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1989 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

Case Concerning the Immunities of a Diplomatic Agent

Majan

v.

United Republic of Aristan

MEMORANDUM OF LAW AND AUTHORITIES FOR JUDGES

NOTICE

This Memorandum is exclusively for the use of Judges in the 1989 Jessup Competition. It may not be shown to, read by, or in any other way communicated or made available to competitors in the moot court competition.

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TABLE OF CONTENTS

I. INTRODUCTION.

This Memorandum of Law and Authorities is intended to provide Judges with an analysis of the 1989 Jessup Problem, the Case Concerning the Immunities of a Diplomatic Agent. The Memorandum begins with a summary of the legal issues raised. Next, the Memorandum briefly discusses the sources of international law. (Because international law is a distinct system of law, unlike any municipal (i.e., domestic) system, Judges who believe they are not currently well versed in international law are encouraged to review this section.) Finally, this Memorandum analyzes the Problem itself.

The analysis of the Problem is far from exhaustive. Its purpose is to highlight for Judges those issues the authors of the Problem believe are of central importance. It must be emphasized, however, that competitors -- who have had the opportunity to study the Problem for several months -- may conceive other approaches to the Problem.

Judges should consider not only the oral advocacy skills of each competitor, but also a competitor's knowledge of the law and legal reasoning ability. A more detailed discussion of the criteria to be applied to assess the performance of the competitors is provided under separate cover.

II. SUMMARY OF THE PROBLEM.

The United Republic of Aristan's Ambassador to Majan, Guido Kitaro, used his car to run down Marc Wilkey, a national of Majan with whom he had been conducting illegal drug transactions, injuring Mr. Wilkey and killing two bystanders in the process. Ambassador Kitaro had just left a diplomatic reception at which his presence was de riguer, meaning that his presence was required by protocol.

The Majan police interviewed witnesses to the accident and issued a report concluding that Ambassador Kitaro was engaged in drug trafficking at a time when he was "obviously drunk." No objective test was offered or administered to Ambassador Kitaro, nor was he interviewed by the police.

The incident caused a public furor in Majan. Ambassador Kitaro was recalled by the Aristani Government and his diplomatic mission was terminated by his Government. Prior to the ambassador's departure, however, Majan's Minister of Justice, Charles Akulu, publicly announced that he was preparing charges against the ambassador for murder, attempted murder, drug trafficking, and drug smuggling and that once the ambassador's accreditation had ceased he could, and would, be prosecuted for acts which occurred while he was accredited.

Several days after the ambassador's departure, an arrest warrant was issued in Majan for the ambassador on the aforementioned charges. Ambassador Kitaro, after having been dismissed from his post by the Aristani Government, departed for the Parrot Islands, from which he was extradited to Majan, where

he was promptly imprisoned.

Prior to the ambassador's trial in Majan, Aristan imposed economic sanctions against Majan. Aristan also seized the assets the International Monetary Union (the "IMU") assigned to Majan on an administered deposit account with the First Aristani National Bank. Majan and sixty other sovereign States are members of the IMU, which is a regional monetary union. No agreement exists between the IMU and Aristan, although Aristan has always regarded the IMU as a regional organization. More than eighty countries have bilateral treaties recognizing the IMU as a regional organization and according its assets complete immunity.

The Case Concerning the Immunities of a Diplomatic Agent revolves around two issues presented to the International Court of Justice ("ICJ" or "Court"). First, the Government of Majan claims that it may criminally prosecute Ambassador Kitaro consistently with its obligations under the 1961 Vienna Convention on Diplomatic Relations ("Vienna Convention"). Second, the Government of Majan claims that the assets assigned to Majan on an administered deposit account with the IMU are immune from seizure by the Government of the United Republic of Aristan.

The Government of the United Republic of Aristan argues in opposition to both these contentions. It claims that Ambassador Kitaro is immune from criminal prosecution under the Vienna Convention. Owing to the imminence of the criminal trial, the Government of the United Republic of Aristan seeks a provisional

order providing for the release of Ambassador Kitaro and the dismissal of all criminal charges against him. Finally, the Government of the United Republic of Aristan claims that the IMU assets assigned to Majan on an administered deposit account with the First Aristani National Bank are not immune from seizure.

The parties have referred the case to the Court pursuant to Article 36, paragraph 1, of the Statute of the Court. The questions presented in the 1989 Jessup Problem -- known as "declarations" -- are the only issues to be addressed to the Court. Any contention that the Court lacks jurisdiction in this matter would be inappropriate.

Finally, no question of damages is presented to the Court. Any effort to plead damages also would be inappropriate.

III. THE SOURCES OF INTERNATIONAL LAW.

It cannot be emphasized enough that international law is a system of law separate from municipal law. Its rule creation and enforcement mechanisms are quite different from the municipal system, where authority is imposed upon the subjects of a given State by their government.

International law, however, is founded upon the consent of States. Although an evolving concept, it is still very largely the case that States are the subjects of

international law. Except in certain extreme situations, or situations in which State conduct threatens the very fabric of the international community, an international legal obligation may not be imposed upon a State without its consent. This is both a cause and a consequence of the system of sovereign equality.

When the International Court of Justice is requested to determine whether a State has committed a delictual act, the Court must first determine whether an international obligation has been violated, because States may engage in whatever activity is not prohibited by international law. Case Concerning the S.S. Lotus (Fr. v. Tur.), 1927 P.C.I.J. Ser. A/B, No. 10. To ascertain whether a rule of international law exists, the Court looks to Article 38, paragraph 1 of the Statute of the Court, which sets forth the sources of international law. (This article has an identical counterpart in the Statute of the Permanent Court of International Justice, the ICJ's predecessor.)

Article 38 provides:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Although the sources of international law appear to be listed in a descending order of priority, they are in fact dynamic. This concept is more fully developed below.

A. Conventions As A Source of Law.

There are two types of conventions (treaties): bilateral and multilateral. Bilateral conventions are clearly a source of law as to the two High Contracting Parties. Bilateral treaties are not usually considered a source of general international law when the reason for concluding them was to create an international obligation which did not exist under general international law. Bilateral extradition treaties, by which two States agree, under certain circumstances, to extradite an alleged offender, fall into this category of contract-law. Absent a bilateral agreement, and leaving multilateral conventions aside for the moment, general international law would not usually require the extradition of an alleged offender. (Of

course, a State may agree to extradite an alleged offender where no treaty exists, but international law does not oblige a State to do so.) The mere existence of a network of bilateral extradition treaties in and of itself has no general law-creating effect.

On the other hand, multilateral conventions with a large number of States Parties may be a source of international law, either as evidence of what these States declare the law to be among themselves, or by setting forth a new rule of law by implication affecting all States. An example of a multilateral convention which is declaratory, rather than amendatory, of general international law is the set of 1907 Hague Conventions on the Laws of War. These conventions set out many rules of the general international law of armed conflict. Parts of the 1949 Geneva Red Cross Conventions can also be said to codify law observable in the practice of belligerents and their diplomatic correspondence. Thus, all States are bound by many of their substantive law rules, even though a handful of States are not Parties to those instruments. Similarly, the 1948 Genocide Convention declares that genocide violates international law. In this regard, it should be noted that the International Court of Justice in the Case Concerning Reservations to the Genocide

Convention (Advisory Opinion), 1951 I.C.J. 15, held that all States were bound to observe the law respecting genocide -- not just States Parties -- since the Genocide Convention codified rules of international law from which no State may derogate.

In contrast, the General Agreement on Tariffs and Trade creates new rules which cannot be said to have existed under general international law. Its terms are binding only upon States Parties. Perhaps the leading case on third party obligations under contract treaties is the Case Concerning Free Zones of Upper Savoy and the District of Gex (Switz. v. Fr.), 1932 P.C.I.J. Ser. A/B, No. 46, involving a dispute as to France's ability to adjust its customs frontier in light of the 1815 Vienna Conference Final Act. France, of course, was a party to the Act, but Switzerland was not. The Court confirmed the rule that such multilateral conventions bind only States Parties and States which might otherwise have accepted those obligations.

Many multilateral conventions contain both elements. For instance, the Third United Nations Convention on the Law of the Sea declares the existing law with respect to most issues, including "innocent passage," fisheries, "exclusive economic zones," and so forth. In other parts, it creates

new law, such as by declaring the seabed and subsoil of the oceans (outside territorial jurisdiction) to be the "common heritage of mankind." (On this disputed principle, see Larschan & Brennan, "The Common Heritage of Mankind Principle in International Law," 21 Colum. J. Transnat'l L. 305 (1983). Another convention which contains both elements is the Vienna Convention on the Law of Treaties. In virtually all respects, the Vienna Convention declares the rules of general international law applicable to treaty interpretation, such as the customary international law rule of pacta sunt servanda (agreements must be honored) or the general principle of international law rebus sic stantibus (fundamental change of circumstances vitiating treaties). However, the Vienna Convention also contains the principle of jus cogens (peremptory norms) -- a disputed principle of international law which might emerge in due course as an accepted principle or might prove to be a hollow concept. Therefore, when the Court looks to a multilateral convention which is both declaratory and amendatory of international law, it must avoid application of a newly-created international law rule to States which have not -- expressly or by implication of their conduct or diplomatic correspondence -- consented to be so bound.

As a final point, it should be noted that a conventional obligation need not be written. This was decisive to the Court's holding in the Case Concerning the Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J., Ser. A/B, No. 53. Denmark claimed that Norway was precluded from asserting sovereignty over Eastern Greenland by virtue of assurances given by M. Ihlen, the Norwegian Foreign Minister. The Court found that in July 1919, the Danish ambassador at Christiana informed the Norwegian Foreign Minister that Denmark would not object to Norway's claim to Spitzbergen, then under discussion at the Paris Peace Conference. He also observed that the Danish Government, which was anxious to obtain recognition by all interested Parties of Danish sovereignty over the whole of Greenland, was confident that the extension of Danish political and economic interests to the whole of Greenland "would not encounter any difficulties on the part of the Norwegian Government." On July 22nd, after he had informed his colleagues in Cabinet, M. Ihlen declared to the Danish ambassador (the so-called "Ihlen Declaration") "that the Norwegian Government would not make any difficulties in the settlement of this question." Denmark raised no objection to the status of Spitzbergen, which was granted to Norway.

Norway later asserted sovereignty over a part of Eastern Greenland. The Court concluded that it is "beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Governnment in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs." Thus, the elements of a conventional obligation -- consent of the Parties to a particular undertaking -- were present and binding, even though unwritten.

In the Case Concerning Nuclear Tests (Aust. v. Fr.), 1974 I.C.J. 253, the Court went further with respect to unilateral acts, stating:

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be

> inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.

Thus, a State may create an international legal obligation as a purely unilateral matter.

Whether the Court's view is still persuasive is open to question. For a thorough discussion of the effect of unilateral declarations, see A.P. Rubin, "The International Legal Effect of Unilateral Declarations," 71 Am. J. Int'l L. 1 (1977).

B. Custom As A Source of Law.

States frequently choose to conduct themselves in certain ways because they believe they are bound to do so by international law and that, should they depart from that conduct, a delict is thereby committed. Therefore, the conduct of States can be evidence of a customary international law rule arising from "a general practice accepted as law." This concept was discussed by the International Court of Justice in the Asylum case, where the Court observed that:

> The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State [acting] and a duty incumbent in the [other] State.

1950 I.C.J. 266.

In the Case Concerning the Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, the Court found Albania responsible for explosions which occurred when British warships -- on manuevers to exercise the right of innocent passage through the international strait -- struck mines in the Corfu Channel off Albania, and held that Albanian sovereignty was not violated by the passage of those ships. With respect to the latter point, the Court noted that it is

> generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.

Before an act or assertion becomes a part of customary international law, it must have been accepted (or at least acquiesced in) for a substantial period of time by States. Thus, in the Case Concerning Anglo-Norwegian Fisheries (U.K. v. Nor.), 1951 I.C.J. 116, the United Kingdom objected to Norway's delimitation of northern Norwegian territorial waters. In upholding the delimitation on the basis of customary international law, the Court noted that

> [t]he general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it. . . . The Court notes that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations.

Thus, the Norwegian assertion, which may have been inconsistent with international law at its inception, had hardened into customary international law by virtue of State practice.

Evidence of custom may be found, inter alia, in diplomatic correspondence, official instructions to diplomatic agents and military officers, acts of municipal legislation and decisions of a State's courts (upon the assumption that they would not knowingly violate an international legal obligation), and the published opinions of legal advisers to governments. It is not unknown that a State may say one thing but conduct itself in a precisely opposite manner. In such a case, the State's conduct is the relevant factor.

The critical element to the creation of a customary rule of international law is that States generally conduct themselves in a certain way not as a mere policy choice, but because they believe they are bound to do so by

international law. For a further discussion, see A. D'Amato, The Concept of Custom in International Law (1971).

C. General Principles of Law As a Source of International Law.

International law is based upon the consent of States. This consent may be found in general principles of law as evidenced by a legal principle being contained in the municipal law systems of States. In this sense, near universal private law rules may be indicative of principles of public international law. In the Gentini Case (Italy v. Venez.), Mixed Claims Comm'n (1903), reprinted in J. Ralston, Venezuelan Arbitrations of 1903 720 (1904), for example, Venezuela argued that the Italian claim, based upon injury to its national, was barred by prescription. The umpire found that prescription was a part of the law of "civilized nations" and, therefore, was a general principle of law.

Application of a general principle was relied upon in the Case Concerning the Factory at Chorzow (Ger. v. Pol.), 1927 P.C.I.J., Ser. A, No. 9. In the course of finding it had jurisdiction over the matter (involving the the Polish Government's expropriation of a factory in Upper Silesia), the Court observed -- with respect to the Polish contention

that the case should have been brought before the German-Polish Mixed Arbitral Tribunal, although Poland had previously objected to the jurisdiction of that tribunal when the plaintiff company sought relief there -- that:

> It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him.

Id. at 31.

A State may be bound by the general principle of law respecting estoppel. In the Case Concerning the Temple Preah Viheah (Cam. v. Thai.), 1962 I.C.J. 6, the Court found that an ancient temple lay on the Cambodian side of a boundary which by treaty was to follow a specific watershed but was to be delimited by a mixed commission. The Court emphasized the fact that Thailand (then Siam) had requested from France in 1907 a map indicating the French view of the boundary. The map showed the temple to be on the French Indochina (now Cambodian) rather than the Thai side of the boundary. Thailand failed to raise an objection to the map or the French assertion. The Court thus found that Thailand

had acquiesced in the Cambodian assertion of sovereignty for 40 years and was estopped from raising the claim.

Another illustration of a general principle is the international law principle of rebus sic stantibus, under which a State may be relieved of its obligation to be bound by the terms of a treaty when there has been a fundamental change of circumstances. This rule of treaty interpretation has its origin in municipal contract law and has been incorporated into public international law. (The principle of rebus sic stantibus has been codified in Article 62 of the Vienna Convention on the Law of Treaties.) It also has been applied to international arbitrations between a private party and a foreign State.

The critical element to the recognition of a general principle of law is its existence in most (but not necessarily all) legal systems.

D. Judicial Decisions and Publicists As Sources of International Law.

Article 38(1)(d) of the Statute of the Court recognizes judicial decisions and the teachings of the most highly qualified publicists as subsidiary means for the determination of rules of international law. It therefore differs from the foregoing sources in that Article 38(1)(d) provides the Court with a further mechanism to find a source

of international law through judicial decisions and the studied views of the most highly qualified publicists.

1. Judicial Decisions.

The judgments of the International Court of Justice and its predecessor, the Permanent Court of International Justice, are but one source of judicial decisions. Also included in this category are the decisions of international arbitral tribunals and the highest courts of States.

Because the international legal system is based upon the sovereign equality of States, from a theoretical point of view there may not exist (without the express consent of States) a rule of stare decisis. Additionally, Article 59 of the Statute of the Court, providing that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case," is an international adoption of the principle of res judicata, and is itself irrelevant to the persuasiveness of prior opinions. It should be noted that any court can overrule itself, but the ICJ does so rarely for the same reasons that the U.S. Supreme Court does so rarely. Reasoned ICJ decisions are highly persuasive, even though not technically binding. The Court thus may be influenced by its own reasoning in previous cases, even though it is not so required, and

decide cases in a manner consistent with the rule of stare decisis. It should be noted that municipal law courts are not bound to accept ICJ decisions unless the municipal legal order translates treaty commitments into municipal law.

Finally, the Court may look to the decisions of international arbitral tribunals and the highest courts of States as evidence of a rule of international law. If a large number of these municipal courts are in agreement -- and if there is little or no similar authority holding to the contrary -- the Court may conclude that the municipal judicial decisions reflect the position of States or general principles of law recognized by civilized nations.

2. Publicists.

The Court also may look to publicists as a subsidiary source of law, not for their opinions on what the law should be, but rather as a statement of what norms constitute customary international law. Perhaps the best formulation of this principle was set forth by the Supreme Court of the United States in The Paquete Habana, 175 U.S. 677 (1900), in which it observed that

> where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators, who by years of labor, research,

> and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Only a few publicists rise to the level of a source (albeit subsidiary) of international law. While Article 38(1)(d) refers to "the most highly-qualified publicists," it is not always easy to discern which scholars rise to this level.

E. Hierarchy of the Sources of International Law.

The sources of international law are not to be applied based upon a rigid hierarchical conception. While a treaty is generally the clearest indication of the consent of States, from the moment a treaty enters into force States may begin the process of modifying its terms by subsequent practice. After a certain period of time, it would be difficult to conceive of the treaty as the appropriate source of law if State practice has been consistently different.

In the same vein, a general principle of law may emerge over time which conflicts with a treaty. In such a situation, the Court would attempt to determine which source of law most clearly reflects the consent of States. Take,

for instance, the situation in which two States concluded a treaty in 1800 permitting the trade in slaves. By 1900, nearly all States had abolished slavery within their territory by municipal law, and there is much evidence that slavery was universally condemned on legal as well as moral grounds. The Court, therefore, undoubtedly would find the 1800 treaty unenforceable by virtue of general principles of international law.

Finally, it should be noted that should a new peremptory norm of general international law (jus cogens) emerges, the norm would render an inconsistent treaty obligation a nullity. This principle is set forth in Article 64 of the Vienna Convention on the Law of Treaties, which provides: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

IV. ANALYSIS OF THE CASE.

A. Whether the Government of Majan May Prosecute Ambassador Kitaro Consistently With Its Obligations Under the Vienna Convention on Diplomatic Relations.

The Government of the United Republic of Aristan asks the Court to declare that the criminal trial of Ambassador Kitaro by the Government of Majan would violate the 1961 Vienna Convention on Diplomatic Relations, 500 U.N.T.S 95, 23 U.S.T. 3227, TIAS 7502, a near-universal multilateral convention to which both Majan and the United Republic of Aristan are States Party.

The conflicting interpretations of the two Governments over the scope of diplomatic immunity required to be accorded to Ambassador Kitaro by international law is set forth in the

exchange of Diplomatic Notes in the Problem. Briefly stated, however, the Government of Majan takes the position that it may compel Ambassador Kitaro to stand criminal trial, subsequent to the termination of his accreditation, for acts which occurred while he was accredited.

1. The Raison d'Etre of Diplomatic Immunity.

There is no dispute over the raison d'etre of diplomatic immunity. One observer, United States Secretary of State Elihu Root, noted in 1906:

> There are many and various reasons why diplomatic agents . . . should be exempt from the operation of the municipal law at [sic] this country. The first and fundamental reason is the fact that diplomatic agents are universally exempt by well recognized usage incorporated into the Common law of nations, and this nation, bound as it is to observe International Law in its municipal as well as its foreign policy, cannot, if it would, vary a law common to all. . . . The reason of the immunity of diplomatic agents is clear, namely: that Governments may not be hampered in their foreign relations by the arrest or forcible prevention of the exercise of a duty in the person of a governmental agent or representative. If such agent be offensive and his conduct is unacceptable to the accredited nation it is proper to request his recall; if the request be not honored he may be in extreme cases escorted to the boundary and thus removed from the country.

Quoted in 4 G. Hackworth, Digest of International Law 513 (1942).

Another U.S. Secretary of State, Cordell Hull, observed that diplomatic immunity was a creation of international law designed "to allow governments to transact official business free from interruption which might flow from molestation of or interference with their representatives." Letter from Secretary Hull to Senator Pittman, quoted in Preuss, "Protection of Foreign Diplomatic and Consular Premises Against Picketing," 31 Am. J.

Int'l L. 705, 708 (1937). Judge Sir Cecil Hurst noted that:

> The writers of textbooks have dealt at great length with the question why immunities are given to diplomatic representatives, and the nature of the obligation upon States to recognize such immunities. In reality the matter is very simple. The privileges and immunities are founded on the necessities of the case. They are essential to the maintenance of international relations. On no other basis than that of exemption from subjection to the local jurisdiction would sovereign States have been willing in times past or today to send their representatives to the headquarters of another State. On no other terms would it have been possible for foreign diplomatic representatives to fulfill the tasks allotted to them.

C. Hurst, International Law: Collected Papers 174 (1950) (lecture delivered at l'Academie de Droit International de la Haye). Accord De Meeus v. Furzano, 336 Foro It. I 65 (Corte cass. (United Sections) Italy 1940); Engelke v. Mussman, [1928] A.C. [H.L.] 433.

2. The Vienna Convention on Diplomatic Relations.

a. The terms of the convention.

General diplomatic law was codified in 1961 in the Vienna Convention on Diplomatic Relations. In large part, the Vienna Convention was declaratory of existing law; in some aspects, however, it was amendatory. E. Denza, Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations 1 (1976). In situations where the Vienna Convention does not expressly cover a particular aspect of diplomatic law, the Convention's Preamble states that customary international law should be applied. See id. at 7. The pivotal question in this section -- the first prong of the Jessup Problem -- is the duration of Ambassador Kiatro's diplomatic immunity in the face of criminal (as opposed

to civil) charges in Majan.

As to who is covered by the Vienna Convention, paragraphs (a) and (e) of Article 1 provide as follows:

> (a) the "head of the mission" is the person charged by the sending State with the duty of acting in that capacity;
>
> * * *
>
> (e) a "diplomatic agent" is the head of the mission or a member of the diplomatic staff of the mission; . . .

Paragraph 1 of Article 31 of the Vienna Convention, which contains the principal and, in the view of the Government of the United Republic of Aristan, dispositive article on diplomatic immunity, provides:

> 1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
>
> (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;1/
>
> (b) an action relating to succession in which the diplomatic agent is involved as executor,

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1/ In its Commentary on the 1958 draft of what became art. 31(1)(a) of the Vienna Convention, its drafters explained:

> (5) The first exception concerns immovable property belonging to the diplomatic agent personally. All States claim exclusive jurisdiction over immovable property on their territory. This exception is subject to the conditions that the diplomatic agent hold the property in his private capacity and not on his Government's behalf for the purposes of the mission.

2 Yearbook of the International Law Commission 1958 78, 98.

administrator, heir or legatee as a private person and not on behalf of the sending State;2/

(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.3/

Agents for the United Republic of Aristan no doubt will argue that the immunity from a receiving State's criminal jurisdiction accorded by paragraph 1 of Article 31 is complete

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2/ The ILC explained:

> (6) The second exception is based on the consideration that, because it is of general importance that succession proceedings should not be hampered, the diplomatic agent cannot plead diplomatic immunity for the purpose of refusing to appear in a suit or action relating to a succession.

Id.

3/ The ILC explained:

> (7) The third exception arises in the case of proceedings relating to professional or commercial activity exercised by the diplomatic agent outside his official functions. It was urged that activities of these kinds are normally wholly inconsistent with the position of a diplomatic agent, and that one possible consequence of his engaging in them might be that he would be declared persona non grata. Nevertheless, such cases may occur and should be provided for, and if they do occur the persons with whom the diplomatic agent has had commercial or professional relations cannot be deprived of their ordinary remedies.

Id.

Indeed, a further admonition is contained in art. 41 of the Vienna Convention, which provides:

> A diplomatic agent shall not in the receiving State practice for personal profit any professional or commercial activity.

and without qualification.

The Government of Majan, however, takes the position that the international law distinction between "prescriptive" and "enforcement" jurisdiction extends to diplomatic immunity. See Problem at 6-7. In the Government of Majan's view, a diplomatic agent is immune only from a receiving State's enforcement jurisdiction, not its prescriptive jurisdiction. Id. Agents for Majan may bring to the Court's attention civil cases involving diplomatic agents which make this distinction. See, e.g., Laperdrix and Penquer v. Kouzouboff and Belin, 53 J. du Droit International 64 (1926). But even these such cases are rare and conflicting.

Reduced to the specifics of the Jessup Problem, the Majani Government's view would have it that once Ambassador Kitaro's accreditation terminated (and a reasonable period for his departure lapsed), Majan could -- consistent with its obligations under the Vienna Convention -- compel him to stand criminal trial for acts which occurred while he was accredited, provided that it had in personam jurisdiction. In this case, since Ambassador Kitaro departed Majani territory prior to the termination of his mission, Majan could seek his extradition or informal rendition or, should the ambassador ever choose to return voluntarily, arrest him.

In support of this view, the Government of Majan could point to two articles in the Vienna Convention. Article 41, in relevant part, provides:

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State.

Further, paragraph 2 of Article 39 provides:

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

In its Diplomatic Note, the Government of Majan concluded:

> The Vienna Convention thus makes clear that the immunities of former diplomats do not subsist in respect to acts that, during the period of performance of diplomatic functions, were not performed in the exercise of functions as a member of the mission.

Problem at 6.

However, while certainly well within the realm of reasonable interpretation, it should be noted that no State has ever before implemented that interpretation by bringing a former diplomatic agent to trial on criminal charges, save for one exception, Empson v. Smith, [1965] 2 All E.R. 881, despite numerous occasions to do so. At the same time it should be noted that several States have unilaterally asserted the right to do so, although they have refrained from so doing when appropriate situations arose. The most recent and notable example is the incident between the United States and Papua New Guinea. See Larschan, "The Abisinito Affair: A Restrictive Theory of Diplomatic Immunity?", 26 Colum. J. Transnat'l L. 283 (1988). Thus, it would appear that the burden is upon agents for the

Government of Majan to persuade the Court.

b. Interpretation of the Vienna Convention on Diplomatic Relations.

To determine the nature of the international law obligation to accord diplomatic immunity in situations where the Vienna Convention's meaning is ambiguous or obscure, resort may be had to the travaux preparatoires, its "legislative history."4/ In this case, the travaux preparatoires tends to support the immunity of diplomatic agents from the criminal law jurisdiction of a receiving State. Under the present circumstances, the travaux preparatoires may be found, inter alia, in the Commentary of the International Law Commission ("ILC"),5/ as well as the official comments of participating governments on the various drafts and amendments to the Vienna Convention.

4/ See, e.g., Vienna Convention on the Law of Treaties art. 32, adopted May 22, 1969; Harvard Research In International law: Draft Conventions on Treaties art. 19, 29 Am. J. Int'l. Law Supp. 937 (1935), which provides:

> (a) A treaty is to be interpreted in the light of the general purpose which it is intended to serve. The historical background of the treaty, travaux preparatories, the circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve.

5/ Late in 1948 the International Law Commission of the United Nations was established to codify international law, consisting of 15 individually qualified members elected by the General Assemble and representing the main "forms of civilization and principal legal systems"; the number has now increased to 25. See U.N. Charter art. 13(1). The ILC drafted the document which went to the Vienna Conference and became the Vienna Convention.

In its Commentary on the 1958 draft of Article 29 (Article 31 of the 1961 Convention), the ILC explained:

> (2) The jurisdictions mentioned comprise any special courts in the categories concerned, e.g. commercial courts, courts set up to apply social legislation, and all administrative authorities exercising judicial functions.
>
> (3) A diplomatic agent enjoys immunity from the receiving State's criminal jurisdiction and, with the exceptions [to civil jurisdiction] mentioned in paragraph 1 of the article, also immunity from its civil and administrative jurisdiction. At the same time, he has the duty to respect the laws and regulations of the receiving State as laid down in article 40 of the present draft.
>
> (4) The immunity from criminal jurisdiction is complete, whereas the immunity from civil and administrative jurisdiction is subject to the exceptions stated in the text.
>
> * * *
>
> (11) The effect of immunity from jurisdiction, and of the privileges mentioned in articles 27 and 28, is that the diplomatic agent is also immune from measures of execution, subject to the exceptions mentioned in paragraph 3 of the present article.
>
> * * *

2 Yearbook of the International Law Commission 1958 78, 98-99 (emphasis added).

Agents for the Government of the United Republic of Aristan could argue, therefore, that an accredited ambassador is entitled to complete immunity from the criminal jurisdiction of the receiving State, pointing out that no distinction is made in the travaux preparatoires between prescriptive and enforcement jurisdiction.

The International Court of Justice has had only a single

opportunity to address the impermissibility of criminal charges and diplomatic immunity. In the Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) (Judgment), 1980 I.C.J. 3, a unanimous Court condemned the violation of diplomatic immunity by Iran. The Court stated that it

> considers it necessary here and now to stress that, if the intention to submit the hostages [diplomatic agents] to any form of criminal trial or investigation were to be put into effect, that would constitute a grave breach by Iran of its obligations under Article 31, paragraph 1, of the 1961 Vienna Convention. This paragraph states in the most express terms: "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State."

Id. at 37, para. 79. While accepting the fact that this is the only relevant ICJ case, agents for Majan would point out that in this case the American diplomats were still accredited.

To the extent that the statements of governments are evidence of international law, it should be noted that the U.S. Department of State observed, in connection with the U.S. Senate hearing on the Vienna Convention, that paragraph 1 of Article 31 "continues, without change, the total immunity" under customary international law of ambassadors from the receiving State's criminal jurisdiction. Vienna Convention On Diplomatic Relations: Hearing Before the Subcomm. of the Comm. on Foreign Relations, 89th Cong., 1st Sess. 54 (1965) [hereinafter cited as Senate Hearing]. The Digest of International Law, the Department of State's official treatise, observes that the protection afforded by Article 31, paragraph 1, is "without qualification." 7 M. Whiteman, Digest of International Law 413-

14 (1970) [hereinafter cited as 7 M. Whiteman]. Prior to the Abisinito Affair, see Larschan, supra, the Government of the United States reaffirmed its traditional view that international law requires the complete immunity of a diplomatic agent from the criminal jurisdiction of the receiving State. It observed that a receiving State "is under an international law obligation . . . to ensure that . . . diplomatic agents shall be absolutely immune 'from the criminal jurisdiction'" of a receiving State. Application of the United States (U.S. v. Iran), 1979 I.C.J. Pleadings (Hostages Case) 2, 10 (29 November 1979). The U.S. has also declared that "threats of [criminal] prosecution" by a receiving State would violate its international obligations under Article 31. Id. "There is no exception; no matter what the cause, the receiving State is precluded from allowing the criminal prosecution of a diplomatic agent." Oral Argument of the United States (U.S. v. Iran), 1979 I.C.J. Pleadings 21, 22 (statement of U.S. Attorney General).

"This complete immunity from criminal jurisdiction is reaffirmed and emphasized by Article 41 of the Vienna Convention; in stating the duty of persons enjoying privileges and immunities to respect the law of the receiving State, Article 41 expressly notes that the duty is '[w]ithout prejudice to their privileges and immunities.'" Memorial of the United States (U.S. v. Iran), 1980 I.C.J. Pleadings (Hostages Case) 11 (January 1980). Thus, agents for the Government of the United Republic of Aristan could argue that Article 41, paragraph 1, merely provides that it is

the (international law) "duty" of an ambassador "to respect the laws and regulations of the receiving State." It does not subject an ambassador to the jurisdiction of the receiving State. Nor can it be said that upon this basis jurisdiction may be asserted by a receiving State. Indeed, Article 31, paragraph 4, expressly provides that:

> 4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.6/

A U.S. Department of State publication has noted:

> The immunity of diplomatic agents from criminal jurisdiction is so universally recognized that one authority on the subject has declared that no instance can be cited where such an agent has been subjected, without his government's consent, to the criminal jurisdiction of the country to which he was accredited.

Barnes, "Diplomatic Immunity From Local Jurisdiction: Its Historical Development Under International Law and Application in United States Practice," 43 Dep't State Bull. 173, 177 (Aug. 1, 1960).

Agents for Aristan could argue that immunity does not mean that an errant diplomat should be allowed to continue to engage in unacceptable behavior. However, the exclusive means available under international law to act against an offending diplomatic agent is set forth in Article 9 of the Vienna Convention, which allows a receiving State to declare him persona

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6/ Agents for the Aristani Government may point out the international law maxim of treaty interpretation expressio unius est exclusio alterius (the expression of one thing is the exclusion of another). See, e.g., 1 L. Oppenheim, International Law 954 (H. Lauterpacht 8th ed. 1955) [hereinafter cited as 1 Lauterpacht].

non grata.7/ Memorial of the United States, U.S. v. Iran), 1980 I.C.J. Pleadings at 51.8/ Indeed, one recent American treatise

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7/ Barnes noted:

> While a diplomatic representative is thus immune from arrest, trial, or punishment for any criminal offense he may commit in the country to which he is accredited, the U.S. Government takes the view that this immunity in no wise relieves him from the obligation of observing local laws and regulations. If he fails to do so, he becomes liable to the sanctions already mentioned.

Barnes, supra, at 177-78. Those sanctions are:

> (1) a formal complaint to his government, (2) an official request to that government for his recall, or (3) if such a request is not granted or if the officer's offense is serious enough, a declaration that he is persona non grata and an order for him to leave the country forthwith.

Id. at 177. It should be noted that criminal or civil actions clearly are not contemplated.

The only exception is when a diplomatic agent poses an immediate threat to the security of the receiving State or to its nationals, in which case he may be temporarily restrained. Lauterpacht conceived of only one exception, and even then it would permit merely a temporary restraint:

> There is one exception to this rule. If a diplomatic envoy commits an act of violence which disturbs the internal order of the receiving State in such a manner as makes it necessary to put him under restraint for the purpose of preventing similar acts, or if he conspires against the receiving State and the conspiracy can be made harmless only by putting him under the restraint, he may be arrested for the time being, although he must in due time be safely sent home.

1 Lauterpacht, supra, at 791.

8/ In its Memorial in the Case Concerning United States Diplomatic and Consular Staff in Tehran, supra, the Government of the United States stated that:

> In the absence of an appropriate waiver of immunity by the sending State, expulsion from the

on diplomatic immunity stated that:

> It may further be mentioned that the immunity in respect of acts committed during the tenure of a diplomat's mission continues even after his term of office has expired. . . .

B. Sen, A Diplomat's Handbook of International Law and Practice 106 (1979) (emphasis added). Agents for Majan could again point out to the Court that these evidences of the law may only contemplate accredited diplomatic agents.

Agents for the Government of the United Republic of Aristan could conclude that, as a result of the foregoing, the conduct of an ambassador in the receiving State, from a criminal law standpoint, is not a matter between the ambassador and the Government of the receiving State, but, rather, is a government-to-government matter. Therefore, it is international law which governs the acts of an ambassador in the receiving State, not the receiving State's municipal law. Agents for the Government of Majan could conclude that (1) the immunity outlined by the foregoing is absolute only during the period of accreditation and (2) that a distinction should be drawn, when considering the issue of the continuance immunity subsequent to termination of accreditation, between official and private acts.

i. Conventional international law.

As noted previously, the only applicable convention is the Vienna Convention. Although the Vienna Convention provides that

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> receiving State is the latter's sole remedy as against a protected person who has engaged in improper conduct; in no event can such person be tried or punished.

Id.

a diplomatic agent is immune from the criminal law jurisdiction of the receiving State, it does not explicitly state that (1) an ambassador is not subject to the prescriptive jurisdiction of a receiving State, or (2) that a criminal action may not be brought against an ambassador, subsequent to the termination of accreditation, for an act which took place while he was accredited. However, the travaux preparatoires supports the view that the drafters of the Vienna Convention contemplated and rejected the bringing of a criminal proceeding against an ambassador subsequent to his termination for an act which occurred while he had immunity.

In interpreting the Vienna Convention in the Case Concerning United States Diplomatic and Consular Staff in Tehran (Judgment), supra, a unanimous World Court flatly rejected Iran's justification for violating diplomatic immunity "because of the more than twenty-five years of continual interference by the United States in the internal affairs of Iran . . . and numerous crimes perpetrated against the Iranian people." The Court declared that

> [t]he rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligation . . . and, on the other, . . . specifies the means at the disposal of the receiving State to counter any such abuse.

Id. at 40, para. 86.

ii. Customary international law.

The Vienna Convention does not expressly define the nature of diplomatic immunity; rather, it assumes that diplomatic

immunity is defined by customary international law. The Preamble to the Vienna Convention provides that "the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention."

Also, as previously stated, the authors of the Problem are unaware of any reported case in which an ambassador was made to face a criminal action subsequent to the loss of diplomatic immunity for an act which occurred while he had immunity, without his consent or by waiver of his government. See, e.g., Barnes, supra, at 177; Satow's Guide to Diplomatic Practice 124 (5th ed. Gore-Booth 1978). There is one case, however, where a former diplomatic agent was forced to stand criminal charges. Empson v. Smith, [1965] 2 All E.R. 881. Agents for Aristan could argue that this is persuasive evidence of the customary international law on diplomatic immunity.

Numerous cases have arisen which provided States ample opportunity to bring a criminal charge against an ambassador for an act which took place while he had diplomatic immunity, subsequent to the termination of that immunity. Agents for Aristan could argue that the practice of States to refrain from such action evidences a process of consistent and uniform reciprocal tolerance which, over the centuries, has hardened into custom. Some instances have been reported by the news media and are summarized below to illustrate this practice.

Perhaps the most egregious incident was the murder in April 1984 of a British constable in London's St. James's Square by an

unidentified assailant firing shots through the window of the Libyan Embassy. The Libyans invoked diplomatic immunity. The British Government declared all members of the "People's Bureau" persona non grata, expelled them, and severed relations with Tripoli.9/ No action was taken against any individual. However, a House of Commons Committee conducted an extensive investigation of the incident and review of diplomatic immunity. The Committee saw the issue as a dual question; first, whether once an individual's diplomatic function has ceased, they could be prosecuted for acts which occurred while they were accredited, and second, whether conduct of a thoroughly undiplomatic sort in any way diminished one's diplomatic immunity. The Committee concluded that international law and self-interest required the continuation of diplomatic immunity. First Report, Foreign Affairs Committee, "The Abuse of Diplomatic Immunities and Privileges" (1984-1985).

A similar incident took place in Paris in 1978, when shots fired from the Iraqi Embassy killed a gendarme who was escorting a Palestinian from the mission. The French Government concluded that diplomatic immunity protected the three suspects. A government spokesman observed that "we are up against international law, which is applicable to all."10/

In July 1984, a former member of the Government of Nigeria, Alhaji Umaru Dikko, was kidnapped from his London home, drugged,

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9 The Times (London), Apr. 18, 1984, at 1, col. 1.

10 The Times (London), Aug. 3, 1978, at 5, col. 1.

put into a crate protected by diplomatic immunity, and shipped to Lagos. The British Government protested and requested the return of Mr. Dikko and a waiver by the Nigerian Government of immunity for those responsible for the kidnapping. The Nigerian Government refused to cooperate. The British declared several Nigerian diplomats persona non grata and expelled them.11/

In November 1982, the grandson (and adopted son) of the Brazilian Ambassador to the United States shot and seriously wounded an employee of a Washington, D.C. nightclub. Brazil invoked diplomatic immunity and the suspect returned to Rio de Janeiro. The victim filed suit against the ambassador and the State of Brazil.12/ The suit against the ambassador was dismissed when diplomatic immunity was invoked and the sovereign immunity of the Brazilian State was upheld.13/

In 1958, a secretary at the Embassy of Haiti killed a colleague in the embassy compound. The Washington, D.C. police surrounded the embassy but were not allowed in. Diplomatic immunity was claimed. The Haitian Ambassador accompanied the diplomat to the airport, whereupon he reportedly returned to

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11 The Times (London), July 7, 1984, at 1, col. 2. Nigeria not only refused to waive diplomatic immunity for one suspect, id., July 13, 1984, at 1, col. 6, id., July 27, 1984, at 3, col. 2, but also detained a British Caledonian airliner, id., July 7, 1984, at 1, col. 5, and expelled two British diplomats in retaliation. Id., July 13, 1984, at 1, col. 6.

12 Skeen v. Federative Rep. of Brazil, 566 F. Supp. 1414 (D.D.C. 1983).

13 Id. at 1420.

Haiti to stand trial.14/

In 1959, New York City police disarmed a Venezuelan colonel, who carried a diplomatic passport, after he allegedly stuck a loaded pistol in the stomach of a passerby on a Manhattan street. The incident was apparently unprovoked, and no reason was offered for the behavior. No prosecution was sought.

One notable and tragic traffic incident which occurred in the United States was the "Dr. Halla Brown Affair." A cultural attache of the Panamanian Embassy in Washington allegedly ran a red light and hit Dr. Brown's car, leaving her a quadriplegic. Diplomatic immunity was invoked to thwart a civil suit for damages, including about $300,000 in medical expenses. "[U]nder enormous pressure and the possibility of a cutoff of foreign aid to Panama under the Foreign Assistance Appropriations Act of 1978," 15/ the Government of Panama made a $10,000 ex gratia payment.16/

iii. Publicists.

The most highly qualified commentators on international law tend toward the view that diplomatic immunity is a complete bar to the jurisdiction of the receiving State. The renowned

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14 Myers, "Diplomatic Immunity," 54 Am. J. Int'l L. 648, 649 (1960).

15 Diplomatic Immunity: Hearing on S. 476, S. 478, S. 1256, S. 1257 and H.R. 7819 Before the Subcomm. on Citizens' and Shareholders' Rights and Remedies of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 2 (Statement of Sen. Metzenbaum).

16 Turan, "The Devilish Demand of Diplomatic Immunity," Wash. Post, Aug. 22, 1976.

international law scholar Judge Sir Hersch Lauterpacht stated:

> As regards the exemption of diplomatic envoys from criminal jurisdiction, the doctrine and practice of International law agree nowadays that the receiving States have no right, in any circumstances whatever, to prosecute and punish diplomatic envoys. For a diplomatic envoy [should] in no respect be considered to be under the jurisdiction of the receiving State. But this does not mean that diplomatic envoy must have the right to do what he likes. The presupposition of the privileges he enjoys is that he acts and behaves in such a manner as harmonises with the internal order of the receiving State . . .. In case he acts and behaves otherwise, and disturbs the internal order of the State, the latter will certainly request his recall, or send him back at once.

1 Lauterpacht, supra, at 790-91. Similarly, Professor Georg Schwarzenberger observed:

> Diplomatic immunities are regarded as absolute and, therefore, are not used as objects of reprisals, unless in retaliation for a breach of such immunities. . . . It was recognized that diplomatic immunity formed an exception to the principle of territorial jurisdiction, and that this exception rested on a rule of international customary law.

G. Schwarzenberger, A manual of International Law 100-01 (5th ed. 1967). The internationally respected Satow's Guide to Diplomatic notes:

> If a diplomatic agent commits a crime in the country to which he is accredited, he cannot be tried or punished by the local courts. No case can be cited where, without his consent or that of his government, such a course has been followed.

Satow's Guide to Diplomatic Practice, supra, at 124.

On the other hand, a classic French treatise on diplomatic immunity unequivocally states:

> The duration of the immunity from jurisdiction is the same as with respect to inviolability, except that it remains effective as regards to all acts committed by the public minister in his official capacity.

J. Secretan, Les Immunities Diplomatiques 81-82 (1928).17/

As previously noted, one American publicist stated:

> The immunity of a diplomatic agent in this regard is absolute, and he cannot under any circumstances be tried or punished by the local criminal courts of the country to which he is accredited. . . . It may be further mentioned the immunity in respect of acts committed during the tenure of a diplomat's mission continues even after his term of office has expired, though this principle has been doubted in one or two cases.18/

B. Sen, supra, at 106 (emphasis added).

The reason is clear:

> Privileges due to diplomatic envoys, apart from ceremonial honours, have reference to their inviolability and their so-called extraterritoriality. The reasons why these privileges must be granted are that diplomatic envoys are representatives of States, and, further, that they could not exercise their functions perfectly unless they enjoyed such privileges. For it is obvious that, were they liable to ordinary legal and political interference like other individuals, and thus more or less dependent on the goodwill of the Government, they might be influenced by personal considerations of safety and comfort to a degree which would materially hamper them in the exercise of their functions. It is equally clear that if their full and free intercourse with their home States through letters, telegrams, and couriers were liable to interference, the objects of their mission could not be fulfilled. In this case it would be impossible for them to send independent and secret reports to, or receive similar instructions from, their home states. For these and various cognate reasons their privileges seem to be inseparable attributes of

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17 (Translation by the authors.) The original states:

> La duree de l'immunite de juridiction est la meme que celle de l'imviolabilite, sauf qu'elle survit aux fonctions pour tous actes accomplis par le ministre public en sa qualite officielle.

18 No citations were offered by the author with respect to the exceptions.

the diplomatic function.

1 Lauterpacht, supra, at 787-88.

iv. Judicial decisions.

The Case Concerning United States Diplomatic and Consular Staff in Tehran judgment), supra, is the only relevant international decision. In it, the International Court of Justice held that

> the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established regime [i.e., the rules of diplomatic law] . . . . .

1980 I.C.J. at 40, para. 86.

In his separate opinion, Judge Tarazi (Syria) specifically approved this observation and gave specific example from Islamic tradition of the Prophet's respect for the inviolability of ambassadors. Id. at 59. Similarly, Judge Lachs (Poland) remarked:

> The principles and rules of diplomatic privileges and immunities are not -- and this cannot be over-stressed -- the invention or device of one group of nations, of one continent or one circle of culture, but have been established for centuries and are shared by nations of races and all civilizations.

Id. at 47-8. Judge Morozov (U.S.S.R.) also noted his strong support for the strict observance of diplomatic immunity. Id. at 51.

B. Whether the Assets the IMU Assigned to Majan on an Administered Account with the First Aristani National Bank Can Be Seized by Aristan.

In the Problem, the Parties formulated this issue in terms of whether the assets are immune; however, the essence of the question is, of course, whether Aristan has committed an international unlawful act by seizing the assets. Such unlawful act may consist of:

1. a breach of an international obligation requiring that the assets are inviolable; and

2. that the seizure cannot be justified as a lawful counter measure.

1. Preliminary Matters

Prior to the investigation into these issues, it may be well to briefly touch on the different legal issues related to the fact that the account with the First Aristani National Bank is in the name of the IMU, and not Majan. This is underscored by the IMU Charter provision authorizing a Member to represent its legal interest and Mr. Zoff's (President of the IMU) agreement to that effect in the present case.

a. The first question to be addressed concerns whether a (Member) State can represent the legal interest of an international organization in a contentious proceeding before the ICJ. This question is prompted by the fact that, according to Article 34, paragraph 1 of the Statute of Court, only States can

be parties in cases before the Court. Therefore, the matter cannot be regarded as if the IMU is represented as a party to the dispute. Rather, it should be seen in the light of Article 34, paragraph 2, according to which, whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is a question in a case before the Court, the Registrar shall notify the organization concerned. Similarly, Article 57, paragraph 3, of the Rules of the Court prescribes that the Court may, at any stage in the proceedings before the termination of the hearing, either propio mutu or at the request of one of the parties, request an international organization to furnish information relevant to a case before it. See S. Rosenne, The Law and Practice of International Court 284-290 (1985). While this remains a relatively unsettled area, it could be argued that Majan is entitled to answer questions on behalf of the IMU for the purposes of Article 34, pragraph 2.

b. Some may raise the question whether Majan has standing in this matter. As we shall examine below, the matter would be more properly treated as an issue of legal right. Although questions of jurisdiction and standing would be inappropriate for the competitors to bring before the Court, some might nevertheless attempt to raise an objection to the Court's jurisdiction (locus standi).

In the 1966 South-West Africa Cases, 1966 I.C.J. 6, 36-38 & 42-43, a bare majority of the Court drew a fine distinction between a jurisdictional issue and the question of legal

interest, the latter being an issue of merits. Id. See also I. Brownlie, Principles of Public International Law 468 (1979). On November 4, 1960, Ethiopia and Liberia instituted separate proceedings against South Africa in a case concerning the continued existence of the mandate for South West Africa. On May 20, 1961, the Court made an order joining the two cases and on December 21, 1962, the Court upheld its jurisdiction by rejecting South Africa's preliminary objections, including the objection that none of the applicants had locus standi. 1962 I.C.J. at 319. In a judgment given on July 19, 1966, the Court found that Ethiopia and Liberia could not be considered to have established any legal rights or interest appertaining to them in the subject matter of their claims and accordingly rejected those claims. Id. According to the Court, the question of whether a State has a legal right or interest in the subject matter of any dispute, i.e., a right or interest upon which a judgment in its favor could be based, depends on the interpretation placed by the Court on the rules of international law upon which the claim is placed. Cf. id. at 67 (Sep. Op. Judge van Wijk).

In other words, an argument by Aristan that Majan lacks standing, meaning locus standi, should fail. The question is thus not a question of standing, but whether Majan can establish any legal right or interest appertaining to it in the subject matter of its claim.

Majan claims that the seizure of assets in the administered account, of which it is the sole beneficiary, is delictual. The question is, thus, whether Majan posses any legal right to or

interest in (i.e., having the "immunity" of) assets recognized and upheld in the subject matter of dispute.

In investigating the above question, it should be kept in mind that the Court in the South-West Africa cases held that, in order to prove that its rights or interest exist, there should be some text or instrument, or rule of law clearly vesting such right or interest in those who claim it. 1966 I.C.J. at 32. Thus, agents for Majan will have to explain on what grounds it should be concluded that a right or interest has been vested in it to have the alleged inviolability of the funds upheld. See 2.c, infra, for an elaboration on Majan's position in relation to the administered account.

2. The Lawfulness of the Seizure of the Assets.

a. The status of the immunity of assets of international organizations under international law.

Majan has an interest in establishing that Aristan is under an international legal obligation to refrain from seizing the assets of the IMU in which it has a legal interest. It claims that the assets are free from such action by Aristan as a matter of general international law. This reliance on general international law, rather than on conventional or customary international law, obviously relates to the fact that no agreements exits between the IMU and Aristan, although Aristan has always regarded the IMU as a regional organization. This notion of general international law entails that there exist rules and principles of international law of universal validity

binding on all subjects of international law. See generally H. Lauterpacht, Collected Papers, 51, 113-117 (E. Lauterpacht ed. 1970). Since the Permanent Court of International Justice ruled in the Lotus case, supra, that the rules binding upon States emanate from their own free will as expressed in treaties or customary law, 1927 P.C.I.J. (ser. A) No. 10, at 18, it will be necessary in the present case to find a rule of customary law of universal validity for Majan's position to prevail.

As noted in the section III, supra, concerning the sources of international law, according to the Asylum case, Majan should have to prove the existence of the alleged rule of general international law supporting its position. Following Judge de Castro, Majan could argue that general customary law does not have to be proved. "The Court must apply it ex officio: it is its duty to know it as quaestio iuris: iuria novit curia. Only regional customs or practices, as well as special custom, have to be proven." Fisheries Jurisdiction Case, 1974 I.C.J. at 79 (Sep. Op. Judge de Castro), citing the Asylum case.

This wisdom notwithstanding, effective advocacy requires that agents for Majan would be better off if they endeavor to prove the existence of a rule of general customary law that requires Aristan not to seize the assets.

b. Publicists.

One author holds the view, that it is uncertain to what extent international organizations enjoy immunities under customary law. M. Akehurst, A Modern Introduction to International law 118 (4th ed. 1983). Brownlie is of the

conviction that it is the general view that there is as yet no customary rule supporting immunities for international organizations, but the fulfillment of obligations of membership involving activities on State territory by an organization could demand a certain amount of immunity without special agreement. I. Brownlie, supra, at 682.

During the 382nd meeting of the ILC, Liang expressed that unlike the privileges and immunities conferred on diplomatic agents, those conferred to international organizations had been regulated almost exclusively by conventional law to which custom has not yet made any appreciable contribution. [1957] I Y.B.I.L.C. at 5. Preuss reports that in the past, the Government of the United States has taken the view that no rule of international law exists according to which privileges and immunities should be extended and that any special status is as yet dependent upon treaty or upon municipal law and domestic practice. L. Preuss, "The International Organizations Immunities Act," 40 Am. J. Intl'l L. 333 (1946).

Bowett takes an intermediate position, and states that whilst it may be difficult to argue that privileges and immunities exist by virtue of a rule of customary international law, it may well be that once a State consented to the presence of an organization on its territory, it is bound by good faith to the extent those privileges and immunities are functionally necessary. D. Bowett, The Law of International Institutions 348 (1982); cf. J. Duffar, Contribution a Letude des privileges et immunities des organisations internationales (1982) and

K. Ahluwalia, The Legal Status of Privileges and Immunities of the United Nations and Certain other International Organizations (1964).

Other authorities hold opinions that are more favorable to Majan's position. Thus, Sorensen maintains in the context of the objective international personality of international organizations, that a customary rule has been evolving requiring third States to recognize privileges and immunities in the same way as they do with foreign States. He cautions, however, that this does not mean that they have to accord the same privileges and immunities as Mmembers. Yet they have to accord a minimum of privileges and immunities as far as it concerns inviolability of property. M. Sorensen, "Princies de droit international public," 101 RdC 139 (1960).

Majan could cite other authors who link the existence of the rule to functional necessity, as evidenced by State practice. This view was expressed by Lalive in his Hauge lectures of 1953. J. Lalive, "L'immunite de jurisdiction des etats et des organizations internationales," 84 RdC 304-306 (1953). See also G. Weissberg, The International Status of the United Nations, 143-146 (1961). However, unlike Lalive, he does not touch on the distinction between third States and Members. Moreover, one should keep in mind that Lalive and Weissberg are essentially concerned with immunity of jurisdiction rather than inviolability of assets.

More recently Professor Dominice argued forcefully in favor of the position which would benefit Majan in this case:

> La pratique conventionelle est suffisament abondante, et constante, pour l'on doive affirmer que les organisations internationales interetatiques beneficient toutes, e dans touts les Etats, de cette immunite.

(I.e., immunity from execution.) C. Dominice, "L immunite des organisations internationales," 187 RdC 224-225, passim (1984).

Lately Professor Schermers asserted that "[a]ll existing treaties and customary international law provide that State immunity -- on the same grounds immunity of international organizations -- extend to all acts of execution." H. Schermers, "Liability of International Organizations," 1 LJIL 10 (1988).

The opinion of other publicists may be indirectly relied upon by Majan to support its position. Seid-Hohenveldern teaches that although a third State will generally be able to disregard the establishment of an organization as res inter alios acta, it cannot do so if it recognizes the legal personality of the organization concerned. I. Seidl-Hohenveldern, Corporations in and under International Law 90 (1987). By such recognition, a third State must resign itself to disregard the separate legal personality of the organization in an action against one of its Members. Id. at 91 (per analogiam). A comparable reasoning has also been applied to the issue whether a claimant can address claims for the acts of a State to a State trading corporation. I Congreso, [1983] A.C. 244 and Rolimplex, [1979] A.C. 351; The "Playa Larga" and "Marble Islands", [1983] 2 Lloyd's Rep. 171; but see First National City Bank v. Banco Para el Commercio Exteriro de Cuba, 462 U.S. 611 (1983); M. Christopher, "Piercing the Corporate Veil Between

Foreign Governments and State Enterprises: A Comparison of Judicial Resolutions in Great Britain and the United States," 25 Va. J. Int'l L 451 (1985).

Recognition of the organization by a third State preempts the disregarding of its personality but does not mean such recognition extends to the substantive law -- including the privileges and immunities of the organization. Seidl-Hoheveldern, supra, at 92 & cases cited therein. Yet it entails that no action against a Member State can justify a disregard of the separate personality of the organization.

c. Case law.

Case law on the issue under consideration is scarce, to say the least. One case that can be cited in this context is International Tin Council v. Amalgamate Incorporated (NY Law Journal, January 28, p. 14, 1988. See A.H. Hermann, "US Court Rejects ITC's claim to Sovereign Immunity," Financial Times, Feb. 11, 1988. In that case, the Supreme Court of New York State rejected the ITC's claim of immunity on the theory that under the U.S. International Organizations Immunities Act, only organizations of which the U.S. is a Member enjoy immunity. This decision, it appears, implicitly rejects the theory that third States are bound by general international law to recognize immunities of international organizations. This is in keeping with the U.S. position which refuses to acknowledge the existence of any obligation under general international law to extend such immunities to organizations. See 4 G. Hackworth, supra, at 423. In Standard Bank v. International Tin Council, [1906] 3 All E.R.

257, it was held, obiter dictum, that international organizations are not entitled to immunity save where such immunity is granted by legislative instrument, and then only to the extent of such grant. Cf. McLain Watson & Co. Ltd. v. International Tin Counsel, Times Law Reports, June 2, 1988.

Dominci claims that Italian Courts have accorded the same treatment to international organizations as they give to States, supra, at 174-175; cf. Sorensen, supra. He cites in this context Giovani Porru v. F.A.O., Rome Court of First Instance (Labour Section), judgment of 25 June 1969, Temi Romana 1969, pp. 531-533, summary in United Nations Juridical Yearbook, 1969, 238-289. In that case the court considered that Article VIII, section 16, of the Headquarters Agreement with Italy confirmed the general rule of customary international law. The provision concerned reads, as far as relevant: "FAO . . . shall enjoy immunity from every form of legal process insofar as in any particular case FAO shall have expressly waived its immunity."

Note that the Porru Court does not clarify whether the customary rules entails immunity vis-a-vis Member States only, or that it operates erga omnes. That case could be distinguished on the basis of the fact that Italy is a Member of the FAO, unlike Aristan in relation to the IMU.

d. Patterns in domestic legislation concerning the status of privileges and immunities of international organizations.

The description of the privileges and immunities of international organizations is to be found in their constitutional instruments, headquarter agreements, and national

legislation. See Legislative Texts and Treaty Provisions Concerning the Legal Status, Privileges and Immunities of International Organizations, United Nations Legislative Series (1959).

The patterns in the domestic legislation do not reveal an unequivocal extension of privileges and immunities to any international organizations. Typically, many national laws are enacted to give effect to treaties in relation to international organizations to which the country in question has acceded. Other legislation that employs the technique of extending privileges and immunities to international organizations generally, (e.g., the U.S. International Organizations Immunities Act), restricts the scope by defining the term "international organizations" narrowly; that is, a public international organization in which the country participates. Yet other legislation would delegate the power to designate the organizations that will enjoy privileges and immunities to the executive. However, under these laws, the executive can only designate organizations of which the country is a Member.

It would appear, from the above summary, that State practice, as maifested in domestic legislation, is not generous in terms of extending privileges and immunities to organizations, outside the context of membership or a treaty requiring that.

3. Content of a Possible Customary Rule.

If Majan were to argue, as does Dominici, that the numerous treaties have amounted to a rule of customary law, it will be necessary to establish the content of such rule. It may be

assumed that if the rule indeed has emerged from the practice of States in concluding the treaties, its content is probably similar to the conventional one. Under the conventions the property of international organizations, wherever located and by whom ever held, shall be immune from search, requisition, confiscation, expropriation, and any other form of interference, whether by executive, administrative, judicial, or legislative action. See The Practice of the United Nations Specialized Agencies and the International Atomic Agency Concerning their Status, Privileges and Immunities: Study Prepare by Secretariat, U.N. Doc. A/CN. 4/L. 118 and Addition 2; [1967] I Y.B.I.L.C. 234-235, 304; K. Ahluwalia, supra, at 81-82; cf. Duffar, supra, at 237-267.

If it indeed exists, under a rule with the above content, Aristan would be clearly incorrect to seize the assets provided that the assets belong to the IMU. This triggers the question whether assets in the administered account are the IMU's assets for the purposes of privileges and immunities.

4. Do Earmarked Funds Enjoy the Immunity of the organization Which is the Nominal Owner?

It is stated in the Problem that the following is to be understood by the term "administered account":

> An 'administered account' is an account administered by the IMU for the exclusive benefit of a member in an account kept separate from the property and accounts of the organization, but which may not be drawn upon by the beneficiary but only by the IMU.

This definition calls into question whether, to the extent that there exists a customary rule with the content described above, it would cover funds in such an administered account. In

other words, are these funds the property of the IMU and, therefore, immune or inviolable under the alleged rule, or are they Majan's property?

In order to explore this matter, it is useful to discuss briefly the phenomenon of fiduciary financial activities of international organizations. See H. Schermers, International Institutional Law 508-509 (1980); Sir Joseph Gold, "Trust Funds in International Law: The Contribution of the International Monetary Fund to a Code of Principle," 72 Am. J. Int'l L. 856 (1978); W. Jenks, The Proper Law of International Organizations 1887 (1962). These activities mostly concern finances obtained by international organizations for voluntary programmes as well as those from gifts offered for financing of specific activities, See H. Schermers, supra, at 901, and have been denominated as trust funds. Id. and Gold, supra, at 856.

Under the rules of international law said to govern these trust funds, the rights of ownership of property subject to an international trust are divided between the trustee and the beneficiary or beneficiaries. Id. at 863. Moreover, a trustee must keep trust property separate from his own property, and the property of other trusts, and must earmark trust property as such. Furthermore, a trust is not a legal entity in the sense that it is the bearer of right or the subject of duties. Finally, a trustee must administer the trust solely in the interest of the beneficiary. Id. at 863-865.

The issue of immunity of assets administered by international organizations in a fiduciary capacity has thus far

received little attention. Gold reports that the Executive Board of the International Monetary Fund ("IMF") has taken the position that, as the IMF is the owner of the resources administered by it as trustee, those resources are part of the property and assets of the IMF and, as such, are covered by the various immunities conferred by its Articles of Agreement. Id. at 863. For the authentic position of the IMF Executive Board, see Proposed Second Amendment to the Articles of Agreement of the International Monetary Fund: A Report by the Executive Directors to the Board of Governors (April 1976), reprinted in IMF, Summary Proceedings of the 31st Annual Meeting of the Board of Governors (1976 Supp.).

Majan could take the same position as the IMF Executive Board and argue that the seized assets are protected by immunities that the IMU allegedly enjoys under general international law. Aristan can argue that these are not IMU property and, therefore, not protected by possible rule of general international law. Aristan could then rely on the Philippine Embassy Bank Account case (German Federal Constitutional Court, Dec. 13, 1977, 65 Int'l L. Rep. 146, 167), where it was held that "there is as yet no custom which is sufficiently general and is backed with the necessary legal consensus to constitute a general rule of customary international law whereby the State of the forum is debarred outright from taking measures of forced execution against a foreign State." Moreover, it was alluded to that in the case of non-functional resources, international law would not impede interference by the

territorial state (id.; cf. Alcom Ltd. v. Republic of Columbia [IGOA] A.C. 580). Majan would then have to prove that the funds are for functional use iure imperii.

5. Possible Defense on Which Aristan Can Rely.

Assuming that there exists a rule of general international law requiring States not to interfere with property of international organizations, Aristan could argue that since these are resources earmarked for Majan, they can be seized as lawful countermeasures to compel compliance with international law by the recalcitrant State. See, e.g., E. Nantwi, The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law 137-140 (1966).

Recently the issue of interference with earmarked resources or claims of States on other international persons has been the subject of litigation. One of such litigations concerned an attempt made by a private party to attach an alleged claim of Yugoslavia on the International Bank for Reconstruction and Development ("World Bank"). S.E.E.E. c/Banque Mondiale, Republique de Yugoslavia, Etat Francaise, 112 J. de Droit International 473-495 (1984), with note of B. Oppetit 1985. For the World Bank's position in that case, see 24 ILM 354-359 (1985). Other cases involve development aid designated by one country to another. E.g., Jagers v. State of the Netherlands, judgment of Sept. 12, 1984, partially reproduced in N.I.P.R. No. 478, 1985, concerning funds destined for Uganda's Idem with regard to funds for Egypt, 16 NYIL, p. 363, N. 4, 1985 and e.f. Vercsde v. State of the Netherlands and national Investment Bank

for Developing Countries, Supreme Court, May 3, 1985, 17 NYIL 307-309, concerning funds destined for Surinam. However, there is no precedent for State action with respect to funds held by international organizations for the benefit of a "recalcitrant State."

If it is accepted that Majan has a legal interest in having the inviolability of the funds in the administered account recognized and upheld, Aristan could argue that it will be entitled under general international law to seize the assets as a reprisal. See O. Elagab, The Legality of Non-Forcible Counter-Measures in International law (1988) and E. Zoller, Peacetime Unilateral Remedies: An Analysis of Countermeasures (1984).

Early publicists held the view that everything that belongs to the targeted nation is subject to reprisals, whenever it can be seized. See, e.g., E. de Vattel, The Law of Nations, Book II, Ch. 18 s. 344, at 284 (1834). The argument can thus be made that, despite a possible immunity of the funds otherwise, as a matter of reprisal, the assets can be seized in order to compel Majan to comply with its international obligations, as seen by Aristan. In this respect, it would appear entirely irrelevant whether the funds are held in the name of an international organizatic