <http://www.state.gov/global/legal_affairs/ca_notification/ca_prelim.html>, Annex 3; *cf.* United States Department of State, *Foreign Affairs Manual*, 7 FAM § 413.1(a) (1984) (as to United States nationals, "possession of a passport satisfactorily establishes both the identity and the citizenship of the individual"), Annex 4.

3. *Oral Argument, Vienna Convention on Consular Relations (Paraguay v. United States)*, para. 1.4 (statement of David R. Andrews), Annex 5; *see also* Stipulation, para. 2, *Breard v. Angelone* (E.D. Va. 1996) (No. 3:96CV366), Annex 2.

Virginia, of Mr. Breard's arrest.[4] Thus, they did not permit Paraguayan consular officials to avail themselves of their right to provide consular assistance to Mr. Breard upon his request.

The Plea Offer, Trial, Conviction, and Sentence

2.3 Following indictment, Virginia officials offered Mr. Breard a plea bargain in which the prosecution would seek only a life sentence if Mr. Breard would plead guilty.[5]

2.4 A "plea bargain" is an offer to a defendant by a prosecutor of a lesser sentence in return for the defendant's plea of guilty. Plea bargaining spares the public treasury the burden of a trial and the prosecutor the prospect of a failure to convict. The practice is commonplace in the criminal justice system of the United States.[6] Describing the practice as "an essential component of the administration of justice," the United States Supreme Court has encouraged its use.[7]

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4. *See* Affidavit of Jorge G. Prieto (27 Aug. 1996), para. 7, Annex 6; Affidavit of Ceferino Adrian Valdez Peralta (30 Sept. 1998), para. 4, Annex 7; Sra. Breard Aff., para. 7, Annex 1.

5. *See* Petition for Writ of *Habeas Corpus*, *Breard v. Netherland* (E.D. Va. 1996) (No. 3:96CV366), para. 20 and p. 73 (verification by Angel Francisco Breard of facts set forth in petition), Annex 8; Affidavit of Robert L. Tomlinson II & Richard J. McCue (13 June 1995), para. 5, Annex 9; Sra. Breard Aff., para. 4, Annex 1.

6. *See* United Nations, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Mission to the United States*, document E/CN.4/1998/68/Add.3, para. 80.

7. *Santobello v. New York*, 404 U.S. 257, 260 (1971).

2.5 Plea bargains are often offered in capital cases,[8] which are far more costly to prosecute to execution than cases seeking punishment of a term of imprisonment.[9] In the Commonwealth of Virginia, plea bargains were commonly offered in capital cases during the period that included Mr. Breard's arrest and trial, even when the alleged crime involved aggravated circumstances.[10]

2.6 By contrast, Paraguayan law does not permit plea bargaining.[11] Any such agreement between the accused and a prosecutor would be legally void and worthless in a Paraguayan court.[12] The principal means to obtain leniency in sentencing under Paraguayan law would be to confess to and denounce the criminal acts charged and appeal to the mercy of the court.[13]

2.7 Mr. Breard refused to authorize his appointed trial lawyers to accept the plea offer and advised them that he intended to confess the crime to the jury. Under Virginia law, a jury returning a guilty verdict (as it would necessarily do if the defendant confessed) could recommend one of only two sentences: life imprisonment or

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8. *See, e.g.*, Federal Death Penalty Resource Counsel Project, *Federal Death Penalty Prosecutions 1988-1998*, p. 1 (September 1, 1998) (listing 39 federal cases out of total of 116 brought to trial in which capital charges were dropped in exchange for guilty plea).

9. *See* Spangenburg & Walsh, "Capital Punishment or Life Imprisonment? Some Cost Considerations," *Loyola L. Rev.*, Vol. 23 (1989), p. 45; International Committee of Jurists, *Administration of the Death Penalty in the United States* (1996), p. 120 n. 190 (estimating cost of death penalty trial and appeals at approximately US$3 million).

10. Affidavit of William S. Geimer (18 Sept. 1998), para. 4, Annex 12.

11. Affidavit of José Ignacio Gonzalez Macchi (24 Sept. 1998), para. 3, Annex 13.

12. *Ibid.*

13. *Ibid.*, para. 4.

death.[14] Alarmed at this refusal, Mr. Breard's lawyers contemporaneously drafted a memorandum describing the case against him, his unwillingness to accept the plea offer, and their request that he reconsider that decision, and they then had Mr. Breard countersign the memorandum.[15]

2.8 Mr. Breard pleaded not guilty and faced trial in a Virginia state criminal court of first instance. The prosecution presented no witnesses to the alleged crimes and relied instead on physical and circumstantial evidence. At the close of the prosecution's evidence, Mr. Breard waived his right not to incriminate himself by his own testimony, took the witness stand, and confessed to the facts of the crimes charged, asserting that he was under a satanic curse placed upon him by his father-in-law at the time he committed the crime and that he was now acting as a witness to his new religious faith.[16] On 24 June 1993, the jury found Mr. Breard guilty.[17]

2.9 On 25 June 1993, during the penalty phase of its deliberations, the jury sent a note to the presiding judge asking how long a term of imprisonment Mr. Breard would serve prior to eligibility for early release if he were sentenced to life in prison.[18]

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14. Va. Stat. Ann. § 19.2-264.4, Annex 10.

15. Memorandum from Richard J. McCue and Robert Lee Tomlinson II to Angel Breard (15 June 1993), Annex 11.

16. *See* Petition for Writ of *Habeas Corpus*, paras. 21-22, *Breard v. Netherland* (E.D. Va. 1996) (No. 3:96CV366), Annex 8.

17. *Ibid.*, para. 7.

18. Petition for Writ of *Habeas Corpus Ad Subjiciendum*, para. 18, *Breard v. Angelone* (Arl. Cty. Cir. Ct. 28 Apr. 1995) (No. CL 95-526), Annex 14. In United States criminal law, an offender may under certain circumstances be granted a conditional release from imprisonment, referred to as "parole," which allows the offender to serve the remainder of the term outside prison, provided that he or she complies with the terms of the release.

The judge responded that he could not answer the jury's question.[19] The jury then sent out a note with a further question, asking whether they could recommend life in prison without possibility of early release.[20] After the judge declined to allow the jury to make that recommendation, the jury deliberated a further six hours before recommending a death sentence.[21] Under Virginia law, the court may not impose the death penalty unless the jury recommends it.[22]

2.10 On 22 August 1993, the trial court sentenced Mr. Breard to death.[23]

2.11 Mr. Breard's refusal of the plea offer against the advice of court-appointed counsel and his insistence on serving as a witness to his religious faith resulted from his lack of understanding of the significant cultural differences between the Paraguayan and United States legal systems.[24] He was, in particular, entirely unfamiliar with the practice of plea bargaining.[25] Mr. Breard neither understood nor trusted his court-appointed trial counsel.[26] Similarly, trial counsel could not understand or appreciate Mr. Breard's belief that leniency would result from his confession to the jury.

2.12 Had Mr. Breard known about his rights under the Vienna Convention, he would have exercised those rights by seeking

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19. *Ibid.*

20. *Ibid.*, para. 21.

21. *Ibid.*, paras. 21, 23.

22. Va. St. Ann. §19.2-264.4, Annex 10.

23. *See* Petition for Writ of *Habeas Corpus*, para. 8, *Breard v. Netherland* (E.D. Va. 1996) (No. 3:96CV366), Annex 8.

24. *See* Sra. Breard Aff., para. 4, Annex 1.

25. *Ibid.*

26. *Ibid.*, paras. 5-6; Affidavit of Alexander H. Slaughter (5 Oct. 1998), para. 4, Annex 15; Statement of Ricardo Caballero Aquino (1 Oct. 1998), para. 8, Annex 16.

the assistance of the Paraguayan consulate.[27] The Paraguayan consulate, which makes a practice of intervening in every case in which it is notified of the arrest of a Paraguayan national, would, if notified, have assisted Mr. Breard by explaining the differences between the legal systems of Paraguay and the United States.[28] In light of those differences, they would have advised Mr. Breard to accept the plea bargain that the Commonwealth's Attorney had offered on behalf of Virginia.[29] Had Mr. Breard been so advised by Paraguay's consul, he would have accepted the plea offer, avoided trial, and eliminated the prospect of receiving a capital sentence.[30]

Appellate and Habeas Proceedings in the Virginia Courts

2.13 Mr. Breard appealed his conviction and sentence to the Virginia Supreme Court, which affirmed, and the United States Supreme Court denied his petition to issue a discretionary writ of *certiorari* to review that judgment.[31]

2.14 Mr. Breard then filed a petition for a writ of *habeas corpus* in the Circuit Court of Arlington County. Among the claims Mr. Breard raised in his *habeas* petition was that his appointed counsel had not effectively assisted him in the criminal proceedings in the Virginia court.[32] To counter that claim, Virginia officials

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27. Caballero Stmt., paras. 9-10, Annex 16; Sra. Breard Aff., para. 9, Annex 1.

28. Valdez Aff., paras. 5-6, Annex 7; Prieto Aff., para. 10, Annex 6.

29. Valdez Aff., para. 8, Annex 7.

30. Sra. Breard Aff., para. 9, Annex 1; Caballero Stmt., para. 10, Annex 16.

31. *Breard v. Commonwealth*, 248 Va. 68, 445 S.E.2d 670 (1994); *Breard v. Virginia*, 513 U.S. 971, 115 S. Ct. 442 (1994) (mem.).

32. Petition for Writ of *Habeas Corpus Ad Subjiciendum*, para. 192 *et seq.*, (continued...)

procured from Mr. Breard's trial counsel an affidavit swearing that, among other things, they had secured for Mr. Breard a clear offer from the prosecutor that he would receive a penalty of life in prison in exchange for a confession to the crimes charged.[33] Virginia officials relied on this affidavit in successfully moving the Arlington County Circuit Court to dismiss Mr. Breard's petition.[34] That dismissal was affirmed by the Virginia appellate court.[35]

2.15 Throughout these proceedings, Mr. Breard remained uninformed of his right to consult the Paraguayan consul, and no Paraguayan official participated therein.

Mr. Breard's Habeas Proceeding in the Federal Courts

2.16 In April 1996, Paraguayan officials learned for the first time of Mr. Breard's imprisonment and impending execution in the United States and immediately began rendering legal and other assistance to Mr. Breard.[36] On 30 August 1996, with the assistance of Paraguayan consular officials and new, court-appointed legal counsel, Mr. Breard took the final step available to him for challenging his conviction and filed a petition for writ of *habeas corpus* in the United States District Court for the Eastern District of

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32. (...continued)
Breard v. Angelone (Arl. Cty. Cir. Ct. 28 Apr. 1995) (No. CL 95-526), Annex 14.

33. *See* Tomlinson/McCue Aff., para. 5, Annex 9.

34. Motion to Dismiss, p. 11, *Breard v. Angelone* (Arl. Cty. Cir. Ct. 14 June 1995) (No. CL 95-526), Annex 17.

35. Petition for *Writ of Habeas Corpus*, para. 11, *Breard v. Netherland* (E.D. Va. 1996) (No. 3:96CV366), Annex 8.

36. Caballero Stmt., para. 3, Annex 16; Valdez Aff., para. 4, Annex 7.

Virginia, a federal court of first instance.[37] Having finally been apprised of his rights under the Vienna Convention, Mr. Breard claimed for the first time that Virginia officials had violated those rights and sought relief from his conviction and sentence on that ground, among others.[38]

2.17 Upon the involvement of Paraguayan consular officials in his federal *habeas corpus* proceedings, Mr. Breard began to cooperate in his own defense.[39] Paraguayan consular officials understood Mr. Breard's cultural perspective, explained his choices in the United States legal system in a way that he could understand, and fostered trust that had previously been lacking between Mr. Breard and his lawyers.[40]

Paraguay's Action in the Federal Courts

2.18 On 16 September 1996, the Republic of Paraguay filed a civil action in the United States District Court for the Eastern District of Virginia, alleging violations of its own rights under both the Vienna Convention and a treaty of friendship, commerce, and navigation between Paraguay and the United States.[41] Paraguay sought, among other relief, *vacatur* of Mr. Breard's conviction and sentence and an order that any future proceedings against Mr. Breard

37. Petition for Writ of Habeas Corpus, *Breard v. Netherland* (E.D. Va. 1996) (No. 3:96CV366), Annex 8.

38. *Ibid.*, paras. 23-60.

39. *See* Caballero Stmt., paras. 6-10, Annex 16; Slaughter Aff., para. 4, Annex 14.

40. *Ibid.*

41. *Paraguay v. Allen*, 949 F. Supp. 1269, 1271-1272 (E.D. Va. 1996).

be conducted in accordance with the terms of the Vienna Convention.[42]

Judgments of the District Court and the Court of Appeals in the Habeas Proceeding and Paraguay's Action

2.19 On 27 November 1996, the federal district court rejected Mr. Breard's claim under the Vienna Convention. Relying on a municipal law doctrine of "procedural default," the court held that, because Mr. Breard had not raised a claim under the Vienna Convention in his state proceedings, he could not raise the claim in the federal *habeas* proceeding.[43] On 22 January 1998, the United States Court of Appeals for the Fourth Circuit (the intermediate federal appellate court) affirmed the judgment.[44]

2.20 On 27 November 1996, the federal district court also dismissed Paraguay's complaint. The court held that because Virginia officials were by then permitting Paraguayan consular officials access to Mr. Breard, the injunction Paraguay sought against the execution was the kind of retrospective relief that a federal court did not have jurisdiction to order against state officials.[45] On 22 January 1998, the same day it rendered its judgment in Mr. Breard's *habeas* proceeding, the Court of Appeals also affirmed in Paraguay's case.[46]

2.21 Taken together, the judgments of the Court of Appeals meant that, while it was Virginia officials who had violated the Convention by failing to provide the required notice, at the time Mr. Breard learned of his right and Paraguay learned of his detention

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42. *Ibid.*, p. 1272.

43. *Breard v. Netherland*, 949 F. Supp. 1255, 1263 (E.D. Va. 1996), Annex 18.

44. *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998), Annex 19.

45. *Paraguay v. Allen*, 949 F. Supp. 1269 (E.D. Va. 1996).

46. *Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998).

it was already too late for either of these intended beneficiaries of the required notice to raise the claim in the United States courts.

Setting of the Execution Date and Commencement of Proceedings in the United States Supreme Court

2.22 On 24 February 1998, Paraguay filed a petition for writ of *certiorari* in the United States Supreme Court to review the judgment of the Court of Appeals.[47]

2.23 On 25 February 1998, the Virginia court that had sentenced Mr. Breard set an execution date of 14 April 1998.[48]

2.24 On 11 March 1998, Mr. Breard also filed a *certiorari* petition in the Supreme Court.[49]

2.25 On 23 March 1998, Mr. Breard applied to the Court of Appeals for a stay of his execution, and on 30 March 1998, filed a similar application to the Supreme Court.[50] On 24 March 1998, Paraguay applied to the Court of Appeals for a stay of or injunction against Mr. Breard's execution, and on 1 April 1998, filed a similar application to the Supreme Court.[51]

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47. Petition for Writ of Certiorari, *Paraguay v. Gilmore*, __ U.S. __, 118 S. Ct. 1352 (24 Feb. 1998) (Nos. CR 92-1467, 1664-1668) (No. 97-1390).

48. Order, *Commonwealth v. Breard* (Arl. Cty. Cir. Ct. 25 Feb. 1998) (Nos. CR 92-1467, 1664-1668).

49. Petition for Writ of Certiorari, *Breard v. Greene*, __ U.S. __, 118 S. Ct. 1352 (11 Mar. 1998) (No. 97-8214).

50. Application for Stay of Execution, *Breard v. Greene*, 134 F.3d 615 (4th Cir. 23 Mar. 1998) (No. 96-25); Application for Stay of Execution, *Breard v. Greene*, __ U.S. __, 118 S. Ct. 1352 (30 Mar. 1998) (No. 97-8214).

51. Application for Stay of or Injunction Against Execution Pending

(continued...)

Diplomatic Negotiations

2.26 In addition to pursuing its claim in the courts of the United States, Paraguay also engaged in diplomatic discussions in an attempt to gain the assistance of the United States in remedying the breach of the Vienna Convention and the treaty of friendship, navigation, and commerce.

2.27 By letter dated 10 December 1996, the Ambassador of Paraguay sought the good offices of the United States Department of State "in order that a new trial may be granted Paraguayan citizen Angel Breard within the framework of constitutional guarantees for proper defense against a criminal accusation as well as the strict fulfillment of the stipulations of international treaties covering acts of such nature."[52]

2.28 Having received no response, Paraguay repeated its request in a letter dated 3 June 1997, the day before oral argument in the Court of Appeals.[53]

2.29 In a response bearing the same date, the United States Department of State expressed disagreement with Paraguay's legal position and offered no assistance to Paraguay in exercising its rights

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51. (...continued)
Disposition of Petition for Writ of Certiorari, *Paraguay v. Gilmore*, 134 F.3d 622 (4th Cir. 24 Mar. 1998) (No. 96-2770); Application for Stay of or Injunction Against Execution Pending Disposition of Petition for Writ of Certiorari, *Paraguay v. Gilmore*, __ U.S. __, 118 S. Ct. 1352 (1 Apr. 1998) (Nos. 97-1390, A-738).

52. Letter from His Excellency Jorge J. Prieto, Ambassador of Paraguay, to His Excellency Jeffrey Davidow, Assistant Secretary of State for Inter-American Affairs, United States Department of State (10 Dec. 1996).

53. Letter from His Excellency Jorge J. Prieto, Ambassador of Paraguay, to His Excellency Jeffrey Davidow, Assistant Secretary of State for Inter-American Affairs, United States Department of State (3 June 1997).

under the treaties.[54] The United States confirmed this position in a letter dated 7 July 1997.[55]

2.30 During the week prior to instituting proceedings in this Court, the Government of Paraguay engaged in further diplomatic discussions with the Government of the United States and forbore from instituting proceedings in consideration of those discussions. The diplomatic negotiations failed when the United States declined to provide Paraguay assurances that it would stop Mr. Breard's execution.[56]

Paraguay's Application to the Court and Request for Provisional Measures of Protection

2.31 On 3 April 1998, Paraguay filed in this Court its Application Instituting Proceedings and a Request for Provisional Measures of Protection. On 7 April 1998, the Court held a hearing on Paraguay's Request.

2.32 On 9 April 1998, two days after the hearing, the Court issued a unanimous Order.[57] The Court stated that although it "will not order interim measures in the absence of 'irreparable prejudice

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54. Letter from James H. Thessin, Deputy Legal Adviser, United States Department of State, to His Excellency Jorge J. Prieto, Ambassador of Paraguay (3 June 1997).

55. Letter from James H. Thessin, Deputy Legal Adviser, United States Department of State, to His Excellency Jorge J. Prieto, Ambassador of Paraguay (7 July 1997).

56. *See Oral Argument, Case Concerning Vienna Convention on Consular Relations (Paraguay v. United States), Provisional Measures*, para. 2.26 (statement of Catherine Brown); *ibid.*, para. 4.19, (statement of Michael J. Matheson), Annex 5.

57. *Vienna Convention on Consular Relations, (Paraguay v. United States), Provisional Measures, Order of 9 April 1998.*

. . . to rights which are the subject under dispute,'"[58] the execution of Mr. Breard as scheduled "would render it impossible for the Court to order the relief that Paraguay seeks and thus cause irreparable harm to the rights it claims."[59] Accordingly, the Court issued an order that the United States "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings . . . ."[60]

2.33 In the Order on the Request, the Court also stated that it would take steps to "to ensure that any decision on the merits be reached with all possible expedition." Consistent with that objective, the Court issued a separate Order on the same day setting an expedited schedule for written submissions.[61]

Response of the United States to the Provisional Measures Order

2.34 By letter dated Sunday, 5 April 1998, and submitted the next day, Paraguay advised the United States Supreme Court of its filing in this Court and of the hearing scheduled for 7 April.[62] On 8 April, the Supreme Court issued an order requesting the United States to submit its views on the petitions for *certiorari* filed by Mr. Breard and Paraguay by 17.00 hours, 13 April, the day before the

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58. *Ibid.*, para. 36 (citations omitted) (ellipsis in original).

59. *Ibid.*, para. 37.

60. *Ibid.*, para. 41(I).

61. *Vienna Convention on Consular Relations, (Paraguay v. United States), Time Limits, Order of 9 April 1998.*

62. Letter from Donald Francis Donovan, Counsel for the Republic of Paraguay, to William K. Suter, Clerk, Supreme Court of the United States (5 Apr. 1998).

execution was scheduled to be carried out.[63] On 9 April, the day of the Order, the United States submitted a copy to the Supreme Court.[64]

2.35 On 10 April 1998, Mr. Breard filed an original petition to the Supreme Court for a writ of *habeas corpus* and a supplemental application for a stay of execution, both based on this Court's Order from the previous day.[65]

2.36 On the same day, Paraguay also submitted a supplemental application for a stay of or injunction against the execution on the additional ground of this Court's Order, urging the Court to give effect to the Order as a matter of treaty obligation and comity.[66]

2.37 On Monday, 13 April 1998, Paraguay moved the Supreme Court for leave to file an original action requesting the Court to enjoin the execution on the ground of this Court's Order, reiterating that it should enforce the Order as a matter of treaty obligation and comity.[67]

2.38 Also on that day, Paraguay wrote to the Solicitor General of the United States (who represents the United States before

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63. Order, *In re Angel Francisco Breard*, __ U.S. __, 118 S. Ct. 1352 (8 Apr. 1998) (Nos. 97-8214, A-732).

64. Letter from Seth P. Waxman, Solicitor General, Department of Justice, to William K. Suter, Clerk, Supreme Court of the United States (9 Apr. 1998).

65. *In re Angel Francisco Breard*, __ U.S. __, 118 S. Ct. 1352 (10 Apr. 1998) (Nos. 97-8660, A-767); Supplemental Brief in Support of Application for a Stay of Execution, *Breard v. Greene*, __ U.S. __, 118 S. Ct. 1352 (10 Apr. 1998) (No. 97-8214).

66. Supplemental Application for Stay of or Injunction Against Execution, *Paraguay v. Gilmore*, __ U.S. __, 118 S. Ct. 1352 (10 Apr. 1998) (Nos. 97-1390, A-738).

67. *Paraguay v. Gilmore*, __ U.S. __, 118 S. Ct. 1352 (1998) (Nos. 125 Orig., A-771).

the Supreme Court) and the Legal Advisor to the Department of State (who, as Agent, represents the United States before this Court) to call on the United States to fulfill its obligations pursuant to the Provisional Measures Order.[68]

2.39 Later that day, at or about 17.00 hours, the United States took two separate but coordinated actions in response to the Provisional Measures Order.[69]

2.40 In response to the Supreme Court's invitation to the United States to express its views, the Solicitor General of the United States, joined by the Legal Advisor, submitted a brief to the Supreme Court arguing that this Court's Order was "precatory rather than mandatory" and urging the court to deny each of Mr. Breard's and Paraguay's pending requests for relief from the execution.[70] The United States advised the court that, while "[t]his case . . . does not raise any questions concerning the ability of the United States to sue in order to enforce compliance with the Vienna Convention,"[71] the means available to stop the execution "include[d] only persuasion [of

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68. Letter from Donald Francis Donovan, Counsel to the Republic of Paraguay, to Seth P. Waxman, Solicitor General, United States Department of Justice, and David R. Andrews, Legal Advisor, United States Department of State (13 Apr. 1998), Annex 20.

69. *See* State Department Regular Briefing, 15 Apr. 1998, *available in* LEXIS, Executive Branch Library, Federal News Service File (James Rubin, briefer) ("For those of you who seemed to have misunderstood this, the United States acted as one. The Department of Justice brief before the Supreme Court was signed by the legal advisor of the State Department . . . . There is no disagreement between the State Department and the Justice Department.").

70. *See* Brief for the United States as *Amicus Curiae*, p. 51, *Breard v. Greene*, __ U.S. __, 118 S. Ct. 1352 (1998), Annex 21.

71. *Ibid.*, p. 15 n. 3 (citing *United States v. Arlington County*, 669 F.2d 925 (4th Cir.), *cert. denied*, 459 U.S. 801 (1982)).

the Governor of Virginia] and not legal compulsion through the judicial system."[72]

2.41 At the same time, Secretary of State Madeleine K. Albright wrote a letter to the Governor of the Commonwealth of Virginia, James S. Gilmore III. The letter advised the Governor that this Court's Order was "non-binding," but requested that the Governor grant a reprieve of Mr. Breard's execution.[73] The Secretary's letter was appended to the brief of the United States to the Supreme Court.[74]

2.42 On 14 April 1998, at approximately 03.00 hours, Paraguay submitted a reply to the Solicitor General's brief, again urging the Supreme Court to give effect to the Provisional Measures Order.[75]

2.43 At approximately 20.00 hours, the Supreme Court issued a *per curiam* decision denying all the pending requests for relief.[76]

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72. *Ibid.*, p. 51. *See also* State Department Regular Briefing, 15 Apr. 1998, *available in* LEXIS, Executive Branch Library, Federal News Service File (James Rubin, briefer) ("Well, we believe we did take the [International Court of Justice's] request seriously, and we believe we found the right balance between making the case before the Supreme Court that there was no requirement to stay the execution and [Secretary of State Albright's] writing this letter to the governor requesting such a stay of execution.").

73. Letter from Madeleine K. Albright, Secretary of State of the United States, to James S. Gilmore III, Governor, Commonwealth of Virginia (13 Apr. 1998), Annex 22.

74. *See* Brief for the United States as *Amicus Curiae*, *op. cit.*

75. Reply to the Brief for the United States as Amicus Curiae, *Paraguay v. Gilmore*, __ U.S. __, 118 S. Ct. 1352 (14 Apr. 1998) (Nos. 97-1390, A-738).

76. *Breard v. Greene*, __ U.S. __, 118 S. Ct. 1352 (1998), Annex 23.

2.44 Immediately upon learning of the decision, Mr. Breard and Paraguay each filed a new complaint in the United States District Court for the Eastern District of Virginia asking that the court give effect to the Provisional Measures Order; each also sought emergency relief to stay or enjoin the then-imminent execution.[77] At about 21.00 hours, after a brief contested hearing, the district court denied relief.

2.45 Both Paraguay and Breard took emergency appeals to the United States Court of Appeals for the Fourth Circuit, which affirmed the district court's denials of relief.

2.46 Shortly after 22.00 hours, the Governor announced that he would not grant a reprieve.[78] He first explained that "[t]he U.S. Department of Justice, together with the Virginia Attorney General, [made] a compelling case that the International Court of Justice [had] no authority to interfere" with Virginia's criminal justice system. As a further reason for refusing a reprieve, the Governor stated that, "[s]hould the International Court resolve this matter in Paraguay's favor, it would be difficult, having delayed the execution so that the International Court could consider the case, to then carry-out the jury's sentence despite the ruling [of] the International Court."[79]

2.47 Mr. Breard's execution by lethal injection was commenced at approximately 22.30 and completed at approximately 22.39 hours.[80]

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77. Complaint, *Breard v. Reno* (E.D. Va. 14 Apr. 1998) (No. 3:98CV226); Complaint, *Paraguay v. Gilmore* (E.D. Va. 14 Apr. 1998) (No. 3:98CV227), *voluntarily dism'd without prejudice* (27 Apr. 1998).

78. Statement by Governor Jim Gilmore Concerning the Execution of Angel Breard (14 Apr. 1998), Annex 24.

79. *Ibid.*

80. Affidavit of Nancy Huerta (5 Oct. 1998), paras. 11-12, Annex 25.

Post-Execution Letters

2.48 The Provisional Measures Order required the United States to "inform the Court of all Measures which it has taken in implementation of this Order."[81]

2.49 On 15 April 1998, the day after the execution, the United States transmitted a letter to this Court advising the Court of that fact. The United States further advised that it had taken the Order "seriously into account" and had taken "all measures lawfully at its disposal" to comply with the Court's Order.[82]

2.50 By letter dated 28 April 1998, Paraguay took issue with that assertion.[83]

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81. *Case Concerning the Vienna Convention on Consular Relation, (Paraguay v. United States), Provisional Measures, Order of 9 April 1998*, para. 41(II).

82. Letter from David R. Andrews, Agent of the United States of America, to His Excellency Eduardo Valencia-Ospina, Registrar, International Court of Justice (15 Apr. 1998) (citation and internal quotation marks omitted), Annex 26.

83. Letter from His Excellency Manuel María Cáceres, Agent of Paraguay, to His Excellency Eduardo Valencia-Ospina, Registrar, International Court of Justice (28 Apr. 1998), Annex 27.

CHAPTER 3

THE COURT HAS JURISDICTION OVER PARAGUAY'S CLAIMS

3.1 At the hearing on Paraguay's request for provisional measures, the United States challenged the Court's jurisdiction to hear Paraguay's claims. Article 36(6) of the Statute provides that "[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." The Court has also held that, even apart from Article 36(6), "[t]he judicial character of the Court and rule[s] of general international law . . . are sufficient to establish that the Court is competent to adjudicate on its own jurisdiction . . . ."[84]

3.2 The Court is plainly competent, therefore, to determine its jurisdiction to hear Paraguay's claims. It is also plainly competent to hear each of Paraguay's claims.

I.

The Optional Protocol Gives this Court Jurisdiction over Any Dispute Arising out of the Application or Interpretation of the Convention

3.3 Paraguay and the United States are both members of the United Nations and, therefore, parties to the Statute of this Court.[85] The Statute gives this Court "jurisdiction . . . [in] all matters specifically provided for . . . in treaties and conventions in force."[86]

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84. *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 120.

85. U.N. Charter, art. 93.

86. I.C.J. Statute, art. 36(1).

3.4 Paraguay and the United States are also parties to the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations (the "Optional Protocol").[87] In the preamble to the Optional Protocol, emphasis supplied, the States Parties

> [e]xpress[ed] their wish to resort in *all matters* concerning them *in respect of any* dispute *arising out of* the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has been agreed upon by the parties within a reasonable period . . . .

Accordingly, by Article I, emphasis supplied, they agreed that

> [d]isputes *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 an application made by any party to the dispute being a Party to the present Protocol . . . .

3.5 The Court need look no further than the ordinary meaning of the text of the Optional Protocol, including its preamble, to determine the scope of its jurisdiction. As the United States has previously advised the Court, Article I of the Optional Protocol is a "model compromissory clause, providing . . . in the clearest manner for the compulsory jurisdiction of the Court over *any* dispute *arising out of* the interpretation or application of the Vienna Convention[] . . . ."[88] "The clarity and precision of Article I" leave no doubt of the broad scope of disputes that the parties intended to bring within the

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87. Optional Protocol Concerning the Compulsory Settlement of Disputes, accompanying the Vienna Convention on Consular Relations, 24 April 1963, 596 U.N.T.S. 261, 21 U.S.T. 77.

88. *Memorial of the United States, United States Diplomatic and Consular Staff in Tehran, I.C.J. Pleadings 1980*, p. 142 (internal quotations omitted) (emphasis added); *see ibid.*, pp. 142-44.

jurisdiction of this Court: "any dispute" arising from the Convention.[89]

II.

The Court Has Jurisdiction Over the Dispute Arising From the United States' Breach of Article 36(1)

3.6 Paraguay's first claim is that the United States violated the Vienna Convention by failing to provide its national Angel Francisco Breard the notification required by Article 36(1). It would be hard to state a claim that more squarely "aris[es] out of the interpretation or application of the Convention."

3.7 Nevertheless, at the hearing on provisional measures, the United States contended that, because it had conceded that it had breached its obligation to Paraguay under Article 36(1) in the case of Mr. Breard, Paraguay's Application raised no "dispute" within the meaning of the Optional Protocol.

3.8 In the *Tehran Hostages Case*, the United States addressed, and peremptorily dismissed, a virtually identical argument. There, the United States anticipated the argument that because Iran's conduct so manifestly lacked legal justification, there was no dispute for the Court to resolve.[90]

3.9 The United States characterized such an argument as "specious." The United States explained that

> the sum and substance of every case brought to the Court under the compromissory clause of a treaty is the claim that the Respondent's conduct violates its obligations under that treaty. It would be anomalous to hold that the Court has jurisdiction where there is

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89. *Ibid.*, p. 142 n. 2.

90. *Oral Argument, United States Diplomatic and Consular Staff in Tehran, I.C.J. Pleadings 1980*, p. 279 (statement of Stephen M. Schwebel).

> an arguable claim that a treaty has been violated but lacks jurisdiction where there is a manifestly well-founded claim that the same treaty has been violated. Such a contention has no support in the jurisprudence or traditions of this Court, or in the terms of the Optional Protocols. Indeed, any such rule would provide an incentive for States to flout their treaty obligations and to avoid offering any justification for their conduct in order to defeat the Court's jurisdiction.[91]

Equally here, the United States' candid concession that Paraguay's rights under Article 36(1) have been violated cannot defeat the jurisdiction to which the United States has consented.

3.10 Moreover, the United States' concession plainly cannot defeat the Court's jurisdiction where, as here, there remains a fundamental dispute over the remedy owed. A dispute is "a disagreement on a point of law or fact, a conflict of legal views or interests between parties."[92] As the hearing on provisional measures demonstrated, the parties here disagree about, among other things, (a) whether the Vienna Convention affords a remedy in the nature of *vacatur* of a criminal conviction; (b) whether prejudice is a prerequisite to any such remedy; (c) whether the remedies available for a violation of the Convention must be found within the four corners of the Convention itself, as the United States has asserted, or can instead be identified by resort to general principles of state responsibility and remedies; and (d) whether Paraguay is entitled to any remedy beyond the bare expression of regret relied upon by the United States.

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91. *Ibid.*

92. *East Timor, Judgment, I.C.J. Reports 1995*, p. 99; *see also Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 27; *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11; *see also* I.C.J. Statute, art. 36(2) (listing among acceptable disputes for the Court those concerning "the nature or extent of the reparation to be made for the breach of an international obligation").

3.11 At a minimum, "there exists a dispute as to whether the relief sought by Paraguay is a remedy available under the Vienna Convention, in particular in relation to Articles 5 and 36 thereof."[93] This Court has jurisdiction over that dispute.

III.

The Court Has Jurisdiction Over the Dispute Arising From the United States' Breach of Article 36(2)

3.12 Paraguay's second claim is that the United States violated Article 36(2) of the Convention by applying a municipal-law doctrine of procedural default to bar Mr. Breard from raising a claim under the Vienna Convention after he learned that he had been deprived of his rights to consular notification and access under the Convention. According to Paraguay, application of the doctrine in these circumstances violates the command of Article 36(2) that "the laws and regulations of the receiving State . . . must enable full effect to be given to the purposes for which the rights accorded under [Article 36] are intended."

3.13 The federal courts of the United States applied the doctrine of procedural default to bar Mr. Breard's claim.[94] The United States advised the Supreme Court that the doctrine applied.[95] Thus, there is a dispute between the parties over the application of that doctrine in light of Article 36(2).

3.14 Because this claim, too, arises out of the interpretation and application of the Convention, the Court has jurisdiction to hear it.

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93. *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998*, para. 31.

94. *Breard v. Greene*, __ U.S. __, 118 S. Ct. 1352, 1354-55 (1998) (*per curiam*).

95. Brief of the United States as *Amicus Curiae*, pp. 37-38, 41-45, *Breard v. Greene*, __ U.S. __, 118 S. Ct. 1352 (1998).

IV.

The Court Has Jurisdiction Over the Dispute Arising From the United States' Breach of the Provisional Measures Order

3.15 Paraguay's third claim is that the United States has violated the Order of Provisional Measures.

3.16 In its brief of 13 April 1998 to the United States Supreme Court, the United States contended that the Order was merely precatory. In its letter of 15 April 1998 to this Court, the United States contended that because, in its view, it had taken the Order seriously into account, and because the Secretary of State had requested the Governor to stay the execution, it had complied with the Order.

3.17 Paraguay takes issue with these statements. It contends that (a) because responsible officials whose conduct is attributable to the United States could have halted the execution, but did not, the United States violated the Order and (b) the Order was binding.

3.18 There is thus a dispute over the United States' compliance with the Order of Provisional Measures entered in this proceeding. The Court has jurisdiction over that dispute both under the Optional Protocol and as a matter of its inherent jurisdiction.

3.19 *First*, the Court has jurisdiction under the Optional Protocol. Paraguay came to this Court to enforce its rights under the Vienna Convention. The Court issued the Order of Provisional Measures in order to preserve those rights pending its resolution of the merits. The Order therefore constituted the Court's provisional "interpretation and application" of the Convention. The parties' dispute whether the United States complied with the Order is therefore a dispute "arising out of the interpretation or application" of the Convention.

3.20 In the *Fisheries Jurisdiction Case*, the Court had issued orders indicating provisional measures that, among other things,

called upon Iceland to take no action to aggravate or extend the dispute over fishing rights in waters surrounding the island.[96] Germany claimed that, after the orders had issued but prior to its submission of its memorial on the merits, Icelandic coastal patrol boats had forcibly interfered with German registered fishing vessels.[97] In its memorial, Germany requested a declaration that Iceland's post-application actions were unlawful under principles of international law.[98]

3.21 The Court held that it had jurisdiction to consider the claim:

> The matter raised . . . is part of the controversy between the Parties, and constitutes a dispute relating to Iceland's extension of fisheries jurisdiction. The submission is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of th[e] Application. As such it falls within the scope of the Court's jurisdiction defined in the compromissory clause [of the jurisdiction-conferring instrument].[99]

So too here, Paraguay's claim arising from the United States' failure to take all measures at its disposal to prevent the execution of Mr. Breard "is part of the controversy between the Parties, and constitutes a dispute relating" to the United States' adherence to the Vienna Convention.

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96. *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 30; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Protection, Order of 12 July 1973, I.C.J. Reports 1973*, p. 313.

97. *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 179.

98. *Ibid.*

99. *Ibid.*, p. 203.

3.22 Reference to the preamble of the Optional Protocol removes any conceivable doubt about the Court's jurisdiction over this claim.[100] The preamble states the parties' "wish to resort in *all matters* concerning them *in respect of any* dispute *arising out of* the interpretation or application of the Convention." Even if the dispute over the Order did not constitute a dispute arising out of the interpretation or application of the Convention, it would surely qualify as a "matter concerning" Paraguay and the United States "in respect of" their original dispute over the Convention, which the Order was intended to freeze.

3.23 *Second*, the Court has jurisdiction over the parties' dispute with respect to the Order as a matter of its inherent jurisdiction.

3.24 The Court has long recognized that there are attributes of its authority that inhere in its status as a court of justice or court of law. In the *Nuclear Tests Cases*, the Court found that it

> possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court, and to "maintain its judicial character." Such inherent jurisdiction . . . derives from the mere existence of the Court as a judicial organ established by the consent of States,

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100. *See* Vienna Convention on the Interpretation of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 31(2); *see also United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, pp. 25-26 (relying on preamble in construing Articles II and III of Optional Protocol).

> and is conferred upon it in order that its basic judicial functions may be safeguarded.[101]

The Court's inherent jurisdiction to safeguard "its basic judicial functions" must encompass the authority to determine when a party has complied with an order of the Court and what consequences should flow from noncompliance.[102] Indeed, if the Court has jurisdiction to determine compliance with more mundane orders, such as procedural rulings, surely it has jurisdiction to determine

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101. *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, pp. 259-260 (quoting *Northern Cameroons, Judgment, I.C.J. Reports 1963*, pp. 15, 29-30); *see also Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 103 (separate opinion of Judge Fitzmaurice) ("[a]lthough much (though not all) of this incidental jurisdiction is specifically provided for in the Court's Statute, or in Rules of Court which the Statute empowers the Court to make, it is really an inherent jurisdiction, the power to exercise which is a necessary condition of the Court — or of any court of law — being able to function at all"); Elihu Lauterpacht, "'Partial' Judgments and the Inherent Jurisdiction of the International Court of Justice," in *Fifty Years of the International Court Justice: Essays in Honor of Sir Robert Jennings* (Vaughan Lowe & Malgosia Fitzmaurice, eds., 1996), p. 477 ("it would no doubt be the case that, even in the absence of statutory provision, the Court would be entitled to deal with [among other things, interim protection, preliminary objections, counter-claims, intervention] . . . in the exercise of its 'inherent' jurisdiction . . .").

102. Bin Cheng, *General Principles of International Law: As Applied by International Courts and Tribunals* (1953), p. 266 ("[w]here a tribunal has jurisdiction in a particular matter, it is also competent with regard to all relevant incidental questions, subject to express provision to the contrary"); *cf.* Shabtai Rosenne, *The Law and Practice of the International Court of Justice, 1920-1996*, Vol. II (1997), p. 600 ("[w]here the inherent jurisdiction relates to matters not specifically regulated in the Statute or in the Rules of the Court, it may be inferred to have been assumed by the Court, in its designated capacity of judicial organ, applying to a concrete problem general principles of international procedural law not specifically mentioned in the Statute or the Rules").

compliance with a matter of the import of an indication of provisional measures.[103]

103. Shabtai Rosenne, *op. cit.*, Vol. II, p. 602 ("In addition to 'mainline' or 'merits' jurisdiction and the related incidental jurisdiction, the Court possesses inherent jurisdiction to control all aspects of the proceedings themselves."); Elihu Lauterpacht, *op. cit.*, p. 475 ("the Court is the master of its own procedure . . . . it is for the Court to decide . . . in what manner a case should be dealt with").

CHAPTER 4

THE UNITED STATES VIOLATED THE VIENNA CONVENTION ON CONSULAR RELATIONS

4.1 The record in this case establishes that the United States violated Paraguay's rights under the Vienna Convention in two respects. *First*, the United States undisputedly failed to provide Mr. Breard the notice that the Convention obliged it to provide. The United States thereby deprived Paraguay of the right to provide consular assistance to its national guaranteed by Articles 5 and 36 of the Convention. *Second*, by relying on the municipal-law doctrine of procedural default to deny Mr. Breard any opportunity to receive consular assistance before and during the trial on the charges against him, the United States violated its obligations under Article 36(2) of the Convention and well-established customary international law.

4.2 As the preamble to the Vienna Convention suggests, the rights at issue in this case have been a feature of international law from its inception, for "[c]onsular relations have been established between peoples since ancient times." An early form of consular assistance was recorded in the ancient Greek city states, where foreign merchants and seamen sought the protection of influential local nationals designated to protect their interests and act on their behalf before local tribunals and assemblies.[104] This practice evolved into the selection of magistrates from within the expatriate

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104. Luke Lee, *Consular Law and Practice* (1991), p. 4; Charles Rousseau, *Droit international public*, Tome IV (1980), p. 212 ("L'institution consulaire remonte à l'Antiquité."); Mohammed Ali Ahmad, *L'institution consulaire et le droit international* (1973), p. 10; Santiago Torres Bernardez, "La Conférence des Nations Unies sur les Relations Consulaires," *Annuaire français de droit international* (1963), p. 83 ("L'institution des consulats, beaucoup plus vielle que celle des missions diplomatiques permanentes, est née des besoins du commerce international et des rapports économiques entre les peuples et des nations. . . . [Elle] trouve des précurseurs dans l'antiquité . . .").

community to preside over the adjudication of its disputes, applying its own laws.[105]

4.3 The direct antecedent to modern consular practice developed in the late Middle Ages, when States began sending envoys known as "consuls" to other States.[106] These consuls performed certain diplomatic functions in addition to exercising civil and criminal jurisdiction over the nationals of the sending State in the receiving State.[107]

4.4 Beginning in the 17th century, consular functions evolved to the modern model.[108] They remained closely focused, however, on the protection of the interests, commercial and otherwise, of their nationals.[109] By this century, the consul's right to protect nationals of the sending State and assist them before the competent authorities

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105. Lee, *op. cit.*, p. 5; Ahmad, *op. cit.*, pp. 9-12; Rousseau, *op. cit.*, p. 212.

106. Lee, *op. cit.*, p. 6; Sir Robert Jennings and Sir Arthur Watts, eds., *Oppenheim's International Law* (9th ed. 1991), p. 1132; Rousseau, *op. cit.*, p. 212; Ahmad, *op. cit.*, p. 13.

107. Lee, *op. cit.*, p. 6; Ahmad, *op. cit.*, pp. 12-13.

108. This evolution resulted from a combination of historical developments. First, as the newly centralized nation-states in Western Europe consolidated their powers, the consul's plenary jurisdiction over foreign nationals ceded to that of the receiving States, with certain exceptions. Oppenheim, *op. cit.*, pp. 1132-1133; Ahmad, *op. cit.*, p. 13; Rousseau, *op. cit.*, p. 213. Second, the establishment of permanent diplomatic missions limited the political duties of consuls. Lee, *op. cit.*, p. 6; Oppenheim, *op. cit.*, p. 1133.

109. Rousseau, *op. cit.*, p. 213; Oppenheim, *op. cit.*, p. 1133. *Cf.* United Nations, *Official Records of the Conference on Consular Relations, Vol. I, Seventh Meeting of the First Committee*, para. 43, document A/CONF.25/16 (statement by Yugoslav delegate) (consular functions at the end of 18th century, in absence of bilateral treaties stating otherwise, centered on protecting rights and interests of nationals and giving them assistance).

of the receiving State was established as a principle of customary international law.[110]

4.5 Given the importance of the subject and centuries of relatively uniform practice among States, the law of consular relations was a ready target for the United Nations' mission of "encouraging the progressive development of international law and its codification."[111] In 1949, the International Law Commission provisionally designated consular relations as one of the fourteen subjects it considered proper for codification.[112] In 1955 the ILC began work on the subject, and in 1957 the Special Rapporteur submitted his report.[113] In 1961, the Commission, having obtained comments from governments, adopted the final text of the draft Articles.[114] The General Assembly convened the Conference on

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110. United Nations, *Official Records of the Conference on Consular Relations, Vol. I, Eighth Meeting of the First Committee*, paras. 35, 44, document A/CONF.25/16 (statement of Janoslav Zourek, Special Rapporteur on Consular Relations); *ibid.*, *Eleventh Plenary Meeting*, agenda item 10, para. 14 (statement of Soviet delegate) (noting "very old rule of international law: the right of every state to protect its nationals."); Rousseau, *op. cit.*, p. 234 ("Fonction de protection — C'est elle qui est à la base de l'institution consulaire . . . . A ce titre les consuls doivent faire respecter les droits de leurs ressortissants et les aider dans leurs enterprises en intervenant éventuellement auprès des autorités compétentes. Etroitement liée à l'institution, cette fonction n'a pas besoin d'être stipulée dans une convention et ne peut être contestée par l'Etat territoriale."); Torres Bernardez, *op. cit.*, p. 85.

111. U.N. Charter, art. 13(1); *see* Ian Brownlie, *Principles of Public International Law* (1990), p. 362.

112. United Nations, *Official Records of the General Assembly, Report of the International Law Commission, 4th Session, Supplement No. 10*, paras. 16, 20, document A/925; *see also* Torres Bernardez, *op. cit.*, pp. 78-79.

113. United Nations, International Law Commission, *Draft Provisional Articles on Consular Intercourse and Immunities: Report of Jaroslav Zourek, Special Rapporteur*, document A/CN.4/108.

114. United Nations, *Official Records of the General Assembly, 16th*

(continued...)

Consular Relations, which was held in Vienna from 4 March to 22 April 1963 with the participation of 92 States.[115]

4.6 The Convention as adopted included detailed provisions, Articles 5 and 36, that codified the sending State's right to provide consular assistance to its nationals in the receiving State,, both generally and in the context of criminal proceedings against the national. As both delegates at the Conference and jurists have noted, the rights of consular protection and assistance codified in these articles "could well be regarded as the underlying objective for all other functions performed by consuls in the interest of the sending state."[116]

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114. (...continued)
Session, Supplement No. 9, document A/4843.

115. General Assembly Resolution 1685 (XVI), United Nations, *Official Records of the General Assembly, 16th Session, Supplement No. 17*, p. 61, document A/5100.

116. Victor M. Uribe, "Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice," *Hous. J. Int'l L.*, Vol. 19 (1997), pp. 375, 379. The Vienna Conference delegate from Mali, referring to Article 36 as a whole, stated:

> [T]he protection of nationals of the sending State was the principal function of consulates . . . . The natural protector of a person abroad was undoubtedly his country's consul. In the case of arrest, for example, the consul should be notified immediately so that he could take whatever action was needed under article 5.

United Nations, *Official Records of the Conference on Consular Relations, Vol. I,, Sixteenth Meeting of the Second Committee*, para. 12, document A/CONF.25/16; *see also ibid., Seventeenth Meeting of the Second Committee,* paras. 17 and 19 (statements of Tunisian and United Kingdom delegates); Brief of *Amici Curiae* Republic of Argentina, Republic of Brazil, Republic of Ecuador and Republic of Mexico In Support of Petition for a Writ of Certiorari, *Paraguay v. Gilmore,* __ U.S. __, 118 S. Ct. 1352, p. 1, Annex 28 ("The protection and support of persons who have been charged with crimes, convicted, or imprisoned by a foreign national has

(continued...)

4.7 It is those rights which the United States violated in the case of Angel Breard and for which Paraguay seeks reparation here.

I.

The United States Deprived Paraguay of Its Right to Provide Consular Assistance by Failing to Provide the Required Notification to Mr. Breard

A. Article 36(1)(b) Required Notification to Mr. Breard in Order to Permit Paraguay to Exercise Its Right of Consular Assistance

4.8 It is uncontested in this proceeding that Article 36(1)(b) required responsible officials of the United States to provide Mr. Breard with notice of his right to contact the Paraguayan consul. The ordinary meaning of that provision, taken in its context and in the light of its object and purpose, confirms that obligation.[117]

4.9 The principal purpose of the Vienna Convention is to guarantee a State Party the right to perform consular functions within the territory of those States Parties with which it has established

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116. (...continued)
always been a critical function of consular officials."); Mariel Revillard, "Consul (Attributions)," *Encyclopédie juridique (Dalloz), Répertoire de droit international,* para. 28 (forthcoming, 1998) ("La protection des nationaux qui se trouvent dans l'Etat de résidence répond au but même de l'institution consulaire."); J. Irizarry y Puenta, *Traité sur les fonctions internationales des consuls* (traduit par C. Schlegel) (1937), p. 274 ("Le droit de protection est, sans aucun doute, le premier, le plus important et le plus actif devoir dans le domaine toujours plus vaste de l'action consulaire."); Ellery C. Stowell, *Le consul: fonctions, immunités, organisation* (1909), p. 62 ("On peut dire que cette fonction du consul est la plus important de toutes."); Pradier-Fodéré, *Droit international public* (1885), p. 555 ("C'est par les consuls . . . que l'Etat étend ses bras protecteurs sur toute la surface du globe.").

117. *See* Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 31.

consular relations.[118] Article 5 of the Convention defines consular functions to include

> (a) 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; [and]
>
> . . .
>
> (e) helping and assisting nationals, both individuals and bodies corporate, of the sending state;
>
> . . . .

4.10 Article 36 of the Convention sets forth a mechanism to ensure that consular officials may perform those functions in a specific setting: that of a national who has been detained by authorities of the receiving State. "With a view to facilitating the exercise of consular functions relating to nationals of the sending state," Article 36(1)(a) guarantees the right of consular officers "to communicate with nationals of the sending state and to have access to them . . . ," as well as the corollary right of nationals to communicate with and have access to their consular officers. Article 36(1)(b) also requires the competent authorities of a State Party to advise, "without delay," any detained national of another State Party that he has the right to contact his consulate. Then, "if he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner."[119]

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118. *See* Vienna Convention on Consular Relations, 24 April 1963, 596 U.N.T.S. 261, 21 U.S.T. 77, preamble (purpose of privileges and immunities granted by Convention is "to ensure the efficient performance of functions by consular posts on behalf of their respective States"); *ibid.*, art. 3 ("Consular functions are exercised by consular posts. They are also exercised by diplomatic missions in accordance with the provisions of the present Convention.").

119. The terms of this provision make clear that it creates rights not only in the State Party but also for the detained national. *Ibid.*, art. 36(1)(b) ("The said authorities shall inform the person concerned without delay of

(continued...)

4.11 Obviously, a sending State cannot "exercise . . . consular functions" with respect to a detained national if the receiving State does not advise it of the detention. As Argentina, Brazil, Ecuador, and Mexico said in their brief *amici curiae* to the United States Supreme Court:

> [c]onsuls can discharge [their] responsibility only if they know of the detention of their nationals by law enforcement authorities. Article 36 of the Convention is designed specifically to ensure that consuls *do* know of the detention of their nationals, and compliance with it is therefore indispensable to the effective performance of consular functions.[120]

Failing to provide the requisite notice to a detained foreigner of his rights under Article 36 necessarily entails a violation of the sending State's rights to render consular protection and assistance to its national, as guaranteed by Articles 5 and 36.

4.12 The *travaux préparatoires* of the Vienna Convention confirm the integral relationship between the sending State's right of consular assistance and the receiving State's obligation to provide prompt notification to the detained national. The United Kingdom delegate urged that "it was essential to introduce a provision to the effect that the authorities of the receiving State should inform the person concerned without delay of his rights," if the Conference were to forgo the automatic notification of the consulate provided in the International Law Commission draft in favor of a proposal to notify

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119. (...continued)
his rights under this sub-paragraph.") (emphasis supplied); *see Memorial of the United States, United States Diplomatic and Consular Staff in Tehran, I.C.J. Pleadings 1980*, p. 174 ("Article 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others.").

120. Brief of *Amici Curiae* Republic of Argentina, Republic of Brazil, Republic of Ecuador and Republic of Mexico In Support of Petition for a Writ of Certiorari, *Paraguay v. Gilmore*, __ U.S. __, 118 S. Ct. 1352, p. 1 (No. 97-1390) (emphasis in original), Annex 28.

the consul only "if [the national] so requests."[121] A provision for notice upon the national's request, without more, would be unworkable, the delegate asserted, "because it could give rise to abuses and misunderstandings. *It could well make the provisions of article 36 ineffective because the person arrested might not be aware of his rights.*"[122]

B. The United States Did Not Provide the Requisite Notice

4.13 As the United States has acknowledged, its competent officials did not notify Mr. Breard at any time after his arrest, and *a fortiori* not "without delay," of his right to contact the Paraguayan consulate. "There is an admitted failure by the Commonwealth of Virginia to have afforded Paraguay timely consular access, that is to say, there is an admitted breach of treaty."[123]

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121. United Nations, *Official Records of the Conference on Consular Relations, Vol. I, Twentieth Plenary Meeting,* agenda item 10, para. 73, document A/CONF.25/16.

122. *Ibid.* (emphasis supplied). *See also ibid., Eleventh Plenary Meeting*, agenda item 10, paras. 13-14 (before the amendment offered by the United Kingdom was added to Article 36(1)(b), the Soviet delegate also expressed concern that "[t]he proposal that the consul should be informed of the arrest of a national of the sending State only at the request of the person concerned could not withstand criticism. What guarantee was there that the person concerned had been informed of his right . . .?" For this reason, the Soviet delegate considered that anything short of automatic notification "conflicted with a very old rule of international law: the right of every State to protect its nationals."); *see also ibid.*, para. 8 (statement of delegate from Ghana).

123. *Vienna Convention on Consular Relations (Paraguay v. United States), Provisional Measures, Order of 9 Apr. 1998, Declaration of President Schwebel. See also ibid., Oral Argument*, para. 1.4 (statement of David R. Andrews); Brief for United States as *Amicus Curiae*, p. 12, *Breard v. Greene*, __ U.S. __, 118 S. Ct. 1352 (1998) ("the Executive Branch has conceded that the Vienna Convention was violated"), Annex 21.

4.14 Because the United States breached its obligation to provide the requisite notice, Paraguay was unaware that Mr. Breard was detained by the United States until April 1996.[124] Mr. Breard also was unaware of his right to consular assistance until consular officers met with him in late April 1996 — about three years after he had been arrested, tried, convicted, and sentenced to death.[125] Paraguay had no opportunity to provide consular assistance to its national between his arrest in September 1992 and April 1996, when it learned of Mr. Breard's detention without any assistance from the United States.

4.15 Thus, by its admitted failure to provide the notification mandated by Article 36, the United States deprived Paraguay of its right to render consular assistance to its national at the time when such assistance was most urgently needed: between Mr. Breard's arrest and the conclusion of the trial of the charges against him.

C. THE UNITED STATES' VIOLATION RENDERS IT INTERNATIONALLY RESPONSIBLE FOR ITS WRONGFUL ACTS

4.16 The conceded violation of the United States' obligations under Article 36 of the Vienna Convention constitutes a clear breach of international law. Under the principle of *pacta sunt servanda*, the United States was required to abide by its obligations under the Vienna Convention. Instead, the United States committed an internationally wrongful act for which it is responsible under international law.[126] "It is of obvious importance to the maintenance

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124. Valdez Stmt., para. 4, Annex 7; Caballero Stmt., para. 3, Annex 16; Sra. Breard Aff., para. 7, Annex 1.

125. Sra. Breard Aff., para. 8, Annex 1.

126. *Draft Articles on State Responsibility, Report of the International Law Commission, United Nations, Official Records of the General Assembly, 51st Session, Supplement No. 10*, arts. 1, 3, document A/51/10 ("Every internationally wrongful act of a State entails the international responsibility of that State."); *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 23; Peter Malanczuk, *Akehurst's Modern Introduction to*

(continued...)

and development of a rule of law among States that the obligations imposed by treaties be complied with and that, where they are not, reparation be required."[127]

1. No Prejudice Need Be Shown for State Responsibility to Attach

4.17 Contrary to the United States' contention during the hearing on provisional measures, international law does not require a showing of prejudice before the offending State's international responsibility is engaged. Rather,

> [l]a responsabilité est le corollaire nécessaire du droit. Touts droits d'ordre international ont pour conséquence une responsabilité internationale. La responsabilité entraîne comme conséquence l'obligation d'accorder une réparation au cas où l'obligation n'aurait pas été remplie.[128]

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126. (...continued)
International Law (7th ed. 1997), p. 254 ("If a state violates a rule of customary international law or ignores an obligation of a treaty it has concluded, it commits a breach of international law and thereby a so-called 'internationally wrongful act.'").

127. *Vienna Convention on Consular Relations (Paraguay v. United States), Provisional Measures, Order of 9 Apr. 1998, Declaration of President Schwebel.*

128. *Affaires des biens britanniques au Maroc espagnol (Sp. - Gr. Brit.), 1 May 1925*, 2 R.I.A.A. 641; *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21 ("It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation, therefore, is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself."); *Factory at Chorzów, Indemnity, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 29 (same); *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 23; *Restatement (Third) of the Foreign Relations Law of the United States* § (continued...)

4.18 Thus, under established principles of international law, the United States' admitted violation of the Vienna Convention should begin and end the inquiry of whether its international responsibility has been engaged. The only question outstanding is that of the reparation owed, which is addressed in Chapter 6.

2. *Prejudice Is Amply Established on this Record in Any Event*

4.19 Although prejudice is not required to establish the United States' responsibility for its violations of the Vienna Convention, the record in this case is replete with evidence of prejudice both to Paraguay and to its national.

a. Injury to Paraguay

4.20 The United States' violation of the Vienna Convention deprived Paraguay of its right to protect and assist its national in the gravest of circumstances: where the receiving State, in its municipal proceedings, threatens not only the liberty, but the very life of the national. The breach at issue here was of rights directly and specifically granted to Paraguay under Article 36(1) as the sending State of which Mr. Breard was the national. As a direct result of the violation, Paraguay was unable to render any consular assistance during a three-year period that included the most crucial moments of the proceedings against its national. In short, the United States deprived Paraguay of the right to exercise an important governmental function at the only time when that function could have fulfilled its purpose: providing meaningful protection and assistance to a Paraguayan national on trial for his life.

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128. (...continued)
901 (1987) ("Under international law, every state that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, to make reparation . . . ."); Rousseau, *op. cit.*, p. 210 ("La réparation est une conséquence nécessaire de l'acte illicite.").

4.21 There can be no doubt that the rights at issue are substantial rights in international law. The United States itself has acknowledged that "Article 36 of the Vienna Convention contains obligations of the highest order and should not be dealt with lightly."[129] Indeed, the United States advised this Court in the *Case Concerning United States Diplomatic and Consular Staff in Tehran* that the right of consular "communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations."[130]

4.22 The three-year delay between Mr. Breard's arrest and Paraguay's first opportunity to provide him consular assistance exacerbated both the violation and the injury. Indeed, the *timing* of the consular notification and assistance is an express and integral aspect of the rights granted by Article 36(1).

4.23 The words "without delay" appear in each of the three sentences that constitute Article 36(1)(b). The focus on rapid notification and communication reflects a recognition that, in many cases, unless consular assistance can be provided at the outset of the proceedings, no effective assistance will be provided at all. For example, the United States' manual on consular affairs provides:

> §411: In order for the consular officer to perform the protective function in an efficient and timely manner, it is essential that the consul obtain prompt notification whenever a U.S. citizen is arrested. *Prompt notification is necessary* to assure early access to the arrestee. *Early access in turn is essential*, among other things, to receive any allegations of abuse [and] to provide a list of lawyers and a legal system fact sheet to prisoners.

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129. Arthur W. Rovine, U.S. Dep't of State, *Digest of United States Practice in International Law* (1973), p. 161. *See also* authorities cited *supra* note 116.

130. *Memorial of the United States, United States Diplomatic and Consular Staff in Tehran, I.C.J. Pleadings 1980*, p. 174 (citations omitted).

> §411.3: . . . *Without such prompt notification of arrest, it is impossible to achieve the essential timely access* to a detained U.S. citizen.
>
> §412: *[P]rompt personal access* . . . provides an opportunity for the consular officer to explain the legal and judicial procedures of the host government and the detainee's rights under that government *at a time when such information is most useful.*[131]

4.24 By breaching its obligations to Paraguay under the Vienna Convention over an extended period of time, the United States caused specific and substantial prejudice to the rights and interests of Paraguay as a sovereign State.

b. Injury to Paraguay's National

4.25 The record also contains ample evidence of prejudice to Paraguay's national, which is an injury to Paraguay under established principles of international law.[132] From the moment of his arrest for a capital crime, Angel Breard was in great need of the assistance of a consular officer who could explain the United States criminal justice system to him in terms that he could understand. Instead, Mr. Breard had only the assistance of court-appointed counsel unfamiliar with his cultural background and unable to explain why his assumptions concerning the defense of a criminal case were unreasonable in the context of criminal justice in Virginia.

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131. U.S. Dep't of State, *Foreign Affairs Manual* (1984), Annex 4 (emphasis added).

132. *See Mavrommatis Palestine Concessions, Jurisdiction, 1924, P.C.I.J., Ser. A., No. 2*, p. 12 ("whether the present dispute originates in an injury to a private interest . . . is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.").

4.26 As the United States instructs its own consular officers:

> [t]raditionally one of the basic functions of a consular officer has been to provide a "cultural bridge" between the host community and the officer's own compatriots traveling or residing abroad. No one needs that cultural bridge more than the individual U.S. citizen who has been arrested in a foreign country or imprisoned in a foreign jail.[133]

4.27 During the course of the proceedings against him, Mr. Breard made a number of objectively unreasonable decisions. Most important, Mr. Breard, despite the advice of his attorneys, rejected a plea offer by the Virginia prosecutor that would have guaranteed him a sentence of imprisonment for life rather than a death sentence. He rejected the plea offer not in the hope of being acquitted, but rather in order to testify as a witness, again contrary to the advice of his lawyers, and confess the crime to the jury. In rejecting the plea offer, Mr. Breard discarded a guaranteed sentence of life imprisonment in favor of a trial where, given his determination to confess his guilt, the only possible outcomes were a sentence of death or a sentence of life imprisonment. This decision was plainly irrational, as it put his life at risk without any prospect of a better result than that offered by the prosecution.

4.28 Unquestionably, the best evidence of why Mr. Breard decided to reject the plea offer would be Mr. Breard's own testimony on the subject. Mr. Breard, however, is no longer available to testify in these proceedings. By executing Mr. Breard in the face of this Court's Order to the contrary, the United States has deprived Paraguay, and the Court, of the ability to obtain that best evidence.

4.29 Thus, in the Request accompanying this Memorial, Paraguay requests that, if and to the extent that there are any disputed issues of fact that are material to Paraguay's claims as to which Mr. Breard's testimony would have been relevant, the Court, in the exercise of its authority pursuant to Articles 48 and 49 of the Statute,

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133. U.S. Dep't of State, *Foreign Affairs Manual*, 7 FAM § 401 (1984), Annex 4.

deem those facts established in Paraguay's favor in order to remedy the evidentiary prejudice suffered by Paraguay by virtue of the United States' execution of Mr. Breard.

4.30 Even without evidence from Mr. Breard, however, the record contains compelling evidence that his decision to reject the plea offer resulted from a misunderstanding of the United States criminal justice system — a misunderstanding that could have, and would have, been rectified through the assistance of Paraguayan consular officers. Whereas plea bargaining is commonplace in United States criminal proceedings, it is unknown in Paraguay, where any such arrangement between prosecutor and defendant would be void.[134] On the other hand, the Paraguayan penal code expressly provides for a reduction in sentence where the defendant's confession is, as was the case in the proceedings against Mr. Breard, the only direct evidence of the crime.[135] Certain other aspects of Paraguayan criminal procedure also favor the confession as a strategic choice for defendants seeking leniency.[136]

4.31 Thus, the notion of making a deal with the prosecution would not make sense to a Paraguayan unfamiliar with the United States legal system, such as Mr. Breard. Mr. Breard's decision to reject the plea offer and confess his crime in open court would have been a rational one in the Paraguayan criminal justice system. In the United States, however, it was deadly folly.

4.32 The record before the Court establishes that, had the United States fulfilled its obligation to notify him of his right to consular assistance, Mr. Breard would have contacted his consulate.[137] Had Mr. Breard requested consular assistance, Paraguayan officials would have intervened at the beginning of Mr.

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134. Macchi Aff., para. 3, Annex 13.

135. *Ibid.*, para. 4.

136. *See ibid.*

137. Sra. Breard Aff., para. 9, Annex 1; Caballero Stmt., para. 10, Annex 16.

Breard's legal proceedings with the same energy and expertise that they brought to their later efforts to obtain a new trial for him in the municipal courts of the United States. Paraguayan consular officers would have explained to Mr. Breard the fundamental differences between United States and Paraguayan criminal justice in terms that Mr. Breard could understand, just as they ultimately did.[138] Specifically, Paraguayan consular officers would have reviewed with Mr. Breard why rejecting the plea offer in favor of confessing at trial would be unreasonable, and they would have recommended that Mr. Breard accept the plea offer.[139] If Mr. Breard had had the benefit of this assistance from the beginning of his legal proceedings, he would have accepted the plea, and would not have been sentenced to death and executed.[140]

4.33 Simply put, in the circumstances of Mr. Breard's case, consular assistance was a matter of life and death. The United States' violation of its international obligations prevented Paraguay from acting in a manner that would have saved its national's life.

II.

The United States Violated the Vienna Convention by Its Application of the Municipal-Law Doctrine of Procedural Default

4.34 The United States also violated Paraguay's rights by applying its municipal law so as to thwart Mr. Breard's efforts to receive consular assistance from Paraguay before and during a trial of the charges against him. Specifically, when Mr. Breard sought post-conviction relief on the ground that he had been tried, convicted, and sentenced to death without the assistance of Paraguay's consul, the United States applied the doctrine of procedural default to defeat

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138. Valdez Stmt., paras. 5-6, Annex 7; Prieto Aff., para. 10, Annex 6.

139. Valdez Stmt., para. 8, Annex 7.

140. Caballero Stmt., para. 10, Annex 16; Sra. Breard Aff., para. 7, Annex 1.

his efforts to receive Paraguay's consular assistance at a new trial. The United States' application of this doctrine in Mr. Breard's case cannot be reconciled with its obligations under Article 36(2) of the Vienna Convention.

A. The United States Was Obligated to Apply Municipal Law so as to Guarantee the Exercise of the Rights Accorded by Article 36 of the Vienna Convention

4.35 Under Article 36(2) of the Vienna Convention, the United States was required to ensure that its municipal law and regulations "enable[d] full effect to be given to the purposes for which the rights accorded under this Article are intended."

4.36 As discussed above, a principal purpose of Article 36 is to ensure that States Parties are able to render consular assistance to nationals detained and charged with crimes by other States Parties. As the terms of Article 36(1)(b) make clear, the rights accorded under that Article were intended to be made known, and exercised, "without delay" after the initial detention of the national. Thus, under Article 36(2), the United States was obligated to ensure that its municipal law "enable[d] full effect to be given" to Paraguay's right to provide, and Mr. Breard's right to receive, consular assistance in a timely fashion relative to the arrest and trial of the charges against him.

4.37 A review of the drafting history of Article 36(2) confirms the breadth of the obligation it imposes. The paragraph as originally proposed by the International Law Commission provided as follows:

> 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 not nullify* these rights.[141]

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141. United Nations, *Official Records of the Conference on Consular Relations, Vol. II, Annexes — Draft articles on consular relations,* p. 24, (continued...)

The Second Committee expanded the International Law Commission's proviso to the form that the States Parties ultimately adopted: "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."[142] This formulation is substantially broader than the International Law Commission proposal in two respects. *First*, it requires the municipal law of States Parties to give "full effect" to the Convention, rather than merely refraining from nullifying the rights accorded by the Convention. *Second*, the obligation to give full effect extends not to the rights accorded by Article 36, but instead to "the purposes for which the rights . . . are intended." As Luke Lee observes:

> [The] reference to the purposes underlying the rights instead of merely the rights themselves must be understood as an expansion of the operation of the proviso in paragraph 2 intended to discourage any technical argument as to whether a particular provision of municipal law was consistent with the Convention, where the overall effect of such a provision was to diminish the full exercise of the rights accorded by the Convention.[143]

4.38 At a plenary meeting of the Conference, the delegate from the Soviet Union proposed restoring the International Law Commission's weaker version.[144] The delegate from the United Kingdom disagreed with the proposed Soviet amendment, stating that

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141. (...continued)
document A/CONF.25/16 (emphasis supplied).

142. United Nations, *Official Records of the Conference on Consular Relations, Vol. I, Eighteenth Meeting of the Second Committee*, para. 47, document A/CONF.25/16; *ibid., Nineteenth Meeting of the Second Committee*, para. 10 (emphasis supplied).

143. Affidavit of Luke T. Lee (1 Oct. 1998), para. 5, Annex 29.

144. United Nations, *Official Records of the Conference on Consular Relations, Vol. I, Twelfth Plenary Meeting*, paras. 3-4, document A/CONF.25/16.

"it was most important that the *substance* of the rights and obligations specified in paragraph 1 be preserved, which they would not be if the Soviet Union amendment were adopted."[145] The Conference rejected the Soviet amendment.

B. The United States Breached Its International Obligations by Applying the Doctrine of Procedural Default in Mr. Breard's Case

4.39 Having committed an internationally wrongful act by violating Article 36(1) of the Vienna Convention, the United States was required under established principles of State responsibility to eliminate the effects of its illegal acts[146] and abide by its "continued duty . . . to perform the obligation it ha[d] breached"[147] by respecting Paraguay's right to render consular protection and assistance before and during the trial of the charges against Mr. Breard. Like that of many States, the United States' municipal law included procedures by which Mr. Breard could have sought a new trial — at which he could have received the consular assistance guaranteed by the Vienna Convention — on the ground that the competent authorities failed to comply with the requirements of international law in his initial trial.

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145. *Ibid.*, para. 7 (emphasis supplied).

146. Oscar Schachter, *International Law in Theory and Practice: General Course in Public International Law* (1985), p. 190 ("When a State is internationally responsible for a wrongful act, it is under an obligation to discontinue the act and to prevent the continuing consequences of the effects of the act."). *Cf. Draft Articles on State Responsibility, op. cit.*, art. 41 ("A State whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct, without prejudice to the responsibility it has already incurred."); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54; *Haya de la Torre, I.C.J. Reports 1951*, p. 82.

147. *Draft Articles on State Responsibility, op. cit.*, art. 36(2).

4.40 The courts of the United States, however, held that those procedures were not available to Mr. Breard. They did so on the basis of a municipal-law doctrine known as "procedural default," which was codified in 1996 in a statute called the Anti-Terrorism and Effective Death Penalty Act.[148] Under the doctrine, a criminal defendant may not obtain post-conviction relief in federal court upon a ground that was not first raised in post-conviction relief proceedings in state court.[149]

4.41 Applying the doctrine, the courts of the United States barred Mr. Breard from raising a Vienna Convention claim in his federal *habeas* proceeding even though (a) he had not known during the prior proceedings of his right under the Convention to contact the Paraguayan consulate, and (b) the very purpose of the notification requirement that the United States breached is to ensure that a detained national in Mr. Breard's position is apprised of that right.[150]

4.42 The Supreme Court recognized that application of the procedural-default doctrine to bar Mr. Breard's attempt to obtain a new trial at which he would exercise his Vienna Convention rights was, on its face, inconsistent with the "Vienna Convention — which arguably confers on an individual the right to consular assistance following arrest . . . ."[151] The Court reasoned, however, that the United States' enactment of the Anti-Terrorism and Effective Death Penalty Act in 1996 limited the application of the Vienna Convention: "Breard's ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently-enacted rule . . . ."[152]

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148. *Breard v. Greene*, __ U.S __, 118 S. Ct. 1352, 1355 (1998).

149. *Breard v. Netherland*, 949 F. Supp. 1255 (E.D. Va. 1996).

150. *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998); *Breard v. Greene*, __ U.S. __, 118 S. Ct. 1352 (1998).

151. *Breard v. Greene*, 118 S. Ct. at 1355.

152. *Ibid.*

4.43 The United States' application of its municipal laws and regulations in Mr. Breard's case plainly did not "enable full effect to be given to the purposes for which the rights accorded under . . . Article [36] are intended."[153] Although the United States was internationally obligated to remedy its admitted violation of the Vienna Convention in Mr. Breard's case, it applied its municipal law in such a manner as to render meaningless the right to consular assistance provided by the Convention — a right of which Mr. Breard was unaware precisely because of the United States' breach of its international obligation.[154]

4.44 Thus, although the United States is internationally obligated to abide by the obligations it assumed in becoming a State Party to the Vienna Convention,[155] its courts, including its Supreme Court, interpreted municipal law to limit the application of the Vienna Convention in Mr. Breard's case.[156] The United States'

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153. Vienna Convention, art. 36(2). *See* Lee Aff., paras. 4-9, Annex 29.

154. The Government of Mexico has requested an advisory opinion from the Inter-American Court of Human Rights on the question of, *inter alia*, the juridical consequences for foreign nationals who were not informed of their right to consular assistance in proceedings against them in the United States. Request for an Advisory Opinion Submitted by the Government of the United Mexican States, Inter-American Court of Human Rights, 17 November 1997. An advisory opinion is anticipated in late 1998 or in 1999.

155. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 27; *Draft Articles on State Responsibility*, *op. cit.*, arts. 4-6; Ian Brownlie, *State Responsibility (Part I)* (1983), pp. 141-43; Ian Brownlie, *Principles of International Law* (1990), p. 35.

156. "It is a well-settled principle of international law that every internationally wrongful act of the judiciary of a state is attributable to that state." *Islamic Republic of Iran v. United States of America, Award No. 586-A27-FT, Iran-U.S. Claims Tribunal, 5 June 1998*, para. 71. *See Draft Articles on State Responsibility, op. cit.*, art. 6; Ian Brownlie, *Principles of Public International Law* (1990), pp. 449-50; Ian Brownlie, *State Responsibility (Part I)* (1983), p. 144; Eduardo Jiménez de Aréchaga, "International Responsibility," in *Manual of Public International Law*

(continued...)

application of municipal law thereby violated not only Article 36(2), but also the rule of customary law that a State may not plead the requirements of its domestic legal system to excuse its failure to abide by or implement international law.[157]

4.45 In rejecting the weaker language proposed by the ILC in favor of the broad, current formulation of the proviso to Article 36(2), the States Parties stated their intent that "the *substance* of the rights and obligations specified in paragraph 1 [of the Article] be preserved . . . ."[158] Paraguay respectfully submits that the United States' application of municipal law in Mr. Breard's case did nothing to preserve the substance of the rights accorded under Articles 5 and 36 of the Convention. The United States' actions breached its obligation under Article 36(2) to accord "full effect" to the rights accorded.

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156. (...continued)
(Max Sørensen ed., 1968), pp. 550-557.

157. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 27; Ian Brownlie, *Principles of International Law* (1990), p. 35; *Draft Articles on State Responsibility, op. cit.*, arts. 4-6. *See also* Jiménez de Aréchaga, *op. cit.*, p. 557 ("It is a generally accepted principle of international law that a federal state is responsible for the conduct of its political subdivisions and cannot evade that responsibility by alleging that its constitutional powers of control over them are insufficient for it to enforce compliance with international obligations."); *Free Zone of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 167 (France not permitted to rely on own legislation to limit scope of international duty); *Greco-Bulgarian "Communities," Advisory Opinion, 1930, P.C.I.J., Series B, No. 17*, p. 32 (between treaty parties provisions of municipal law cannot prevail over treaty obligations); *Treatment of Polish Nationals in Danzig, 1931, P.C.I.J., Series A/B, No. 44*, p. 24 (State cannot use own constitution to excuse international law violations).

158. United Nations, *Official Records of the Conference on Consular Relations, Vol. I, Twelfth Plenary Meeting*, agenda item 10, para. 7, document A/CONF.25/16 (statement of U.K. delegate) (emphasis supplied).

CHAPTER 5

BY EXECUTING MR. BREARD, THE UNITED STATES VIOLATED A BINDING ORDER OF THIS COURT

5.1 By its Order of Provisional Measures of 9 April 1998, this Court indicated that "[t]he United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings." With full knowledge of that Order, the Governor of Virginia directed that the execution proceed, and the United States Government took no legally effective steps to stop it.

5.2 There can be no question that the United States thereby breached the Order of this Court. Equally, there can be no question that the Order was binding.

5.3 The United States does not dispute that, pursuant to Article 94(1) of the United Nations Charter, it has "undertake[n] to comply with the decision" in this proceeding. As Article 41 expressly states, the Court's authority to indicate provisional measures is intended to preserve the rights of the parties pending a decision on the merits, so that one party's unilateral conduct does not deprive the Court of the capacity to render a meaningful judgment after both parties have been fully heard. The authority of the Court to indicate provisional measures is thus fundamental to the Court's role as a "*judicial* organ" — an organ that resolves disputes by the considered application of law, not the unfettered exercise of power. Simply put, it is impossible to reconcile, on the one hand, a party's obligation to comply with a decision of the Court with, on the other, the liberty to deprive the Court of the capacity to render an effective decision in favor of the adverse party.

5.4 This case illustrates perfectly — indeed, graphically — why an indication of provisional measures must be binding. Paraguay's national is now dead at the hands of the Commonwealth of Virginia. Because of the deliberate conduct of competent officials of the United States, this Court is no longer in a position to issue a judgment granting Paraguay *restitutio in integrum* in the form of a

new trial for its national or the reconveyance of the plea offer. Equally, the United States is no longer in a position to comply with any such judgment. By going forward with the execution in disregard of the Court's Order, the United States wrested from this Court, and arrogated to itself, the authority to determine whether Paraguay would be granted the relief it sought.

5.5 Indeed, in announcing that the execution would proceed, the Governor of Virginia candidly acknowledged the incentive to lawlessness created by the United States' position that he was not bound to comply with the Order. By his own account, the Governor refused to grant a temporary reprieve from the execution because he was

> concerned that to delay Mr. Breard's execution so that the International Court of Justice may review this matter would have the practical effect of transferring responsibility from the courts of the Commonwealth and the United States to the International Court. *Should the International Court resolve this matter in Paraguay's favor, it would be difficult, having delayed the execution so that the International Court could consider the case, to then carry-out the jury's sentence despite the rulings [of] the International Court.*[159]

In other words, far from "tak[ing] all measures . . . to ensure that . . . Breard [was] not executed,"[160] the Governor acted to ensure that this Court's eventual decision on the merits could not *prevent* the execution.

5.6 Because this Court is a court, and because its job is to apply law, the United States cannot have had the right to act as it did. Paraguay's claim for relief for the United States' violation of the

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159. Statement of Governor Jim Gilmore (14 Apr. 1998), p. 2 (emphasis added), Annex 24.

160. *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998*, para. 41.

Order of Provisional Measures requires the Court to consider the very nature of the authority it exercises.

I.

The United States Violated the Order of Provisional Measures

5.7 At the time of the Order, Mr. Breard was in a correctional facility of the Commonwealth of Virginia. From that time until his execution, Virginia officials had full control over his person. Virginia officials executed Mr. Breard by lethal injection on 14 April 1998, as scheduled.

5.8 The Governor of Virginia is the chief executive official of the Commonwealth. Under Virginia law, the Governor has plenary power to grant reprieves of capital sentences.[161] Relying on the advice of the United States that the Order was not binding, he permitted the execution to go forward.[162] The Governor explained that he did not grant Mr. Breard a reprieve because he did not want to risk the possibility that this Court might render the judgment that Paraguay had requested.[163]

5.9 Plainly, the occurrence or nonoccurrence of the execution was within the control of the Governor of Virginia. Plainly, he did not "take all measures at [his] disposal" to halt the execution. The

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161. *See* Va. Stat. Ann. § 53.1-229 ("[T]he power to commute capital punishment and to grant pardons or reprieves is vested in the Governor."), Annex 10; *ibid.* § 53.1-232(D) ("Should the condemned prisoner be granted a reprieve by the Governor . . . the Director [of Corrections] shall yield obedience to [such reprieve]"). At the end of the term of reprieve by the Governor, an execution may proceed without resentencing. *See ibid.* § 53.1-232(C).

162. Statement of Governor Jim Gilmore (14 Apr. 1998), p. 2, Annex 24.

163. *Ibid.*

Governor is an official for whose acts the United States is responsible.[164] The United States therefore violated the Order.

5.10 In its letter to this Court dated 15 April 1998, the United States advised that (a) Virginia had gone forward with the execution; (b) executive officials had done nothing to stop it except write a letter to the Governor "requesting" that he issue a stay; and (c) the United States Supreme Court, after having been advised by the executive that "it would be inconsistent" with United States domestic law to grant a stay pending this Court's judgment, had declined to give effect to the Order. Nevertheless, the United States advised the Court in the 15 April letter that "[t]hrough its actions, culminating in the Secretary of State's 13 April request to the Governor of Virginia to stay Mr. Breard's execution . . . , the United States took all measures lawfully at its disposal to do what the Court requested."[165]

5.11 The United States is wrong as a matter of both international law, which matters here, and United States domestic law, which does not.

5.12 Whether the federal government of the United States was constitutionally or otherwise legally restrained from ensuring

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164. *See, e.g.*, Eduardo Jiménez de Aréchaga, "International Responsibility," in *Manual of Public International Law* (Max Sørensen ed., 1968), pp. 531, 557; *Draft Articles on State Responsibility, Report of the International Law Commission*, United Nations, *Official Records of the General Assembly, 51st Sess., Supp. No. 10*, art. 7(1), document A/51/10 (1996); Case C-58/89, *Commission des Communautés Européenes v. République Fédérale d'Allemagne*, 1991 E.C.R. I-5019, I-5026-27 (imputing acts of Länder to Germany); *Francisco Quintanilla*, U.S.-Mex. General Claims Comm'n (16 Nov. 1926), 4 R.I.A.A. 101, 103 (imputing actions of federated state of United States to United States of America); *Francisco Mallén*, U.S.-Mex. General Claims Comm'n (27 Apr. 1927), 4 R.I.A.A. 173, 177 (same).

165. Letter from David R. Andrews, Agent of the United States of America, to His Excellency Eduardo Valencia-Ospina, Registrar, International Court of Justice (15 Apr. 1998) (citation and internal quotation marks omitted), Annex 26.

compliance with the Order by Virginia officials is irrelevant to the question of the United States' compliance with that Order.

> It is a generally accepted principle of international law that a federal state is responsible for the conduct of its political sub-divisions and cannot evade that responsibility by alleging that its constitutional powers of control over them are insufficient for it to enforce compliance with international obligations.[166]

This principle reflects the broader but equally fundamental rule that a State may not plead strictures arising from its municipal law as an excuse for its failure to comply with an international obligation.[167] From the standpoint of international law, it matters only that officials whose acts are attributable to the United States had custody of Mr. Breard and could have stopped the execution, but did not.

5.13 In any event, as a matter of United States law, federal officials could easily have stopped Virginia from carrying out the execution had they determined to do so. In the United States, the law of foreign relations is quintessentially federal, and the authority of the federal government in the area is plenary.[168] As a result, the federal

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166. Jiménez de Aréchaga, *op. cit.*, p. 557.

167. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 27; *Draft Articles on State Responsibility, op. cit.*, arts. 4-6; Ian Brownlie, *Principles of International Law* (1990), p. 35. *See also Free Zone of Upper Savoy & the District of Gex, Judgment, 1932, P.C.I.J., Series A/B. No. 46,* p. 35 (France not permitted to rely on own legislation to limit scope of international duty); *Greco-Bulgarian "Communities," Advisory Opinion, 1930, P.C.I.J., Series B, No. 17,* p. 32 (between treaty parties provisions of municipal law cannot prevail over treaty obligations); *Treatment of Polish Nationals in Danzig, 1932, P.C.I.J., Series A/B, No. 44*, p. 24 (State cannot use own constitution to excuse international law violations).

168. *See* U.S. Const., art. VI, cl. 2; *United States v. Pink*, 315 U.S. 203, 231 (1942) ("the power of a State to refuse enforcement of rights [based on State policy considerations] . . . must give way before the superior Federal

(continued...)

authorities of the United States had ample means by which to ensure compliance by state officials with the international obligation imposed by this Court's Order. *First*, federal executive officials can bring suit in the courts of the United States to enforce federal law, of which the international obligations of the United States form a part.[169] *Second*, the President has broad discretion to facilitate the resolution of international disputes even acting on his own authority.[170] *Finally*, the federal courts, including the Supreme Court, have undoubted authority to enjoin state authorities from

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168. (...continued)
policy evidenced by a treaty or international compact or agreement"); *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states"); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-22 (1936) (because states never had sovereignty for foreign relations purposes, federal foreign relations authority is plenary); *Missouri v. Holland*, 252 U.S. 416 (1920) (upholding federal statute regulating hunting of migratory birds as implementation of treaty even on assumption that statute would be invalid in absence of treaty). *See also Restatement (Third) of the Foreign Relations Law of the United States* § 1, reporters' note 5 (1987).

169. *See* Brief for the United States as *Amicus Curiae*, p. 15 n. 3, *Breard v. Greene*, __ U.S. __, 118 S. Ct. 1352 (1998), (citing *United States v. Arlington County* to establish "the ability of the United States to sue in order to enforce compliance with the Vienna Convention"), Annex 21; *Sanitary District v. United States*, 266 U.S. 405, 425-26 (1925) (United States has standing to bring suit against State of Illinois to "carry out treaty obligations to a foreign power"); *United States v. Arlington County*, 669 F.2d 925 (4th Cir.), *cert. denied*, 459 U.S. 801 (1982) (suit by United States to enforce bilateral international agreement and enjoin municipality from taxing property owned by foreign government); *United States v. City of Glen Cove*, 322 F. Supp. 149 (E.D.N.Y.), *aff'd on opinion below*, 450 F.2d 884 (2d Cir. 1971) (suit by United States to enforce bilateral consular convention and enjoin municipality from assessing taxes on property owned by foreign government).

170. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654 (1981) (upholding executive authority to enter into Algiers Accords settling Iranian hostage crisis and transferring claims from United States courts to Iran-United States Claims Tribunal).

enforcing a criminal conviction obtained in violation of federal law.[171] Thus, the failure of the federal executive and the federal judiciary to take any legally effective steps to halt the execution also constituted a violation of the Order.

5.14 Angel Francisco Breard was not executed by accident. The Governor of Virginia decided to go forward, and the United States Government decided to do nothing to stop him. By virtue of both Virginia's act and the federal government's refusal to act, the United States violated the Order.

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171. *See, e.g., Kyles v. Whitley*, 514 U.S. 419 (1995) (granting defendant sentenced to death in state court proceeding new trial on petition for *habeas corpus* under 28 U.S.C. § 2254 on grounds that state prosecutors withheld evidence); *Felker v. Turpin*, 518 U.S. 651 (1996) (holding that recent amendment to the *habeas corpus* statute (Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1217) does not preclude Supreme Court from entertaining an application for relief under statute); All Writs Act, 28 U.S.C. § 1651 (providing that the "Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"); *Habeas Corpus* Statute, 28 U.S.C. § 2254 (providing that the "Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or law or treaties of the United States"); *see also Missouri v. Jenkins,* 495 U.S. 33, 57 (1990) (federal court may enjoin municipality to levy taxes to comply with desegregation order, even when levy would contravene state law); *Asakura v. Seattle*, 265 U.S. 332 (1924) (enjoining enforcement of municipal ordinance in violation of treaty); *French v. Hay*, 89 U.S. (22 Wall.) 250 (1874) (federal court may enjoin enforcement of state judgment entered in violation of federal law); *cf.* Va. Stat. Ann. § 53.1-232(D) (Virginia Director of Corrections must respect a stay of execution issued by any court of competent jurisdiction), Annex 10.

II.

The Order of Provisional Measures Was Binding on the United States

5.15 In opposing Paraguay's requests to the United States Supreme Court that it give effect to the Order by stopping the execution, the United States advised the court that an indication of provisional measures pursuant to Article 41 was not binding as a matter of international law.[172] "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[173] As a matter of the ordinary meaning of Article 41 in its context, no less than its evident object and purpose, the United States is wrong.

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172. Brief for the United States as *Amicus Curiae*, *op. cit.*, pp. 49-51. The Court has never squarely addressed the question whether orders indicating provisional measures create binding obligations. *See Application of the Convention on the Prevention and Punishment of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 384 (separate opinion of Judge Weeramantry); *ibid.*, p. 399 (separate opinion of Judge Ajibola); Shigeru Oda, "Provisional Measures: the Practice of the International Court of Justice," in *Fifty Years of the International Court of Justice: Essays in Honor of Sir Robert Jennings* (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996), pp. 541, 555 ("[t]he Court has never taken an overt position [on the binding nature of provisional measures] but, as a matter of principle, the Court's Order ought to be properly observed").

173. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 31. Articles 31 and 32 of the Vienna Convention on the Law of Treaties reflect customary international law. *See, e.g.*, Olivier Corten, *L'utilisation du "raisonnable" par le juge international* (1997), p. 34 (collecting cases and doctrine).

A. ARTICLE 94(1) OF THE CHARTER REQUIRES THE PARTIES TO COMPLY WITH AN INDICATION OF PROVISIONAL MEASURES

5.16 Article 94(1) of the United Nations Charter obligates the signatories "to comply with the *decision* of the International Court of Justice in any case to which it is a party."[174] Given the judicial means by which the Court resolves a request for an order of provisional measures, it qualifies easily, as a matter of the ordinary meaning of the term, as a "decision" of the Court subject to Article 94(1).[175]

5.17 The United States expressly recognized the breadth of the obligation set forth in Article 94(1) after Iran failed to comply with the Court's indication of provisional measures in *United States Diplomatic and Consular Staff in Tehran*. At that time, the United States stated:

> Iran had formally undertaken, pursuant to Article 94, paragraph 1, of the Charter of the United Nations, to comply with the decision of the Court in any case to which Iran might be a party. Accordingly it was the

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174. U.N. Charter, art. 94(1) (emphasis supplied).

175. *See, e.g.*, Edvard Hambro, "The Binding Character of the Provisional Measures of Protection Indicated by the International Court of Justice," in *Rechtsfragen der Internationalen Organisation* (Walter Schätzel & Hans-Jürgen Schlochauer, eds., 1956), pp. 152, 168-69; *Application of the Convention on the Prevention of the Crime of Genocide, Order of 13 September 1993, I.C.J. Reports 1993*, pp. 383-84 (separate opinion of Judge Weeramantry). *See also* ICJ Rules, art. 74(2) ("The Court, if it is not sitting when the request [for provisional measures] is made, shall be convened forthwith for the purpose of proceeding to a *decision* on the request as a matter of urgency.") (emphasis added); art. 76 (1) (Court has authority to "revoke or modify any *decision* concerning provisional measures") (emphasis added); art. 76(3) (requiring Court to provide parties an opportunity to be heard "[b]efore taking any *decision* under paragraph 1") (emphasis added); art. 77 (requiring transmission of "any *decision* taken by the Court under Article 76, paragraph 1 . . . to the Secretary-General . . .") (emphasis added).

> hope and expectation of the Government of the United States that the Government of Iran, in compliance with its formal commitments and obligations, would obey any and all Orders and Judgments which might be entered by the Court in the course of the present litigation.[176]

As the United States recognized, the obligation to comply imposed by Article 94(1) covers "all Orders and Judgments" of this Court, including an indication of provisional measures.[177]

B. The Ordinary Meaning of Article 41 in its Context Establishes That an Indication of Provisional Measures Is Binding

5.18 Even without reference to Article 94(1) of the Charter, the ordinary meaning of Article 41(1) in its context makes it clear that an indication of provisional measures is binding.

5.19 The Court's Statute is authentic, and equally authoritative, in English, French, Spanish, Russian, and Chinese.[178]

5.20 The English text of Article 41 provides:

> 1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

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176. *Oral Argument, United States Diplomatic and Consular Staff in Tehran, I.C.J. Pleadings 1980*, p. 266 (statement of Roberts Owen).

177. *See also* Jean Combacau & Serge Sur, *Droit international public* (1997), p. 599.

178. *See* U.N. Charter, arts. 92, 111; Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 33(1).

> 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

The French text of Article 41 provides:

> 1. La Cour a le pouvoir d'indiquer, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire.
>
> 2. En attendant l'arrêt définitif, l'indication de ces mesures est immédiatement notifiée aux parties et au Conseil de sécurité.

5.21 The context of Article 41 is (a) the Charter insofar as it deals with the Court and (b) the Statute of the Court read as a whole.[179] By virtue of the Charter, the Court is "the principal *judicial* organ of the United Nations."[180] The Statute provides that the "function" of the Court is "to decide in accordance with international law such disputes as are submitted to it."[181] The procedures the Court employs — whether on the merits, on an application for an order of provisional measures, or on any other application by a party before it — are judicial in character: the Court receives pleadings; it hears the parties through oral and written submissions; and it deliberates, votes, and renders an order or judgment.

5.22 Hence, to state the obvious, the context in which Article 41 must be read is a treaty that constitutes the statute of a *court*. The terms that appear there must therefore be read in light of the judicial function with which the Court is charged.

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179. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 31(2).

180. U.N. Charter, art. 92 (emphasis supplied); *see* I.C.J. Statute art. 1.

181. I.C.J. Statute, art. 38(1).

1. The English Text of Article 41(1)

5.23 Some commentators have opined that the French and English texts of Article 41(1) diverge in respects material to the question whether an indication of provisional measures is binding.[182] It appears to be generally agreed that *if* there is a discrepancy (which is by no means generally agreed), the English text less clearly supports the binding character of provisional measures.[183]

5.24 Properly viewed, however, "in the[] context" of the Statute as a whole — that is, as a provision defining the authority of a judicial body — the English text of Article 41 admits only of an interpretation that provisional measures are binding. If even the English text admits only of that interpretation, there can be little question that the Article must be so read.

a. "The Court shall have the power . . ."

5.25 The ordinary meaning of the term "power" connotes the capability to demand compliance.[184] When it is considered that it is

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182. *See* Henri-A. Rolin, "Force obligatoire des ordonnances de la Cour permanente de Justice internationale en matière de mesures conservatrices," in *Mélanges offerts à Ernest Mahaim* (1935), pp. 280, 281 ("La discordance est flagrante."); Jerzy Sztucki, *Interim Measures in the Hague Court: An Attempt at Scrutiny* (1983), p. 263 ("There is a clear discrepancy between the French and the English text of Article 41.").

183. *See, e.g.,* Jerzy Sztucki, *op. cit.,* p. 263.

184. *E.g., Cassell's New English Dictionary* (2d ed. 1920), p. 833 (defining "power" as the "[a]bility to do or act so as to effect something; . . . strength, force, energy, esp. as actually exerted; influence, dominion, authority (over); right or ability to control; legal authority or authorization"); *Oxford English Dictionary: A New English Dictionary on Historical Principles,* Vol. VII (1908), p. 1213 (defining "power" as the "1. Ability to do or effect something or anything, or to act upon a person or thing . . . . 2. Ability to act or affect something strongly; physical or mental strength; might; vigour, energy; force of character; telling force, effect . . . . 4. Possession of control or command over others; dominion, rule; government,

(continued...)

the "power" of a *court* that is under consideration, the connotation of an obligation to comply becomes compelling.

5.26 If an indication of provisional measures does not constitute a binding order of the Court, it must have some other function, as the Statute should not be read to include meaningless provisions.[185] If an indication of provisional measures is not binding, it must constitute only an appeal to the "moral" sense of the parties. But any such moral exhortation would be inconsistent with the function of the Court:

> It cannot be lightly assumed that the Statute of the Court — a legal instrument — contains provisions relating to any merely moral obligations of States and that the Court weighs minutely the circumstances which permit it to issue what is no more than an appeal to the moral sense of the parties.[186]

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184. (..continued)
domination, sway, command; control, influence, authority . . . . b. Authority given or committed; hence, sometimes, liberty or permission to act. . . . c. The limits within which administrative power is exercised . . . . 5. Legal ability, capacity, or authority to act; esp. delegated authority; authorization, commission, faculty; spec. legal authority vested in a person or persons in a particular capacity.").

185. *See* Jacque Dehaussy & Mahmoud Salem, "Sources du droit international: Les traités. Interprétation," 1 *Juris classeur de droit international*, Fascicule 12-6 (1995), p. 18 (describing *effet utile* as "*un principe fondamental*" of public international law); Jean Combacau & Serge Sur, *op. cit.*, p. 175 ("Concrètement, entre deux interprétations, on retiendra celle qui donne un sens à chacun des termes, c'est-à-dire leur effet utile, ce qui est le sens exact de la maxime *ut res magis valeat quam pereat.*"). *See also* Olivier Corten, *op. cit.*, pp. 42-43 (1997) ("Le «raisonnable» se retrouve plus explicitement dans un moyen d'interprétation consistant à donner toute sa portée à l'objet et au but d'une disposition, celui dit de l'«*effet utile*».").

186. Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (1958), p. 254.

Put another way,

> [o]n peut ajouter que si le statut prend soin d'accorder expressément en cette matière un *pouvoir* à la Cour, c'est là l'affirmation d'une compétence normale qui doit sauf indication contraire s'exercer par la voie de décisions obligatoires pour les Parties.[187]

5.27 Indeed, the Court has previously cautioned that in exercising its judicial authority, it must act to ensure the observance of the inherent limitations on the exercise of the judicial function, and to "maintain [the Court's] judicial character."[188] Hence, among other things, the Court could not "give a judgment which would be dependent for its validity on the subsequent approval of the parties."[189] Instead, the Court may act only where its judgment will "have some practical consequence in the sense that it can *affect existing legal rights or obligations of the parties*, thus removing uncertainty from their legal relations."[190]

5.28 A nonbinding indication of provisional measures would "depend[] for its validity on the subsequent approval" of one of the parties; it would not "affect existing legal rights and obligations." It therefore would not partake of the Court's "judicial character." The status of the Court as a court requires that the "power" accorded by Article 41(1) be read to invoke a legal obligation to comply.

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187. Henri-A. Rolin, *op. cit.*, pp. 280, 281 (emphasis in original).

188. *Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 29; *see also Nuclear Tests (Australia v. France), Application for Permission to Intervene, Order of 20 December 1974, I.C.J. Reports 1974*, p. 259.

189. *Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 29 (internal quotations omitted).

190. *Ibid.*, pp. 33-34 (emphasis supplied).

b. ". . . to indicate . . ."

5.29 The power "to indicate" provisional measures reinforces the Court's judicial function. "[T]he word 'indicate' expresses exactly the Court's function, which is to *point out* what the parties must do in order to remain in harmony with what the Court holds to be the law."[191] Thus, the use of the term "indicate" as a matter of diplomatic politesse cannot detract from the authority attaching to the indication:

> The term *indicate*, borrowed from treaties concluded by the United States with China and France on September 15, 1914, and with Sweden on October 13, 1914, possesses a diplomatic flavor, being designed to avoid offense to the susceptibilities of states. It may have been due to a certain timidity of the draftsmen. Yet it is not less definite than the term *order* would have been, and it would seem to have as much effect. The use of the term does not attenuate the obligation of a party within whose power the matter lies to carry out the measures which ought to be taken. An indication by the Court under Article 41 is equivalent to a declaration of obligation contained in a judgment, and it ought to be regarded as carrying the same force and effect.[192]

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191. Edward Dumbauld, *Interim Measures of Protection in International Controversies* (1932), p. 169 (emphasis in original). *See also* Roger Pinto, "Cour internationale de Justice; Procédure," 4 *Juris-classeur de droit international*, Fascicule 217 (1980), p. 14 (stating, with specific regard to provisional measures, "les ordonnances de la Cour n'ont pas le caractère de simples recommendations. Ce sont des décisions judiciaires. A ce titre elles sont obligatoires pour les parties.").

192. Manley O. Hudson, *The Permanent Court of International Justice, 1920-1942* (1943), pp. 425-26 (emphasis in original) (footnotes omitted) (internal quotation marks omitted). *See* V.S. Mani, "Interim Measures of Protection: Article 41 of the I.C.J. Statute and Article 94 of the UN Charter," *Indian J. Int'l L.*, Vol. 10 (1970), pp. 359, 365 ("The term 'indicate' was employed by the Advisory Committee of Jurists of 1920, not

(continued...)

In context, the term "indicate," too, connotes a legal obligation to comply.

c. ". . . if it considers that the circumstances so require . . ."

5.30 The Court responds to an application for an order of provisional measures by "considering" whether the legal and factual circumstances "require" the order. Again, the Court performs a judicial function. If, after performing this function, the Court determines that an indication of provisional measures is "required," it is hard to see how the adverse party, having been given the opportunity to be heard, would not be "required" to comply with the indication.

d. ". . . any provisional measures which ought to be taken to preserve the respective rights of either party."

5.31 "The word 'ought' carries the connotation of an obligation . . . ."[193] When used in the context of a court, it can plausibly carry no other connotation.

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192. (...continued)
because the Committee did not want to clothe the Court with a power of issuing an order which would be binding upon the parties to a case, but because of diplomatic precedent.") (footnotes omitted); *see also* C.H. Crockett, "The Effects of Interim Measures of Protection in the International Court of Justice," *Cal. W. Int'l L.J.*, Vol. 7 (1977), pp. 348, 354 ("In diplomacy, if a choice is presented, the phrase or term carrying the least onerous connotation is usually chosen so long as that choice accommodates the parties' intentions.").

193. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 380 (separate opinion of Judge Weeramantry).

5.32 The reference to the parties' "rights" compels the same conclusion. The concept of a legal right necessarily implies a corresponding legal duty.[194]

5.33 The object and purpose of provisional measures, "to preserve the respective rights of either party," is addressed below. Examining here only the context in which the terms "ought" and "rights" appear, it suffices to observe that courts are simply not in the business of making moral pronouncements or of providing gentle reminders of a State's legal obligations; they are charged to decide cases in a manner that vindicates legal rights.

5.34 In sum, read in the context of Article 92 of the Charter and of the Statute as a whole, the English text of Article 41(1) cannot bear an interpretation that strips an indication of provisional measures of legal force.

2. The Other Authentic Texts of Article 41(1)

5.35 The French, Spanish, Russian, and Chinese texts of Article 41(1) strengthen the conclusion that an indication of provisional measures is binding. In at least two respects, the ambiguity perceived by some in the English text does not appear in the French counterpart, and the Spanish, Russian, and Chinese accord with the French. For convenience, we refer to the French.[195]

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194. *See, e.g.*, Jerome B. Elkind, *Interim Protection: A Functional Approach* (1981), p. 153.

195. The Spanish, Russian, and Chinese texts of Article 41(1) read as follows:

> 1. La Corte tendrá facultad para indicar, si considera que las circunstancias así lo exigen, las medidas provisionales que deban tomarse para resguardar los derechos de cada una de las partes.
>
> 1. Суд имеет право указать, если, по его мнению, это требуется обстоятельствами, любые временные меры,

(continued...)

5.36 *First*, the phrase "power to indicate" is derived from "*pouvoir d'indiquer*." While "indicate," particularly in a judicial context, carries the force of obligation, "*indiquer*" is even less susceptible of a merely precatory dimension.[196]

5.37 *Second*, the French "*doivent*" admits of a more limited range of meaning than the English "ought." The French "*doivent*" is generally translated as "must" and used to denote mandatory obligations.[197] For example, in Article 40(1) of the Statute, the phrase "*doivent être indiqués*" is rendered in English as "shall be indicated," and in Article 43(4), "*doit être communiquée*" as "shall be communicated."[198] Thus, "*doivent*" accords with the principal

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195. (...continued)
которые должны быть приняты для обеспечения прав каждой из сторон.

一．法院如認情形有必要時，有權指示當事國應行遵守以保全彼此權利之臨時辦法。

196. *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 380 (separate opinion by Judge Weeramantry) ("the French word '*indiquer*' probably goes even further in this direction [of creating a connotation of obligation] than the English word 'indicate'"). *See also Petit Larousse illustré* (1919), p. 502 (defining "*indiquer*" to mean "montrer, désigner une personne ou une chose. Enseigner à quelqu'un ce qu'il cherche.").

197. *See Petit Robert dictionnaire alphabetique et analogique de la langue française,* Tome I (1990), p. 531 (defining "*devoir*", when followed by an infinitive, to mean "[ê]tre dans l'obligation de (faire qqch.) . . . cf. Être tenu, obligé de; il faut."); Gérard Cornu, *Linguistique juridique* (1990), p. 267 ("Certains verbes, en petit nombre, expriment la contrainte. . . . Le noyau [de ces verbes] comprend les termes: devoir . . . ."). *See also* Jerzy Sztucki, *op. cit.*, pp. 263-64.

198. *See also* U.N. Charter, art. 2 ("doivent agir conformément" rendered as "shall act in accordance with"); *ibid.*, art. 2(2) ("doivent remplir" rendered as "shall fulfill"); *ibid.*, art. 12(1) ("ne doit faire aucune" rendered as "shall not make any").

definition of "ought" in English, indicating obligation and duty, but it does not admit of advisability and prudence.[199]

5.38 In the face of this divergence, if divergence there be, the Court must adopt the reading that corresponds to the band of meaning that is common to both texts, rather than choose a meaning that can be reconciled only with one of the two. As the Permanent Court explained,

> where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, [the Court] is bound to adopt the more limited interpretation which can be made to harmonize with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties.[200]

In other words, hypothesizing a divergence for purposes of argument, if the French text allows only an imperative reading, and the English permits both an imperative and a permissive one, then the imperative reading is "the meaning which best reconciles the texts."[201] Applying that principle here, Article 41(1) must be read to empower the Court to issue binding orders.

3. Article 41(2)

5.39 In its brief to the United States Supreme Court, the United States made much of the formulation "measures suggested" in

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199. *See* Jerzy Sztucki, *op. cit.*, p. 263 ("The French phrase *'doivent être prises'* which points to *devoir* (duty) is stronger than the corresponding English phrase 'ought to be taken'.").

200. *Mavrommatis Palestine Concessions Case, Judgment No. 2, 1924, P.C.I.J., Series A*, p. 19.

201. Vienna Conventions on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 33(4).

the second paragraph of the English text of Article 41.[202] However, none of the other authentic texts uses a term equivalent to "suggested" in Article 41(2); each uses a term equivalent to "indicated." Emphasis supplied, the non-English texts read, respectively:

> 2. En attendant l'arrêt définitif, *l'indication de ces mesures* est immédiatement notifiée aux parties et au Conseil de sécurité.
>
> 2. Mientras se pronuncia el fallo, se notificarán inmediatamente a las partes y al Consejo de Seguridad las *medidas indicadas*.
>
> 2. Впре ь о окончания решения сооб ение *о предлагаемых мерах* неме ленно ово ится о све ения сторон и Совета Безопасности.
>
> 二．在終局判決前，應將*此項指示辦法*立即通知各當事國及安全理事會。

Hence, as the commentators agree, the use of "suggested" in the English text of Article 41(2) cannot be read to change the meaning of Article 41(1).[203]

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202. Brief for the United States as *Amicus Curiae, op. cit.*, p. 49.

203. *See* Manley O. Hudson, *op. cit.*, p. 425 n. 18 ("Little significance is to be attached to the phrase 'measures suggested' in paragraph 2 of Article 41, no equivalent of which appears in the French version."); Eckhard Hellbeck, "Provisional Measures of the International Court of Justice — Are They Binding?," *A.S.L.I.S. Int'l L. J.*, Vol. 9 (1985), pp. 169, 171 (similar); *see also* Taslim O. Elias, *The International Court of Justice and Some Contemporary Problems* (1983), p. 79 (similar).

C. THE OBJECT AND PURPOSE OF BOTH ARTICLE 41 STANDING ALONE AND THE STATUTE OF THE COURT TAKEN AS A WHOLE REQUIRE THAT PROVISIONAL MEASURES BE BINDING

5.40 The terms of Article 41 must be interpreted not only "in their context," but "in light of its object and purpose." In addition, if the meaning of an international instrument differs between two official texts — if, for example, the French and English texts of Article 41(1) are read to diverge — resort to object and purpose may be had in order to reconcile the texts.[204]

5.41 The object and purpose of Article 41(1) is "to preserve the respective rights of either party" pending resolution of the merits of the dispute. The object and purpose of the Statute as a whole is to allow the peaceful resolution of disputes in accordance with international law. As this case illustrates, these objects and purposes can only be achieved if an indication of provisional measures binds the parties to the case before the Court.

1. A Nonbinding Indication of Provisional Measures Cannot Preserve the Rights of the Requesting Party

5.42 Under Article 94(1) of the Charter, each Member of the United Nations "undertakes to comply" with any decision of the Court to which it is a party.[205] In its Order of Provisional Measures in this case, the Court explained that its power "to indicate provisional measures . . . is intended to preserve the respective rights of the parties pending its decision . . . ." Hence, the Court further explained, it "will not order interim measures in the absence of 'irreparable prejudice . . . to rights which are the subject of dispute . . . .'"

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204. Vienna Conventions on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 33(4); *see also Restatement (Third) of Foreign Relations Law of the United States* § 325, cmt. f (1987).

205. *See also* I.C.J. Statute, art. 59.

5.43 Here, the Court determined that the execution of Mr. Breard on the scheduled date "would render it impossible for the Court to order the relief that Paraguay seeks and thus cause irreparable harm to the rights it claims." Given that determination, the Court concluded that "the circumstances require[d] it to indicate . . . provisional measures."

5.44 In disregard of the Order, the execution of Mr. Breard went forward. As the Court predicted, the execution has "render[ed] it impossible for the Court to order the relief Paraguay seeks."

5.45 Either the execution was unlawful as a breach of a binding international obligation, or an indication of provisional measures cannot possibly achieve the object Article 41 purports to seek:

> [C]learly, there would be no point in making the final [judgment] binding if one of the parties could frustrate that decision in advance by actions which would render the final judgment nugatory. It is, therefore, a necessary consequence . . . of the bindingness of the final decision that the interim measures intended to preserve its efficacy should be equally binding.[206]

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206. United Nations, *Official Records of the Security Council, Sixth Session, 559th Meeting*, p. 20, document S/PV, 559 (1951) (statement of Sir Gladwyn Jebb, Representative of the United Kingdom). *See, e.g.,* Abdelhamid El Ouali, *Effets juridiques de la sentence internationale* (1984), pp. 99-100 (provisional measures "doivent trouver le fondement de leur force juridique essentiellement dans leur raison d'être"; "En reconnaissant au juge international le pouvoir d'indiquer ces mesures, on doit lui reconnaître par là-même implicitement le droit de les imposer aux Etats."); E.K. Nantwi, *The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law* (1966), p. 153 ("provision that the final judgment is binding becomes pointless if the decision can be negatived by actions of one of the parties in advance of the judgment"); Alan W. Ford, *The Anglo-Iranian Oil Dispute of 1951-1952* (1954), p. 93 ("a provision that the final decision (judgment) is binding becomes pointless if that decision can be negated by the actions of one party in advance of judgment"); Julius Stone, *Legal Controls of International*

(continued...)

Indeed,

> [t]he whole logic of the jurisdiction to indicate interim measures entails that, when indicated, they are binding — for this jurisdiction is based on the absolute necessity, when the circumstances call for it, of being able to preserve, and to avoid prejudice to, the rights of the parties, as determined by the final judgement of the Court.[207]

The only way to vindicate the Court's authority to preserve the rights of the parties pending its final judgment is to recognize the binding character of any provisional measures the Court indicates.

2. *A Nonbinding Indication of Provisional Measures Cannot Preserve the Court's Ability to Resolve Disputes in Accordance with Law*

5.46 This Court was "established by the Charter of the United Nations as the principal judicial organ of the United Nations."[208] In other words, this Court contributes to the United Nations' mission of

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206. (...continued)
Conflicts (1954), p. 132 (Court's indications of provisional measures must be binding because "any other arrangement might leave an unscrupulous defendant legally free to produce a *fait accompli* during time gained by a dilatory plea to the jurisdiction").

207. Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986), p. 548 (footnote omitted). *See Application of the Convention on the Prevention and Punishment of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 399 (separate opinion of Judge Ajibola) ("Logic and common sense would consider it ridiculous and absurd for the Court to be unable to preserve the rights of the parties pending final judgment."). *Cf.* Sir Gerald Fitzmaurice, *op. cit.*, p. 548 n. 3 (if provisional measures orders were not binding, they would "*in practice*, have a lesser status than that of other interlocutory orders of far smaller importance . . . .") (emphasis in original).

208. I.C.J. Statute, art. 1; *see* U.N. Charter, art. 92.

promoting the peaceful resolution of disputes and ensuring compliance with international law by providing a judicial forum in which international law may be impartially applied to such disputes as States have consented to submit.[209]

5.47 By arguing against the binding character of provisional measures, the United States effectively contends that a party that has consented to the judicial resolution of a given dispute retains the right to determine whether or not to comply with an order of the tribunal even when that order is intended to preserve the tribunal's capacity to render an effective judgment in the dispute. That contention cannot be squared with the object and purpose of judicial resolution of disputes in accordance with international law.[210]

5.48 The Governor's conduct in this case demonstrates the stark incompatibility between the Statute's purpose to facilitate the judicial resolution of disputes and the notion that an indication of provisional measures is not binding. Advised that he was under no obligation to abide by the Order, but knowing that he would have an obligation to abide by a final judgment, Governor Gilmore determined to go forward with the execution now so that he would not be foreclosed from doing so later. While Governor Gilmore's action may, by his own lights, have been a rational response to the United States' position, any legal regime that would induce such a response to an order granting conservatory measures would be thoroughly irrational.

5.49 When parties agree to submit a dispute to a court, they consent to the resolution of the dispute by an impartial body in accordance with established legal standards. By making that submission, they necessarily waive their right to resolve the dispute by unilateral action. As a result, the Court has repeatedly pointed out that its authority under Article 41 "presupposes" that "the Court's

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209. *See* U.N. Charter, art. 1(1).

210. *See* Manley O. Hudson, *op. cit.*, p. 426 ("The judicial process which is entrusted to the Court includes as one of its features, indeed as one of its essential features, th[e] power to indicate provisional measures which ought to be taken.").

judgment should not be anticipated by reason of any initiative regarding the measures which are in issue."[211] Any other rule would effectively allow a party to oust the Court of its jurisdiction over the subject matter of a dispute after the dispute has arisen, thereby rendering meaningless the obligation undertaken by the compromissory agreement.

5.50 Hence, a court, to function in conformity with its judicial character, must have the authority to control the resolution of the dispute by excluding unsanctioned nonjudicial action:

> The function of a judicial tribunal, once an issue has been brought to it, is to take the necessary steps according to law towards reaching a decision in accordance with the principle of the equality of parties. This presupposes that the issue brought to it, once committed to the court, must as far as possible be preserved in that form, free of interference by unilateral action of a party, until the determination made by the court. It means also that the principle of equality cannot be disturbed by the superior force available to one party, wherewith to impair or interfere with the subject-matter until determination. It is thus inherent in the authority of that tribunal that, ancillary to the power of judgment, it must have the power to issue incidental orders to ensure that the subject-matter of the suit is preserved intact until judgment.[212]

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211. *Fisheries Jurisdiction, (Federal Republic of Germany v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972,* p. 34. *See also Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976,* p. 9 (Article 41 power presupposes that "the Court's judgment[s] should not be anticipated by reason of any initiative regarding matters in issue before the Court").

212. *Application of the Convention on the Prevention and Punishment of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993,* p. 376 (separate opinion of Judge Weeramantry); *see also* Moncef Khdir, *Dictionnaire juridique de la Cour internationale de Justice*

(continued...)

In short, once having agreed to submit a dispute to this Court, a party does not have the right to act unilaterally on the dispute in the manner of the United States here.[213]

D. The Interpretation of Article 41 Must Also Take into Account the Rule That the Parties to a Judicial Proceeding Have an Obligation to Preserve the Subject Matter

5.51 The interpretation of Article 41 must also take into account any "relevant rules of international law applicable in the

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212. (...continued)
(1997), p. 139 (defining "ordonnance" as "Terme employé pour désigner une décision prise par la cour ou par son Président, et dont l'objet est de régler un point de procédure, sans se prononcer sur le fond de l'affaire, notamment en matière de mesures conservatoires . . . . Les ordonnances ont un caractère obligatoire"); *ibid.*, p. 124 ("[les mesures conservatoires] ont force obligatoire au même titre que les arrêts de la cour.").

213. *See* Edvard Hambro, *op. cit.*, pp. 164-65 ("It is in the very essence of the Court that its decisions must be binding. It is against the function of the Court and against the dignity of the Court (not the dignity in the sense of protocol or prestige, but dignity of the Court as the embodiment of the majesty of law) to render decisions which the Parties are free to accept or to ignore at their will."); Jerome B. Elkind, *op. cit.*, p. 30 (power to indicate provisional measures is "part and parcel of the idea of law in the sense that law is a substitute for violence. A party who cannot rely on the courts for a just solution of his dispute may well recur to the more primitive remedy of self-help. Nowhere is this problem more glaring than in a situation where the other party has anticipated the judgment of the court and has performed an action which would make that judgment valueless."); Edward Dumbauld, *op. cit.*, p. 167 ("[T]he Court may forbid acts of self-help and hostilities to the extent that such conduct interferes with the Court's functioning or jeopardizes the functioning of its judgment."); Lawrence Collins, "Provisional and Protective Measures in International Litigation," in *Recueil des Cours*, Tome 234, 1992-III (1993), p. 23 ("[T]here are historical grounds for seeing [the] origin [of provisional and protective measures] in the desire of those administering the law to prevent violent self-help . . . .").

relations between the parties."[214] The rule applicable here is that, quite apart from any conventional obligation, a party that has agreed to submit a dispute for judicial resolution may not act on the subject matter of the dispute in a manner that interferes with the capacity of the tribunal to render an effective judgment.

5.52 The Permanent Court has confirmed that the authority to indicate provisional measures pursuant to Article 41 simply reflects

> the principle universally accepted by international tribunals . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.[215]

Thus, in exercising its authority under Article 41, the Court "give[s] life and blood to a rule that already exists in principle."[216]

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214. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 31(3)(c).

215. *Electric Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77*, p. 199.

216. Edvard Hambro, *op. cit.*, p. 167. *See, e.g., Comité des juristes de l'étude du statut de la Cour Permanente de Justice Internationale* (First Session, 11 March 1929) (statement of Elihu Root) ("parties to a case, when they submitted their controversy to the Court, might be regarded as having come under an obligation not to destroy the subject matter of their controversy or in any way to anticipate the judgment of the Court by action of their own;" "[s]uch an obligation was implied in their acceptance of the jurisdiction of the Court") (unofficial translation); Henri-A. Rolin, *op. cit.*, p. 295 ("Une première proposition qui ne nous paraît pas susceptible de contradiction . . . est que toute soumission de justiciables à une juridiction . . . implique l'obligation de s'abstenir en cours d'instance de tout acte susceptible soit de contrarier le fonctionnement du Tribunal, soit de paralyser éventuellement l'efficacité de sa décision.").

5.53 This principle of restraint is a rule of customary international law.[217] It is fundamental that "from the moment that, and as long as, a dispute is submitted to a judicial decision and one is awaited, the parties to the dispute are under an obligation to refrain from any act or omission the specific factual characteristics of which would render the normative decision superfluous or impossible."[218] Thus, even absent Article 41, "it is perfectly certain that all States parties to an international dispute *sub judice* have an absolute obligation to abstain from any act that would nullify the result of the judgment to be rendered by the international court in question."[219]

5.54 This principle of restraint should inform the interpretation of Article 41. Specifically, Article 41 should be read to harmonize a party's preexisting obligation not to irrevocably alter the subject matter of the dispute with the Court's express authority to

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217. Peter J. Goldsworthy, "Interim Measures of Protection in the International Court of Justice," *Am. J. Int'l L.*, Vol. 68 (1974), pp. 258, 260 ("The practice of states reveals acceptance of a general obligation to maintain the status quo pending a final decision in a dispute."). *See, e.g.*, General Assembly Resolution 2625, *United Nations Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among Nations in Accordance with the Charter of the United Nations*, reprinted in 9 I.L.M. 1292 (1970).

218. Niemeyer, *Einstweilige Verfügungen des Weltgerichtshofs, ihr Wesen und ihre Grenzen* (1932), pp. 15-16 (quoted and translated in *Application of the Convention on the Prevention of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 378 (separate opinion of Judge Weeramantry)). *See, e.g.*, Manley O. Hudson, *op. cit.*, p. 426 ("If a State has accepted the general office of the Court . . . it has admitted the powers which are included in the judicial process entrusted to the Court. It would seem to follow that such a State is under an obligation to respect the Court's indication of provisional measures . . . ."); Jerome B. Elkind, *op. cit.*, pp. 162-63 ("[t]he duty of the parties not to prejudice the outcome of a judicial dispute pending the final decision of the Court can be[] seen as a duty arising from the fact that judicial proceedings have been instituted").

219. Edvard Hambro, *op cit.*, p. 167. *See Application of the Convention on the Prevention of Genocide, Order of 13 September 1993, I.C.J. Reports 1993*, p. 377 (separate opinion of Judge Weeramantry) (citing Hambro with approval on this point).

define the scope of that obligation in the circumstances of a particular dispute. Read in that light, an order pursuant to Article 41 must be binding.

E. The Circumstances of the Adoption of Article 41 Confirm That an Indication of Provisional Measures Is Binding

5.55 "[T]he preparatory work of the treaty and the circumstances of its conclusion" may provide a "supplementary means of interpretation."[220] Such means may be used (a) to confirm an interpretation reached by the general rule that a treaty shall be construed to accord with the ordinary meaning of the text in its context and in the light of its purpose; (b) to resolve a meaning that is "ambiguous or obscure;" or (c) to reconsider a reading that appears "manifestly absurd or unreasonable."[221] It follows that the supplementary means cannot be used to overturn an interpretation dictated by the general rule.

5.56 In the case of Article 41, there is no reason to have recourse to the supplementary means, as the ordinary meaning, context, and object and purpose of the provision establish a clear, unambiguous, and eminently reasonable reading. But if recourse were to be had, the supplementary means would only confirm the binding character of an indication of provisional measures.

5.57 What is now Article 41 of this Court's Statute first appeared as the like-numbered article of the Statute of the Permanent Court of International Justice. The original draft of that Statute was prepared by an Advisory Committee of Jurists that was appointed by the League of Nations and met in 1920. The League's Secretariat

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220. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 32.

221. *Ibid.*

prepared a preparatory memorandum,[222] but the Advisory Committee based the provision on language employed in the Bryan Treaties between the United States and Sweden, France, and China, respectively.[223] The Statute was adopted by the Assembly of the League of Nations on 13 December 1920.

5.58 The Statute of this Court was drafted by a Committee of Jurists convened in Washington in 1945. The Committee adopted Article 41 from the Statute of the Permanent Court without recorded discussion and with only two minor changes.[224] This Court's Statute was unanimously approved, without discussion of Article 41, at the San Francisco Conference later in 1945.[225] Thus, if any preparatory work or adoption history might shed light, it must be that preceding the adoption of the Statute of the Permanent Court.

5.59 The circumstances surrounding the adoption of that Statute by the Assembly of the League of Nations provide strong support for the conclusion that an indication of provisional measures

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222. *See* "Memorandum Presented by the Legal Section of the Permanent Secretariat of the League of Nations," reprinted in *Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice* (1920).

223. *See* Manley O. Hudson, *op. cit.*, p. 425. *See generally* Hans-Jürgen Schlochauer, "Bryan Treaties (1913/1914)," in *Encyclopedia of Public International Law*, Vol. I (1992), pp. 509-11.

224. United Nations Committee of Jurists, *Documents of the United Nations Conference on International Organization San Francisco, Seventh Meeting, 13 Apr. 1945*, Vol. 14 (1945), p. 172. Only two changes were included in the text of Article 41. The first, following a proposal from the United States, was the addition of the word "Security" before "Council" in the second paragraph, to distinguish the organ to be notified of provisional measures from the Council of the League of Nations. Second, the word "reserve," in the second paragraph, was changed to "preserve" in accordance with the original version approved in 1920 but inadvertently altered in a typographical error.

225. Commission IV/1, *Documents of the United Nations Conference on International Organization San Francisco, Sixth Meeting, 12 May 1945*, Vol. 13 (1945), p. 170.

is binding. Before a final vote on the Statute, the Advisory Committee's draft was referred to the Third Committee of the Assembly. The Committee made two changes to the English text. First, the translation of "*pouvoir d'indiquer*" was revised from "power to suggest" to "power to indicate."[226] Second, the English "should" was changed to "ought" to comport with "*doivent*."[227] Had the Assembly intended the Court's authority to indicate provisional measures to be merely advisory, there would have been no reason to make these changes.[228]

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226. *See Procès-Verbaux of the Third Committee of First Assembly, Fifth Meeting, 29 Nov. 1920*, reprinted in *League of Nations: Permanent Court of International Justice Documents Concerning the Action Taken by the Council of the League of Nations*, Vol. 3 (1920), p. 134 (noting that "M. Huber said that the existing divergence between the two treaties must be eliminated and he insisted that the stronger term 'indiquer' should be considered authentic").

227. *See ibid.*

228. Some commentators have nevertheless been confused by a single exchange in the Advisory Committee, by which the Committee declined to adopt a proposal to replace "indicate" in Article 41 with "order." *See Procès-Verbaux of the Proceedings of the Committee, 28th Meeting, 20 July 1920*, reprinted in *League of Nations: Legal*, Vol. 2 (1920), p. 588. *See, e.g.*, Jerzy Sztucki, *op. cit.*, p. 24; Edward Dumbauld, *op. cit.*, p. 168 & n. 9. This exchange simply cannot carry the weight that some have asked it to bear. *First*, as a matter of law, the preparatory work cannot override the ordinary meaning of the Article in its context and in light of the statute's object and purpose. *Second*, there is no reason to believe that the drafters believed that the term "indicate" would carry any less force than "order." *See* authorities cited at note 192 *supra*. *Third*, any inference from an amendment that *was not* adopted in the Advisory Committee could not overcome the contrary inference from the revision that *was* made by the Third Committee, as the action taken by the delegates to the Assembly that actually adopted Article 41 is better evidence of the Assembly's understanding. *Finally*, the exchange, as well as a similar discussion in the Committee Report, reflects not a conviction that the measures were not binding but rather a concern that the Court would have no means to enforce them. *Procès-Verbaux of the Third Committee of First Assembly, Fifth Meeting, 29 Nov. 1920*, reprinted in *League of Nations: Permanent Court of International Justice Documents Concerning the Action Taken by the*

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F. THE COURT MUST CONSIDER THE ORDINARY MEANING, CONTEXT, OBJECT AND PURPOSE, RELEVANT RULES, AND ADOPTION HISTORY AS THEY INFORM INTERPRETATION TODAY

5.60 In applying the available means of treaty interpretation, the Court cannot ignore the contemporary fabric of international law. The treaty at issue, the Statute of the Court, is a constitutive treaty that must speak for decades or longer. It legitimates the work of an institution that stands at the apex of the international legal order. Given that position, the Court cannot ignore the contemporary legal universe in which Article 41 operates.

5.61 This universe is far removed from that in which the predecessor to Article 41 originated. In particular, the capacity of an international tribunal to deal authoritatively with States no longer stirs the controversy or concern that it once may have.[229] If this Court is to vindicate the role of the rule of law in the quest for peace, it must assert its authority to perform effectively the task the Charter has assigned it.

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228. (...continued)
Council of the League of Nations, Vol. 3 (1920), p. 134 (statement of Chairman Hagerup); Henri-A. Rolin, *op. cit.*, p. 285 (examining Procès-Verbaux, Commissions, I, p. 368, and concluding that binding nature of provisional measures was not at issue). *See also* Advisory Committee of Jurists, *Report on the Draft Scheme for the Establishment of the Permanent Court of International Justice* (1920), p. 45.

229. *See, e.g., Texas Overseas Petroleum Co./California Asiatic Oil Co. and Libyan Arab Republic* (Dupuy, arb., 19 Jan. 1977) (Merits), reprinted in 17 I.L.M. 3 (1977) and 53 I.L.R. 389 (1979).

CHAPTER 6

PARAGUAY IS ENTITLED TO APPROPRIATE AND MEANINGFUL REMEDIES

6.1 Paraguay is entitled to adequate reparation for the United States' violations of its international legal obligations, and it need not ground its request for relief in any express authorization of a particular remedy in the text of the Vienna Convention.

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation, therefore, is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the Convention itself.[230]

To the contrary, "[p]rinciples of international law concerning remedies are not rigid or formalistic and give an international tribunal wide latitude to develop and shape remedies."[231]

6.2 There are four remedies to which Paraguay is entitled as a result of the United States' several violations of the Vienna Convention and customary law, including its violation of this Court's Provisional Measures Order: (i) a declaration that the United States violated the Vienna Convention in the manner set forth in this Memorial; (ii) an order of non-repetition; (iii) *restitutio in integrum*, that is, a restoration of the status quo — now an impossibility given the execution of Mr. Breard; and (iv) compensation and satisfaction in lieu of *restitutio*.

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230. *Memorial of the United States, United States Diplomatic and Consular Staff in Tehran, I.C.J. Pleadings 1980*, p. 188, quoting *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J. Series A, No. 9*; *see also Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J. Series A, No. 17*, p. 29; *Affaires des biens britanniques au Maroc espagnol (Sp. - Gr. Brit.), 1 May 1925*, 2 R.I.A.A. 615, 641.

231. *Restatement (Third) of the Foreign Relations Law of the United States* § 901, cmt. d (1987).

I.

Paraguay Is Entitled to a Declaration that the United States Violated Paraguay's Rights Under the Vienna Convention

6.3 This Court has jurisdiction to render declaratory judgments in contentious cases. The purpose of such declaratory relief is to "ensure recognition of a situation at law, once and for all and with binding force as between the Parties, so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned."[232]

6.4 It is with a view to just such a final interpretation of the Vienna Convention that Paraguay requests a declaratory judgment from the Court. The parties' dispute in this case concerns the application of the Vienna Convention, an important treaty that remains in force between the parties. Definitive interpretations by this Court on the requirements of Article 36 of the Convention and the consequences of violating its provisions will ensure that the parties apply the Convention properly in the future and should obviate the need for the parties to return to this Court with a similar dispute.

6.5 Related concerns support a declaratory judgment with respect to the United States' violation of the Provisional Measures Order entered by the Court in this case. The United States' breach of the Order also raises hotly disputed legal and factual issues with continuing ramifications that this Court should definitively resolve.

II.

Paraguay Is Entitled to an Order of Non-Repetition

6.6 Paraguay is entitled to an order that the United States not repeat its violations of international law. As stated in the

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232. *Factory at Chorzów, Interpretation of Judgments Nos. 7 and 8, Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 20.

International Law Commission's Draft Articles on State Responsibility, an "injured state is entitled, where appropriate, to obtain from the State which has committed an internationally wrongful act assurances or guarantees of non-repetition of the wrongful act."[233]

6.7 There is particular need for an order of non-repetition in this case, because the United States has already evinced a pattern of violating the Vienna Convention,[234] and Paraguay is entitled to assurances that its rights will not be similarly violated in the future should a Paraguayan national be arrested in the United States.

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233. *Draft Articles on State Responsibility, op. cit.*, art. 46.

234. *See, e.g., Republic of Paraguay v. Allen*, 134 F.3d 622, 629 & n.7 (4th Cir. 1998) (expressing the court's "disenchantment" with Virginia's repeated violations of the Vienna Convention); *United Mexican States v. Woods*, 126 F.3d 1220, 1222-1223 (9th Cir. 1997); *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997); *Faulder v. Johnson*, 81 F.3d 515, 550 (5th Cir. 1996). On 22 April 1998, one week after the execution of Mr. Breard, the State of Arizona executed José Roberto Villafuerte, despite pleas from President Carlos Flores Facusse of Honduras and an acknowledgment by the United States Department of State that Article 36 was violated. *See* "US executes Honduran national by lethal injection," *Agence France Presse*, 22 Apr. 1998, available in LEXIS, News library, Curnws file; Philippe Sands, "Execution of Paraguayan a Serious Error," *Newsday*, 23 Apr. 1998, p. A49. According to Amnesty International, there are more than 60 foreign nationals on death row in the United States who were denied their consular notification rights under the Vienna Convention. Amnesty International, *The Execution of Angel Breard: Apologies Are Not Enough*, May 1998, pp. 1-2; *see also Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution, Mr. Bacre Waly Ndiaye, Submitted Pursuant to Commission Resolution 1997/61, Official Records of the Economic and Social Council, Commission on Human Rights, 54th Session*, provisional agenda item 10, para. 118, document E/CN.4/1998/68/Add.3; Marcia Coyle, "Are 65 Illegally on Death Row in U.S.?", *National Law Journal*, 27 Apr. 1998, p. A16.

III.

Paraguay Was Entitled to *Restitutio in Integrum*

6.8 In the classic formulation from the *Chorzów Factory Case*: "The essential principle of international law is 'that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.'"[235] Thus, "*restitutio in integrum* is the natural redress of any violation of" international treaty obligations.[236]

6.9 Restitution is the sole remedy that could have provided meaningful relief to Paraguay and its national — undoing the effects of the United States' illegal acts (Mr. Breard's conviction and/or death sentence) and permitting the exercise by Paraguay of its rights under the Vienna Convention.[237]

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235. *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47. *See also Draft Articles on State Responsibility, op. cit.*; *Restatement (Third) of Foreign Relations Law of the United States* § 901, cmt. d (1987) ("Ordinarily, emphasis is on the forms of redress that will undo the effect of the violation, such as restoration of the *status quo ante*, restitution, or specific performance of an undertaking . . . ."); Jiménez de Aréchaga, *op. cit.*, pp. 565-67.

236. *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 28. *See also* Oscar Schachter, *International Law in Theory and Practice: General Course in Public International Law* (1985), p. 190 ("When a state is internationally responsible for a wrongful act . . . [it is] normally under a duty to restore the situation as it existed before the breach."); *Texas Overseas Petroleum Co./California Asiatic Oil Co. and Government of the Libyan Arab Republic*, (Dupuy, arb., 19 Jan. 1977) (Merits), reprinted in 17 I.L.M. 3 (1977) and 53 I.L.R. 389 (1979) (citing Lauterpacht, Reitzer, Schwarzenberger, Jiménez de Aréchaga, de Visscher, Tenékidès and Guggenheim in support of *restitutio in integrum* as the basis of reparation).

237. Schachter, *op. cit.*, p. 190 ("When a State is internationally responsible for a wrongful act, it is under an obligation to discontinue the act and to prevent the continuing of the effects of this act."); *Restatement*

(continued...)

6.10 In this case, as adequate reparation for its illegal acts, the United States would have had to void Mr. Breard's conviction and sentence, permit Paraguay fully to exercise its right of consular assistance at any new trial, and reconvey the plea offer that Mr. Breard rejected as a result of his lack of consular protection; a judgment requiring such relief would have restored the *status quo ante*. Absent such an order, Paraguay and its national would continue to suffer the consequences of the breach — as they did here.

6.11 It is of no consequence that restitution would have required the United States to reverse the judgment of a domestic criminal proceeding. "The obligation of a state to terminate a violation of international law may include discontinuance, revocation, or cancellation of the act (whether legislative, administrative or judicial) that caused the violation."[238]

6.12 While it falls to the Court to determine the parties' international legal obligations, it falls to the parties to comply with those legal obligations. The Court will not give practical advice to

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237. (...continued)
(Third) of Foreign Relations Law of the United States § 901, cmt. d (1987) ("Ordinarily, emphasis is on the forms of redress that will undo the effect of the violation . . ."). *Cf. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54; *Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 82 ("[t]his decision entails a legal consequence, namely that of putting an end to an illegal situation: the Government of Colombia which had granted the asylum irregularly is bound to terminate it. As the asylum is still being maintained, the Government of Peru is legally entitled to claim that it should cease."); *Restatement (Third) of Foreign Relations Law of the United States* § 901 (1987) ("Under international law, a state that has violated a legal obligation to another state is required to terminate the violation . . .").

238. *Restatement (Third) of the Foreign Relations Law of the United States* § 901, cmt. c (1987). *See United States v. Rangel-Gonzales*, 617 F.2d 529 (9th Cir. 1980) (overturning conviction for illegal entry after deportation because defendant prejudiced by immigration officials' failure in deportation proceedings to inform of right to contact consulate).

the parties as to how to implement their obligations. Instead, the Court "assume[s] that the Parties, [once] their mutual legal relations have been made clear, will be able to find a practical and satisfactory solution."[239]

6.13 Finally, the Vienna Convention specifically contemplates the possibility that compliance with its obligations might require changes to domestic law. As discussed above, Article 36(2) requires that municipal "laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

6.14 The *travaux préparatoires* to the Vienna Convention demonstrate that the States Parties anticipated the potential conflict between Article 36's obligations and domestic criminal law, and that they understood that the international obligation undertaken must take priority over countervailing rules of municipal law.[240] At the Vienna Conference on Consular Relations in 1963, the Soviet delegate proposed restoring the International Law Commission draft of Article 36(2), which only required that municipal laws not "nullify" the rights under Article 36. The Soviet delegate objected to the positive formulation of Article 36(2) requiring states' municipal laws to give "full effect to the purposes" for those rights, because "it might force states to alter their criminal laws and regulations and allow consuls to interfere with normal legal procedure in order to protect alien offenders."[241] The Romanian delegate supported the Soviet amendment, stating that "[t]he provisions of the article could not possibly

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239. *Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 82. Significantly, the Court's judgment in the *Haya de la Torre* case ordered the termination of what it had determined to be an illegal grant of asylum. States typically view their powers over immigration as fundamental to sovereignty, perhaps more so than even the criminal law. Nonetheless, this Court determined this sovereign act to have been illegal and ordered that it be reversed.

240. Lee Aff., paras 4-8.

241. United Nations, *Official Records of the Conference on Consular Relations, Vol. I, Twelfth Plenary Meeting*, para. 4, document A/CONF.25/6.

attempt to modify the criminal laws or regulations or the criminal procedure of the receiving State."[242] Further, the Romanian delegate opposed the idea that international law was superior to domestic law. Thus, the delegates debated these issues, and rejected the position that Article 36 should not be permitted to require a State to revise or alter its criminal procedures or laws. The Conference, instead, passed the current language, "which conformed to the principle that international law prevailed over municipal law."[243]

IV.

Given the United States' Violation of the Order, Making *Restitutio in Integrum* Impossible, Paraguay Is Entitled to Alternative Reparation

6.15 The United States' action in executing Mr. Breard had the effect, and was designed for the very purpose,[244] of preventing the possibility of *restitutio in integrum.*

6.16 This Court must not permit the United States to limit its international responsibility to Paraguay through deliberate disregard of the rule of law. As the United States has previously argued, "[t]his Court can best uphold the rule of law in the international community by emphasizing that serious breaches of international law are not without consequence."[245]

6.17 Under international law, Paraguay was entitled to restitution of the *status quo ante* as the best and only adequate remedy for the United States' violations of the Vienna Convention.

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242. *Ibid., Eleventh Plenary Meeting*, para. 26.

243. *Ibid., Nineteenth Meeting of the First Committee*, para. 5 (statement of the Spanish delegate).

244. Statement of Governor Jim Gilmore (14 Apr. 1998), Annex 24.

245. *Memorial of the United States, United States Diplomatic and Consular Staff in Tehran, I.C.J. Pleadings 1980*, p. 189.

The actions of the United States that now prevent the Court from providing this remedy do not affect Paraguay's original entitlement to *restitutio* or the United States' responsibility now to make alternative reparation that approximates as closely as possible restoration of the *status quo ante*. As stated by the Court in *Factory at Chorzów*, adequate reparation requires "[r]estitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear . . . ."[246]

6.18 Similarly, by the very nature of the United States' violation of this Court's Order of Provisional Measures, *restitutio in integrum* is not available as a remedy for that breach. Therefore, alternative reparation must also be available for this breach of international law.

6.19 Reparation in any form must, as far as possible, "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability have existed if that act had not been committed."[247] Needless to say, where, as here, the illegal act resulted in the death of a human being, no form of reparation can wipe out the consequences of that act. Inadequate though it may be, however, Paraguay is entitled now to seek an alternative to the form of relief originally sought. Thus, Paraguay should receive (1) compensation for the taking of Mr. Breard's life in violation of both the Vienna Convention and this Court's Order of Provisional Measures; and (2) satisfaction, in the form of moral damages, for the moral injury it suffered as a result of these violations.

6.20 Paraguay respectfully requests that the Court "receive evidence and . . . determine, in a subsequent phase of [these] proceedings, the amount of damage to be assessed" in lieu of *restitutio in integrum*.[248]

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246. *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47.

247. *Ibid.*

248. *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland),*

(continued...)

SUBMISSIONS

6.21 FOR THESE REASONS, the submissions of the Government of the Republic of Paraguay are as follows:

MAY IT PLEASE THE COURT

(a) to adjudge and declare that the United States violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, under articles 5 and 36 of the Vienna Convention, by arresting, detaining, trying, convicting, sentencing, and executing Angel Francisco Breard without providing Paraguayan consular officials the opportunity to provide effective assistance;

(b) to adjudge and declare that the United States violated its international legal obligation under Article 36(2) of the Vienna Convention by applying the municipal-law doctrine of procedural default to bar Angel Francisco Breard from raising his claim under the Vienna Convention and thereby failing to give full effect in United States municipal law to the provisions of Article 36;

(c) to adjudge and declare that the United States violated its international legal obligation to comply with the Provisional Measures Order issued by this Court on 9 April 1998 by failing to take all measures at its disposal to ensure that Angel Francisco Breard was not executed; and

(d) to adjudge and declare that the United States violated its international legal obligation not to undertake any action that might prejudice any eventual decision in the case or aggravate the dispute by failing to halt the execution of Angel Francisco Breard;

and, in light of the foregoing violations,

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248. (...continued)
Merits, Judgment, I.C.J. Reports 1974, p. 205.

(e) to adjudge and declare that the United States is under an international legal obligation to provide Paraguay a guarantee that the United States will not repeat its illegal acts, but will carry out in conformity with the foregoing international legal obligations, any future detention of or criminal proceedings against any Paraguayan national in its territory, whether by a constituent, legislative, executive, judicial, or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

(f) to adjudge and declare that Paraguay was entitled to *restitutio in integrum* and would have been entitled to the restoration of the *status quo ante* had the United States not executed Mr. Breard;

(g) to adjudge and declare that in light of the United States' actions rendering it impossible for the Court to provide the remedy of *restitutio in integrum*, Paraguay, in its own right and in the exercise of diplomatic protection of its national, is entitled to payment by the United States, in an amount to be determined by the Court in a subsequent proceeding, of (1) compensation and (2) moral damages as satisfaction;

(h) to adjudge and declare that, as a remedy for the United States' breach of the Provisional Measures Order and of its international legal obligation not to undertake any action that might prejudice any eventual decision in the case or aggravate the dispute, the Republic of Paraguay is entitled to payment by the United States, in an amount to be determined by the

Court in a subsequent proceeding, of (1) compensation and (2) moral damages as satisfaction.

The Hague, 9 October 1998

(Signed) Manuel María CÁCERES
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Text reflects corrections submitted to the Court on 9 November and 23 December 1998

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LIST OF ANNEXES TO THE MEMORIAL OF PARAGUAY