

CORRESPONDENCE

CORRESPONDANCE

I. THE AGENT OF PARAGUAY TO THE REGISTRAR OF THE
INTERNATIONAL COURT OF JUSTICE

7 April 1998.

In its oral submissions this morning, the United States stated that there was no support in the domestic caselaw of the United States for the proposition that a failure to accord the consular notification rights protected by the Vienna Convention might affect the validity of a criminal conviction.

In rebuttal, Paraguay referred to *United States v. Rangel-Gonzalez*, a decision of the United States Court of Appeals for the Ninth Circuit, and to an earlier case from the same court on which *Rangel-Gonzalez* built. See *United States v. Rangel-Gonzalez*, 617 F. 2d 529 (9th Cir. 1980); *United States v. Calderon-Medina*, 591 F. 2d 529 (9th Cir. 1979). We have provided copies of these decisions to the Court.

At the conclusion of Paraguay's rebuttal, the Court asked whether the defendants in those cases had been retried. Paraguay partially responded and stated that it would complete its response later today. Paraguay herewith attaches that further response.

(Signed) Manuel María CÁCERES.

*Response of Paraguay to Question Posed
at Conclusion of Paraguay's Rebuttal Submission*

In *United States v. Calderon-Medina*, 591 F. 2d 529 (9th Cir. 1979), which involved two consolidated cases, a federal trial court had dismissed indictments for illegal re-entry following deportation. Such re-entry is a federal crime pursuant to 8 USC § 1326. The courts had dismissed the indictments on the ground that in the underlying deportations, immigration officials had not complied with a federal regulation that (1) provided that "[e]very detained alien shall be notified that he may communicate with the consular or diplomatic officers of the country of his nationality", and (2) was intended to "ensure compliance" in immigration proceedings with the United States' obligations under the Vienna Convention (591 F. 2d at 530 (quoting 8 CFR § 242.2 (e) (1978)); *ibid.*, at 530, n. 6). The Court of Appeals held that a deportation could be denied effect as a predicate for the crime of illegal entry following deportation "only if the violation prejudiced interests of the alien which were protected by the regulation" (*ibid.*, at 531). Applying that standard, the Court held that the consular notification regulation protected interests of the aliens, but remanded for a determination of prejudice.

There is no published subsequent decision in the case of Mr. Calderon-Medina. In *United States v. Rangel-Gonzalez*, 617 F. 2d 529 (9th Cir. 1980), the companion case returned to the Court of Appeals after defendant had been convicted of the offence charged, illegal re-entry after deportation. The Court first held that the trial court had clearly erred by finding that the failure to notify the Mexican consul had not affected the outcome of the deportation proceeding. It then reversed the conviction, holding that "the indictment should have been dismissed" (617 F. 2d at 529).

In the posture of *Rangel-Gonzalez*, unlike here, the consular notification violation in the underlying deportation proceedings would have tainted any subsequent indictment for illegal re-entry after deportation in the same manner as it tainted the original indictment. Accordingly, Paraguay presumes that there were no further proceedings on those charges. There is, in any event, no subsequent published decision in *Rangel-Gonzalez*, so Paraguay also cannot determine whether the United States initiated new deportation proceedings, which would be the proceedings analogous to the state trial in this case.

2. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

9 April 1998.

I have the honor to refer to the Court's Order today in relation to Paraguay's request for an indication of provisional measures in the case concerning the *Vienna Convention on Consular Relations (Paraguay v. United States of America)*.

In its Order, the Court indicated that the United States should "inform the Court of all the measures which it has taken in implementation" of the Order. Accordingly, I wish to inform you of several recent actions related in that Order.

1. On April 2, the day before this case was filed. I communicated to the Counsel of the Governor of Virginia, on behalf of the Secretary of State of the United States, a request that the Commonwealth of Virginia stay the execution of Angel Breard. After consultation with the Governor, Counsel for the Governor replied that Virginia was not at that time prepared to grant our request in light of the pendency of the case before the US Supreme Court.

2. I have today transmitted to the Governor of Virginia a copy of the Court's Order and requested that he give consideration to it.

3. I have asked the Solicitor General of the United States (the Justice Department official who represents the United States before the US Supreme Court) to ensure that a copy of the Court's Order is promptly transmitted to the Supreme Court, and this is being done. We are also discussing the Court's Order with officials of the Department of Justice as a matter of urgency.

(Signed) David R. ANDREWS.

3. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

(by telefax)

15 April 1998.

I have the honor to refer further to the Court's Order of April 9 in the case concerning the *Vienna Convention on Consular Relations (Paraguay v. United States of America)*. In that Order, the Court indicated that the United States should "inform the Court of all the measures which it has taken in implementation" of the Order. I have previously written to you concerning the measures taken on April 9. This letter describes subsequent events.

1. On Monday, April 13, the Secretary of State of the United States wrote to Governor Gilmore of the Commonwealth of Virginia, formally requesting that he exercise his powers as Governor to stay the execution of Mr. Angel Breard in light of the Court's indication of provisional measures. A copy of Secretary Albright's letter to Governor Gilmore is attached¹.

2. Also on April 13, the Solicitor General filed a brief in the US Supreme Court on behalf of the United States responding to an April 9 order from the Supreme Court. This brief was prepared with close consultation between the US Departments of State and of Justice. It stated that :

"[t]he Executive Branch, on behalf of the United States, takes the order recently entered by the ICJ very seriously, even though the United States argued against that court's jurisdiction and against the indication of provisional measures. Accordingly, in response to the ICJ's order, the Secretary of State is today requesting that the Governor of Virginia stay Breard's execution".

At the same time, the US brief concluded that it would be inconsistent with the governing rules of US domestic law for the Supreme Court to order a stay of Mr. Breard's execution by the Commonwealth of Virginia, for many of the reasons indicated by the US Supreme Court in its April 14 opinion (*infra*). Several other briefs were filed in the Supreme Court on April 13 and 14, including a further brief by Paraguay filed on April 14.

3. During the evening of April 11, the Supreme Court of the United States issued a *per curiam* opinion denying the various motions and petitions before it relating to Mr. Breard's case. A copy is attached².

4. Following the Supreme Court's action, later in the evening of April 14, the Governor of Virginia decided not to stay the execution, and Mr. Breard was executed.

This Court's April 9 Order indicated that the 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". The United States has taken "the Court's indications seriously into account", case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment of 27 June 1986*, para. 289. Through its actions, culminating in the Secretary of State's April 13 request to the Governor of Virginia to stay Mr. Breard's execution on account of this Court's indication of provisional measures, the United States took all measures lawfully at its disposal to do what the Court requested.

4. THE AGENT OF PARAGUAY TO THE REGISTRAR

28 April 1998.

I have the honour to respond to the letter of David R. Andrews, Agent of the United States to this Court, dated 15 April 1998, reporting on the actions of the United States pursuant to the Court's Order of 9 April 1998 indicating

¹ Not reproduced.

² Not reproduced.

provisional measures in the case concerning the *Vienna Convention on Consular Relations (Paraguay v. United States of America)*.

As the United States advises, officials of the Commonwealth of Virginia executed Angel Francisco Breard as scheduled on Tuesday, 14 April 1998. The Governor of the Commonwealth of Virginia took no steps to halt the execution, and no federal authority took any action to compel Virginia officials not to go forward. In these circumstances, Paraguay regretfully takes issue with the United States' assertion that it complied with its obligation to "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings".

At the time this Court issued its 9 April Order, Paraguay had pending before the United States Supreme Court a petition for a writ of *certiorari* and accompanying application for a stay of or injunction against the execution. On Friday, 10 April, Paraguay submitted a supplemental application for a stay or injunction, citing the Order as a separate and independent ground on which to grant the application. Also on Friday, 10 April, Mr. Breard, who already has pending a petition for a writ of *certiorari*, filed an original petition for a writ of *habeas corpus* in the Supreme Court on the basis of the Order indicating provisional measures. On Monday, 13 April, also invoking the Supreme Court's original jurisdiction, Paraguay filed a motion for leave to file an original complaint that, like the supplemental application for a stay or injunction, requested relief from the execution on the basis of this Court's Order.

Also on Monday, 13 April, Paraguay's counsel wrote to Mr. Waxman, Solicitor General of the United States, and Mr. Andrews, Legal Adviser to the Department of State and Agent to this Court in this proceeding, to call upon the United States to fulfil its obligations pursuant to the 9 April Order. Paraguay requested that the United States (i) support Paraguay's applications to the United States Supreme Court for a stay of Mr. Breard's execution pending a final decision by this Court on the merits of Paraguay's suit; (ii) file an action in the United States' own name in the United States District Court requiring Virginia officials to comply with the 9 April Order; (iii) support Mr. Breard's applications for relief from the impending execution; and (iv) take any other steps that might be necessary to ensure compliance with the 9 April Order by Virginia officials and, hence, the United States. That letter, a copy of which is attached, confirmed discussions between counsel to Paraguay, on the one hand, and Mr. Andrews, Mr. Waxman, and their deputies, on the other, during the period immediately following issuance of the Order.

The United States did not take any of the steps identified in the 13 April letter. Instead, on 9 April, the United States submitted a copy of the Order to the United States Supreme Court, and on 13 April, the Secretary of State wrote a letter to the Governor of the Commonwealth of Virginia requesting that he grant a reprieve of Mr. Breard's execution, a request the Governor declined to honour. At the same time, in a brief filed 13 April 1998 and signed by the Solicitor General and Mr. Andrews, in his capacity as Legal Adviser of the State Department, the United States argued to the Supreme Court that (i) the Order indicating provisional measures was "precatory rather than mandatory"; (ii) the Secretary's letter represented the only "measure[] at [the United States'] disposal under [the United States] Constitution" to ensure compliance with the 9 April Order; and (iii) the Supreme Court should not grant either Paraguay's or Mr. Breard's requests for a stay of the execution.

Early on 14 April, Paraguay submitted a reply to the brief of the United States to the Supreme Court, again urging that court to give effect to this Court's Order.

At approximately 8.30 p.m. on 14 April, the United States Supreme Court issued a decision denying (i) Paraguay's petition for a writ of *certiorari* and motion for leave to file an original complaint; (ii) Mr. Breard's petitions for a writ of *certiorari* and for an original writ of *habeas corpus*; and (iii) the corresponding requests for provisional relief halting the execution. *Breard v. Greene*, 66 USLW 3684 (US Apr. 14, 1998) (Nos. 97-8214, 97-1390, 97-8660, and 125 Orig.). The decision barely acknowledged this Court's Order and did not expressly consider its effect.

Immediately upon learning of the Supreme Court's decision, Paraguay filed a new complaint in the United States District Court for the Eastern District of Virginia requesting that court to give effect to the Order indicating provisional measures by ordering Virginia officials not to carry out the execution. When that court denied emergency relief, Paraguay took an immediate appeal to the United States Court of Appeals for the Fourth Circuit, which also denied relief. Around the same time, the Governor announced that he would not accede to the Secretary's request to halt the execution. Shortly thereafter, at approximately 10.30 p.m., Virginia officials executed Mr. Breard.

Paraguay respectfully submits that the filing of this Court's Order with the Supreme Court and the issuance of the Secretary's letter to the Governor did not amount to "all measures at [the] disposal" of the United States to ensure that Mr. Breard's execution be stayed.

First, the Governor of Virginia, an official of the United States as a matter of international law, has plenary power to grant reprieves of capital sentences, 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"); see also *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). The Governor, however, failed to grant Mr. Breard a reprieve.

Second, the breadth of federal authority in the area of international relations belies the United States' suggestion that federal executive authorities were constitutionally incapable of enforcing compliance by state officials with federal law in the form of the United States' international obligations. See *Sanitary District v. United States*, 266 US 405, 425-426 (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 US 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 (EDNY), *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); see also *Dames & Moore v. Regan*, 453 US 654 (1981) (affording Executive Branch great latitude in effecting resolution of international dispute); *Asakura v. Seattle*, 265 US 332 (1924) (enjoining enforcement of municipal ordinance that violated treaty). Indeed, in his brief to the Supreme Court, the United States Solicitor General expressly recognized that the federal executive has the authority to bring a judicial action to enforce compliance with international obligations by constituent entities of the United States. Brief of the United States as Amicus Curiae (13 April 1998) at 15, n. 3 (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").

Third, the judiciary engages the United States' international responsibility as fully as does the executive. Ian Brownlie, *State Responsibility*, Part 1, 144 (1983) ("The judiciary and the courts are organs of the state and they generate responsibility in the same way as other categories of officials"); *Report of the Int'l Law Comm'n*, UN, *GAOR*, 51st Sess., Supp. No. 10, Art. 6, at 126, UN doc. A/51/10 (1996) (draft articles on State Responsibility) ("draft articles"). The United States Supreme Court has the authority to enforce compliance by state officials with federal law, of which international law forms a part, and which prevails over inconsistent state law. US Const., Art. VI, cl. 2; *Cooper v. Aaron*, 358 US 1, 18-19 (1958); see also *Missouri v. Jenkins*, 495 US 33, 57 (1990) (federal court may order municipality to levy taxes to comply with desegregation order, even when levy would contravene state law); *French v. Hay*, 89 US (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). The Supreme Court, the final arbiter of federal law, *Marbury v. Madison*, 1 Cranch 137 (1803), clearly had the authority to stop the execution by means of a stay or injunction, but did not.

Finally, the United States' failure to comply with this Court's Order would not be excused even if, as a matter of United States law, the measures identified above were not available to the state executive, the federal executive, and the federal judiciary, respectively. There can be no dispute that the execution was within the control of competent authorities of the United States. Given that control over the occurrence or non-occurrence of the disputed event, there can also be no dispute over the United States' responsibility. "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." (Jiménez de Aréchaga, "International Responsibility", in *Manual of Public International Law*, 531, 557 (Max Sørensen, ed., 1968).) This principle reflects an even more fundamental dictate — that a State may not rely on municipal law impediments to excuse a failure to comply with an international obligation. See Vienna Convention on Law of Treaties, Art. 27; see also draft articles, Arts. 5-8, 10, at 126-128.

In sum, Paraguay submits that the United States failed to "take all measures at its disposal to ensure that Angel Francisco Breard . . . not [be] executed pending the final decision in these proceedings".

[Annex to letter not reproduced.]

5. THE AGENT OF PARAGUAY TO THE REGISTRAR

2 November 1998.

I have the honour to refer to the case concerning the application of the *Vienna Convention on Consular Relations (Paraguay v. United States of America)*.

In accordance with Article 89 of the Rules of Court, the Government of Paraguay hereby informs the Court that it wishes to discontinue the proceedings, with prejudice. Paraguay accordingly requests that the case be removed from the List.

6. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

3 November 1998.

I have the honor to refer to your letter of November 2, 1998, whereby you have conveyed to my Government a letter of the same date from the Government of Paraguay regarding the case concerning the application of the *Vienna Convention on Consular Relations (Paraguay v. United States of America)*.

In its November 2 letter, the Government of Paraguay has informed the Court that, in accordance with Article 89 of the Rules of Court, the Government of Paraguay wishes to discontinue the proceedings with prejudice and has requested that the case be removed from the List.

Please be advised that the Government of the United States concurs in discontinuance of the proceedings with prejudice and in the Government of Paraguay's request.
