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YEAR 1998

Public sitting

held on Tuesday 7 April 1998, at 3 p.m., at the Peace Palace,

Vice-President Weeramantry, Acting President, presiding

in the case concerning the Application of the Vienna Convention on Consular Relations

(Paraguay v. *United States of America)*

Request for the Indication of Provisional Measures

VERBATIM RECORD

ANNEE 1998

Audience publique

tenue le mardi 7 avril 1998, à 15 heures, au Palais de la Paix,

sous la présidence de M. Weeramantry, vice-président, faisant fonction de président

en l'affaire de l'Application de la convention de Vienne sur les relations consulaires

(Paraguay c. Etats-Unis d'Amerique)

Demande en indication de mesures conservatoires

COMPTE RENDU

Present:

Vice-President	Weeramantry, Acting President
President	Schwebel
Judges	Oda
	Bedjaoui
	Guillaume
	Ranjeva
	Herczegh
	Shi
	Fleischhauer
	Koroma
	Vereshchetin
	Higgins
	Parra-Aranguren
	Kooijmans
	Rezek
Registrar	Valencia-Ospina

Présents : M. Weeramantry, vice-président, faisant fonction de président en l'affaire
M. Schwebel, président
MM. Oda
Bedjaoui
Guillaume
Ranjeva
Herczegh
Shi
Fleischhauer
Koroma
Vereshchetin
Mme Higgins,
MM. Parra-Aranguren,
Kooijmans
Rezek, juges

M. Valencia-Ospina, greffier

The Government of the Republic of Paraguay is represented by:

H. E. Mr. Manuel María Cáceres, Ambassador of the Republic of Paraguay to the Kingdom of Belgium and the Kingdom of the Netherlands, Brussels,

as Agent;

Mr. Donald Francis Donovan, Debevoise & Plimpton, New York,

Mr. Barton Legum, Debevoise & Plimpton, New York,

Mr. Don Malone, Debevoise & Plimpton, New York,

Mr. José Emilio Gorostiaga, Professor of Law at the University of Paraguay in Asunción and Legal Counsel to the Office of the President of Paraguay,

as Counsel and Advocates.

The Government of the United States of America is represented by:

Mr. David R. Andrews, Legal Adviser, United States Department of State,

as Agent;

Mr. Michael J. Matheson, Deputy Legal Adviser, United States Department of State,

as Co-Agent;

Mr. John R. Crook, Assistant Legal Adviser for United Nations Affairs, United States Department of State

Ms Catherine Brown, Assistant Legal Adviser for Consular Affairs, United States Department of State

as Counsel and Advocates;

Mr. Sean D. Murphy, Legal Counsellor, United States Embassy, The Hague,

Mr. Robert J. Ericson, United States Department of Justice,

as Counsel.

Le Gouvernement de la République du Paraguay est représenté par:

S. Exc. M. Manuel María Cáceres, ambassadeur du Paraguay au Royaume de Belgique et au Royaume des Pays-Bas, à Bruxelles,

comme agent;

M. Donald Francis Donovan, membre du cabinet Debevoise et Plimpton, New York,

M. Barton Legum, membre du cabinet Debevoise et Plimpton, New York,

M. Don Malone, membre du cabinet Debevoise et Plimpton, New York,

M. José Emilio Gorostiaga, professeur de droit à l'Université du Paraguay à Asunción et conseiller juridique de la Présidence du Paraguay,

comme conseils et avocats.

Le Gouvernement des Etats-Unis d'Amérique est représenté par:

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comme agent;

M. Michael J. Matheson, conseiller juridique adjoint principal du département d'Etat des Etats-Unis,

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M. John R. Crook, conseiller juridique adjoint chargé des questions concernant les Nations Unies au département d'Etat des Etats-Unis,

Mme Catherine Brown, conseiller juridique adjoint chargé des affaires consulaires au département d'Etat des Etats-Unis,

comme conseils et avocats;

M. Sean D. Murphy, conseiller juridique à l'ambassade des Etats-Unis, La Haye,

M. Robert J. Ericson, du département de la justice des Etats-Unis,

comme conseils.

The VICE-PRESIDENT: Please be seated. The Court resumes its sessions to hear the second round of oral submissions and I give the floor now to His Excellency Mr. Cáceres of Paraguay.

Mr. CACERES: Thank you Mr. President. I would like to ask the Court to call upon Mr. Donovan to offer Paraguay's rebuttal. Thank you.

The VICE-PRESIDENT: Thank you. Mr. Donovan, please.

Mr. DONOVAN: Mr. President, Mr. Vice-President, distinguished Members of the Court.

It would be useful, I believe, to start this afternoon's session by summarizing where the Parties stand in light of this morning's submissions.

First, there is no dispute about the terms of the governing texts, Articles 5 and 36 of the Vienna Convention.

Second, there is no dispute on the basis of the United States submissions this morning that the duties owed under the Vienna Convention to Paraguay and to its national were not fulfilled by the competent authorities of the United States, and hence, that there was a violation of the Treaty.

Third, there is no dispute about the generally applicable principle of restitution, that is that the author of an offending illegal act has the obligation to restore the prior situation.

Fourth, there is no dispute between the Parties that the object of provisional measures is to preserve the Parties' rights so that the Court will be in a position, upon rendering final judgment, to render an effective final judgment, a judgment that means something.

Fifth and perhaps most importantly, there is no dispute that unless this Court orders provisional measures, Mr. Breard, Paraguay's national, will be executed on Tuesday 14 April. In Paraguay's, view these points of agreement standing alone not only support an indication of provisional measures in accord with the Court's cases and governing Statute but compel one. Nevertheless, we would like to briefly address several of the other points made by the United States this morning.

First, with respect to jurisdiction. The United States appears to contest the Court's jurisdiction on two converse grounds. On the one hand, the United States argues, it is plain, indeed the United

States concedes, that there was a violation here. While on the other hand, the United States argues, it is just as plain that the Vienna Convention affords no effective remedy for that violation. We of course agree that there was a violation, we of course disagree that there is no effective remedy but in any event, neither of these arguments can defeat the Court's jurisdiction in this case.

May I explain? There are at least two reasons why the United States concession that there was a violation here of Article 36 cannot deprive this Court of jurisdiction over the dispute. The first was well stated by the United States in its oral arguments before this Court in the Tehran hostages case. There the United States thought it prudent to address the argument, or the possible argument, that given that there was no possible legal justification for the actions by Iran of which the United States complained in that case, there might not be a dispute between the Parties coming within the Optional Protocol. And if the Court will permit me, I would remind the Court that one of the treaties on which the United States founded its claims in that case was the Vienna Convention on Consular Relations and one of the bases of jurisdiction was indeed the Optional Protocol on which Paraguay founded this case.

The United States described that argument, or any such argument, as specious. It said "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 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. I continue to quote "indeed any such role 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". I would respectively suggest that the same reasoning applies here. A State party should not be permitted to divest the Court of jurisdiction by in effect confessing error, by in effect stating yes indeed our obligations were not complied with, we agree with the relevant obligation and therefore there is no dispute for all the reasons well stated by the United States in its earlier submissions.

The second reason that the concession of a violation cannot deprive this Court of jurisdiction is that, as this very case amply demonstrates, disputes about the "interpretation and application" of the Convention may well arise from disagreements about the consequences that should flow from a given violation. It may well be in this case that the Parties would be able to reach a stipulation with respect to the relevance of events and indeed perhaps reach a stipulation as to the underlying act or omission that brings the Parties to this Court and then move to a remedies phase or phase that would address the consequences that flow from those events. But that does not change the fact that there is a dispute here as to the interpretation and application of the treaty. Indeed I would suggest that the United States own arguments this morning suggest that there is very much a disagreement on the subject of what consequences should flow from the omission that is not in issue.

The United States appears to have made two additional points with respect to jurisdiction that I would also like to address.

First, in at least one formulation this morning, the United States suggested that there was no jurisdiction because Paraguay had no legally cognizable claim. We disagree with that statement of course, with respect to Paraguay's claim but I note for the moment that it would in any event not afford a basis for denying jurisdiction; it is an argument properly addressed to the merits of the claim.

Second, the United States referred to Articles II and III of the Optional Protocol. I simply want to note that this Court of course may claim again in the *Tehran* hostages case, both in the provisional measures Order and in its final Judgment, that those Articles do not in any way affect the compulsory jurisdiction of this Court under Article I.

I would like now to address several of the circumstances that the United States suggested are relevant to Paraguay's Application.

First, the United States suggested that somehow Paraguay should be penalized for having filed its Application this past Friday, in light of the impending execution on 14 April.

This Court, I believe, will appreciate the magnitude of a decision by a Government like that of Paraguay to institute proceedings in the International Court of Justice against the United States.

Needless to say, that is not a decision that is taken lightly. As we explained this morning, even last week there were discussions between the Parties as to ways to avoid the filing that was finally made late in the day on Friday.

As the United States itself advised the Court, those discussions foundered when it became clear that the United States was not prepared to take steps to halt the impending execution pending further discussions between the Parties, or pending some alternative means of dispute resolution. I add parenthetically that that is another reason of course why any recourse to Articles II and III was not available at this point, but of course an indication of provisional measures, and the continuance of this proceeding, will in no way make impossible further discussions on those topics. But for present purposes, if the Court were to now penalize Paraguay for its efforts to amicably resolve the dispute and to take all steps to avoid having to come to this Court, it would create what, we would respectfully suggest, would be an unwise different sentence to parties who wish to take every step to avoid a filing here, and for that reason we would respectfully suggest that that element should play no role in the Court's deliberations.

We would further suggest that it would be particularly inappropriate to allow any such circumstance to affect the Court's deliberations in this case.

As has been mentioned, Paraguay here went the extra mile to avoid coming to this Court. It took what we believe is a perfectly justifiable, but nonetheless unusual step, of filing a lawsuit first in the United States courts, asserting its own rights under the Vienna Convention, and seeking relief in the form of an injunction against further enforcement of the conviction and sentence of its national. It took the same position in that proceeding that it takes here, that is, it did not contest the authority of the Virginia officials to enforce its criminal law, and it did not contest the authority of the Virginia officials to re-try Mr. Breard if Paraguay received the relief it requested, if Virginia officials were so advised, which Paraguay fully expects they would be.

Because there has been some discussion of those proceedings, I would like to address two aspects of those proceedings in order to clarify the record before the Court.

First, there was a suggestion this morning that Paraguay at some point in those proceedings suggested that this case should not come before this Court, that the United States courts were the

appropriate forum. I understand the United States is going to provide the Court with a June 3 diplomatic letter. We are going to provide the Court as well with a letter that may shed some light on that exchange, which was a letter sent by Paraguay's counsel to counsel for the United States in the domestic litigation, which is of course the Department of Justice, in response to the position taken by the United States in the domestic litigation.

If the Court will permit me a moment.

In the initial proceeding in the district court, that is the federal trial court in the United States, the court held that Paraguay had standing to sue for breach of a treaty in the United States courts. It dismissed the suit, however, on an alternative jurisdictional ground that has to do with the constitutional structure of the United States, and the authority of a federal court to impose remedies against State officials. Paraguay appealed that decision.

In the court of appeals the United States filed a brief, *amicus curiae*, in which it urged the court of appeals not to rely on the ground relied upon by the district court, but instead to affirm on the alternative jurisdictional ground that a sovereign should not be permitted, that a suit by a sovereign in a court in the United States raises a non-justiciable controversy.

In the course of that brief, the United States took the position that in fact the proper form was diplomatic negotiations or this Court. At the same time, the United States suggested an argument that perhaps presaged the argument it makes here, that there would be no jurisdiction given that the Parties agreed on the obligations imposed by the Vienna Convention. In response to that position by the United States, Paraguay's counsel wrote a letter which we will happily provide to the Court, which stated what I have said this morning, that Paraguay had determined that it was appropriate to seek relief in the first instance from the municipal courts of the United States, had Paraguay been able to obtain effective relief, the Parties may never have come before this Court. Paraguay did not obtain that relief, but Paraguay has never suggested that the courts of the United States somehow by filing suit in the courts of the United States, it would somehow be foreclosed from its rights under the Optional Protocol, and the suggestion that the United States courts are in some way the appropriate forum is a bit difficult to understand in light of the position that the United States took

in the domestic litigation that a sovereign, such as Paraguay, should not be permitted to sue for breach of treaty in those courts.

There is a second aspect of the United States litigation that I believe requires clarification after this morning's submissions.

The United States referred to some litigation in the United States, relatively recent litigation, arising from claims under the Vienna Convention in death penalty cases. No court in the United States has yet reached the merits of any such claim. I would like to briefly describe the two kinds of claims that have arisen, and perhaps give the Court some appreciation of the dilemma of a Government like Paraguay that seeks to vindicate its rights.

In the first instance there have been two cases by sovereigns. The first is that by Paraguay, and the second is a suit modelled on Paraguay's action that was filed by the United Mexican States in an attempt to halt the execution of one of its nationals. In both cases the district court dismissed on the constitutional immunity ground that I have just described, and in both cases the court of appeals affirmed on that ground. In other words, in neither case did the court reach the merits of the Vienna Convention claim. Indeed in the Paraguay lawsuit, in the lawsuit brought by the Government here, the Court emphasized the importance of the Vienna Convention, but simply held that it was disabled by the XIth Amendment to the United States Constitution from ordering the relief sought against State officials.

In the second category of cases are federal *habeas* claims by prisoners themselves seeking to attack their convictions on the basis of the Vienna Convention and a failure to provide the required notification. In all of those cases of which I am aware, and there are now probably three or four, the claim has not been raised until the prisoner has reached a federal court, on a *habeas* petition, that is, the claim was not raised in the proceedings in the state court, as in Mr. Breard's case, and was not raised in the state *habeas* proceedings. In that situation, the holdings are uniform, thus far, that the stringent limitations that both the United States Supreme Court has laid down and Congress has recently codified with respect to *habeas* petitions generally, and death penalty *habeas* petitions in particular, bar the *habeas* petitioner from raising the claim. In other words, those courts too have not reached the merits, although I should note that in Mr. Breard's own case, again, one

of the judges on the panel — although he concurred in the judgment saying that the court could not provide relief — emphasized the importance of the rights at issue.

If you put the two cases involved with respect to Mr. Breard — that is Paraguay's case asserting its rights and Mr. Breard's case asserting his rights — together, the Court can appreciate the difficulty. The claim here arises from a failure to notify. Notwithstanding the discussion, the United States this morning with respect to what the Vienna Convention and what the various discussions were, it seems to me that there can be no dispute that an obligation in Article 36, paragraph 1 *(a)*, requiring the detaining State to advise the national of his right to consult consul, has a very obvious purpose, that is to ensure that that detainee is knowledgeable, becomes advised of his or her rights. And yet the combination of the holdings in Mr. Breard's case and in Paraguay's own suggest that, even in a case where the claim arises from failure to notify and the petitioner — the *habeas* petitioner, in one case — learns of the rights under the Vienna Convention only after he has gone through the proceeding in which he has been deprived of them, he is too late to raise them. Indeed, without going into the nuances of United States law, effectively the holding in Paraguay's own case, because of the peculiar limitations on federal courts' authority to provide relief, was to the same effect — that Paraguay because it was attacking or, in the understanding of the Court, attacking the judgment — was in effect too late because it would be undoing prior State action.

I do not mean to suggest that those cases are relevant to this Application. To my mind the only relevance here is that clearly Paraguay should not be penalized for some suggestion that it has delayed. Clearly there have been substantial efforts to resolve the dispute prior to reaching the Court.

There is, however, one more line of cases in the United States which may be relevant and that is, at least two courts have addressed the suggestion where the impact of a failure to notify under the Vienna Convention and the possible impact that might have on the enforcement of a conviction. We would be happy to provide the Court with a copy of the case that I am about to refer to, but it is a case from the United States Court of Appeals for the Ninth Circuit — this is one of the federal courts of appeals — and that case considered federal regulations that require federal

officials, immigration officials, to advise an alien detainee of his or her rights under the Vienna Convention. The regulations are explicitly intended to implement the Vienna Convention, the obligations. The federal court to which I refer did set aside a conviction for illegal entry after deportation as a result of the immigration authority's failure to comply with this regulation. The court reversed the conviction on the ground that the underlying order of deportation was invalid because the arresting authorities had failed to notify the defendant at the time of his initial detention of his right to contact a consular official. The court went further to determine that prejudice was present and it therefore afforded the relief. It built on, by the way, an earlier case from the same court of appeals. In short, there is authority in the United States that, in fact, a failure to comply with the Vienna Convention obligations can have an effect on the validity of a conviction obtained in the tainted proceedings and I shall return to that point in a few moments when talking about the United States submissions on the merits.

I would like to address now the United States suggestion that there is no legally cognizable claim in so far as it might be relevant not to jurisdiction but to the circumstances forming the Court's decision whether to grant provisional measures.

I should start by noting that whatever the weight of this factor in another case, it is hard to see how it could weigh against provisional measures here where there appears to be agreement on the failure to comply with the underlying obligations and the dispute is very much about the consequences that should flow. It would seem to me that the Court should exercise serious caution in deciding in the face of a conceded violation — that the applicant State does not bring a sufficiently weighty case to warrant provisional measures. I would think that that caution would apply particularly where the suggestion of the United States that there is no remedy, and hence no legally cognizable claim, appears to contradict so squarely the fundamental principle as to the remedy of restitution, the applicability of that remedy in the event of an internationally wrongful act and the substance of that remedy, that is, to restore the situation that existed prior to the wrongful act. Given that the United States position is so squarely inconsistent with that basic understanding, I would think the Court would want to exercise extreme caution before reaching a decision that somehow the Vienna Convention was intended as an exception to that principle.

In any event, however, we believe that the United States submission does not hold up even on its own terms.

First, the United States argument is essentially that the Court should conclude that Paraguay is not entitled to the remedy it seeks because one looks in vain, in Article 36 or elsewhere in the Vienna Convention, or even in the legislative history, for confirmation that that remedy is available. With all due respect, we would suggest that the United States is engaged on a misguided search. One need not find the remedy in the text of the Convention. If the United States argument were accepted, it would be necessary to reproduce the Articles on State Responsibility in every treaty and surely that is not the expectation of treaty drafters. Instead, the fundamental understanding with respect to remedies is part of a legal context in which any treaty must operate and therefore the fact that one does not find an explicit confirmation of the remedy Paraguay seeks in either the Optional Protocol or the Vienna Convention itself, should certainly not lead to the conclusion that that remedy is not available. Indeed, this Court would have to reverse or repudiate a long line of authorities because it has never imposed a requirement in considering whether particular remedy was available that that remedy appear in the given international instrument on which the claim was founded. Again, if one would recall the eminently justifiable range of remedies this Court provided in the *Tehran* hostages case one would have a hard time finding explicit confirmation for each of those remedies in the underlying instrument. In effect, the United States argument here, their reading of the Vienna Convention, will effectively limit this Court to grants of declaratory relief without the power to order a remedy. That role is plainly inconsistent with the understanding of parties who both adhere to an international treaty and subscribe to a dispute resolution protocol. It is intrinsic to the notion of a violation, as *Chorzów* itself suggests, that consequences flow from that violation.

Again, however, even on the United States own terms, even if one were looking to the Vienna Convention itself, there would not be the support that the United States finds.

First, with respect to Professor Lee's treatise. The case to which the United States referred, although it is only a brief account in the treatise, by no means suggests that a remedy is not available. Indeed, the Court actually went to the issue, or it appears from the brief account in Lee,

and decided that the applicant could not show prejudice. From the brief account in Lee it appears that that case actually supports Paraguay's argument that a remedy is available, even if it may affect the validity of the underlying conviction. Lee then follows the discussion of the Italian case, with a discussion of the two cases from the United States that I have just described which indeed do draw consequences as to the validity of an underlying conviction from a failure to notify under Article 36. To the extent that it is relevant now — and I will address that issue in a moment — the weight of Lee's treatise suggests that Paraguay is entitled to its remedies.

Likewise with respect to the negotiating history, the United States points to certain sections of that drafting history to support a contention that the parties did not intend the Convention to alter the operation of domestic criminal proceedings. Yet the history on which the United States bases its argument support an opposite conclusion. In particular, the United States referred, but not by name, to statements by Mr. Kostov, a delegate of the Soviet Union and Mr. Avakov, a delegate of Belorussia, and presented those statements as supporting the view that the Convention did not intend to alter the effect or have any effect on domestic criminal proceedings. In fact, Mr. Kostov argued further that paragraph 2 of Article 36 as then drafted, and as ultimately adopted by the Convention, was an attempt to interfere with the internal affairs of States by hampering the administration of justice in regard to aliens, and that that version would make it difficult for States to exercise their sovereign right to prosecute aliens who broke the law. Mr. Kostov and Mr. Avakov spoke in support of restoring the ILC's draft of paragraph 1 of Article 36 *(b)*. Mr. Evans, a delegate of the United Kingdom, characterizes the Soviet proposal as follows: according to Mr. Evans, it would have meant that the laws and regulations of the receiving State would govern the rights specified in paragraph 1 provided that they did not render those rights completely inoperative. In the event, however, the Conference chose to eject the proposed Soviet amendment. Thus, so far as we understand the statements, the legislative history on which the United States relies, was in support of an alternative to the provision in the Vienna Convention which would have deluded the effect of that Convention specifically with respect to its possible effect on criminal proceedings. Thus the legislative history supports the notion that the Convention in appropriate instances might even subordinate municipal criminal procedures to the provisions of Article 36, paragraph 1.

The United States has also suggested that it would be unwise for this Court to grant Paraguay the remedies it seeks because that would somehow open the floodgates to claims like that brought by Paraguay.

We would respectfully submit that, in the first instance, that the fact that others might have the same right that Paraguay might have should not deter the Court from recognizing that right in Paraguay; that would be fundamentally inconsistent with the judicial role. But in any event we do not believe that there is any basis for the scare the United States raises. Contrary to the characterization of the United States, Paraguay's Application is not an appeal to this Court and the question before this Court is not whether, in every criminal proceeding involving a foreign national, a violation of the Vienna Convention requires a new trial. Paraguay's action is not an appeal, it does not ask the Court to review or reverse any judgment of a municipal court, it does not ask the Court to review the proceedings in that court or to review the judgments of that court. Further, the question is not what remedy would be required in every criminal proceeding everywhere in the world, the question is what can Paraguay show with respect to this proceeding and on the basis of that showing, what relief would it be entitled to. The facts relevant to that enquiry are quite discreet and to the extent that, as the United States suggested this morning, it would require a consul to bring on evidence with respect of practices of the like, if a court found that relevant, the foreign sovereign could certainly make a decision when it sought the relief whether or not it wished to do so.

Finally, as this case demonstrates, cases of this kind would prompt a sovereign to come to this Court only with the greatest reluctance and even on the terms of the United States own argument, we do not think there is any basis for the concern.

Finally, the United States suggests that Paraguay's Application would require this Court to anticipate a judgment and would in fact anticipate a judgment in favour of Paraguay. That suggestion is belied by the very disciplined and narrowly tailored relief that we request. But before addressing the relief Paraguay requests, I would like to examine the United States' submissions in the light of the concern that the United States itself raises, that is that an indication of provisional measures here might anticipate a judgment. The United States comes to this Court and asks the

Court to reject Paraguay's Application on the basis of the facts that it says it will be able to prove, on the basis of a survey of State practice, of which we were advised this morning, and on the basis of a showing on the legal rights at issue that I have just addressed. Clearly the Parties disagree about certain aspects of the consequences of this behaviour. If the Court would arrest a denial of the request for provisional measures on an assumption that the United States will be able to prove its facts and Paraguay will not, that indeed would anticipate a judgment. Equally, the extent of the informal survey of State practice might be relevant to the eventual determination of this Court, surely the Court should not make a decision on the basis of the advice provided over this lectern as to an informal survey conducted by the United States Department of State. That too would surely anticipate the proof, and hence the judgment, that would be elicited at the merits phase. And finally the United States asked this Court to reject Paraguay's claim on the basis that it has no legally cognizable claim. Again, while we disagree with that suggestion and while we believe the suggestion is not supported even by the authorities that the United States cites, nothing would so surely anticipate a judgment by this Court than a conclusion that notwithstanding the violation in this case, the remedy Paraguay seeks is not available.

Conversely, Paraguay asks for provisional measures that are extremely narrow. The only thing in effect that Paraguay asks this Court to do at this time is to order that the United States ensure that Mr. Breard is not executed while this case is before the Court. We would welcome the views of other States parties that might intervene, we are certain that they would enlighten the Court and we would fully expect the Court to take into account any other State that were motivated enough to join these proceedings. But surely before receiving those views, the Court should ensure that the case stays before this Court, that the case remains in its full dimension. As I stated this morning, Mr. Breard, even if this Court grants the interim relief, will remain in Virginia's custody. If the United States prevails on the merits on this case Virginia will be able to schedule a new execution date and put him to death. Surely the United States does not mean to suggest that the delay in executing the sentence of death overrides Paraguay's interest in the life of its national to the extent that the Court would wish to balance in any way the effect of these interim measures on the two Parties, or in any way to protect against a decision here, either granting or denying the

provisional measures Paraguay seeks in a manner that anticipates its judgment. It plainly, Paraguay respectfully submits, must grant the narrowly tailored measures Paraguay seeks.

I very much appreciate the Court's courtesy this afternoon.

The VICE-PRESIDENT: Thank you very much Mr. Donovan. Before you conclude the President would like to address a question to you.

The PRESIDENT: Mr. Donovan, you referred to two United States cases which did overturn earlier decisions on the grounds of failure to comply with the Vienna Convention on Consular Relations, if I understood you correctly. Did those decisions overturning the earlier judgments lead to retrials on the original charges or simply in dismissal of the original charges.

Mr. DONOVAN: I do not know the subsequent history of those cases. I do not believe that there is anything in those cases which would suggest that a retrial would not be possible and certainly, as I have said, it is not Paraguay's position here that a retrial would be barred. But I cannot definitively answer the Court's question, but I would be happy to do so when we provide those cases subsequently.

The PRESIDENT: Thank you very much.

The VICE-PRESIDENT: May I ask what is the earliest time you could furnish an answer to that question.

Mr. DONOVAN: This afternoon, that is in so far as it is disclosed by the published accounts of those opinions.

The VICE-PRESIDENT: Thank you Mr. Donovan. That concludes the second round of oral pleading of Paraguay and we will have a short adjournment to enable the United States to make its submissions.

The Court adjourned from 3.50 to 4.20 p.m.

The VICE-PRESIDENT: Please be seated. We meet now to hear the second round of oral submissions of the United States, and I give the floor to Mr. Andrews, Legal Adviser to the United States Department of State.

Mr. ANDREWS: Mr. President, I would like to call to the podium Mr. John Crook to respond on behalf of the United States.

The VICE-PRESIDENT: Mr. Crook, please.

Mr. CROOK: Thank you Mr. President. Members of the Court.

In our final presentation this afternoon we will make, I believe, six points, attempting to bring together and respond to a number of the considerations that distinguished counsel for Paraguay introduced in his rebuttal. I shall try not to be too long.

My first point is this, that it seems to me that throughout this case, and certainly in the rebuttal we have just heard from Paraguay, there has been a signal of voidance of the burden of proof that the Applicant here must bear. They have in fact proved very little, if anything. Now Mr. Donovan in his presentation this afternoon tried to make up some of the deficiencies by seeking to build upon the evidence and argumentation that we gave you this morning. As to his arguments, I would simply invite the Court to consider the sources and determine in its own mind whether our reading of them, or Mr Donovan's reading of them, is the better. But it does seem to me that it is an anomalous position; a peculiar situation where the burden of the Applicant's proof is that the Respondent did not disprove the Applicant's assertions to the satisfaction of the Applicant. I would certainly disagree with that characterisation, but it does seem to me unsound in relation to the burdens that the Applicant here must bear.

There is one key issue here that I think we should take note of and it is an issue to which counsel for Paraguay did not refer, and that is the key issue of whether in fact consular access in this case would have made any difference. Counsel for Paraguay ignored that point in his summation, and it seems to me that it is an important point and is one that cannot be ignored, because all of Paraguay's case here rests on the factual premise, the assumption, the belief, that

things would have been different had a Paraguayan consul been involved. For all the reasons that we suggested, the reasons that Ms Brown suggested, that seems to us to be not the case, that the burden here is on the Applicant, the burden has not been met.

My second basic point Mr. President, is that the Applicant here seems to me have responded to large parts of the United States submission by ignoring them or trivializing them. They ignored Ms Brown's long, and I think very informative description, of the realities of consular practice. Paraguay had nothing to say about that this afternoon. In large measure they ignored the indications that we brought to you regarding the realities of how States interpret and imply their obligations under the Vienna Convention on Consular Relations. They ignored altogether the circumstances of Mr. Breard's trial, defences for which he was charged, the adequacy of his counsel, the extensive nature of the appellate remedies that he pursued. They ignored large parts of the United States submission.

My third major point, Mr. President, is that it seems to me that the presentation here by distinguished counsel for Paraguay showed an undue preoccupation with the domestic litigation in the United States in which matters similar to these are being addressed. Counsel for Paraguay indicated that in his view, those cases were not relevant. We would agree, and we therefore will not seek here to re-argue them. I do wish here though to respond particularly to the cases that were raised at the last minute, and that were the occasion of the question from President Schwebel. The Applicant will presumably make those available to the Court, and the Court can inspect them and come to its own judgment regarding their implications. Our recollection is that the cases that the Court has requested were immigration cases involving deportation orders, and not criminal cases. That is our recollection, and we suffer from not having the text with us, but it is our belief that they turned not on the Vienna Convention on Consular Relations obligations as such, but on the fact that the immigration service had failed to follow its own regulations, calling for consular notification. Under federal law, federal agencies are required to follow their regulations, and that was the basis for the courts' decision on those cases. That is our recollection, if we have mischaracterized them, the Court will soon have the opinions and will be able to see, but that is our understanding of what was involved in those cases.

My fourth point is that it seems to me that the Applicants in this case have ignored — have dealt with significant parts of the United States presentation this morning by ignoring it — or in any case by trivializing the implications. We spent a good deal of time here going through the implications of the course of action that is advocated by Paraguay, for example, for other governments, the other parties to the Vienna Convention on Consular Relations.

Counsel for Paraguay responded to that essentially by trivializing the point, saying we have one case and one case only here, and that's all the Court need concern itself about. With respect, Mr. President, that seems to me not to be good enough. With respect to the concerns of the United States, again, counsel for Paraguay minimized or trivialized the consequences of the remedy that they seek here, but again I think in all fairness, that is not good enough. The United States has significant interest in the orderly and authoritative administration of its criminal law, certainly in a case where the murder took place in 1992, the trial took place in 1993, and there appears to be no guilt, no dispute between the parties as to the guilt of the accused.

I think the same observation holds true as well concerning our points regarding the implications of the remedy sought by Paraguay for the Court. The concern is a real one, the implications for other countries and other situations are real, they cannot be ignored. That brings me closer to my final points, Mr. President.

The fifth point is the rather basic question. Is there a remedy? And the associated question, is there jurisdiction here? For the reasons that I indicated, it seems to me that the Court must consider the likelihood of Paraguay being able to show that the remedy that underlies their whole case exists and is available to them within the four corners of the Vienna Convention on Consular Relations. It is not appropriate for me here to re-argue the points I made this morning but I simply invite the Court to consider them. The point that there is no support in the text, the point that there is no support in the history, the point that there is no support in practice. I think it is a fair gloss on that, that Paraguay is quite unlikely to be able to show that the remedy it seeks either is available, or in any case, is to be found within the sphere of the Vienna Convention on Consular Relations which of course is the requirement for there to be jurisdiction. We are at something of a disadvantage because Paraguay, as the Applicant, has never really made the case. We have sought

to respond, Paraguay has then tried to make its case by dealing with our response and we are left in this very unsatisfactory situation, Mr. President, that the basic burden of the Applicant has not been met. I think I would agree here with distinguished counsel for Paraguay who, in his presentation this afternoon, used words to the effect — and I freely admit that this is a paraphrase and not a quote; I hope this is a fair paraphrase — that to find the remedy, you must go beyond the text of the treaty, that is the problem, Mr. President, there is no jurisdiction. The Applicants seem unlikely to prevail on the merits.

Let me turn to my sixth and final point, Mr. President, and that is the reference to the *Hostages* case. Now, there was I think perhaps a misunderstanding of our position and I want to deal with it, because I think it is important. It is not our contention here that the Court is divested of jurisdiction by reason of the fact that we have confessed error and admitted that Mr. Breard was not given consular notification, that is not our point at all. Our point is the much broader one, that I have just discussed, that the remedy that is sought here is a remedy that goes far beyond the scope of the Vienna Convention and far beyond the scope of the jurisdiction of the Court.

Let me respond to other points regarding the *Hostages* case. It does seem to me that it is — unseemly is perhaps too strong a word — but it is not quite right to draw upon the *Hostages* case as the precedent for action by this Court here. The *Hostages* case involved a much more aggravated situation, the continued detention of a large number of hostages in conditions of apparent danger, in violation of fundamental rules for the protection of diplomats and consuls. It was a profound, potentially very dangerous, disruption of international relations and it seems to me that it perhaps trivializes that case to analogize it to a situation where the Applicant is seeking not to deal with matters of great consequence at stake in the *Hostages* case, but rather to disrupt the operations of the criminal courts of a party to the Statute of this Court. It seems to me the analogy is not appropriate and it is not one that should illuminate the deliberations of this Court. Mr. President, I apologize that these remarks have been somewhat disjointed, the circumstances are a bit difficult, but I hope they have been of some use in clarifying our position. As always my delegation appreciates the courtesy of the Court in listening to our presentation. You have heard already the submission of the United States Agent and it is only for me to thank the Court.

The VICE-PRESIDENT: Thank you Mr. Crook. This brings us to the end of these oral hearings. I would like to express on behalf of the Court its warm thanks to the Agents, counsel and advocates of the Parties for the quality of their arguments and the courtesy and co-operation they have shown. In accordance with the usual practice, may I ask the Agents to remain at the disposal of the Court for any further information which it might need and, subject to that, I now declare closed the oral hearings on the request for the indication of provisional measures in the case concerning the *Application of the Vienna Convention on Consular Relations (Paraguay* v. *the United States)*. The Court will now withdraw to deliberate. The Order containing the decision of the Court will be read at a public sitting to be held on Thursday 9 April. There being no other matters before it today, the Court will now rise.

The Court rose at 4.35 p.m.