

**AMENDED APPLICATION INSTITUTING  
PROCEEDINGS SUBMITTED  
BY THE GOVERNMENT OF PARAGUAY**

**REQUÊTE INTRODUCTIVE D'INSTANCE MODIFIÉE  
PRÉSENTÉE PAR LE GOUVERNEMENT  
DU 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 Court, I respectfully submit this Amended Application to take account of the actions of the United States of America with respect to Angel Francisco Breard following the institution of these proceedings and the issuance of this Court's provisional measures Order on 9 April 1998, which constitute further violations of the international obligations owed to Paraguay by the United States. The Court has jurisdiction pursuant to Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations.

#### PRELIMINARY STATEMENT

1. Article 36, subparagraph 1 (b), of the Vienna Convention on Consular Relations (done on 24 April 1963) (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 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. Paraguay instituted this action by filing an Application and request for provisional measures on 3 April 1998. As Paraguay's Application explained, the United States' actions violated the obligations owed by the United States to Paraguay under the Vienna Convention. Paraguay therefore sought *restitutio in integrum*: the restoration of the situation that existed before the United States failed to provide the notifications and permit the consular assistance required by the Convention.

5. On 9 April 1998, the Court issued a provisional measures Order indicating that "[t]he United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings".

6. In spite of the Court's Order of provisional measures, United States authorities failed to take steps within their control to prevent the execution of Mr. Breard. They instead proceeded to execute Mr. Breard without ever having notified him of his right to consular assistance or provided Paraguay with any meaningful opportunity to exercise its rights under Articles 5 and 36 of the Vienna Convention.

7. The conduct of the United States in Mr. Breard's case, including its actions since 3 April 1998, violated the obligations owed by the United States to Paraguay under the Vienna Convention. The actions since 3 April 1998 also violated the obligation of the United States to comply with the Court's provisional measures Order. Finally, those actions have also violated the obligation owed by the United States to Paraguay under customary international law not to undertake any action that might prejudice any eventual decision in the case or aggravate the dispute.

8. As a result of these breaches, and in light of the impossibility of restoration of the *status quo ante*, Paraguay is entitled to a declaration of the United States' liability, an order of non-repetition of such acts, and reparation in the form of compensation and satisfaction.

## I. THE FACTS

### *Municipal Court Proceedings concerning Mr. Breard*

9. 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.

10. 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.

11. 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 12 through 14 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.

12. 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 concern-



ing the criminal justice system that a Paraguayan national might be expected to have.

13. 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. Most notably, 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 invoke 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 resulted in his death sentence.

14. 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; 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.

15. 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.

16. In April 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.

17. 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.

18. 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 set an execution date of 14 April 1998. The authorizing statute called for officials of Virginia on that date, absent an intervening court order, to "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).

19. By petition for a writ of *certiorari*, Mr. Breard requested that the United States Supreme Court exercise its discretionary authority to review the lower federal courts' decisions against him and grant a stay of his execution pending that review.

#### *Paraguay's Efforts to Secure Relief in the United States*

20. 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 have sought, as Paraguay expected would be the case, to prosecute Mr. Breard anew.

21. Paraguay did not seek from the federal court of first instance any relief barring the competent authorities of the United States from enforcing its criminal law or, specifically, retrying Mr. Breard. Paraguay did contend, however, that the competent authorities of the United States were required to enforce the criminal law by means that comported with the obligations undertaken by the United States in the Vienna Convention.

22. 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, through an *amicus curiae* brief, 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.

23. Paraguay filed a petition for a writ of *certiorari* in the United States Supreme Court seeking review of the appellate decision.

24. In addition to its efforts to have its claim heard in the courts of the United States, Paraguay 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 defense



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 United States expressed disagreement with Paraguay's legal position and offered no assistance to Paraguay in exercising its rights under the Treaties. The United States confirmed this position in a letter dated 7 July 1997. Further attempts at a diplomatic resolution took place in the weeks before the date scheduled for Mr. Breard's execution.

*This Court's Order of Provisional Measures*

25. Because a petition for *certiorari* is a matter of the Supreme Court's discretion and is rarely granted, and because diplomatic efforts had been of no avail, Paraguay determined to seek redress in this Court.

26. On 3 April 1998, Paraguay filed in this Court its initial Application instituting proceedings. Together with that Application, Paraguay filed a request for provisional measures of protection.

27. On 7 April 1998, the Court held a hearing on the request for provisional measures at which both Paraguay and the United States presented oral argument.

28. Two days later, on 9 April 1998, the Court unanimously issued a provisional measures Order. In its Order, the Court found that the execution of Mr. Breard would render it impossible for the Court to order the relief that Paraguay was seeking and thus would cause irreparable harm to Paraguay's claimed rights. (Provisional measures Order, para. 37 [*I.C.J. Reports 1998*, p. 257].) The Court therefore ordered the United States to "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings" (*ibid.*, para. 41 (I)).

*The United States' Execution of Mr. Breard in Defiance of the Provisional Measures Order and Paraguay's Rights under the Vienna Convention*

29. On 9 April 1998, the United States transmitted a copy of the provisional measures Order to the United States Supreme Court.

30. On 10 April 1998, Mr. Breard supplemented his stay application then pending in the United States Supreme Court, citing this Court's Order as further grounds for a stay of execution. He also filed an original action for a writ of *habeas corpus* in the Supreme Court, also grounded in this Court's Order.

31. Also on 10 April 1998, Paraguay supplemented its stay application in front of the United States Supreme Court, citing this Court's Order as further grounds for a stay of or injunction against the execution. On 13 April 1998, Paraguay submitted to the Supreme Court and moved for leave to file an original action, based on the provisional measures Order and seeking emergency relief against the execution.

32. Also on 13 April 1998, Paraguay wrote a letter to the Solicitor General of the United States (who represents the United States before the Supreme Court) and the Legal Adviser to the United States Department of State (who represents the United States before this Court) calling upon the United States to take the necessary steps to comply with the Order.

33. In spite of this Court's Order that the United States take all available measures to stop the execution, the competent officials of the United States did not do so.

34. On 13 April 1998, Secretary of State Madeleine K. Albright wrote a letter to the Governor of Virginia. Secretary Albright discussed this Court's

Order and explained that the United States had opposed Paraguay's request for provisional measures. While Secretary Albright suggested that the Governor grant a reprieve of Mr. Breard's execution, she nevertheless characterized the Order as "non-binding".

35. Also on 13 April 1998, the Solicitor General of the United States, joined by the Agent of the United States in these proceedings, submitted a brief to the Supreme Court, opposing Mr. Breard's and Paraguay's requests that the Supreme Court give effect to this Court's provisional measures Order and arguing that the Order was not binding. Thus, rather than take affirmative measures to secure compliance with the Order, the Solicitor General and the Agent of the United States openly resisted its implementation. The Solicitor General and the Agent of the United States contended that Secretary Albright's letter was the only means of complying with the Order and that the Supreme Court should not grant Mr. Breard's or Paraguay's request for a stay.

36. Early the following morning, 14 April 1998, Paraguay submitted a brief to the Supreme Court in reply to the United States.

37. That evening, at approximately 8 p.m., the United States Supreme Court issued a summary decision denying all the petitions and requests for relief filed by Mr. Breard and by Paraguay (*Breard v. Greene*, 118 S. Ct. 1352 (1998)).

38. Later that evening, at approximately 10 p.m., the Governor of Virginia publicly announced that he had declined to grant a reprieve and ordered that the execution of Mr. Breard be carried out. Far from giving effect to the provisional measures Order, the Governor stated his intention to deny Paraguay any possibility of effective relief in this Court. He stated:

"Should the International Court resolve this matter in Paraguay's favour, it would be difficult, having delayed the execution so that the International Court could consider the case, to then carry-out the jury's sentence despite the ruling [of] the International Court."

39. At approximately 10.35 p.m. on 14 April 1998, Virginia officials executed Mr. Breard by lethal injection.

## II. THE JURISDICTION OF THE COURT

40. 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".

41. As Members of the United Nations, Paraguay and the United States are parties to this Court's Statute, to the Vienna Convention, and to its Optional Protocol Concerning the Compulsory Settlement of Disputes. In the Preamble to the Optional Protocol, the parties:

"Express[] their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice."

42. Article I of the Optional Protocol then 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."

43. Paraguay therefore submits that the matters in dispute between Paraguay and the United States as reflected in Paraguay's claims lie within the compulsory jurisdiction of the Court.

### III. THE CLAIMS OF THE REPUBLIC OF PARAGUAY

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

(a) Pursuant to Article 36, subparagraph 1 (b), of the Vienna Convention, the United States was 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 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 violated the foregoing obligations.

(b) Pursuant to Article 36, subparagraph 1 (b), of the Vienna Convention, the United States was under the international legal obligation to a detained 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 violated 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 provide consular assistance to a detained national prior to trial. Its failure to provide the notifications required by Article 36, subparagraph 1 (b), of the Vienna Convention with respect to Mr. Breard effectively prevented Paraguay from exercising its right to carry out consular functions pursuant to Articles 5 and 36 of the Convention. The United States violated the foregoing obligation.

(d) Pursuant to Article 36, paragraph 2, of the Vienna Convention, 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 applied the municipal-



law doctrine of procedural default to bar Mr. Breard's efforts to obtain the benefit of Paraguayan consular assistance during and before a trial of the charges against him. Its application of municipal law failed to give full effect to the purposes for which the rights under Article 36 were intended. The United States thereby violated the foregoing obligation.

- (e) Pursuant 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. By invoking and applying its municipal law of procedural default, the United States violated the foregoing obligation.
- (f) Pursuant to 94 (1) of the United Nations Charter, Article 41 of this Court's Statute, and customary international law, the United States is under an international legal obligation to comply with this Court's Orders of provisional measures. By failing to take all available measures to prevent Mr. Breard's execution and by carrying out that execution on 14 April 1998, the United States failed to comply with this Court's 9 April 1998 Order of provisional measures. The United States violated the foregoing obligation, which was owed directly to Paraguay, as the State whose rights the Order expressly was intended to preserve.
- (g) Pursuant to customary international law, the United States is under an international legal obligation to refrain from any action that might prejudice any eventual decision in a case or otherwise aggravate a pending dispute. Its execution of Mr. Breard interfered with the ability of this Court to grant fully effective relief in this action and seriously aggravated the dispute. The United States violated the foregoing obligation.

#### IV. THE JUDGMENT REQUESTED

45. *For these reasons*, the submissions of the Government of the Republic of Paraguay are as follows:

*May it please the Court*

- (a) to adjudge and declare that the United States violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, under Articles 5 and 36 of the Vienna Convention, by arresting, detaining, trying, convicting, sentencing, and executing Angel Francisco Breard without providing Paraguayan consular officials the opportunity to provide effective assistance;
- (b) to adjudge and declare that the United States violated its international legal obligation under Article 36 (2) of the Vienna Convention by applying the municipal-law doctrine of procedural default to bar Angel Francisco Breard from raising his claim under the Vienna Convention and thereby failing to give full effect in United States municipal law to the provisions of Article 36;
- (c) to adjudge and declare that the United States violated its international legal obligation to comply with the provisional measures Order issued by this Court on 9 April 1998 by failing to take all measures at its disposal to ensure that Angel Francisco Breard was not executed; and
- (d) to adjudge and declare that the United States violated its international legal obligation not to undertake any action that might prejudice any

eventual decision in the case or aggravate the dispute by failing to halt the execution of Angel Francisco Breard ;

and, in light of the foregoing violations,

- (e) to adjudge and declare that the United States is under an international legal obligation to provide Paraguay a guarantee that the United States will not repeat its illegal acts, but will carry out in conformity with the foregoing international legal obligations, any future detention of or criminal proceedings against any Paraguayan national in its territory, whether by a constituent, legislative, executive, judicial, or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character ;
- (f) to adjudge and declare that Paraguay was entitled to *restitutio in integrum* and would have been entitled to the restoration of the *status quo ante* had the United States not executed Mr. Breard ;
- (g) to adjudge and declare that in light of the United States' actions rendering it impossible for the Court to provide the remedy of *restitutio in integrum*, Paraguay, in its own right and in the exercise of diplomatic protection of its national, is entitled to payment by the United States, in an amount to be determined by the Court in a subsequent proceeding, of (1) compensation, and (2) moral damages as satisfaction ;
- (h) to adjudge and declare that, as a remedy for the United States' breach of the provisional measures Order and of its international legal obligation not to undertake any action that might prejudice any eventual decision in the case or aggravate the dispute, the Republic of Paraguay is entitled to payment by the United States, in an amount to be determined by the Court in a subsequent proceeding, of (1) compensation, and (2) moral damages as satisfaction.

#### V. JUDGE AD HOC

46. 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

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

The Hague, 9 October 1998.

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

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