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State Department Dishonored Our Treaty Obligations

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Faculty Editorial:

State Department Dishonored Our Treaty Obligations

By Richard J. Wilson*

Angel Breard, a citizen of Paraguay, was executed by the commonwealth of Virginia on April 14 despite the best efforts of his own lawyers and lawyers for the government of Paraguay to put a temporary hold on that state's determined efforts to kill him. Since his death, I can't escape the feeling that a voice has been whispering in my ear. It asks me to explain the willful failure of the U.S. government to live up to our obligations under a 30-year-old treaty. And it asks why it fell to a state governor to effectively decide the legal force of a decision of an international tribunal.

Five days before Breard's scheduled execution, the Paraguayan government obtained a favorable decision from the International Court of Justice, asking the U.S. government to put off Breard's death until the 15 judges of the ICJ had a chance to review his case more fully. That action followed months of repeated efforts by Paraguay, always rebuffed, to appear in our courts on Breard's behalf. Secretary of State Madeleine Albright also sent a strongly worded letter to Virginia Gov. James Gilmore urging him to delay the exe-

cution until the ICJ had the chance to complete its review.

Gov. Gilmore chose instead to follow the decision of the U.S. Supreme Court, which decided by a vote of 6-3, five days after the ICJ had ruled, not to stay the execution. The Supreme Court ruled against Breard only an hour before his scheduled execution. Once Breard was dead, Gilmore said that deferring to the ICJ would have had, in his exact words, "the practical effect of transferring responsibility from the courts of the commonwealth and the United States to the International Court."

The precise legal issue in Angel Breard's case had to do with the interaction of treaties and domestic statutes, an often complex interplay that is only dimly understood by most lawyers, let alone the general public. Specifically, it involved the application of a treaty, the Vienna Convention on Consular Relations, to which almost 160 countries are parties. Countries that sign a treaty agree to be legally bound by its terms, much as they would be bound by a multiparty contract.

In the Vienna Convention, those 160 countries agreed to "promptly" advise foreign citizens who are arrested in that country that they have a right to contact immediately a representative of their own government—specifically, their consulate. This is not new law. The United States formally agreed to be

Capital Punishment in the United States

by Sarah Oppenheim

Twenty five years ago, in *Furman v. Georgia*, the U.S. Supreme Court considered whether the death penalty violated the Eighth Amendment prohibition on cruel and unusual punishment. The Court explained that the lack of uniform standards for the application of the death penalty resulted in arbitrary and discriminatory sentencing, violating the Eighth Amendment prohibition on cruel and unusual punishment. The death penalty was thus rendered unconstitutional. In response to this decision, states modified their death penalty legislation to accommodate the concerns of the Court. In the 1976 case, *Gregg v. Georgia*, the Court

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bound by the Vienna Convention in 1969.

The problem in Breard's case is one that often arises in international law: What is to be done when the treaty is violated, or there is an honest dispute over what the treaty requires? What happens when, as in Breard's case, an individual is not advised of the right to contact the consulate, does not talk to a representative of his government at the time of his arrest, and proceeds to a trial where he is convicted and sentenced to death?

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Disputes Decided by ICJ

One of the clearest answers is provided in the text of the treaty itself. When the United States signed onto the Vienna Convention, it also signed a related agreement on the handling of conflicts over the treaty's application. That agreement says that such disputes are to be resolved by the ICJ. In other words, the U.S. government voluntarily agreed to submit disputes about the Vienna Convention to the ICJ—and implicitly agreed to be bound by those decisions at home. What Paraguay did when it sought the ICJ's intervention was part of a process that the United States had agreed to almost 30 years ago.

A mere three weeks ago, the U.S. government appeared to be playing by the rules when it sent a team of State Department lawyers to The Hague to argue why the treaty's violation should not stop Breard's execution. Their arguments were extensive and forceful—and they lost. The ICJ, which includes an eminent jurist from the United States, ruled unanimously in Paraguay's favor, found that a genuine dispute existed as to the meaning of the Vienna Convention, and entered a temporary order that the United States abide by the

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rules of the court and "take all measures at its disposal" to stay Breard's execution until the court had a chance to review the case more fully.

Let's examine closely the scope of the ICJ ruling. It didn't say that Breard should go free. It didn't pass any judgment on the validity of the death sentence imposed in his case. It didn't even say that he should get a new trial. Moreover, it didn't reach any decision as to the ultimate question before the ICJ—that is, what should be done when the Vienna Convention is violated. It simply

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said that Angel Breard should not be executed until the court had a chance to hear the full arguments on the application of the Vienna Convention in the context of Breard's case, a legal dispute over which the U.S. government had explicitly agreed that the ICJ had jurisdiction.

But that was three weeks ago. At the beginning of that week, the U.S.

Supreme Court had yet to rule on requests by both Breard and the government of Paraguay that it review the same issues presented to the ICJ. By the end of the week, the Supreme Court was put in the awkward position of having been pre-empted by the ICJ. This was the first time in history that an international tribunal had actually "trumped" the Supreme Court and acted to intervene in domestic legal proceedings before our high court had a chance to rule on the same issue.

During the many interviews I gave to the press in the days preceding Breard's execution, I was repeatedly asked to predict the outcome in this conflict between courts, based on prior experience with such issues. There is no prior experience, I answered. This is an issue of first impression in this country. I did,

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however, note that the Europeans have grown quite accustomed to the intervention of international tribunals in their countries, and the great powers of Europe—Germany, France, and England—all agree, for example, that decisions by the European Court of Human Rights are binding on their domestic courts in all respects.

Two-Faced Response

Faced with the same conflict, the U.S. government's response was duplicitous and shameful.

It was duplicitous on its face. After the ICJ's clear and unequivocal ruling on April 9, a Thursday, and after a profoundly silent weekend in our State and Justice Departments with Breard's execution scheduled for the following Tuesday, a two-pronged strategy emerged from the State Department. The first prong was the letter from Secretary of State Albright to Gov. Gilmore seeking to *persuade* him to follow the ICJ's ruling. Not to follow the international court, the secretary said in the letter, and later publicly on several occasions, would be

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to put U.S. citizens arrested in other countries at risk when they seek to obtain the advice and assistance of U.S. consular officers. What was made implicit by the letter (and in the department's press briefings) was that the ultimate decision on whether the United States would honor the ICJ's decision was up to the commonwealth of Virginia.

At the same time, the State Department pursued a second, less public, and totally disingenuous legal strategy. Department lawyers signed onto briefs submitted by the solicitor general to the Supreme Court arguing, as grounds for our Court not to intervene, the very same legal position that the State Department had offered to the ICJ the

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week before. These were the very arguments that the ICJ had rejected. State and Justice lawyers surely knew that the Supreme Court is generally conservative on issues having to do with both the death penalty and the application of international law, and that they had a much more receptive audience than they did at The Hague.

These government lawyers, who had purported to honor the international court's jurisdiction the week before, now argued to the highest domestic court in the United States that the ICJ's ruling was "not binding" and that its order was merely "precatory" in nature—in other words, that the ICJ's ruling was not entitled to any legal deference in the U.S. courts. The State Department thus was a cynical participant in an effort to undermine the authority of an international tribunal to which the U.S. government had agreed to submit.

Realpolitik Triumphed

The State Department's position in all these proceedings was shameful because it continues a sad pattern by our government of disrespect for interna-

tional law and the bodies charged with its enforcement. Here, as all too often happens, domestic political considerations outweighed international legal obligations.

There is simply no debate among international lawyers, including the knowledgeable and intelligent attorneys at our State and Justice departments, that international law speaks to states or governments as a whole, not to a single constituent branch, whether that branch is the executive or the judicial. There is also no doubt that international law binds the nation as a whole and all its component parts—which, in our case, include the individual states of the union, whether the State Department likes enforcing those rules in Virginia or not.

Here, as all too often happens, domestic political considerations outweighed international legal obligations.

As an international lawyer, litigator, teacher, and observer of the unfolding drama of Angel Breard, I assumed that these legal concepts would bind the U.S. government, acting through our State Department, to follow the ICJ's decision and delay Breard's execution. I actually believed, and told my students, that Breard could not be killed by the commonwealth of Virginia because the United States was bound to follow the rulings of an international tribunal to which it had agreed to submit. I believed, and still do, that the secretary of state had not the option, but rather the legal duty, to intervene and order Gov. Gilmore—not merely attempt to persuade him—not to execute Breard because that's the way that international law should work. Sadly, our State Department lacked the will to act.

My academic colleagues generally mocked my political naiveté. I simply did not understand the nuanced political response this situation called for, they said. If the executive branch wants a permanent international criminal court to be established with U.S. support (which it does), it can't give Congress the impression that U.S. soldiers or civilians would ever be subject to the jurisdiction of an international tribunal with powers superior to our domestic courts. (Instead, we give the impression that we would follow the rulings of any such court only if and when we wished.) Nor

did I understand the *Realpolitik* that allows the reigning world power to yawn in the face of the ICJ.

I had been willing to overlook the past sins of the U.S. government in responding to the ICJ, most notably our withdrawal from the court's jurisdiction when the court ruled against the United States over the mining of Nicaragua's harbors in the 1980s. This was different, I told my colleagues and students, because here was a particular treaty with specific language that the United States was bound to follow. But I was wrong. The situation demanded not only the proper interpretation of the law, but also the moral courage to implement it.

Instead, the State Department took the low road in the case of Angel Breard while trying to appear honorable. It argued publicly that Virginia *should* follow the ICJ's ruling, not that it *must* as a matter of law. At the same time, State Department lawyers before the Supreme Court argued quietly that the ICJ was wrong and that its ruling did not have to be followed at all.

The ICJ will, I presume, ultimately answer the precise legal question asked by the government of Paraguay as to the scope and effect of the notification provisions of the Vienna Convention. The answer, of course, will not affect Angel Breard. Breard is dead, and long live the Republic of Virginia.

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Maybe the ICJ's ruling will save other lives. But what am I to tell my students about the U.S. government's respect for international legal institutions? What am I to tell lawyers from other countries about what the U.S. example should teach their governments about honoring international law and tribunals? What am I to do with these persistent whispers? ☹

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