

No. 97-1390

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

REPUBLIC OF PARAGUAY, et al.,

Petitioners,

V.

JAMES S. GILMORE III,

Governor of the Commonwealth  
of Virginia, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

STATEMENT AMICUS CURIAE OF  
INTERNATIONAL LAW PROFESSORS  
GEORGE A. BERMAN, DAVID D. CARON, ABRAM CHAYES,  
LORI FISLER DAMROSCH, RICHARD N. GARDNER, LOUIS HENKIN,  
HAROLD HONGJU KOH, ANDREAS F. LOWENFELD, W. MICHAEL REISMAN,  
OSCAR SCHACHTER, ANNE-MARIE SLAUGHTER, AND EDITH BROWN WEISS

IN SUPPORT OF PETITIONERS' SUPPLEMENTAL APPLICATION  
FOR STAY OF OR INJUNCTION AGAINST EXECUTION

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### Interest of the Amici Curiae<sup>1</sup>

Amici are professors of law expert in the fields of international law and the application of international law by the courts of the United States, as more particularly set forth in the Appendix. Amici have special expertise concerning international tribunals, including the International Court of Justice (ICJ).

Under Article 38(1)(d) of the Statute of the International Court of Justice, 59 Stat. 1055, 3 Bevans 1179 (hereinafter ICJ Statute), which is itself a treaty of the United States within the meaning of Articles II, III, and VI of the United States Constitution, the teachings of "the most highly qualified publicists of the various nations" are among the sources to be consulted in determining rules of international law applicable to disputes between states. The views of jurists on points of international law likewise are taken into account when such questions arise in U.S. courts. See, e.g., The Paquete Habana, 175 U.S. 677, 700 (1900); United States v. Smith, 18 U.S. 153, 160-61 (1820).

Amici, through scholarship and practice before international and national tribunals, have contributed to the development of

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<sup>1</sup> In accordance with Supreme Court Rule 37.6, amici curiae state that no party other than Amici and their counsel authored this brief in whole or in part, and no person or entity, other than Amici and their counsel, has made a monetary contribution to the preparation or submission of this brief. Since written consent to the filing of this amicus brief could not be obtained in the time frame relevant to the Supplemental Application for a Stay, a motion for leave to file under Rule 37.3(b) is being submitted simultaneously herewith.

jurisprudence on various questions related to the pending matter. Amici therefore seek leave to present their views to the Supreme Court of the United States concerning the significance of a ruling of the ICJ indicating provisional measures and the respect that should be accorded such a decision by courts in the United States, in the context of the present application to stay execution of a death sentence during the pendency of related proceedings at the ICJ.

#### Argument

On April 9, 1998, by a vote of 15 to 0, the International Court of Justice entered a ruling indicating provisional measures at the request of Paraguay in the Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America). In its pleadings and its request for provisional measures, Paraguay claims that the United States has treaty-based obligations to advise the relevant consular office of Paraguay in the United States when one of Paraguay's nationals is arrested and detained in the United States; that these treaty obligations were not complied with in the case of Angel Francisco Breard, a Paraguayan national who was convicted of capital murder in the Commonwealth of Virginia and who is scheduled to be executed on April 14, 1998; and that the rights of Paraguay and its national will be irreparably prejudiced if the execution goes forward. The United States has appeared before the ICJ in the case and contested the indication of provisional measures. The ICJ's

provisional measures ruling now calls upon 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."

The ICJ is the "principal judicial organ of the United Nations." U.N. Charter, 59 Stat. 1031, 3 Bevans 1153, Art. 92. It functions according to the ICJ Statute, which is annexed to the U.N. Charter and is an integral part thereof. According to Article 93 of the U.N. Charter, all Members of the United Nations, including the United States, are ipso facto parties to the ICJ Statute. Under Article 94(1) of the U.N. Charter, "[e]ach Member of the United Nations undertakes to comply with the decisions of the Court in any case to which it is a party." The United States accepted these obligations by ratifying the U.N. Charter as a treaty with the advice and consent of the U.S. Senate in accordance with Article II of the U.S. Constitution in 1945, and these undertakings remain fully in force as treaty obligations of the United States.

Jurisdiction of the ICJ is founded on principles of consent and reciprocity, as regulated by Article 36 of the ICJ Statute. The pending case arises under Article 36(1) of the ICJ Statute, establishing jurisdiction over "all matters specially provided for . . . in treaties and conventions in force." The Optional Protocol Concerning the Compulsory Settlement of Disputes, 21 U.S.T. 325, TIAS No. 6820, 596 UNTS 487 (hereinafter Optional Protocol), which accompanies the Vienna Convention on Consular

Relations, 21 U.S.T. 77, TIAS No. 6820, 596 UNTS 261 (hereinafter Vienna Convention), has also been ratified by the United States in accordance with Article II of the Constitution. Thus, both the Vienna Convention and the Optional Protocol are treaties in force for both the United States and Paraguay within the meaning of Article 36(1) of the ICJ Statute. 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.

Paraguay, being such a party, has brought such an application.

The authority of the ICJ to enter provisional measures is established in Article 41 of the ICJ Statute, which provides:

1. The Court shall have power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

Jurisprudence of the ICJ has clarified the standards for issuance of a provisional measures ruling. The ICJ must determine first (without prejudice to further proceedings to dispose of any

jurisdictional objections) that the jurisdictional provisions relied on by the applicant state appear, prima facie, to afford a basis for the ICJ to exercise jurisdiction; in the present case, the ICJ has found such a prima facie basis in Article I of the Optional Protocol (paras. 23-34 of the provisional measures ruling). Second, the ICJ will not indicate provisional measures unless it finds that they are needed to prevent "irreparable prejudice" to a party's rights and that they are required by urgent circumstances; in this case, the ICJ has found that the requirement was satisfied by the imminence of the scheduled execution date for Mr. Breard and the impossibility of preserving Paraguay's rights should he be executed (paras. 35-37).

Amici contend that this Court should now stay the execution of Mr. Breard. The legal effects of provisional measures of international tribunals present issues of considerable jurisprudential significance which Amici and other scholars have addressed in depth in scholarly writings and before various tribunals. Under the circumstances of this case, there is no doubt that the measures ought to be complied with. The motion

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\* A government that does not respect [a provisional measures ruling] may risk the following consequences, among others:

- unfavorable inferences on jurisdictional or substantive issues that may arise in subsequent proceedings in that case (for example where either party alleges a breach of a duty to negotiate in good faith);
- losing the sympathy of the judges when they deal with other issues in the same case or other cases of interest to that government;
- weakening the credibility of its respect for law, including its ability to encourage respect for law by foreign states as well as its own citizens;

for a stay can and should be resolved in favor of Petitioner, in order to preserve these questions for full consideration by the appropriate tribunal -- whether that be this Court, the state or lower federal courts, or the ICJ.

The decision indicating provisional measures is directed to the United States government as a whole. In the view of Amici, necessary steps should be taken by all relevant U.S. officials -- whether executive or judicial, state or federal -- to ensure that the United States complies with the ruling. This position is shared by all Amici, regardless of any differences of views they may have concerning other issues involved in the present matter.

The United States is a frequent litigant at the ICJ, both as applicant and as respondent. The United States has initiated cases at the ICJ several times and has itself requested and received provisional measures in the past. In the Case Concerning U.S. Diplomatic and Consular Staff in Tehran (United States v. Iran), 1979 I.C.J. 7 (Provisional Measures Order of Dec. 15); 1980 I.C.J. 3 (Merits Judgment of May 24), the United States requested and was granted an indication of provisional measures to ensure the safety of the U.S. hostages then being

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-- increasing the likelihood of criticism from foreign states directly or in the form of U.N. action; . . .  
-- weakening the legitimacy of its bargaining posture and deepening its dispute with the other party; . . .  
-- weakening the fabric of international relations on which it, along with other states, relies to maintain international order."

Bernard H. Oxman, "Jurisdiction and the Power to Indicate Provisional Measures," in The International Court of Justice at a Crossroads (Lori F. Damrosch, ed., 1987), at 323, 332-33.

held in Tehran. Indeed, in that case, the United States relied for jurisdiction on the very Optional Protocol that Paraguay has now invoked before the ICJ. And the Vienna Convention on Consular Relations on which Paraguay bases its claim was likewise one of the treaties invoked by the United States in the Tehran Hostages case. When the ICJ indicated provisional measures against Iran on December 15, 1979, the United States Government repeatedly insisted on Iranian compliance with the ICJ's decision and referred to it when issues concerning the international dispute arose in U.S. and foreign tribunals.

A stay should be granted to prevent irreparable harm to Petitioner. The irreparable harm if the execution is effected without plenary review by this Court is manifest. To permit the execution of a Paraguayan national, under circumstances alleged to entail breach of treaty rights and in derogation of a ruling from the ICJ entered to preserve those rights *pendente lite*, would work irreparable harm, not only to the Petitioner but also to the national interest.

Likewise, there are "compelling reasons" for this Court to exercise plenary review of "important federal questions" under the standards of Supreme Court Rule 10. On the only previous instance when a controversy was simultaneously pending before this Court and the ICJ, this Court did grant certiorari, and the ICJ thereafter dismissed the international proceeding. See Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958); compare



Interhandel (Switzerland v. United States), 1957 I.C.J. 105  
Order of Oct. 24); 1959 I.C.J. 6 (Judgment on Preliminary  
Objections of Mar. 21). This Court's unanimous decision in that  
matter established lasting precedents on such important federal  
questions as how to take account of the legitimate interests of a  
foreign sovereign in matters of actual or potential  
interjurisdictional conflict.

Disregard of the ICJ's provisional measures ruling could  
impair the credibility of the United States not only in the case  
brought by Paraguay in the ICJ, but also in matters before other  
international bodies. Since the ICJ is part of the United  
Nations system, disregard of a ruling of the "principal judicial  
organ of the United Nations" could redound to the discredit of  
U.S. positions before other international judicial and arbitral  
tribunals, including the International Criminal Tribunals for the  
Former Yugoslavia and Rwanda, the Iran-United States Claims  
Tribunal, and the contemplated International Criminal Court.

Amici respectfully suggest that this Court should weigh the  
potential consequences for the United States of non-compliance  
with an ICJ provisional measures ruling and enter the appropriate  
orders to ensure that long-range interests in compliance with the  
rule of law are not unnecessarily undercut by a rush to carry out  
the judgment of the lower court.

This Court has repeatedly affirmed the need to undertake a  
"searching scrutiny" of state or local actions affecting U.S.  
foreign relations that may provoke consequences for the nation as

a whole. See, e.g., Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979); Zschernig v. Miller, 389 U.S. 429 (1968). When, as here, the ICJ has unanimously indicated provisional measures to prevent irreparable harm, the national interests of the United States are directly engaged. The matter has become sufficiently compelling that this Court should enter a stay. And I urge this Court to ensure that actions of the authorities in Virginia -- actions which can easily be deferred for the temporary period necessary for an airing of the claims -- do not inadvertently cause incalculable and irreparable damage on the international plane. The grant of a stay is necessary to preserve the Court's ability to exercise its certiorari jurisdiction over this matter of compelling national importance.

#### Conclusion

However this Court rules, the present case will set a precedent regarding this Nation's respect for international law and for provisional measures rulings of the ICJ. This Court has the responsibility to determine the important federal questions raised by the petition, including issues arising under treaties of the United States and other aspects of international and federal law. For the reasons set forth above, this Court should enter the requested stay of execution to ensure respect for the provisional measures ruling of the ICJ.

Respectfully submitted,

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Paraguay v. United States of America: Verbatim...

linked Mr. Breard to the murder and the attempted rape. Indeed, ample evidence independent of his own testimony existed to prove that Mr. Breard committed these crimes. Mr. Breard was also implicated in a third sexual assault committed before he murdered Ms Dickie.

Washington police took Mr. Breard into custody and charged him with serious offences. The United States court proceedings that the "competent" authorities have Paraguay's

APPENDIX - IDENTIFICATION OF AMICI

George A. Bermann is the Charles Keller Beekman Professor of Law at Columbia University and an expert on the European Court of Justice and on international and transnational litigation.

David D. Caron is professor of law at the University of California at Berkeley and an expert on the Iran-United States Claims Tribunal.

Abram Chayes is Felix Frankfurter Professor of Law Emeritus at Harvard University and a former Legal Adviser to the U.S. Department of State (1961-1964).

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Richard N. Gardner is Henry L. Moses Professor of International Law and Organization at Columbia University and former Ambassador of the United States to Italy and to Spain.

Louis Henkin is University Professor Emeritus at Columbia University and a past president of the American Society of International Law. He served as Chief Reporter for the American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States and is the author of Foreign Affairs and the United States Constitution (2d ed. 1996).

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CERTIFICATE OF SERVICE

I, Lori Fidler Damrosch, counsel of record for Amici Curiae International Law Professors George A. Bermann et al., hereby certify that on April 13, 1998, I caused a copy of the Statement Amicus Curiae of International Law Professors George A. Bermann et al. to be served by overnight mail upon and sent a copy also by telecopy to:

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Dated: April 13, 1998  
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