Interim Measures of Protection for Rights under the Vienna Convention on Consular Relations

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Abstract

*The number of requests for interim orders of protection registered with the International Court of Justice showed a marked increase between 1990 and 1999. Despite the growing resort to this remedy, the full legal significance of ICJ interim measures remains a matter of continuing debate. The recent requests for and responses to ICJ interim measures to protect rights under the Vienna Convention on Consular Relations (*Breard *and* LaGrand *cases) have rekindled the debate as to the binding nature of such orders. Through a review of these recent cases, this article argues that the text of Article 41 alone of the Statute of the ICJ, under which interim orders are made, is an insufficient guide to the legal effect of the orders made thereunder. Despite the imprecision of the language of Article 41, there is adequate evidence based on the principles of interpretation to lend weight to the binding nature of ICJ provisional measures. It is clear from the review of the cases that the direct impact of provisional measures on the protection of human rights makes this conclusion a compelling one. The article also reviews the consequences of the United States' response to the ICJ orders.*

1 Introduction

The last time the International Court of Justice (ICJ) was called upon to adjudicate on questions relating to diplomatic and consular relations was in the *Iranian Hostages* case[1] in 1980. The United States, as the applicant in that case, requested and was granted a declaration by the Court to the effect that, by its conduct, the Islamic Republic of Iran had violated its obligations under, *inter alia,* the Vienna Convention

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[1] *United States Diplomatic and Consular Staff in Tehran* (*USA v. Iran*), ICJ Reports (1980) 3. For the decision on provisional measures, see ICJ Reports (1979) 7.

on Diplomatic Relations (1961)[2] and the Vienna Convention on Consular Relations (1963).[3] Eighteen years on (1998–1999), the tables have been turned and the United States stands accused before the same Court of two instances of violations of the Vienna Convention on Consular Relations.[4] However, the interest in these cases exceeds the simple fact that the United States is accused of breaches of international law; they also raise important questions of treaty interpretation, the place of international law in a domestic forum (especially, in this context, a federal jurisdiction), the legal significance of interim measures and the consequences of the pervasive impact of international human rights standards. Most of these questions are expected to be addressed at the merits stage of the *LaGrand* case[5] but, already, the activities at the preliminary stages of both cases raise important international law issues. This article assesses some of the issues raised by the litigation before the domestic and international tribunals.

2 Litigation before the International Court of Justice

In April 1998 and March 1999, Paraguay and Germany respectively filed applications before the Court against the United States of America[6] alleging violations of Articles 5[7] and 36[8] of the Vienna Convention on Consular Relations.[9] Both applicants maintained that nationals of their respective countries (Angel Francisco Breard in the

[2] Done on 24 April 1961, 500 UNTS 95.

[3] Done on 24 April 1963, 596 UNTS 262.

[4] The first case, *The Case Concerning the Vienna Convention on Consular Relations* (*Paraguay v. USA*) has been discontinued at the request of Paraguay (ICJ, *Press Communiqué 98/36* of 11 November 1998). The second case, *LaGrand* (*Germany v. USA*), is still pending before the Court. See for details, <www.icj-cij.org>.

[5] *Ibid.*

[6] *Ibid.*

[7] Article 5 of the Vienna Convention on Consular Relations (1963) provides *inter alia* that:

> Consular functions consist in:
> protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;
> . . .
> subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests.

[8] Article 36(1)(b) of the Vienna Convention on Consular Relations (1963) provides that:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
> if 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. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

[9] Done on 24 April 1963, 596 UNTS 262.

Paraguayan case and Karl and Walter LaGrand in the German case), who had been convicted of serious criminal offences in the United States, were not informed, as required by Article 36(1)(b) of the Vienna Convention, of their right to contact consular officials in the United States. Further, consular officials had not been notified of the arrests and detention. In both cases, the accused were, at the time of the applications, facing the death penalty and all domestic remedies had been exhausted. Paraguay and Germany both asked the Court to adjudge and declare *inter alia* that:

1. the United States is obliged not to rely on its domestic law, especially the doctrine of 'procedural default' to preclude the exercise of rights under the Vienna Convention on Consular Relations;
2. the criminal liability imposed on the accused in violation of international law should be recognized by United States authorities as void;
3. the United States restore the *status quo ante*, that is re-establish the situation which existed before the breach of the Vienna Convention on Consular Relations;[10]
4. the United States provide guarantees of the non-repetition of the illegal acts;
5. Applicants are entitled to reparation for the illegal acts.[11]

The jurisdiction of the Court was, according to the applicants, founded on Article 36(1) of the Statute of the Court[12] and on Article 1 of the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes.[13] Given that the United States had all but conceded the breaches of the Convention, the above issues may be encapsulated under the broad heading of the consequences of such a breach. As the Convention itself does not identify any particular consequences, the conclusions of the Court in this regard would be of immense academic and practical interest.

3 Provisional Measures

In consideration of the imminence of the scheduled execution dates at the time of the applications,[14] the Court was also requested to order provisional measures restraining

[10] In the German application, this claim was restricted to Walter LaGrand because Karl LaGrand had already been executed.

[11] Paraguay claimed *restitutio in integrum*, while Germany focused on compensation for the execution of Karl LaGrand on 24 February 1999.

[12] Article 36(1) of the Statute embodies the so-called compulsory jurisdiction of the Court and it provides that:

> The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and Conventions in force.

[13] Done at Vienna, 24 April 1963, 596 UNTS 488 (1963). Article 1 of the Optional Protocol provides that:

> 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 Party to the present Protocol.

[14] The Paraguayan application was filed on 3 April 1998 and Angel Breard was scheduled to be executed on 14 April 1998. Walter LaGrand was scheduled to be executed on 3 March 1999, the day after Germany initiated its litigation against the United States.

the United States from implementing the death sentences while the cases were under consideration by the Court.[15] Both applications argued the grounds for their requests and the possible consequences of its dismissal in terms similar to the following from the Paraguayan application:

> Under the grave and exceptional circumstances of this case, and given the paramount interest of Paraguay in the life and liberty of its national, provisional measures are urgently needed to protect the life of Paraguay's national and the ability of this Court to order the relief to which Paraguay is entitled: restitution in kind. Without the provisional measures requested, the United States will execute Mr Breard before this Court can consider the merits of Paraguay's claims, and Paraguay will be forever deprived of the opportunity to have the *status quo ante* restored in the event of a judgment in its favour.[16]

In the case of Paraguay this request was granted a few days later, following an oral hearing.[17] The German request for interim measures, on the other hand, was granted by the Court *proprio motu* in accordance with the powers conferred by Article 75(1) of the Court's Rules of Procedure.[18] The order was made without having heard argument from the parties. The Court justified this unprecedented action on account of the urgency of the situation.[19]

The United States unsuccessfully contested both applications for provisional measures, including an opportunity to set out its arguments during the oral hearings of the *Breard* case. Considering the similarity of issues in the two cases, it is conceivable that arguments similar to those presented in the *Breard* case would have been relied upon in the *LaGrand* case had there been an opportunity to do so. At the oral hearings to consider the application for provisional measures in the *Breard* case, the United States relied on three broad arguments relating to the jurisdiction of the Court, equality of arms and public policy.

A *Jurisdiction*

In contesting Paraguay's application for provisional measures, the United States argued that the Court had no jurisdiction to hear the case. This was based on two separate but related contentions. Firstly, the Court had no jurisdiction to hear the case

[15] See *Case Concerning the Vienna Convention on Consular Relations* (*Paraguay v. USA)* Request for the Indication of Provisional Measures (9 April 1998) [hereafter referred to as the *Breard* case (Application for Provisional Measures)] and *Case Concerning the Vienna Convention on Consular Relations* (*Germany v. USA)* Request for the Indication of Provisional Measures (3 March 1999), [hereafter referred to as the *LaGrand* case (Application for Provisional Measures)]. See for details, <www.icj-cij.org>.

[16] *Ibid*, at para. 8.

[17] The Court decided that:

> The 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, and should inform the Court of all measures which it has taken in implementation of this Order. *Ibid*, at para. 41.

[18] Article 75(1) of the Rules of Procedure provide that:

> 1. The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties.

[19] See *LaGrand* case, *supra* note 15, at para. 12. The proposal not to hear argument was originally made by Germany.

because there was no dispute between the parties as to the interpretation or application of the Vienna Convention on Consular Relations. As far as the United States was concerned, both parties were *ad idem* that Article 36 of the Convention conferred the rights of notification identified in the Paraguayan application. Furthermore, the United States had conceded the omission to notify Mr Breard of his rights, and the Paraguayan consul of Mr Breard's arrest and detention. In recognition of the error of her ways, the United States had already apologized to Paraguay for the omission and had also undertaken to ensure that the omissions would not occur in the future.[20] In the same vein, Paraguay's objections to the criminal proceedings against Mr Breard do not constitute a dispute concerning the interpretation of the Convention.

The second string to the jurisdiction argument was that, as it appears that Paraguay's arguments will not enable it to be successful on the merits of the case, provisional measures should not be ordered.[21] In support of this contention, the United States reasoned that although the accused was not informed of his rights under the Vienna Convention, he had received all the necessary legal assistance, had understood the nature of the criminal proceedings and had also admitted his guilt. Therefore, consular assistance would not have made much difference to the outcome. In addition, Paraguay had no legally cognizable claim to the relief sought in its application. There was no entitlement to *restitutio in integrum* under the terms of the Vienna Convention on Consular Relations[22] and, further, the invalidation of criminal conviction for which Paraguay stood in her application has no foundation in the text or *travaux préparatoires* of the Vienna Convention on Consular Relations nor in state practice. The state practice in matters of Article 36(1) notifications is uneven and failures to notify are often remedied by apology. In any case, according to the United States, *restitutio in integrum* would be unworkable in practice.[23]

Since the *Fisheries Jurisdiction* cases, the Court has consistently held that it is not necessary that it conclusively satisfy itself that it has jurisdiction on the merits of a case in order to be able to indicate provisional measures, although it ought not to make indications for provisional measures if the absence of jurisdiction was manifest.[24] This view has been restated in a long line of cases.[25] In the *Nuclear Tests* case,[26] for example, the Court found that:

> Whereas on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, and yet ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded.[27]

[20] *Breard* case, *supra* note 15, at para. 28.
[21] See, generally, *ibid*, at para. 20.
[22] *Ibid*, at para. 28.
[23] *Ibid*, at paras 18 and 20.
[24] *UK v. Iceland,* and *Germany v. Iceland,* Interim Protection Order, ICJ Reports (1972), 12 and 30, para. 16.
[25] See, e.g., *Aegean Sea Continental Shelf case* (*Greece v. Turkey*), ICJ Reports (1976) 3, and the *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. U.S.A*), ICJ Reports (1984) 169.
[26] *Australia v. France,* Interim Protection Order, ICJ Reports (1973) 99.
[27] *Ibid*, at para. 13.

Due to this established practice, the Court's reaction to the United States' arguments relating to its jurisdiction, especially the second strand, was fairly predictable. The prima facie standard was reiterated by the Court in the *Breard* decision,[28] adding that 'the existence of the relief sought by Paraguay under the Convention can only be determined at the stage of the merits; and ... the issue of whether any such remedy is dependent upon evidence of prejudice to the accused in his trial and sentence can equally only be decided upon at the merits'.[29] The Court was similarly unpersuaded by the suggestion that there was no dispute between the parties. In the opinion of the Court, 'there exists a dispute as to whether the relief sought by Paraguay is a remedy available under the Vienna Convention, in particular in relation to Articles 5 and 36 thereof'.[30] As there was a dispute relating to the consequences of breach of the Vienna Convention, the Court had little difficulty in founding jurisdiction under Article 1 of the Optional Protocol Concerning the Compulsory Settlement of Disputes.[31]

B *Equality of Arms*

The United States argued further that provisional measures must take account of the rights of both parties in order to maintain a fair balance. This would not be the situation if the Paraguayan request were granted.[32] The principle of equality of arms is an inherent part of the right to a fair hearing in any litigation,[33] including incidental proceedings before the ICJ. The Court therefore has to be mindful of the impact of its provisional orders on the equality of arms principle. It is indeed arguable that by seeking to preserve the rights of litigants, provisional measures aim to ensure the equality of arms in litigation before the Court. It follows that not all claims to preserve rights will necessarily conform to the need to maintain equality of arms. The nature and context of the Court's interpretation of its powers to indicate provisional measures ensures that parties maintain a balance in their standing. In the first place, the rights in need of preservation must refer to rights which are the subject of dispute in the judicial proceedings and, perhaps more importantly, it must be shown that they are at risk of irreparable prejudice.[34] In addition, provisional measures are justified only if

[28] *Breard* case, *supra* note 15, at para. 23, where the Court concluded that:
> on a request for the indication of provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, but ... it may not indicate them unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded.

[29] *Ibid*, at para. 33.

[30] *Ibid*, at para. 31.

[31] *Ibid*, at paras 31 and 34.

[32] *Ibid*, at para. 21.

[33] See Article 6 of the European Convention on Human Rights. For a review of the place of the principle of equality of arms under the Convention, see D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (1995), at 207 *et seq.* See also D. Harris, L. Zwaak and D. Gomien, *Law and Practice of the ECHR and the European Social Charter* (1996), at 172 *et seq.*

[34] In the *Aegean Sea Continental Shelf* case, *supra* note 25, the Court rejected the Greek application for provisional measures because it reasoned that the harm alleged in the Greek application was one that may be capable of reparation by appropriate means.

there is urgency[35] about the threat to the potential prejudice to the rights in question. In the *Breard* case, and by extension of the argument, the *LaGrand* case, the scheduled execution of the accused would render it impossible for the Court to order the relief sought by Paraguay or Germany. It was the incontestable urgency in the *Breard* and *LaGrand* cases which led Judges Schwebel and Oda to vote with the rest of the Court, despite their strong reservations about the final decisions.

The question of equality of arms was also at the centre of the decision of the Court to order provisional measures without hearing argument from the parties in the *LaGrand* case. Although the Court claimed to have granted the order *proprio motu,* it did so at the instigation of the Applicant in the case. Not to have heard the Respondent's view in the case raises obvious issues of equality of arms in the litigation. This was an issue which caused Judge Schwebel sufficient concern for him to question whether the Court's approach was 'consistent with the fundamental rules of the procedural equality of the parties'.[36] Schwebel argued fairly strongly on the distinction between Article 74 of the Court's Rules of Procedure[37] which should govern situations in which a party makes an application before the Court on the one hand, and Article 75(1)[38] by which the Court is empowered to indicate provisional measures under its own steam. According to Schwebel,

> The Rule (Article 75(1)) assumes that the Court may act on its own motion where a party has not made a request for the indication of provisional measures. But the Court's consideration of the matter in this case has only been provoked by Germany's application and its request for provisional measures. Article 74 of the Rules provides that, when a party makes such a request, the Court shall arrange 'a hearing which will afford the parties an opportunity of being represented at it'. No such hearings have been held, arranged or contemplated in the current case.

Despite his reservations, Schwebel nevertheless voted for the order and hoped that the Court's action would not form a precedent. In the circumstances, his decision to support the order, rather than vote against it, is correct. The distinction sought to be drawn between Articles 74 and 75 of the Rules of Procedure is, on reflection, not a particularly secure one and may only be justified by reading Article 75(1) in isolation and thus out of context. The Court has the power to indicate provisional measures *proprio motu* even when a party has made an application, and this is confirmed in Article 75(2) which provides that:

> 2. When a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request.

Schwebel's concern for equality of arms is however totally valid because it does not

[35] See the application by Switzerland in the *Interhandel* case (*Switzerland v. USA*) ICJ Reports (1957) 105, which was dismissed on account of a lack of urgency.

[36] Separate Opinion of President Schwebel in the *LaGrand* case, *supra* note 15.

[37] The relevant provision in the Rules of Procedure is Article 74(3), which provides that:

> 3. The Court, or the President if the Court is not sitting, shall fix a date for a hearing which will afford the parties an opportunity of being represented at it. The Court shall receive and take into account any observations that may be presented to it before the closure of the oral proceedings.

[38] See *supra* note 18.

appear on reading the Rules of the Court that a hearing should be dispensed with without overwhelming and compelling reasons.

Confronted with the imminent execution of Mr LaGrand, the Court chose to follow what seemed to it to be the most effective way of securing the life of Mr LaGrand and the rights of Germany. This decision was influenced largely by the extreme urgency of the matter, contributed to by the absence of credible evidence that the United States authorities would show goodwill by staying the execution while the matter was argued before the Court. The distrust of the United States authorities seemed to be confirmed by the fact that, despite the indication of provisional orders requesting the United States 'to take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings', the execution nevertheless went ahead as scheduled. Mr Breard was similarly executed in spite of a similarly worded order from the Court. The decision by the United States authorities after both the *Bread* and *LaGrand* cases to execute the accused in the face of the Court's orders rekindles the debate as to whether provisional measures are legally binding and, if so, whether the US authorities had complied with the Court's order. An interesting matter to which we shall turn in the next section.

C *Public Policy*

Finally, the United States made what is, in essence, a general public policy argument to the effect that provisional measures in the circumstances of the present case would be contrary to the interests of states parties to the Vienna Convention on Consular Relations and the international community as a whole. According to the United States, the order sought by Paraguay would disrupt criminal justice systems, given the risk of proliferation of cases.[39] This is not an argument which the Court addressed directly, but perhaps there was little need to do so. If states parties, such as Paraguay and Germany, agreed with the United States argument, they would not seek provisional measures from the Court. The present litigation is an indication either that they would not consider that such measures would disrupt their criminal justice systems, or that any such disruptions would, in the circumstances, be legitimate. The Court was, however, keen to point out that the issues in this case do not concern the entitlement of the United States to resort to the death penalty for serious crimes, and also that it is not its function to act as an international court of criminal appeal.[40]

The decisions to indicate provisional measures in the context of the *Breard* and *LaGrand* cases have brought the Court into the direct frame of individual rights protection. In the evolutionary development of its powers this is not surprising, as in the past it has not shunned human rights concerns.[41] The protection of individual rights was at the heart of the Court's provisional orders in both the *Iranian Hostages*[42]

[39] *Breard* case, *supra* note 15, at para. 22.

[40] *Ibid*, at para. 38.

[41] For a discussion of this issue, see Higgins, 'Interim Measures for the Protection of Human Rights', in J. I. Charney, D. K. Anton and M. E. O'Connel (eds), *Politics, Values and Functions. International Law in the 21st Century. Essays in Honor of Professor Louis Henkin* (1997) 87.

[42] *U.S. Diplomatic and Consular Staff in Tehran* case, *supra* note 1.

and the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*[43] cases. The difference between the present cases and the previous ones is the Court's focus on the rights of the individual. This development was noticeable enough to lead Judge Oda, in his separate opinion, to caution against its recurrence. He wrote:

> If the Court intervenes *directly* in the fate of an individual, this would mean some departure from the function of the principal judicial organ of the United Nations, which is essentially a tribunal set up to settle inter-state disputes concerning the rights and duties of States. I fervently hope that this case will not set a precedent in the history of the Court.[44]

Judge Oda is clearly swimming against the tide because the *LaGrand* and *Breard* cases are a predictable and, in the circumstances, justifiable development from the *Hostages* case and the *Bosnia Genocide* case. In addition, on occasions such as in the present cases where the rights of states and those of individuals are inseparable, it would be unwise for the Court to remain inflexible by seeking to address only the rights of states. This would prove unworkable in practice. International human rights law is understandably a pervasive phenomenon. It provides the essential link in international law between the state and the individual, the ultimate bottom line in any legal order. The effective protection of individual rights before the ICJ cannot be based on the traditional principles of diplomatic protection alone. Diplomatic protection has to take account of the developments in international human rights law.

There is also the policy question of the credibility of interim measures, an issue that has been brought into sharp focus by the events surrounding this case. The artificial separation between incidental proceedings and the merits stages has often led the Court to postpone the consideration of perfectly valid substantive arguments until the later stage. Respondents in litigation for provisional measures, such as the United States in the cases under discussion, often consider interim measures emerging from incidental proceedings as not sufficiently in conformity with due process rules. This may well account for the abysmal record of compliance with such measures.[45] In the ten cases in which provisional measures were ordered,[46] only in two of them[47] may one confidently say that they have been complied with fully. The others (including the two involving the Vienna Convention on Consular Relations)[48] have had either an

[43] *Bosnia & Herzgovina v. Yugoslavia & Montenegro*, ICJ Reports (1993), at 3 and 325.

[44] Separate Opinion of Judge Oda in the *LaGrand* case, *supra* note 15.

[45] On this point see Oda, 'Provisional Measures. The Practice of the International Court of Justice', in V. Lowe and M. Fitzmaurice, *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* (1996) 541.

[46] The ten cases are: (a). *Anglo-Iranian Oil* case (*UK v. Iran*) ICJ Reports (1951) 89; (b). *Fisheries Jurisdiction* cases, *supra* note 24; (c). *Nuclear Tests* cases, *supra* note 26; (d). *U.S. Diplomatic and Consular Staff in Tehran* case, *supra* note 1; (e). *Frontier Dispute* (*Burkina Faso v. Mali*) ICJ Reports (1986) 3; (f). *Military and Paramilitary Activities in and against Nicaragua* case, *supra* note 25; (g). *Bosnia Genocide* case, *supra* note 43; (h). *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria*) ICJ Reports (1996) 13; (i). *Breard* case, *supra* note 15 and (j). *LaGrand* case, *supra* note 15.

[47] *Frontier Dispute* case, *supra* note 46, and *Land and Maritime Boundary between Cameroon and Nigeria* case, *supra* note 46.

[48] On this point see analysis *infra* below.

indifferent or a less compliant response. This profile of state practice creates an unacceptable credibility gap that needs to be bridged. Considering the urgency of provisional measures in order to avoid irreparable prejudice to the rights of litigants, perhaps the best way forward in this regard would be to speed up proceedings in which provisional measures have been ordered. The gap that currently exists between incidental proceedings and the merits stage is sufficiently excessive to generate a sense of injustice in the minds of some litigants.

4 The Response to the ICJ Orders within the United States

In response to the Court's provisional measures order in the *Breard* case, the United States Secretary of State, Madeleine Albright wrote to the Governor of Virginia requesting that he exercise his powers as Governor to stay the execution of Mr Breard.[49] She added, however, that 'it is only with great reluctance that I make this request, especially given the aggravated character of the crime for which Mr Breard has been convicted and sentenced and our view of the merits of the Paraguay's legal claims. As Secretary of State, however, I have a responsibility to bear in mind the safety of Americans overseas.'[50] A *habeas corpus* application and a petition for *certiorari* before the United States Supreme Court for the release of Mr Breard were denied the day after the ICJ's provisional measures order. The Supreme Court concluded that Mr Breard had 'procedurally defaulted his claim, if any, under the Vienna Convention [on Consular Relations] by failing to raise that claim in the state courts'.[51] The Supreme Court was similarly unconvinced about the material consequences on the case of the failure to comply with the terms of the Vienna Convention. According to the majority opinion:

> Even were Breard's Vienna Convention claim properly raised and proven, it is extremely doubtful that the violation should result in the overturning of the final judgment of conviction without some showing that the violation had an effect on the trial. . . . Breard decided not to plead guilty and to testify at his own trial contrary to the advice of his attorneys, who were likely far better able to explain the United States legal system to him than any consular official would have been.[52]

Of central importance to the present discussion is the fact that the State Department and the Department of Justice filed an *amicus curiae* brief before the Supreme Court urging the Court to decline the *habeas corpus* and *certiorari* petitions. The *amicus* brief drew the attention of the Court to the ICJ provisional measures, but argued at length that despite the lack of consensus on the matter they should be seen as not binding. Both Breard and LaGrand were executed on schedule.

Was the United States legally bound to comply with the orders of the Court to 'take

[49] Letter of Madeleine K. Albright, U.S. Secretary of State, to James Gilmore III, Governor of Virginia (13 April 1998).

[50] *Ibid.*

[51] *Breard v. Greene*, 118 S.Ct. 1352, 1354 (1998).

[52] *Ibid.*, at 1355.

all measures to ensure that [the accused][53] [are] not executed pending the final decision in these proceedings'?[54] What are the legal consequences of the United States' reaction in response to the order? These are two of the interesting questions posed by the preliminary litigation before the International Court of Justice relating to the Vienna Convention on Consular Relations.

A *Binding or Bound to be Ineffective?*

The legal effect of orders indicating provisional measures is a subject upon which the Court has not had an opportunity to make a definitive pronouncement, although this is one area upon which there is vast but differing academic opinion.[55] It is generally argued that the reference in Article 41 of the Court's Statute defining the ICJ's 'power to *indicate*, if it considers the circumstances so require, any provisional measures which *ought to be taken* to preserve the respective rights of either party'[56] is a strong pointer to the non-binding nature of these measures. In its *amicus* brief to the Supreme Court, the United States argued that: 'the use of precatory language ("indicate," "ought to be taken," "suggested") instead of stronger language (e.g.: the ICJ may "order" provisional measures that "shall" be taken) strongly supports a conclusion that the ICJ provisional measures are not binding'.[57] On reflection, the arguments based on the language of Article 41 of the Statute of the ICJ are rather inconclusive and on deep consideration show a serious misinterpretation of that provision. In the first place, the argument fails to address the simple but crucial question of why a treaty obligation is presented as not binding.[58] Furthermore, in the context of the preliminary litigation during which provisional measures are often ordered, the ICJ would not have had an opportunity to be fully appraised of all the circumstances of the case, including the most appropriate and precise measures necessary for securing litigants' rights. The language of Article 41 of the Statute anticipated this and was therefore drafted to enable the Court to secure the rights of litigants by making broad directions, leaving states with sufficient discretion to select the most appropriate means, in terms of effectiveness, of achieving the aims of the order. Such cooperation between an international tribunal and national government, based on good faith and self-interest, underlies effectiveness in international law. The power to 'indicate provisional measures' 'which ought to be taken' reflects the ability of the Court to make 'indications' which are expected to be carried out in the relevant domestic environment by the litigating states.

A proper interpretation of Article 41 of the Statute, taking account of its context,

[53] Angel Francisco Breard in the Paraguay application and Walter LaGrand in the application submitted by Germany.

[54] *Breard* case, *supra* note 15, at para. 41 and *LaGrand* case, *supra* note 15, at para. 29.

[55] See for discussions on this subject, J. B. Elkind, *Interim Protection: A Functional Approach* (1981); Collins, 'Provisional and Protective Measures in International Litigation', 234 *RdC* (1992-III) 9 and R. Bernhardt (ed.), *Interim Measures Indicated by International Courts* (1994). See also Oda, *supra* note 45.

[56] ICJ Statute, June 1945 (emphasis added).

[57] See on this point the *amicus* brief of the United States to the Supreme Court.

[58] See Article 26 of the Vienna Convention on the Law of Treaties (Done 22 May 1969), which provides that: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

object and purpose,[59] does not lend sufficient support to the view that provisional measures are not legally binding. As an obligation arising from a treaty, the suggestion that an order made by the ICJ, even at the preliminary litigation stage, is not binding is bizarre in the extreme, especially when Article 41 of the Statute of the ICJ is read in conjunction with Article 94(1) of the Charter of the United Nations.[60] That ICJ provisional measures are legally binding, in terms of requiring states to comply with them, is not in doubt. To reason otherwise is to deny the provision of the Statute of effect and this could not have been the intention of the drafters of such an important treaty.

Admittedly, the language of Article 41 of the Statute of the ICJ may be imprecise, but that alone is not sufficient reason to conclude that the provision is not binding, especially if its effectiveness can be justified by applying the well-known treaty law principle of *ut res magis valeat quam pereat.* This principle, often referred to as the principle of effectiveness,[61] is acknowledged to be inherent in Article 31 of the Vienna Convention on the Law of Treaties[62] and has been invoked, often approvingly, in litigation before the ICJ.[63] In general, it postulates that treaty provisions should, where possible, be interpreted so as to make the treaty effective rather than to deprive it of effect. In practice, the principle is particularly useful in the interpretation of treaties whose purposes are clear, so that when a tribunal is confronted with competing

[59] As recommended by Article 31(1) of the Vienna Convention on the Law of Treaties (1969).

[60] Article 94(1) of the United Nations Charter (1945) provides that: 'Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.' See also the effect of Article 26 of the Vienna Convention on the Law of Treaties, *supra* note 58. It is particularly important to distinguish between provisional measures issued by the ICJ under the authority of a treaty and those which are issued under facilitative Rules of Procedure, such as under the Rules of Procedure of the European Court of Human Rights or those of the United Nations Human Rights Committee. The acknowledged non-binding nature of the orders made under Rules of Procedure (on this, see van Boven, 'Facing Urgent Human Rights Cases; Legal and Diplomatic Action', in R. Lawson and M. de Blois (eds), *The Dynamics of the Protection of Human Rights in Europe. Essays in Honour of Henry G. Schermers,* vol. III (1994) 61), does not apply to the ICJ orders which are treaty based.

[61] For a discussion of the scope of this principle, see A. NcNair, *Law of Treaties* (1961) 383–385. See also T. O. Elias, *The Modern Law of Treaties,* (1974), at 73–75 and M. S. McDougal, H. D. Laswell and J. C. Miller, *The Interpretation of Agreements and World Public Order,* (1967), at 156 *et seq.* See also, Fitzmaurice, 'The Law and Practice of the ICJ: Treaty Interpretation and Certain Other Treaty Points', 28 *BYbIL* (1951) 18.

[62] *Supra* note 58. Article 31 of this Convention provides *inter alia* that: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose.' During the discussion of the draft of this Convention, the International Law Commission took the view that 'in so far as the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in [draft] article 27, paragraph 1, [i.e. article 31(1) of the final text] which requires that a treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to its terms in the context of the treaty *and in the light of its object and purpose.* When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.' See, *YBILC,* (1966-II) 219.

[63] See, e.g., the *Corfu Channel* case (*UK v. Albania*), ICJ Reports (1949) 4, at 24; the *Ambatielos* case (*Greece v. UK*) ICJ Reports (1952) 24 at 45; the Advisory Opinion in the *Reparations for Injuries Suffered in the Service of the United Nations,* (1949), ICJ Reports (1949) 174, at 179, and the Advisory Opinion in the *Certain Expenses of the United Nations* case, ICJ Reports (1962) 151, at 162 *et seq.*

interpretations of that treaty, it can favour the interpretation which most closely conforms to the purposes of the treaty in question. In so far as Article 41 of the Statute of the Court is intended to preserve the rights of litigants before the Court pending its final decision and also to ensure that irreparable damage is not caused to these rights, it is important that this provision be interpreted to have more compelling force. In other words, an interpretation that enables litigants to ignore orders made under Article 41 would surely deprive the provision of its effectiveness and is hence unacceptable. A similar approach to interpretation was taken by the Court in its Advisory Opinion in the *Reparations* case.[64] To the question whether the United Nations has the capacity to bring an international claim on behalf of its agents, the Court concluded that as 'the organisation was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. . . . it could not carry out the intentions of its founders if it was devoid of international personality.'[65] Accordingly, the Court concluded that the United Nations is an international person.

However, the Court has regularly reiterated the view that where the purpose of the treaty is unclear or non-existent, it is not the role of the tribunal to divine such a purpose under the pretext of seeking to make the treaty effective. To the question posed in the request for an Advisory Opinion in the *Interpretation of Peace Treaties* case[66] as to whether, in the event of the parties' failure to nominate a representative to the tribunal envisaged by the treaty, the Secretary-General of the United Nations could nevertheless nominate the 'third member' of the tribunal, the Court answered in the negative, reasoning *inter alia* that:

> The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat,* often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of dispute in the Peace treaties a meaning which . . . would be contrary to the letter and spirit.[67]

This caveat is inapplicable in the present interpretation of Article 41 of the Statute of the Court.

It is possible to argue that Article 41 of the ICJ Statute has lost some or all of its binding character as a consequence of the continuing disregard with which most respondent states have treated the provisional orders directed at them.[68] However, the state practice on the matter is an indication of the ineffectiveness of provisional measures in practice rather than of their non-binding nature in law.

The true legal character of provisional measures may lie somewhere between the two extreme academic characterizations. On a purposive interpretation of Article 41, it is clear that provisional measures are expected to secure vulnerable rights of the parties and will be ordered only after the most rigorous examination of key questions

[64] *Reparations* case, *supra* note 63.
[65] *Ibid.*
[66] (Second Phase) ICJ Reports (1950) 221.
[67] *Ibid*, at 229.
[68] On this point, see Oda, *supra* note 45. See also *supra* notes 46–48 and accompanying texts.

relating to the jurisdiction of the Court, the urgency of the matter and the possibility of irreparable harm.[69] The rigour and care with which the Court reviews requests for provisional measures is an indication of their legal importance and orders emanating from such a context deserve higher legal value than that of a mere recommendation. In fact, there should be little dispute about their binding character. From an objective point of view, it is difficult to contest this as a matter of principle, in which case the focus of the debate should be on the practical consequences of the individual Court order. For example, a broadly drafted Court order may give contesting states wider discretion as to the manner of compliance. In such an event, less comprehensive measures short of total disobedience to the Court order can be considered to be legitimate within the scope of the letter of the order if not always in the spirit of it. Conversely, an order with more precise indications provides relatively limited scope for states' manoeuvre in their compliance with the order. Unlike the broadly drafted provisional orders, it is much easier in cases of narrowly drafted orders to tell the extent of non-compliance. The broad manner of the orders in the *Breard* and *LaGrand* cases 'to take all measures to ensure that [the accused are] not executed', contrasts sharply with, for example, the Court's order in the *Iranian Hostages* case for Iran to immediately ensure the restoration of the premises of the US Embassy to the possession of the US authorities as well as the immediate release of the hostages.[70]

In the cases relating to the Vienna Convention on Consular Relations,[71] the United States was extremely careful not to suggest that all provisional measures were not binding but rather limited its views and practical response to the specific terms of the Court's orders. Although in their *amicus curiae* opinion to the US Supreme Court, the State Department and Department of Justice expressed a preference for the academic opinion holding ICJ provisional measures not to be binding, this was in a wider context acknowledging a clear lack of academic consensus on the matter.[72] Not only is this preference for a particular line of academic argument inconclusive of the issue of legal effect of provisional measures, but it is also a position which reserves room for persuasion to an alternative view at a later stage of the academic discourse. Therefore, the most significant contribution of the *amicus curiae* opinion is the conclusion that the provisional measures directed at the United States are rather broad, leaving the United States to take whatever measures it considers appropriate in the circumstances. According to the *amicus* brief,

> the 'measures at [the Government's] disposal' are a matter of domestic United States law, . . . The 'measures at [the United States'] disposal' under our constitution may in some cases include persuasion – such as the Secretary of State's request to the Governor of Virginia to stay Breard's execution – and not legal compulsion through the judicial system.

[69] *Nuclear Tests* cases, *supra* note 26, at 103; *U.S. Diplomatic and Consular Staff in Tehran* case, *supra* note 1, at para. 36 and, *Bosnia Genocide* case, *supra* note 43, at para. 34.

[70] Other precise orders were in the *Nuclear Test* cases, when France was ordered to avoid (atmospheric) nuclear tests causing the deposit of radioactive fall-out on Australian and New Zealand territories. See also the order in the *Nicaragua* case, in which the United States was called upon to cease and refrain from any action blocking access to or from Nicaraguan ports and laying mines.

[71] *Breard* case, *supra* note 15, and *LaGrand* case, *supra* note 15.

[72] *Breard v. Greene*, 118 S.Ct. 1352 (1998) Brief of the United States as *Amicus Curiae*.

Similarly, in her letter to the Governor of Virginia, the Secretary of State Madeleine Albright focused on the 'non-binding language' of the specific order under consideration rather than suggesting that provisional measures were not legally binding as a matter of international law.[73] This phrase 'non-binding language' used by the Secretary of State must not be interpreted to suggest that the order was not legally binding per se but should rather be seen as a reflection of its broad character, leaving room for the United States to take the necessary action to comply with it. Indeed, the Secretary of State's letter to the Governor of Virginia in response to the ICJ order is itself evidence that she considered the order to be legally binding.

B *Compliant or Disregarding*

The issue of whether the provisional orders from the ICJ are binding is directly related to the extent of United States compliance with the orders. In truth, although the United States' response to the ICJ orders may be said to be in compliance of the letter of the orders, the limited action by the Secretary of State and the contradictory arguments filed by her office in conjunction with the Department of Justice in the *amicus curiae* opinion before the Supreme Court unfortunately undermined the spirit of the ICJ orders. There is an overwhelming impression that the United States did not take the ICJ orders seriously and therefore lost an opportunity to indicate good practice for instilling effectiveness into such orders. In the circumstances, the United States betrayed the confidence normally reposed in states to flesh out skeletal orders of international tribunals. It may also be the fact that the ICJ's inability to prescribe more precise indications in such circumstances is a structural shortcoming in international dispute settlement that may need to be remedied.

In the light of the ICJ order directing the United States to 'take all measures at its disposal to ensure that [the accused are] not executed pending the final decision in these proceedings', could or indeed should the United States have done more than it chose to do? Emphasizing the need to take 'all measures at its disposal', it is arguable, for example, that the Secretary of State could have been less diffident and more compelling in her letter to the Governor of Virginia, demanding rather than urging the postponement of Mr Breard's execution. A more decisive approach from the Secretary of State and the State Department may have helped focus the minds of other United States institutions in ensuring that the ICJ orders are implemented in full. The State Department need not have joined the Department of Justice in its *amicus curiae* opinion, in which it played down the legal significance of the ICJ order. One would normally have expected nothing less than the contrary arguments in which the attention of the Supreme Court is drawn to the compelling obligations inherent in the ICJ orders or persuaded to show deference for the views of the ICJ as a matter of judicial

[73] Letter of Madeleine K. Albright, U.S. Secretary of State, to James Gilmore III, Governor of Virginia, *supra* note 49. She wrote: 'The International Court, however, was not prepared to decide the issues we raised in its urgent proceedings last week. Using non-binding language, the Court said that the 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".'

comity.[74] In fact, the Supreme Court could have taken a more serious account of the legal obligations generated by the ICJ orders or, where this is not possible, 'invite the executive branch to invoke judicial assistance by other proceedings'.[75] With its recognized leadership in the field of international affairs, the State Department could have argued the legal significance of ICJ measures arising from United States treaty obligations, which by the terms of the Constitution of that country are part of the law of the land.[76] As applicable law of the United States, the ICJ orders defined obligations 'for all who exercised authority in or on behalf of, the United States'.[77] In this instance, according to Professor Louis Henkin,

> Secretary [of State] Albright heard the voice of the International Court and acted upon it. But the Solicitor General seemed to be under the impression that the order of the Court was not addressed to him (or at least he was not bound by it). The Supreme Court was also perhaps under the impression that the ICJ order was not addressed to it, that it was not bound by it, or that it had no responsibility (and no means) to honor it. The Department of Justice did not take measures to obtain compliance by the State of Virginia with the treaty obligation of the United States to stay the execution. Governor Gilmore seemed to be under the impression that the International Court of Justice was not addressing him; perhaps he did not think he was required to honor Secretary Albright's request.[78]

The United States' response to the ICJ orders was haphazard and often contradictory. The relevant institutions did not work together towards a single purpose and to all intents and purposes clearly failed to implement the orders effectively. This is particularly unfortunate in view of the fact that a genuine lack of cooperation by other official institutions and departments could have been overcome by an executive order from the President compelling compliance with United States treaty obligations.[79]

In the United States, effective implementation of ICJ orders depends on the leadership provided by the federal government and especially the State Department. Where this leadership is weak and uncertain, the process of implementation fails too.[80] The Secretary of State took *a* measure as required by the ICJ order by writing to the Governor of Virginia, but the terms of the letter lacked commitment. She found no further reason to explore alternative measures and in fact did not object to the endorsement given by her officials to a damaging *amicus* brief prepared by the Department of Justice. The irresolute approach taken by the Secretary of State and her officials was extremely influential in the reaction of other United States institutions and officials. Judges of the Supreme Court, no doubt as independent as they are known

[74] On this point, see, Slaughter, 'Court to Court', 92 *AJIL* (1998) 708.

[75] See Henkin, 'Provisional Measures, U.S. Treaty Obligations and the States', 92 *AJIL* (1998) 679. He cites the cases of *Sanitary Dist. v. United States,* 262 U.S. 405 (1925) and *United States v. Minnesota*, 270 U.S. 181 (1926) to support this claim.

[76] See Article VI of the United States Constitution. On this point, see Henkin, *supra* note 75, and Vazquez, '*Breard* and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures', 92 *AJIL* (1998) 683.

[77] Henkin, *supra* note 75, at 680.

[78] *Ibid.*

[79] Vazquez, *supra* note 76, at 685.

[80] Weak leadership is, of course, no excuse for non-compliance with international obligations.

to be, could not have lost sight of the significance of the official State Department position in this matter in their conclusions. In the same vein, the Governors of Virginia and Arizona, where Mr Breard and Mr LaGrand faced the death penalty respectively, were strengthened in their determination not to exercise clemency.

The United States set a particularly bad precedent for the future of the international rule of law. The United States' treatment of the provisional orders reflects a failure of leadership on its part. If other states are encouraged to follow the US example by being selective and sceptical about ICJ orders, the authority of the Court will surely be undermined. The ICJ may well have to reconsider the confidence and good faith it has reposed in states to treat its orders with respect. This lack of trust may have partly contributed to the unprecedented step taken by the Court to order provisional measures in the *LaGrand* case without argument from the parties. The Court may also decide to restrict state discretion in the implementation of provisional measures by being a lot more specific and precise in its future orders. Such a development would be unfortunate because the Court risks greater conflict with litigating states in the hope of asserting its authority.

A crucial factor in looking at the specific content of ICJ provisional measures for guidance as to how best to implement them diligently is to pay attention to all relevant qualitative issues. Unfortunately, in its effort to avoid disruption to its domestic legal process, the United States failed to realize that despite the broad presentation of the ICJ orders there was a matter of the human right to life at the heart of all the formality of diplomatic discourse and the rigidity of legal argument. By failing to attach importance to this distinguishing characteristic of the cases, the United States ignored not only the stark reality of the irreparability of lost life but also the importance of the right to life in international human rights law.[81] It has been argued that restrictions on and abolition of the death penalty is fast approaching a norm of customary international law,[82] and this fact should have been weighted more heavily in favour of adopting further and more effective measures to implement the ICJ orders. In the same vein, the lack of consular access in both the *Breard* and *LaGrand* cases, which arguably

[81] Apart from the provisions in international treaties recognizing the right to life (see Article 6 of the International Covenant on Civil and Political Rights (1966); Article 4 of the American Convention on Human Rights (1969); Article 4 of the African Charter on Human and Peoples' Rights (1981); Article 2 of the European Convention on Human Rights (1950)), there is an increasing effort to abolish the death penalty (see Protocol No. 6 of the ECHR (1983); the Second Optional Protocol to the ICCPR (1989) and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990)). In practice, it is estimated that by December 1998, 63 states had abolished the death penalty for all crimes, 16 states had done so for all but the most exceptional crimes such as war crimes and another 24 states have been abolitionists *de facto* as they have not carried out any executions for at least 10 years. On this point see, E. Prokosch, *Human Rights v. Death Penalty. Abolition and Restriction in Law and Practice* (1998). In addition, it is noteworthy that the European Court of Human Rights and the Inter-American Court of Human Rights have ruled certain aspects of the death penalty to be inhuman and degrading (see *Soering v. United Kingdom*, ECHR (1989), Series A, No. 161; and Inter-American Court of Human Rights, Advisory Opinion OC-3/83 of 8 September 1983 on *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights*. See also Case 9647, *Roach and Pinkerton*, in *Annual Report of the Inter-American Commission on Human Rights 1986–1987*, at 147).

[82] See W. A. Schabas, *The Abolition of the Death penalty in International law* (1997), at 20.

created an unfairness in the criminal procedures,[83] should have tilted the scales in favour of the restraint suggested by the ICJ in its provisional measures. The true impact of these human rights issues will become clear at the merits stage, but nevertheless their significance at the preliminary stage should have been recognized.[84]

The complementarity between international and national institutions in upholding the international rule of law is well known. In practice, the implementation of measures, such as orders made at the preliminary stage of international litigation, can involve complex processes of balancing competing claims and interests at both national and international levels.[85] However, it is crucial that the whole process be seen to be transparent, as objective as possible and in any case, effective in upholding the international obligations assumed in good faith. Domestic law and procedures may be taken into account in defining the most effective way of upholding international obligations in practice, but it is trite knowledge that domestic law cannot be an excuse for non-compliance with international law.[86] In the same context, unjustified preferences for some factors over others or a dependence upon irrelevant considerations may damage the credibility of the process and its conclusions. In the context of how to implement the ICJ measures effectively, the United States unfortunately attached greater importance to domestic factors to the detriment of the international rule of law. For example, at the stage of the preliminary litigation before the ICJ, the arguments that the deceased had had a fair trial or that their cases were unlikely to be prejudiced by the lack of consular access[87] were clearly irrelevant as to whether or not to heed the Court's preliminary orders. In making the preliminary measures orders, the Court was fairly aware of the domestic trials and equally aware

[83] The European Court of Human Rights, for instance, has devoted considerable attention to the distinction in Article 6 of the ECHR between objective and subjective impartiality. In the present cases, the issue is not one of subjective impartiality but of objective impartiality under which the question is whether there have been sufficient guarantees to exclude any legitimate doubt in the trial process. On this point see *Hauschildt v Denmark,* ECHR (1989), Series A, No. 154.

[84] For a general discussion of this subject see Higgins, *supra* note 41.

[85] See Bradley and Goldsmith, 'The Abiding Relevance of Federalism to U.S. Foreign Relations', 92 *AJIL* (1998) 675.

[86] See Article 27 of the Vienna Convention on the Law of Treaties, which provides that: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty . . .'. There is also a wealth of respectable case law to support this view. See, for example, the *Alabama Claims* Arbitration (1872), the *Wimbledon* case (*France, Italy, Japan and the UK v. Germany*), 1923 PCIJ Series A, No. 1, 29; the *Chorzow Factory* (Merits) case (*Germany v. Poland*), 1928 PCIJ Series A, No. 17, 33, 34; the *Nottebohm* case (*Liechtenstein v. Guatemala*), ICJ Reports (1955) 4, at 20–21.

[87] See *Breard v. Greene, supra* note 51. A careful examination of the facts of the *Breard* case suggests that this assertion is also unjustified. In an earlier litigation in the United States courts (*Breard v. Netherland,* 949 F.Supp. 1255 (1996)), it apparently emerged that 'Breard believed he had committed the crime under a satanic curse from his ex-father-in-law. His conversion and rebirth in Jesus Christ, according to Breard, freed him from the curse. Thus Breard believed that if the jury were told of the satanic curse and his rebirth in Jesus Christ, they would understand that he had not been responsible for his actions at the time of the murder and would set him free. Apparently, in South American jurisprudence, the fact one believes he is under a satanic curse is mitigating evidence in the sentencing phase of a trial and a confession to a jury is likely to result in greater leniency.' See Kadish, 'Article 36 of the Vienna Convention on Consular Relations: A Search for the Right of Consul', 18 *MJIL* (1997) 565, at 582. Breard had also turned down a

of the impact of these and other substantive issues on arguments relating to the merits of the case. The Court's primary concern at that stage of litigation was to secure the rights of the parties by forestalling irreparable harm. Similarly, domestic law arguments relating to procedural default and the so-called exclusive jurisdiction of the United States Supreme Court to postpone the execution or the clemency powers of Governors of states should not have been used to override the value of the Court's orders at the preliminary stage of the litigation.[88]

5 Conclusions

That the United States was not entirely unequivocal in its suggestion that interim measures are not binding per se is a significant factor in the discourse relating to the legal significance of such measures. On critical reflection of the United States' response to the ICJ orders, there is merit in the inherent argument that a distinction should be drawn between the binding nature of such orders and the steps taken to implement them. This is crucial to our understanding of the subject because states may, depending upon the wording of the individual ICJ order, legitimately take less than comprehensive steps to implement the Court's directions without doubting their binding nature. The discretion which states retain in the implementation of such orders allows them to strike a balance between competing factors at both national and international levels. This is what the United States sought to do in the *Breard* and *LaGrand* cases. Unfortunately, it did so rather poorly by attaching excessive importance to domestic law factors to the detriment of its international obligations. While it is difficult to say that such a misuse of discretion is itself a breach of the terms of the ICJ orders, it most certainly went against the spirit of the orders.

As a country confronted with widespread deficiencies in its domestic application of the Vienna Convention on Consular Relations,[89] the United States' response to the ICJ order should not come as particularly surprising. The fear of a floodgate of litigants seeking to set aside convictions for non-compliance with the Vienna Convention on Consular Relations, as well as counter pressure from victims' families and non-governmental organizations may have weighed heavily on the minds of United States policy-makers. There are also public order concerns (including the need to deter the growing culture of violent crime), nor should we forget the career ambitions of individual policy-makers, especially the Governors of states where these offences are committed. Perhaps, the importance of the international rule of law, and especially in the present context the importance of international human rights law, should have been paramount. Be that as it may, as it is unlikely that the Court will review the

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plea bargaining offer with the Commonwealth of Virginia to be able to make this confession to the jury. Evidently he was not particularly bright but if ever someone could have benefited from the perception of a consular officer on this matter it was Mr Breard. The cultural implications of his decisions were most likely not appreciated by his American lawyers.

88 See *supra* note 86 and accompanying text.

89 It is estimated that there are more than 70 other foreign nationals in detention in the United States who have not been made aware of their right to consular access. See Shank and Quigley, 'Foreigners on Texas's Death Row and the Right of Access to a Consul', 26 *St Mary's Law Journal* (1995) 719.

United States' use of discretion in this matter, it is important to look to the future of the international law issues raised here. There is a definite structural shortcoming in the manner in which provisional measures are currently conceived. Unless these are remedied, their effectiveness will remain a matter of chance. The procedures for consular access may well get the necessary boost. The benefits of any increased awareness about consular access may however remain variable. Nevertheless, even if only some detainees were to receive the full benefits of consular access as a result of recent events in the United States, then the litigation and the widespread academic comment can be said to have been worthwhile.