

CONDITIONAL REQUEST OF PARAGUAY
FOR AN ORDER CONCLUSIVELY
ESTABLISHING FACTS

DEMANDE CONDITIONNELLE DU PARAGUAY
TENDANT À CE QUE LA COUR RENDE
UNE ORDONNANCE QUI ÉTABLISSE
DES FAITS DE FAÇON CONCLUANTE

On behalf of the Republic of Paraguay, I hereby submit a Conditional Request for an Order Conclusively Establishing Facts.

1. On 14 April 1998, in violation of this Court's Order of provisional measures of 9 April 1998, responsible officials of the United States executed Angel Francisco Breard. The execution deprived the Republic of Paraguay of a principal source of evidence in Paraguay's case: Mr. Breard himself.

2. As Paraguay more fully explains in its Memorial dated this date, there are no disputed issues of fact that it needs to establish in order to prevail on any of the claims it submits to this Court. The United States has candidly acknowledged its breach of the Vienna Convention on Consular Relations in Mr. Breard's case, and in Paraguay's view, as a matter of law, no prejudice need be shown in order to obtain a remedy for that breach. Further, even if the Court were to determine that a showing of prejudice were required on any of Paraguay's claims, the showing made by Paraguay from other sources would suffice to establish prejudice.

3. If the Court determines, however, that there remain any disputed issues of fact that are material to Paraguay's claims as to which Mr. Breard's testimony would have been relevant, it should deem those facts established in Paraguay's favour in order to remedy the evidentiary prejudice to Paraguay by virtue of the United States' execution of Mr. Breard.

BY EXECUTING MR. BREARD,
THE UNITED STATES DEPRIVED PARAGUAY OF HIS TESTIMONY

4. For the reasons set forth in Chapter 5 of Paraguay's Memorial, the United States' execution of Mr. Breard breached a binding Order of this Court. Paraguay seeks appropriate reparation for that breach.

5. Separate and apart from that breach, the execution also violated the fundamental obligation owed by a party to a tribunal in which its case is pending not to interfere with the tribunal's capacity to reach a fully informed and fully effective judgment on the dispute submitted¹.

"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 . . ."²

¹ E.g., *Electricity Company of Sofia and Bulgaria, Interim Measures of Protection*, 1939, P.C.I.J., Series A/B, No. 79, p. 199.

² *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. 376 (separate opinion of Judge Weeramantry). Cf. Ted L. Stein, "Contempt, Crisis, and the Court: The World Court and the Hostage Rescue Attempt", *American Journal of International Law*, Vol. 76, p. 509.

This duty of fidelity to the tribunal encompasses a duty to make relevant evidence available¹. Contrary to that duty, the United States interfered with the Court's judicial processes by unilaterally taking action that makes certain evidence unavailable.

6. Whatever the character of the United States's obligations under the Order of provisional measures, it will remain the case that Paraguay will not have access to Mr. Breard's testimony because the United States chose to disregard that Order. For purposes of these proceedings, as between Paraguay and the United States, it should be the United States that suffers any adverse consequences from Mr. Breard's absence. Hence, however the Court may rule on Paraguay's claim for reparation arising from the breach of the Order, Paraguay is independently entitled to an order remedying any evidentiary prejudice it might suffer from the conduct that deprived it of Mr. Breard's testimony.

7. The case for such an order is especially compelling here because it is the United States that raises the only disputed issue as to which Mr. Breard's testimony might have been relevant. Specifically, at the hearing on provisional measures, the United States contended that Paraguay could not show prejudice to Mr. Breard from the admitted violation of the Vienna Convention, arguing that such prejudice was a prerequisite to relief for that violation². As its Memorial reflects, Paraguay contends, to the contrary, that it is entitled to reparation as a matter of law and that therefore it need make no factual showing of prejudice in order to prevail on its Article 36 claims.

8. In the Order, the Court took note of the United States' contentions concerning prejudice and determined that "the issue of whether any such remedy is dependent upon evidence of prejudice to the accused in his trial and sentence can . . . only be decided upon at the merits"³. If the Court were to hold a showing of prejudice to be required, the injury to Paraguay's ability to pursue its claims under the Vienna Convention would ripen. In that event, Paraguay would be entitled to an appropriate order protecting it from any evidentiary prejudice.

IF THIS COURT HOLDS THAT PARAGUAY
MUST SHOW PREJUDICE, IT SHOULD ALSO HOLD
THAT PREJUDICE HAS BEEN CONCLUSIVELY ESTABLISHED

9. If this Court holds that Paraguay must make a factual showing of prejudice in order to prevail on its Vienna Convention claims, it should also hold that, for purposes of this proceeding, that fact should be deemed conclusively established. The Court would have authority to so order as a sanction for the violation of the Order or of the general duty owed by State litigants not to

¹ *Parker* case, US-Mexico Claims Comm'n, No. 127, 31 Mar. 1926, *Ops. of Comm'rs*, p. 40 (party has obligation to provide tribunal "all evidence within its possession to establish the truth, whatever it may be").

² See Oral Argument, case concerning *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Statement of Catherine Brown, para. 2.24; *ibid.* Statement of John R. Crook, paras. 3.30-3.31; *ibid.*, Statement of Michael J. Matheson, paras. 4.14 and 4.16.

³ Case concerning *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, *Provisional Measures, Order of 9 April 1998*, *I.C.J. Reports 1998*, pp. 253, 254 and 256, paras. 18, 20, 32, 33.

interfere with the effective functioning of the judicial process¹. But it would also have authority to enter such an order pursuant to its authority, both express and inherent, to conduct the proceeding in a fair and effective manner.

10. Under its Statute, the Court has authority to "make orders for the conduct of the case"². It also has authority to "make all arrangements connected with the taking of evidence", to "call upon the agents to produce any document or to supply any explanations" and to take "[f]ormal note . . . of any refusal" to do so³.

11. The Court also has authority to "frame rules for carrying out its functions"⁴. Pursuant to that authority, the Court has issued rules addressing the conduct of its hearings and the production and reception of evidence⁵.

12. Even without these express provisions of the Statute and Rules, the Court, as a court of justice, would have authority to control the proceedings before it, including by determining proof of facts⁶.

13. Hence, the Court has undoubted authority to determine the means by which it will determine disputed facts. This authority includes the authority to enter appropriate orders when a party deprives the Court of relevant evidence, either by refusing to provide it or, as here, preventing the adverse party from doing so⁷. For example:

"In any case where evidence which would probably influence [the court's] decision is peculiarly within the knowledge of the claimant or of the respondent government, the failure to produce it, unexplained, may be taken into account by the [court] in reaching its decision."⁸

¹ 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 and Hans-Jürgen Schlochauer, eds. 1956), p. 170 (easing of burden of proof is a "natural and normal" result of violation of provisional measures order).

² I.C.J. Statute, Art. 48.

³ I.C.J. Statute, Arts. 48, 49.

⁴ I.C.J. Statute, Art. 30 (1).

⁵ I.C.J. Rules of Court 1978, Arts. 54-72. See, e.g., Rules of Court, Art. 62 (authorizing Court to "call upon the parties to produce such evidence" as the Court may consider necessary).

⁶ See Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure", 1958 *Brit. YB Int'l L.*, p. 117 and n. 1 (international tribunals inherently empowered "to prescribe the steps to be taken by the parties for the presentation of their respective cases; . . . to rule on questions of the admissibility of evidence; and to control the conduct of the proceedings generally"); Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), p. 266 ("Where 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"); see also *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253 (the "Court possesses an inherent jurisdiction enabling it . . . to provide for the orderly settlement of all matters in dispute").

⁷ See Sir Gerald Fitzmaurice, *op. cit.*, p. 151 (where a party refuses or fails to produce evidence called for pursuant to Article 49, "the sanction lies in the possibly adverse effect that this may have on the case of the party responsible"); see also Gilbert Guillaume, "Preuves et mesures d'instruction", in *La juridiction internationale permanente: colloque de Lyon* (1987), p. 196 ("Compte tenu de ces difficultés, il est apparu nécessaire de donner tant aux parties qu'au juge une grande liberté de moyens pour la manifestation de la vérité" in cases where important evidence is in the opposing State's control).

⁸ *Parker case*, US-Mexico Claims Comm'n, No. 127, 31 Mar. 1926, *Ops. of Comm'rs*, p. 40.

Thus, when a party fails to produce evidence in its control or, as in this case, renders such evidence impossible to obtain, a tribunal may order that the adverse party be deemed conclusively to have established the disputed fact¹.

14. Whether as a sanction for violating the Order or the customary law duty of fidelity to a judicial body, or as a matter of the Court's express and inherent authority to prevent prejudice to Paraguay resulting from the United States' execution of an important witness, the Court should enter an order protecting Paraguay from any evidentiary prejudice caused by Mr. Breard's execution.

RELIEF REQUESTED

15. *Wherefore*, Paraguay requests that

- (a) if and to the extent that the Court determines that Paraguay must make a factual showing of prejudice as an element of its claims under the Vienna Convention on Consular Relations, the Court deem the fact of prejudice conclusively established;
- (b) if and to the extent that the Court determines that Paraguay has the burden to prove any other fact material to its claims as to which Mr. Breard's testimony would have been relevant, the Court deem such fact conclusively established; and
- (c) the Court provide such other and further relief as will fully protect Paraguay from any evidentiary prejudice it might incur as a result of Mr. Breard's execution.

The Hague, 9 October 1998.

(Signed) Manuel María CÁCERES,
Agent of the Republic of Paraguay.

¹ See, e.g., *Sedco, Inv. v. NIOC*, Iran-US Claims Tribunal, 2 July 1987, No. 129, para. 91; *INA Corp. v. Iran*, Iran-US Claims Tribunal, 12 Aug. 1985, No. 129, p. 382; see also *Nemazee v. Iran*, Iran-US Claims Tribunal, 10 Dec. 1996, No. 575-4-3, para. 62 (collecting cases).