

DECLARATION OF JUDGE ODA

1. I voted in favour of the Court's Order with great hesitation as I believed and I still believe that the request for the indication of provisional measures of protection submitted by Paraguay to the Court should have been dismissed. However, in the limited time — one or two days — given to the Court to deal with this matter, I have found it impossible to develop my points sufficiently to persuade my colleagues to alter their position.

2. First of all, I would like to express some of my thoughts in connection with this request.

I can, on humanitarian grounds, understand the plight of Mr. Breard and recognize that owing to the fact that Paraguay filed this request on 3 April 1998, his fate now, albeit unreasonably, lies in the hands of the Court.

I would like to add, however, that, if Mr. Breard's rights as they relate to humanitarian issues are to be respected then, in parallel, the matter of the rights of victims of violent crime (a point which has often been overlooked) should be taken into consideration. It should also be noted that since his arrest, Mr. Breard has been treated fairly in all legal proceedings within the American judicial system governed by the rule of law.

The Court cannot act as a court of criminal appeal and cannot be petitioned for writs of *habeas corpus*. The Court does not have jurisdiction to decide matters relating to capital punishment and its execution, and should not intervene in such matters.

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3. As stated earlier, Paraguay's request was presented to the Court on 3 April 1998 in connection with and at the same time as its Application instituting proceedings against the United States for violations of the 1963 Vienna Convention on Consular Relations. Paraguay's Application was unilaterally submitted to the Court on the basis of the Optional Protocol. I very much doubt that, on the date of filing of the Application and the request, there was any "dispute[s] arising out of the interpretation or application of the [Vienna] Convention" (Optional Protocol, Article I).

If there was any dispute between Paraguay and the United States concerning the interpretation or application of the Vienna Convention, it could have been that the United States was presumed to have violated the

Convention at the time of the arrest of Mr. Breard in 1992, as the United States did not inform the Paraguayan consul of that event.

This issue was raised by Paraguay when it became aware of Mr. Breard's situation. In 1996, negotiations took place between Paraguay and the United States concerning the consular function provided for under the Convention. In July 1997, the United States proceeded to remedy the violation by sending a letter to the Government of Paraguay apologizing for its failure to inform the consul of the events concerning Mr. Breard and giving an assurance that this failure would not be repeated in future. In my view, the United States was thus released from its responsibility for violation of the Vienna Convention.

From that time, the question of violation of the Vienna Convention, which may have led to a dispute concerning its application and interpretation, no longer existed. However, this question was raised once more on 3 April 1998, the date on which Paraguay's Application was filed.

4. What did Paraguay ask the Court to decide in its Application of 3 April 1998? Paraguay asked mainly for a decision relating to Mr. Breard's personal situation, namely, his pending execution by the competent authorities of the State of Virginia.

Paraguay requested *restitutio in integrum*. However, if consular contact had occurred at the time of Mr. Breard's arrest or detention, the judicial procedure in the United States domestic courts relating to his case would have been no different. This point was clarified in the course of the oral pleadings.

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5. I would like to turn to some general issues relating to provisional measures. First, as a general rule, provisional measures are granted in order to preserve *rights* exposed to imminent breach which is irreparable and these *rights* must be those to be considered at the merits stage of the case, and must constitute the subject-matter of the Application or be directly related to it. In this case, however, there is no question of such *rights* (of States parties), as provided for by the Vienna Convention, being exposed to an imminent irreparable breach.

6. Secondly, in order that provisional measures may be granted by the Court, the Court has to have, at the very least, *prima facie* jurisdiction to deal with the issues concerning the *rights* of the States parties. However I believe that, as regards the present request for provisional measures, the Court does not even have *prima facie* jurisdiction to handle this matter.

7. Thirdly, if the request in the present case had not been granted, the Application itself would have become meaningless. If that had been the case, then I would have had no hesitation in pointing out that the request for provisional measures should not be used to ensure that the main

Application continue. In addition the request for provisional measures should not be used by applicants for the purpose of obtaining interim judgments that would affirm their own rights and predetermine the main case.

8. I have thus explained why I formed the view that, given the fundamental nature of provisional measures, those measures should not have been indicated upon Paraguay's request.

I reiterate, however, that I voted in favour of the Order, for humanitarian reasons, and in view of the fact that, if the execution were to be carried out on 14 April 1998, whatever findings the Court might have reached might be without object.

(Signed) Shigeru ODA.
