

INTERNATIONAL COURT OF JUSTICE

APPLICATION OF THE REPUBLIC OF PARAGUAY

On behalf of the Republic of Paraguay and in accordance with Article 40, paragraph 1, of the Statute of the Court and Article 38 of the Rules of the Court, I respectfully submit this Application instituting proceedings in the name of the Government of the Republic of Paraguay against the Government of the United States of America for violations of the Vienna Convention on Consular Relations (done on 24 April 1963) (the "Vienna Convention"). The Court has jurisdiction pursuant to Article I of the Vienna Convention's Optional Protocol concerning the Compulsory Settlement of Disputes.

Preliminary Statement

1. Article 36, subparagraph 1 (*b*), of the Vienna Convention requires the competent authorities of a State party to advise, "without delay," a national of another State party whom such authorities arrest or detain of the national's right to consular assistance guaranteed by Article 36.

"[I]f 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." (*Ibid.*)

2. As the Government of the United States stated in its Memorial in the case concerning *United States Diplomatic and Consular Staff in Tehran*:

"a principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between consular officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations. [. . .] 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." (*I.C.J. Pleadings*, p. 174 [references omitted].)

3. In 1992, the authorities of the Commonwealth of Virginia, one of the federated states comprising the United States, detained a Paraguayan citizen named Angel Francisco Breard. Without advising Mr. Breard of his right to consular assistance, or notifying Paraguayan consular officers of his detention, as required by the Vienna Convention, such authorities tried and convicted Mr. Breard and sentenced him to death.

4. These actions violated the obligations owed by the United States to Paraguay under the Vienna Convention. As a result of the breach, Paraguay is entitled to *restitutio in integrum*:

the re-establishment of the situation that existed before the United States failed to provide the notifications and permit the consular assistance required by the Convention.

I. The Facts

Municipal Court Proceedings concerning Mr. Breard

5. On 1 September 1992, law enforcement authorities of Virginia arrested Mr. Breard on suspicion of murder. Although aware of Mr. Breard's Paraguayan nationality, the authorities at no time informed Mr. Breard of his rights to consular assistance under Article 36, subparagraph 1 (*b*), of the Vienna Convention. Nor did the authorities ever advise Paraguayan consular officers of Mr. Breard's detention. Unaware of, and not having been apprised of, these rights, Mr. Breard could not and did not exercise them before his trial.

6. Had Mr. Breard been properly informed of his rights under the Vienna Convention, he would have communicated with his Consul, seeking the assistance provided for in Article 36. In turn, Paraguay would have rendered that assistance.

7. The failure to provide the notification required by the Vienna Convention thus precluded Paraguay from protecting its interests in the United States as provided for in Articles 5 and 36 of the Vienna Convention. Among other things, Paraguay could not contact its national, assist in the defence of its national (as described in paragraphs 8 and 10 below), monitor the conditions of its national's detention, or ensure that international legal norms were respected in the treatment of, and proceedings against, its national.

8. The failure to provide the required notification also precluded Paraguay from protecting its national's interests in the United States as provided for in Articles 5 and 36 of the Vienna Convention. The authorities of Virginia effectively prevented Paraguayan consular officers from arranging for appropriate legal representation of Mr. Breard. Instead, the authorities themselves arranged for Mr. Breard to be represented by court-appointed counsel who were unfamiliar with Paraguayan culture and with the preconceptions concerning the criminal justice system that a Paraguayan national might be expected to have.

9. As a result of the lack of consular assistance, Mr. Breard made a number of objectively unreasonable decisions during the criminal proceedings against him, which were conducted without translation. He refused to accept the authorities' offer of life in prison in exchange for his pleading guilty to the crime. Instead, Mr. Breard insisted on risking a death sentence and confessing and denouncing his past criminal conduct at trial. Mr. Breard took these highly detrimental steps because — in the absence of advice from his consulate — he did not comprehend the fundamental differences between the criminal justice systems of the United States and Paraguay. Whereas Mr. Breard believed his confession and denunciation would appeal to the mercy of the American court, as he understood they would a court in Paraguay, in reality these acts virtually assured Mr. Breard's conviction and death sentence.

10. Consular assistance would have included advice on cultural and legal differences between Paraguay and the United States, including the desirability of accepting or rejecting plea offers in light of those differences; an interpreter; appropriate additional or other legal counsel; identifying and communicating with family members who could provide assistance and

information; supplying records, documents, and other evidence helpful to Mr. Breard's defence; transport of family members and other witnesses to Virginia to provide testimony; attendance by consular officers at court or other proceedings; collecting and presenting mitigating evidence at the sentencing phase; and other forms of assistance both legal and non-legal. Such consular assistance would have affected the result of the criminal proceeding against Mr. Breard, including any sentence imposed.

11. On 24 June 1993, Mr. Breard was convicted of murder. On 22 August 1993, the trial court imposed a death sentence. Mr. Breard's direct appeals of the conviction and sentence were denied, as was his petition to the state courts for a writ of *habeas corpus*, a collateral proceeding seeking relief from unlawful detention.

12. In the spring of 1996, Paraguay, without benefit of information from the authorities of Virginia and the United States, finally learned that Mr. Breard was imprisoned in the United States and awaiting execution. Immediately upon learning of his situation, Paraguay, through its embassy and consulate, began rendering assistance, both legal and otherwise, to Mr. Breard. Until contacted by the Paraguayan consular representatives at that time, Mr. Breard had been entirely unaware of his rights under the Vienna Convention.

13. On 30 August 1996, with the assistance of Paraguayan consular officers, Mr. Breard took the final step available to him for challenging his conviction and sentence by filing a petition to the federal court of first instance for a writ of *habeas corpus*. For the first time, Mr. Breard claimed violations of the Vienna Convention. That court rejected the assertion of this and other claims based on a municipal law doctrine of "procedural default" (*Breard v. Netherland*, 949 F. Supp. 1255 (E.D. Va. 1996)). Applying this doctrine, the court decided that, because Mr. Breard had not asserted his rights under the Vienna Convention in his previous legal proceedings, he could not assert them in the federal *habeas* proceeding. This municipal law doctrine was held to bar such relief even though, first, Mr. Breard was unaware of his rights under the Convention at the time of the earlier legal proceedings, and second, he was unaware of his rights precisely because the local authorities failed to comply with their obligations under the Convention promptly to inform him of those rights. The intermediate federal appellate court affirmed. (*Breard v. Pruett*, 134 F. 3d 615 (4th Cir. 1998).) Mr. Breard's appeal to the intermediate federal appellate court was the last means of legal recourse in the United States available to him as of right.

14. In light of the federal appellate court's affirmance of the federal trial court's denial of Mr. Breard's *habeas* petition, the Virginia court that sentenced Mr. Breard has set an execution date of 14 April 1998. Absent intervention, officials of Virginia will then, in the words of the authorizing statute, "cause the prisoner under sentence of death to be electrocuted or injected with a lethal substance until he is dead" (*Va. Stat. Ann.* § 53.1-234).

15. By petition for a writ of *certiorari*, Mr. Breard has now requested that the United States Supreme Court exercise its discretionary authority to review the lower federal courts' decision against him and grant a stay of his execution pending that review. The Supreme Court grants less than 5 per cent of all *certiorari* petitions submitted to it. Moreover, in cases, such as Mr. Breard's, involving an imminent execution and submitted on an expedited basis, the Court frequently does not rule on the petition and accompanying request for interim relief until days, or even hours, before the scheduled execution.

Paraguay's Efforts To Secure Relief In The United States

16. On 16 September 1996, the Republic of Paraguay filed its own civil lawsuit in a federal court of first instance against the municipal officials responsible for Mr. Breard's arrest, conviction, continuing imprisonment, and pending execution, alleging violations of the Vienna Convention. Paraguay sought, among other relief, an order vacating Mr. Breard's conviction, barring the municipal officials from taking any future actions based on that conviction, including refraining from putting Mr. Breard to death, and requiring those officials to afford Paraguay its rights under the Convention in any future proceedings should Virginia, as Paraguay would expect, seek to prosecute Mr. Breard anew.

17. Paraguay did not seek from the federal court of first instance, and does not intend to seek from this Court, any relief barring the competent authorities of the United States from enforcing its criminal law or, specifically, retrying Mr. Breard if the competent authorities are so advised. Paraguay does contend, however, that the competent authorities of the United States must enforce the criminal law by means that comport with the obligations undertaken by the United States in the Vienna Convention.

18. On 27 November 1996, without having considered the merits of Paraguay's claim, the federal court of first instance held that it could not take jurisdiction of the case because it was barred by a municipal doctrine providing sovereign immunity to the several states that comprise the United States (*Paraguay v. Allen*, 949 F. Supp. 1269 (E.D. Va. 1996)). Paraguay appealed the decision, which was affirmed (*Paraguay v. Allen*, 134 F. 3d 622 (4th Cir. 1998)). During the appellate proceedings, the United States took the position that although the Vienna Convention is of great importance to United States nationals abroad, the issue of its own violation of the Convention was not justiciable in the courts of the United States in an action brought by another State party to the Convention.

19. Paraguay has filed a petition for a writ of *certiorari* in the United States Supreme Court seeking review of the appellate decision. As explained above, a petition for *certiorari* is a matter of the Supreme Court's discretion and is rarely granted.

20. In addition to its efforts to have its claim heard in the courts of the United States, Paraguay has also engaged in diplomatic efforts to gain the assistance of the United States in remedying the effect of the breach of the Vienna Convention. In a 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 defence against a criminal accusation as well as the strict fulfillment of the stipulations of international treaties covering acts of such nature".

In a response delivered 3 June 1997, the Department of State expressed disagreement with Paraguay's legal position and offered no assistance to Paraguay in exercising its rights under the Treaties.

II. The Jurisdiction of the Court

21. Under Article 36, paragraph 1, of the Statute of the Court, "[t]he jurisdiction of the Court comprises . . . all matters specially provided for . . . in treaties and conventions in force".

22. The Republic of Paraguay and the United States are, as Members of the United Nations, parties to the Statute, and are parties to the Vienna Convention and to its Optional Protocol concerning the Compulsory Settlement of Disputes. Article I of the Optional Protocol provides:

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

23. Paraguay therefore submits that, upon the filing of the present Application, the matters in dispute between Paraguay and the United States concerning Paraguay's claims under the Vienna Convention lie within the compulsory jurisdiction of the Court.

III. The Claims of the Republic of Paraguay

24. The Government of the Republic of Paraguay claims that:

(a) Pursuant to Article 36, subparagraph 1 (b), of the Vienna Convention, the United States is under the international legal obligation to Paraguay, a State party to the Convention, to inform "without delay" any Paraguayan national, such as Mr. Breard, who is "arrested or committed to prison or to custody pending trial or is detained in any other manner" of his rights under that subparagraph. These rights include:

(i) the right, if the national arrested or detained so requests, to have the competent authorities of the receiving State inform the local consular post of the sending State that that State's national has been so arrested or committed to prison or to custody pending trial or detained in any other manner;

(ii) the right to have the competent authorities of the receiving State forward any communication "addressed to the consular post from the person arrested, in prison, custody or detention . . . without delay".

The United States has violated and is currently violating the foregoing obligations.

(b) Pursuant to Article 36, subparagraph 1 (b), of the Vienna Convention, the United States is under the international legal obligation to an arrested national of Paraguay, such as Mr. Breard, to inform him "without delay" of his rights under that subparagraph. These rights include:

(i) the right, if the national arrested or detained so requests, to have the competent authorities of the receiving State inform the local consular post of the sending State that that State's national has been so arrested or committed to prison or to custody pending trial or detained in any other manner;

(ii) the right to have the competent authorities of the receiving State forward any communication "addressed to the consular post from the person arrested, in prison, custody or detention . . . without delay".

The United States has violated and is currently violating the foregoing obligations with respect to Mr. Breard.

(c) Pursuant to Article 36 of the Vienna Convention, the United States is under the international legal obligation to ensure that Paraguay can communicate with and assist an arrested national prior to trial. Its failure to provide the notifications required by Article 36, subparagraph 1 (b), of the Vienna Convention has effectively prevented Paraguay from exercising its right to carry out consular functions pursuant to articles 5 and 36 of the Convention. The United States therefore has violated and is currently violating the foregoing obligation.

(d) Pursuant to Article 36, paragraph 2, of the Vienna Convention and Article 26 of the Vienna Convention on the Law of Treaties (done on 23 May 1969), the United States is under an international legal obligation to ensure that its municipal law and regulations enable full effect to be given to the purposes of the rights accorded under Article 36. The United States has violated and is currently violating the foregoing obligation.

(e) Pursuant to Article 27 of the Vienna Convention on the Law of Treaties and to customary international law, the United States may not derogate from its international legal obligation to uphold the Vienna Convention based upon its municipal law doctrines and rules, nor upon the basis that the acts in derogation are those of a subordinate organ or constituent or judicial power. The United States has violated and is currently violating the foregoing obligation.

IV. The Judgment Requested

25. Accordingly, the Republic of Paraguay asks the Court to adjudge and declare:

(1) that the United States, in arresting, detaining, trying, convicting, and sentencing Angel Francisco Breard, as described in the preceding statement of facts, violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, as provided by Articles 5 and 36 of the Vienna Convention;

(2) that Paraguay is therefore entitled to *restitutio in integrum*;

(3) that the United States is under an international legal obligation not to apply the doctrine of "procedural default" or any other doctrine of its internal law, so as to preclude the exercise of the rights accorded under Article 36 of the Vienna Convention; and

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against Angel Francisco Breard or any other 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;

and that, pursuant to the foregoing international legal obligations,

(1) any criminal liability imposed on Angel Francisco Breard in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;

(2) the United States should restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of Paraguay's national in violation of the United States' international legal obligations took place; and

(3) the United States should provide Paraguay a guarantee of the non-repetition of the illegal acts.

V. Judge *Ad Hoc*

26. In accordance with the provisions of Article 31 of the Statute and Article 35, paragraph 1, of the Rules, the Republic of Paraguay declares its intention to exercise its right to name a judge *ad hoc*.

VI. Reservation of Rights

27. The Republic of Paraguay reserves the right to modify and extend the terms of this Application, as well as the grounds invoked.

VII. Provisional Measures

28. The Republic of Paraguay requests that the Court indicate interim measures of protection, as set forth in a separate request filed concurrently with this Application.

* *

I have the honour to reassure the Court of my highest esteem and consideration.

Brussels, 3 April 1998

(Signed) Manuel María Cáceres

Ambassador of the Republic of Paraguay to
the Kingdom of Belgium and the Kingdom of
the Netherlands
