

THE 1982 JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

KINGDOM OF SEPTENTRION

v.

PEOPLE'S DEMOCRATIC REPUBLIC OF MERIDION

JUDGES' BENCH MEMORANDUM
(Not to be Seen by Participants */)

Introduction

This Memorandum sets out the arguments Judges are most likely to hear in the 1982 Jessup International Law Moot Court Competition. It is intended for use by Judges who may be unfamiliar with the area of human rights law, or with the specific sources upon which contestants are likely to rely.

It is NOT intended to be a comprehensive exposition of all possible arguments, or even of all possible good arguments. Judges are reminded that creativity is an important aspect of good advocacy. No one should be penalized for taking approaches different from those discussed below, assuming that he or she presents such approaches effectively and eloquently.

Judges should also keep in mind the importance of participants' organization of their presentations. The case is a complex one; it is unlikely that any oralist or team will be able to address each and every one of the issues set out below. Participants should be judged on their allocation of effort among the issues. There is no advantage in simply listing aspects of the problem. The substantive merits of the case are not to be considered in judging memorials or oral arguments.

*/ Upon pain of execution without trial.

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Preliminary Issues

Jurisdiction

The jurisdiction of the International Court of Justice has been stipulated (compromis, p. 8). Thus the case has been referred to the Court under Article 36(1) of its Statute, */ and jurisdiction is not likely to be a contested issue.

Standing

It is unlikely that either party will contest the other's standing to seek the relief requested, with one exception. Septentrion seeks a declaration that Meridion's treatment of BIS personnel was in violation of international law, and asks that such a declaration encompass treatment of Meridionese nationals. Meridion may argue that its handling of its own citizens is shielded from international scrutiny by Article 2(7) of the U.N. Charter, and that in any event Septentrion has no standing to challenge such acts. It may cite the ICJ's discussion of standing in The Southwest Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa).

To this, Septentrion would probably respond that the acts alleged are sufficiently serious to confer upon any nation the right to protest them whatever the nationalities of the parties (relying perhaps on the Anglo-American notion of hostes humani generis, codified with respect to pirates in the Geneva Convention on the High Seas). It might argue that citizenship is neither a necessary nor a sufficient condition for the maintenance by a state of a claim for injury to an individual,

*/ Both states are members of the United Nations and hence are parties to the Statute.

citing The Nottebohm Case (Guatemala v. Liechtenstein) and The Barcelona Traction Case (Belgium v. Spain).

Question I

Treatment of BIS Personnel

A. Is Meridion responsible for the acts of the MLA?

Meridion can be expected to urge at the outset that it has no legal responsibility for acts alleged to have been committed during the insurgency; that is, before June 18, 1977. Meridion will argue that the MLA was not a de jure government, and that as a rebel army it was without international legal personality.

Septentrion will contend that the MLA was a de facto government, at least in some parts of Meridionese territory. It will also submit that the Revolutionary Order No. 1 expressly adopts the MLA's actions as those of the new Republican Government. Meridion will deny the retroactive effect of the Order. */

This discussion may give rise to submissions concerning the definition of statehood. The MLA did control territory and carry out some of the normal civil functions of a government. On the other hand, it does not appear to have been recognized by any other state.

Meridion should, of course, be fully prepared to respond to questions which assume that it will be held responsible for the acts of the MLA, as well as for its own acts committed on or after June 18, 1977.

*/ Septentrion may also argue that the former Republic was responsible for keeping order in Meridion, and that the new Government succeeded to its predecessor's obligations.

B. What treaties are applicable to the dispute? */

The only treaties to which both Septentrion and the Republic of Meridion were parties are the U.N. Charter, the Geneva Conventions, and the Refugee Protocol. Meridion may argue that some or all of these are no longer applicable to it, since there has been a fundamental change in its government. Septentrion would respond that such a change is not sufficient to avoid a treaty or to withdraw from it, either under the Vienna Convention on the Law of Treaties (whose formalities have not been observed in any event) or in customary law. Meridion will reply that the Vienna Convention is not applicable, and that customary law allows a new state the right to decide its treaty obligations on its own. **/

Septentrion has not ratified the two U.N. Human Rights Covenants, and so Meridion will submit that Septentrion is without standing to allege violations of those agreements. Septentrion will allege that their content has become customary law, although Meridion may respond by citing the ICJ's reluctance to impute treaty obligations to non-parties (The North Sea Continental Shelf Case; The Nuclear Test Ban Case).

Both parties can be expected to rely on the customary international law of human rights: Septentrion reading it as granting broad protection; Meridion finding it to be of limited scope. Septentrion will point to numerous U.N. instruments raising human rights violations to the status of international legal norms. Meridion will counter that such instruments do not

*/ See Note on page 14.

**/ Note that the Vienna Convention on State Succession to Treaties is of prospective applicability only, and the present dispute arose before it was finalized. The Convention is not yet in force.

outweigh state practice, which unfortunately shows little consensus in the prohibition of such acts. Septentrion will answer by stating that even as they violate human rights, few states deny that those rights have become enshrined in international law.

C. The specific events giving rise to the complaint.

1) The September 1976 massacre.

Reports of the September 1976 massacre are sketchy, and Meridion may argue that there is insufficient evidence to support any alleged legal liability. Furthermore, Meridion may argue that even if it is liable for certain MLA actions, the reported massacre occurred so early in the revolution that the MLA was not yet a "proto-government."

Meridion will also submit that the persons killed were at least reasonably believed to be soldiers, and that the MLA's acts were therefore not excessive. BIS personnel were not killed but merely detained. They were, however, at least arguably guilty of harboring enemy troops. That they were held incommunicado, Meridion will submit, was an inevitable result of dangerous conditions in the war zone.

Septentrion will rely upon the many provisions of the Geneva Conventions (e.g. Article 15 of the Convention Relative to the Protection of Civilian Persons in Time of War) forbidding mistreatment of civilians and/or of injured combatants. It may also cite Article 18 of that Convention for the proposition that hospitals "may in no circumstances be the object of attack."

Meridion may deny the contention that in September 1976 the revolution was "of international character" so as to give rise to Convention obligations. It will probably argue in the alternative that BIS by its conduct effectively compromised the neutrality of its hospital and had no claim to special protection.

2) The incident at Polis and its aftermath.

The school at Polis was being used for partisan purposes. However, this admission was exacted only through violence. The incident raises questions concerning rights to which foreigners are entitled in times of emergency.

Septentrion will allege violations of norms against coerced confessions, denial of due process, and torture. Meridion will deny that there are such legal norms, will assert that there is insufficient evidence of violations, and will plead justification by necessity in case any excess may in fact have been committed. */

As in incident (1) above, it is to be expected that both sides will rely upon the Geneva Conventions. Again, Septentrion will assert that individuals have the right in international law to be free from such conduct, and Meridion will deny that there are such international norms. Meridion may claim that trial by a "People's Court" meets whatever standard is applicable during civil war. Septentrion may point to the Universal Declaration of Human Rights as a "guide to interpretation" of the U.N. Charter, and to its various guarantees of freedom

*/ Septentrion may refer to the opinion of Judge Kaufman in the United States case of *Filartiga v. Pena*, 630 F.2d 876 (2d Cir. 1980).

from torture and denial of rights before the law.

3) The proceedings before the People's Revolutionary Court

Septentrion will probably argue that (a) the Revolutionary Court was without jurisdiction to hear charges concerning the MLA's Decree; (b) "cultural genocide" is an unconscionably vague charge; (c) BIS personnel were denied elementary civil rights, such as freedom of speech; (d) defendants were denied fundamental due process when they were not permitted to retain counsel of their own selection; (e) they were denied due process when they could not cross-examine every witness against them; (f) they were effectively denied access to the appellate courts; and (g) the sentences meted out were cruel and unusual. As in the previous two subparagraphs, Septentrion will point to provisions of the Universal Declaration, the U.N. Covenants, and other international instruments, as well as customary law, in support of these claims. Meridion will argue that no international norms have been violated by its application of its own laws within its own borders.

Meridion can also be expected to contend that even if certain international instruments are applicable, its procedures comply with minimum international standards. Thus it will submit that the right to due process of law may include the right to be represented by counsel, but not necessarily by counsel of one's choosing; and that it may contain the right to confront one's accuser, but not necessarily that of cross-examination of every witness in every situation. The discussion

of the specific content of international legal norms should raise issues of traditional state responsibility as well as of the interplay between human rights law and constitutional (and procedural) protections granted by individual states.

Question II

Creation of the Refugee Problem

There is very little law on the question whether causing a mass migration entails legal liability of the sending state to the state receiving the refugees. Septentrion here asks the Court to recognize a new species of international wrong. Thus while Question I should tax the creative powers of Meridionese representatives, this Question is designed to evoke creativity from the Septentrionese.

The most likely theory to be constructed by Septentrion is one akin to the Anglo-American concept of nuisance. A landowner is liable to his neighbor, even without negligence, for acts "overflowing" his borders and injuring the neighbor's property. Thus Septentrion would argue that Meridion is liable for damage suffered as a result of Meridionese acts causing extraterritorial effects. Under Article 38(1)(c) of its Statute, the Court is empowered to apply "the general principles of law recognized by civilized nations." This Question should therefore lead to a discussion of the sources of international law, and in particular of the extent to which domestic legal concepts can be raised to the international plane.

Septentrion may look for analogies in such areas as trans-border environmental disputes. Meridion can be expected to stress the differences between pollution incidents and human migration, while Septentrion will attempt to minimize the distinction.

Meridion may also argue that even if it was guilty of some sort of wrong in generating a large-scale migration, it was not foreseeable that the emigrants would go to Septentrion. The applicant, in turn, would submit that cultural and historical ties between the countries were sufficient to make injury to Septentrion a likely result of actions by Meridion.

Finally, Meridion will contend that the persons who left its shores did so of their own free will; that they fled because of disagreements with (or perhaps uncertainty over) the policies of the Government and not in fear of persecution; and that they were not refugees in any legal sense of the term. Septentrion will simply contest each of these submissions, and will probably argue that the mass emigration was generated wilfully as a means of purging undesirable elements from Meridion.

Question III

Septentrionese Treatment of the Detainees

Septentrion seeks a declaration that its treatment of immigrants from Meridion was consistent with international law. Several aspects of that treatment are likely to be at issue.

- A. A preliminary matter: Does the Refugee Protocol apply, and if so, to whom?

The Refugee Protocol, to which both Septentrion and Meridion are parties, concerns the status of persons who are outside the country of their nationality "owing to a well-founded fear of being persecuted for reasons of [inter alia] political opinion." Septentrion may deny that the Protocol applies at all, or that it applies to the last or the last two categories of detention camp inmates (see the compromis, pp. 6-7). ^{*/} As to these, Septentrion may allege that economic and not political reasons motivated their emigration, or that any fear of persecution was speculative.

Meridion too may argue that the Protocol is inapplicable, since otherwise it is forced to admit that emigrants left its shores with a reasonable fear of political persecution. In such a case, however, Meridion should take the position that Septentrion's obligations to the inmates are governed by customary international law rules of non-discrimination.

Either or both parties may, however, accept the applicability of the Protocol, preferring to rest its case on argument that the agreement has or has not been observed.

- B. Detention of the immigrants in resettlement camps.

Septentrion will argue that detention of the camp inmates is undertaken consistently with its own immigration laws, and that it is reasonable and humane in the circumstances. Meridion may allege that one or more of the following are violations of

^{*/} Septentrion may also attempt to distinguish among the groups of emigrants who left Meridion at different times.

the Refugee Protocol and/or of customary international law:

(a) general conditions of residence in the camps (i.e. the cramped quarters); (b) segregation of men and women, and division of families; (c) lack of access to legal services or to the courts; and (d) the unwillingness of Septentrionese officials to meet with inmates' representatives. Septentrion will deny that any of these is impermissible in international law, given the disruption of Septentrionese society which was threatened by the influx of undocumented aliens. Septentrion may also dispute Meridion's right to raise the treatment of these persons as an issue, since it was the conduct of Meridion which was responsible for their flight in the first place.

C. Failure of Septentrion to resettle the inmates.

Meridion may allege that Septentrion's continued detention of the camp inmates, with no apparent prospect for their eventual release, constitutes arbitrary detention and violates the U.N. Covenants, the Universal Declaration, and customary international law. Such an allegation was recently considered by United States courts in Rodriguez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), aff'd, 654 F.2d 1382 (10th Cir. 1981).

D. Discrimination in favor of third-country nationals, and those with "special skills of close relatives in Septentrion."

Septentrionese law allowed certain persons to leave the camps and to enter Septentrionese society. Others -- those inmates who were not of Meridionese nationality -- were permitted to leave the country.

Meridion may claim that these distinctions constitute discrimination among the camp inmates which is not permissible under the Refugee Protocol or customary international law. Septentrion will argue that such distinctions are common practice, and that each state has a sovereign right to decide who will and who will not be allowed entry.

E. The forced return of certain "boat people" to Meridion.

Meridion will presumably object to the interception of Meridionese vessels on the high seas by Septentrion's Coastal Service. It will argue that the freedom of the high seas is a general principle of international law binding upon all states, whether or not they are signatories to the Geneva Convention on the High Seas of 1958.

Septentrion will cite authorities from municipal law in which states have claimed the right to perform acts on the high seas necessary to protect their health, safety, or welfare. Meridion will attempt to read any such exception to the freedom of the seas narrowly, and can be expected to argue that it does not apply on these facts.

Septentrion might be questioned by Judges as to whether its interdiction of vessels and forced return of their occupants is consistent with the Refugee Protocol, since at the time of these incidents the Coastal Service cannot have known whether the "boat people" had legitimate claims to refugee status under that instrument.

The Prayer for Relief

A. The Declaratory Relief

There seems little doubt that the Court has authority to grant declaratory relief: see, for example, The Northern Cameroons Case.

B. Repatriation of BIS Prisoners

Similarly, it is unlikely to be disputed that the Court has authority to order a party to take specific action. It entered such an order (although in the event the order was not obeyed) in The Iranian Hostages Case.

C. Monetary Damages

The Court has occasionally awarded money damages: see The Corfu Channel Case. Counsel might be questioned, however, on how damages should be quantified, and on whether Septentrion has standing to seek an award of damages on behalf of individuals who may have been injured. Parties may cite discussions of this issue in The Reparations Case, as well as in various other ICJ and arbitral tribunal decisions.

Conclusion

The problem is an especially highly charged one, and good advocates on both sides will make the best of the rhetorical advantages of their cases. It should draw from both Septentrion and Meridion the deep feelings behind the "North-South dialogue." The problem is designed to heighten the awareness of both

participants and judges alike of the developing normative content of the international law of human rights.

NOTE: In response to a request for clarification of the 1982 Jessup Case, participants were advised that Septentrion and Meridion had become parties to the two 1977 Protocols Additional to the 1949 Geneva Conventions (texts at 72 Am. J. Int'l L. 457 & 502 (1978)). The Protocols were adopted by consensus at a diplomatic conference on June 8, 1977, and were opened for signature on December 12, 1977.

Owing to postal and other difficulties, some student teams received this information too late to incorporate it in their memorials. Judges of memorials and of oral arguments are asked to bear this in mind in assessing legal theories, lines of analysis, and supporting documentation.