1989

A CASE STUDY IN DIPLOMATIC IMMUNITY AND ECONOMIC SANCTIONS AND REPRISALS*

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INTRODUCTION

As the relations of men and States become increasingly intertwined, the matter of diplomatic intercourse and the question of the rights and privileges of members of the diplomatic community, vis-a-vis State duties and responsibilities, have recurrently raised flashpoints in the already conflict-strewn arena of State relations. Indeed, despite the codification, in the form of The 1961 and 1963 Vienna Convention on Diplomatic and Consular Relations, of the rules intended to govern the immunities of the diplomatic corps, cases in recent years have raised novel, if not complex, questions.

Another area, also treated in this comment, that presents an archetype, postmodern, conflict in international law is the area of economic confrontation between States.

These issues have been afforded an interesting interpretation in the following hypothetical, "real-life" case. The problem was presented as follows.

STATEMENT OF FACTS

In the evening of 13 February 1988, Ambassador Guido Kitaro (hereinafter referred to as the Ambassador), chief of mission of the United Republic of Aristan (hereinafter referred to as the sending State), met Marc Wilkey, a national of Majan (hereinafter referred to as the receiving State). Apparently, the two were engaged in a drug deal which, unbeknownst to the authorities of the sending State, were smuggled into the receiving State by diplomatic pouch.

The national of Majan tried to double-cross the Ambassador and ran with the suit case of drugs. The Ambassador pursued the national and in a panic, ran over the national and two bystanders. The national was critically

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injured but the two bystanders were killed. In addition, the drugs were spewn about the scene of the accident.

Although the Ambassador was not interviewed nor tested regarding the incident, the police report filed after the investigation hastily concluded "that the ambassador was engaged in drug trafficking at a time when he was obviously drunk."

Amidst an outpouring of criticism, including a non-binding resolution passed overwhelmingly in the receiving State's National Assembly calling for the immediate criminal trial of the Ambassador, the latter was voluntarily recalled by his Government.

However, prior to the ambassador's departure, the receiving State's Minister of Justice, announced that he was preparing charges against the Ambassador.

"The acts charged are very serious and could result in the death penalty," he said. "Based on the evidence, there seems to be no doubt that, under our law, the Ambassador is guilty of all charges," the Minister added.

Concerned by the intention to indict its Ambassador, the Government of the sending State dispatched a Diplomatic Note which, in essence, called on the Government of the receiving State to observe Article 31 of the Vienna Convention on Diplomatic Relations.

Notwithstanding this, an arrest warrant was issued several days after the departure of the Ambassador. This was done although the receiving State's law does not allow for trial *in absentia*.

Upon his return to his State, the Ambassador received a hearing and was dismissed from the foreign service. One week later, while in the Parrot Islands, the Government of the receiving State demanded for his extradition under a bilateral extradition treaty. The terms of which left no margin to question such a demand. The Ambassador was promptly extradited and imprisoned in the dark cells of the receiving State to await trial.

The vehement and repeated protests of the sending State fell on deaf ears. Hence, in an effort to pressure the receiving State to release the Ambassador, said sending State imposed economic sanctions upon the former.

On the day trial began, the sending State, pursuant to its law, ordered one of its national banks not to release the assets of the receiving State until further notice. The assets were being administered by the International Monetary Union (IMU) and were placed in an administered deposit account with such national bank, a private commercial institution in the sending State.

Although the sending State regards the IMU as a regional organization, no bilateral treaty or agreement exists between the former and the latter.

The IMU President protested the seizure as a violation of the IMU's immunity under general international law. The President allowed the receiving State to defend both its own and the IMU's interests.

Aside from claiming that the act of seizing the assets was valid, the sending State seeks the immediate release and dropping of all charges against its Ambassador. On1 February 1989, both States, in accordance with Article 40 of the Statute of the Court and Article 38 of the Rules of the Court, notified the registrar of the International Court of Justice that they were submitting the matter by special agreement to the jurisdiction of the Court under Article 36, paragraph 1, of the Statute of the Court.

QUESTIONS PRESENTED

I. Whether the Government of the receiving State violated international law when it commenced the prosecution of the Ambassador.

II. Whether the Government of the receiving State should release the Ambassador and dismiss all the charges against him.

III. Whether the sending State was justified in seizing the funds assigned to the Government of the sending State.

1V. Whether the sending State is bound to grant immunity to the assets of International Monetary Union.

On the first two problems, the main issue suggests a conflict in the interpretation of Article 30, paragraph 2 of the 1961 Vienna Convention:

> 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 upon 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 person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

It has been suggested that the first sentence of the above provision refers to a continuation of immunity status even after the diplomatic mission has ended, and that the second sentenee in relation thereto, makes the distinction between official and unofficial acts only at that point in time when immunity subsists after the termination. In other words, the provision is interpreted to refer to a period when immunity subsists even after termination, and it is within that period where the distinction is drawn out, that as to official acts, immunity shall subsist, and as to unofficial acts, it shall not.

From this interpretation, it is concluded that immunity from criminal jurisdiction is absolute. This novel argument, however, suffers from a legal

infirmity and overstrains the interpretative mind of the judge when doubt can be resolved by a plain reading of the law.

It is a generally accepted rule that it is only when the law is ambiguous, that interpretation thereof is in order. The above quoted provision needs no interpretation. It clearly refers to a person whose functions have terminated. The first sentence asserts that his immunity shall cease except in the situations provided for. As to acts in the exercise of his functions, the second sentence provides that immunity shall continue to subsist.

Fortunately, there is another argument which does not require the rules of Statutory Construction, but instead leverages on the basis of the universally accepted theory that diplomatic functions necessarily require such immunity.

As to the third and fourth questions, with the minimal contribution of international law on the concept of permissible and impermissible economic coercion by States, and the failure of the international community to establish institutional means to regulate them, the acts of economic compulsion effected by the sending State can be readily justified.

The following are the points posited by the advocates of the sending State.

SUMMARY OF ARGUMENTS

I.

The prosecution of the Ambassador by the government of the receiving State violates Article 31 of the Vienna Convention on Diplomatic Relations and is contrary to the general principles of international law.

Such conduct by the receiving State will defeat the purpose of the Convention and will compromise and jeopardize the diplomatic functions and the national security of the sending State.

II.

The principle of *restitutio in integrum* demands the immediate release and the dropping of charges against the Ambassador. States have consistently adhered to this practice whenever diplomatic immunity is claimed. Further, the continued detention of the Ambassador places the national security of the sending State in jeopardy.

III.

The act of the sending State in ordering one of its commercial banks not to release the funds of the receiving State is consistent with international law. Evidence of state practice shows that the imposition of economic sanctions is a valid means of reprisal recognized under international law.

Article 2(4) of the U.N. Charter prohibits reprisals involving the use of force but not reprisals involving economic sanctions.

Moreover, economic sanctions are usually carried out by a state by virtue of its sovereignty and discretionary power. Ideas to restrict a state's ability to undertake economic sanctions have not attained the status of international law.

IV.

The IMU enjoys no immunity within the territory of the sending State. The IMU does not possess the status, privileges, and immunities pertaining to international persons such as states. The recognition of IMU by the sending State merely grants it a legal personality but does not confer on it immunity.

The sending State, not being a party to any agreement with respect to IMU, has no obligation to grant immunity to IMU's assets.

DEVELOPMENT OF ARGUMENTS

The contentions, as presented by the agents for the sending State, begin with the fundamental assertion that the government of the receiving State may not prosecute the Ambassador without violating the provisions of the 1961 Vienna Convention on Diplomatic Relations.[1]

First of all, under the hypothetical situation, the criminal prosecution of the Ambassador by the receiving State for acts done during the period he was the diplomatic agent of the sending State is in breach of the 1961 Vienna Convention on Diplomatic Relations [hereinafter referred to as 'the Convention']. Article 29 of the Convention declares that the person of a diplomatic agent is inviolable and not subject to any form of arrest or detention.[2] Being inviolable, the diplomatic agent is exempted from measures

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[1] The Convention was concurred in by the Senate, S.R. No. 65, May 3, 1965. The Philippine instrument of ratification was signed by the President, October 11, 1965 and was deposited with the Secretary General of the United Nations, November 15, 1965. The Convention entered into force, April 24, 1964, and with respect to the Philippines, November 15, 1965.

[2] Article 29, Vienna Convention on Diplomatic Relations (1961) provided in full states, "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity." Relatedly, Article 30 expands the scope of immunity:

> 1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.
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> 2. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability.

that will amount to direct coercion.[3] Article 31 of the Convention further provides for a complete, absolute and unqualified immunity from criminal jurisdiction of the receiving State to the diplomatic agent of the sending State.[4]

[3] According to the Commentaries on Article 27, U.N. Report of the International Law Commission, 10th Session, April 28 – July 4, 1958:

> "This article confirms the principle of the personal inviolability of the diplomatic agent. From the receiving State's point of view, this inviolability implies, as in the case of the mission's premises, the obligation to respect, and to ensure respect, for the person of the diplomatic agent. The receiving State must take all reasonable steps to that end, possibly including the provision of a special guard where circumstances so require. Being inviolable, the diplomatic agent is exempted from measures that would amount to direct coercion. This principle does not exclude in respect of the diplomatic agent either measures of self-defense or, in exceptional circumstances, measures to prevent him from committing crimes or offenses."

[4] Article 31, Vienna Convention on Diplomatic Relations (1961):

> 1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy; immunity from its receiving State. He shall also enjoy; immunity from its civil and administrative jurisdiction, except in the case of:
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> (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;
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> (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator heir or legatee as a private person and not on behalf of the sending State;
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> (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.
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> 2. A diplomatic agent is not obliged to give evidence as a witness.
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> 3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a) (b) (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.
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> 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.

See also, Commentaries on Article 29, U.N. Report of the International Law Commission, 10th Session, April 28 – July 4, 1958; Brownlie, Principles of Public International Law, 3rd ed. (1979), p. 355; Whiteman, Digest of International Law, Vol. 7 (1970), pp. 413-414; See also Hearing before the Subcommittee of the Committee on Foreign Relations, U.S. Senate, 89th Congress, 1st Session, July 6, 1965, on Vienna Convention on Diplomatic Relations, pp. 54-55.

Moreover, Article 9 and Article 32 of the Convention provide the only remedies available to the receiving State, namely, to declare the diplomatic agent *persona non grata* and ask for his removal or recall from the receiving State (Article 9) [5] or to request a waiver of immunity from the government of the sending State (Article 32) in order to proceed with the criminal prosecution.

In the case of *United States vs Iran* (1980), the International Court of Justice declared that:

> The rules of diplomatic law in short constitute a self-contained regime which, on the one hand, lay down the receiving State's obligations . . . and, on the other hand, specifies the means at the disposal of the receiving State to counter any such abuse of the privileges. Thus, the only means are those stated in Article 9 of the 1961 Convention and Article 23 of the 1963 Convention declaring a person suspected of abusing diplomatic privileges *persona non grata* and having him recalled. Iran had not availed itself of these means and was not justified in using any other."[6]

The recall by the sending State of its ambassador from the receiving State made the enforcement of the provisions of Article 9 unnecessary.

Article 32 of the Convention requires that waiver by the sending State must be express before the host State may acquire criminal jurisdiction over

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[5] Article 9, of the Convention:

1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *pesona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission.

[6] U.S. vs. Iran as cited in the Sydney Law Review, p. 658. In the Hostage Case, Iranian students and demonstrators seized the United States Embassy in Tehran by force, including its archives and documents, and continued to hold fifty-two United States nationals. Fifty of them were either diplomatic or consular staff, the other two being private citizens. The International Court decided unanimously that Iran had violated its diplomatic obligations to the United States. Obligations which were then in force at that time.

the diplomatic agent.[7] This article implies that the immunity of its diplomatic agents from jurisdiction may be waived by the sending State alone. The waiver of immunity must be on the part of the sending State, because the object of the immunity is that the diplomatic agent should be able to discharge his duties in full freedom and with the dignity befitting them. This is the principle underlying the provision contained in paragraph 1 of Article 32.[8] It is a universally accepted rule of international law that, in the absence of the waiver of immunity, a diplomatic agent is immune from the civil and criminal jurisdiction of the receiving State.[9]

Since there was no request made, much less granted, for the waiver of the immunity of the Ambassador, the receiving State has no authority to prosecute him.

Second, the prosecution of the Ambassador by the receiving State is contrary to the general principles of international law.

> "The inviolability of the diplomat is the oldest established and the most fundamental rule of diplomatic law. Even if conspiring against the monarch, he could not be tried and punished, merely expelled."[10]

A diplomatic representative is immune from arrest, trial, or punishment for any criminal offense he may commit in the country to which he is accredited. He may be restrained and expelled as soon as possible, but he may not

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[7] Article 32, Vienna Convention on Diplomatic Relations (1961):

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be wavied by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, which a separate waiver shall be necessary.

[8] Commentaries Article 30, U.N. Report of the International Law Commision, 10th Session, April 28 – July 4, 1958: ". . . paragraph 1 of Article 32 (sic) implies that the immunity of its diplomatic agents from jursidction may be waived by the sending State alone. The waiver of immunity must be on the part of the sending State because the object of immunity is that the diplomatic agent should be able to discharge his duties in full freedom and with the dignity befitting them. This is the principle underlying the provision contained in paragraph 1."

[9] Whiteman, op. cit., note 3 at p. 409 citing U.N. Conference on Diplomatic Intercourse and Immunities, Vienna, Austria, March 2 – April 13, 1961, pp. 16-17.

[10] C. J. Lewis, State and Diplomatic Immunity, 2nd ed. (1985), p. 172.

be punished by the injured state.[11] If he commits a crime in the count which he is accredited, he cannot be tried or punished by local courts.[12]

Furthermore, Judge Oppenheim observes that:

> "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. 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."[13]

In 1718, the Spanish ambassador to France, Prince Cellamare organized a conspiracy against the French Government. He was arrested and placed in custody. After claiming diplomatic immunity, he was subsequently released and charges against him were dropped.[14]

Several such cases occurred in the United States in the period preceding its entrance into World War I, the most notorious being those involving Captain Boy-Ed, naval attache, and Captain von Papen, military attache, of the German Embassy, who were guilty of numerous violations of American laws and of their obligations as diplomatic officers. Captain Boy-Ed directed various attempts to provide German war vessels at sea with coal and other supplies in violation of American neutrality, while Captain von Papen furnished money to various individuals to sabotage factories and other installations in Canada and also directed the manufacture of incendiary bombs and their placement on Allied vessels. They were recalled by their Government at the request of the United States.[15]

In 1979 in Great Britain, criminal prosecution in 284 cases, including cases of violence against the person, sexual offenses and shoplifting, were not pursued because of claims of diplomatic immunity.[16]

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[11] "Diplomatic Immunity from Local Jurisdiction: Its Historical Development under International Law and Application in U.S. Practice," William Barnes, Special Assistant to the Director of the Historical Office, Dept. of State, XLIII Bulletin, Dept. of State, No. 1101, August 1, 1960, pp. 173, 177-178.

[12] Bland, Satow's Guide to Diplomatic Practice, 4th ed. (1957), p. 181.

[13] Lauterpacht, Oppenheim's International Law, Vol. 1, 8th ed. (1955), p. 791.

[14] Phillimore, Commentaries Upon International Law, 3rd ed., 4 vols. (1879-1888), section 170.

[15] XLIII Bulletin, Dept. of State, No. 1101, August 1, 1960, pp. 173, 177-178; See also Hackworth, Digest of International Law, Vol. 4 (1942), p. 515 et seq.

[16] D. J. Harris, Cases and Materials on International Law, 3rd ed. (1983), footnote 71 on p. 272., citing Hansard, H.C. Vol. 985, W.A., Col. 871, June 6, 1989. "In 1979, criminal prosecutions in 284 cases (including cases of violence against the person, sexual offenses and shoplifting) were not pursued because of claims of diplomatic immunity."

No case can be cited where, without his consent or that of his government, a diplomatic agent has been criminally prosecuted and punished by the receiving State.[17]

Thus, it has been established state practice to respect diplomatic immunity and desist from the criminal prosecution of a diplomatic agent. The act of the Government of the receiving State in pursuing the prosecution of the Ambassador is unprecedented and violative of the respect due and granted by all signatories to the Vienna Convention on Diplomatic Relations.

Third, the Ambassador enjoys immunity from the criminal jurisdiction of the receiving State even after his removal from office.

The first point is that immunity is granted to diplomats in order to ensure that diplomatic relations between States will not be hindered.

> ". . . . the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States."[18]

It is a general principle of international law that immunity is granted to the diplomatic agents of the sending State in order that they may discharge their duties in full freedom and with the dignity befitting them.[19] Therefore, the primary purpose of granting immunity to foreign diplomatic agents is to prevent the disruption of diplomatic relations and foster an atmosphere of freedom in which the States may interact.

It is essential to the proper conduct of a diplomatic mission that it have the right to retain and relay confidential communications necessary for its operations. This principle is embodied by Article 27 of the Convention, which permits and protects all official communication between the diplomatic mission, its Government and the other missions and consulates of the sending State.[20]

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[17] See note 10, supra.

[18] Preamble, Vienna Convention on Diplomatic Relations, 1961.

[19] See Commentaries on Article 30, U.N. Report of the International Law Commission, 10th Session, April 28-July 4, 1958.

[20] Article 27, Vienna Convention on Diplomatic Relations (1961):

> 1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever stituated, the mission may employ all appropriate means including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State.
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> 2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.

The second point raised is that the diplomatic functions, not to mention the national security, of the sending State may be compromised or jeopardized if any member of its diplomatic mission is forced to divulge such matters to other States.

Paragraph 2 of Article 37 of the Convention grants immunity from criminal jurisdiction to the technical and administrative staff of a diplomatic mission. This provision is based on the 1958 draft of the International Law Commission (Article 36) which recognized the need for the protection of sensitive information.

> "It is the function of the mission as an organic whole which should be taken into consideration, not the actual work done by each person. Many of the persons belonging to the services in question *perform confidential tasks* which, for the purposes of the mission's function, may be even more important than the tasks entrusted to some members of the diplomatic staff. An *Ambassador's secretary* or an archivist may be as much the *respository of secret or confidential knowledge* as members of the diplomatic staff. Such persons equally need protection of the same order against *possible pressure by the receiving state.*"

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3. The diplomatic bag shall not be opened or detained.

4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.

5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to to any form of arrest or detention.

6. The sending State or the mission may designate diplomatic couriers *ad hoc*. In such cases the provisions of paragraph 5 of this Article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.

7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.

See also Commentaries on Article 25, U.N. Report of the International Law Commission, 10th Session, April 28 - July 4, 1958.

> "For these reasons, and because it would be difficult to distinguish as between the various members or categories of the administrative and technical staff, the Commission recommends that the administrative and technical staff should be accorded not only immunity from jurisdiction in respect of official acts performed in the course of their duties but, in principle, all the privileges and immunities granted to the diplomatic staff."[21]

Following the above argument, the Ambassador as Head of a Diplomatic Mission, should receive a greater immunity than that of his secretary or one of his archivists. He has access to all the sensitive information which the diplomatic mission possesses. Moreover, he may have knowledge of matters which pertain to no one else in the mission.

In a bilateral agreement between the United Kingdom and the Union of Soviet Socialist Republics, the members of the staff of Her Majesty's Embassy in Moscow below the rank of attache, their wives and families, the personal servants of the Ambassador and servants of the Embassy Offices were granted immunity from personal arrest and other legal process and from the civil and criminal jurisdiction of the Soviet courts. The arrangements were justified by the British Undersecretary of State for Foreign Affairs as follows: ". . . the threat of legal proceedings, in other words, blackmail, is a weapon which can be and is used to subvert members of diplomatic missions in some countries."[22] The United Kingdom has similar agreements with Bulgaria and Czechoslovakia.[23]

Such a threat of future prosecution may continue to bar effective relations between States if the receiving State is allowed to prosecute, punish or incarcerate a diplomatic agent upon his removal from office.

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[21] According to the Commentaries on Article 36, U.N. Report of the International Law Commission, 10th Session, April 28-July 4, 1958:

> "The reasons relied on may be summarized as follows. It is the function of the mission as an organic whole which should be taken into consideration, not the actual work done by each person. Many of the persons belonging to the services in question perform confidential tasks which for the purposes of the Mission's function, may be even more important than the tasks entrusted to some members of the diplomatic staff. An Ambassador's Secretary or Archivist may be as much the repository of secret or confidential knowledge as members of the diplomatic staff. Such person equally needs protection of the same order against the possible pressure by the receiving State."

[22] D. J. Harris, Cases and Materials on International Law, 3rd ed. (1983), p. 283 and footnotes.

[23] Ibid.

The Ambassador, as the Chief of Mission to the receiving State, by the very nature of his position, is privy to highly confidential and extremely sensitive information. The unauthorized disclosure of such state secrets, in the course of his detention in such receiving State, may not only hamper the operation and function of the sending State's diplomatic mission to the receiving State, but may endanger and threaten the peaceful existence of the sending State. His continued detention or incarceration by and within a foreign sovereignty unnecessarily exposes the Ambassador to physical abuse, as well as more subtle coercive forces and compromises the very security of the country he represents. Such a state of vulnerability and exposure of a sovereign State is inconsistent with and totally unacceptable for the continued growth and harmony of diplomatic relations between the two countries under international law.

The other fundamental assertion set forth by the agents of the sending State regarding the issue of the Ambassador's diplomatic immunity from prosecution is that the receiving State has the obligation under the general principles of international law to release the Ambassador and to dismiss all charges against him.

First of all, the sending State has the right to question the arrest and the prosecution of the Ambassador. Although it is the Ambassador's personal rights which are directly affected by his arrest and prosecution, customary international law upholds the rule that it is the State which has the capacity to present international claims.[24] The International Court of Justice in deciding the Mavrommatis Palestine Concessions case said: "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its rights to ensure, in the person of its subjects, respect for the rules of international law."[25]

Specifically, courts have previously held that States are entitled to raise the issue of the right to prosecute. This rule is premised on the widely accepted norm that a receiving State may exercise jurisdiction over a diplomat only when there has been no protest by the sending State.[26] In the cases cited to prove this concept, there was no protest lodged by the sending State. Consequently, the general rule is that the receiving State has no juris-

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[24] As exemplified in the Asylum case, ICJ Reports (1951), p. 266; Haya de la Torre case, ICJ Reports (1951), p. 71; Anglo-Iranian Oil Co. case, ICJ Reports (1952), p. 93; Ambatielos case, ICJ Reports (1953), p. 10; Nottebohm case, ICJ Reports (1955), p. 4.

[25] ICJ Reports, Ser. A, No. 2 (1924).

[26] Moore Digest of International Law, p. 311, In Re Argoud (1961) 15 I.L.R. 90, Afouneh vs. Attorney General, Cr. A 11/12 (1912) 9 PIR 63, 10 A.D. 327. In the case of

diction, unless the sending State acquiesces to the exercise of such jurisdiction.

Dickinson suggests the following provision, in the Harvard Research Convention on Jurisdiction with Respect to Crime which is a reflection of customary rule.

> "Art. 16: Apprehension in Violation of International Law – In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures."[27]

The lack of consent and the active protest of the sending State against the prosecution of their Ambassador preclude the receiving State from exercising effective jurisdiction.

Second, the release and dismissal of charges against a diplomat enjoying immunity is a well settled state practice. It is customary state practice that criminal charges brought against a diplomatic agent are dismissed. Except in cases where the sending State has waived jurisdiction, States have limited themselves to the remedies provided in the Vienna Convention on Diplomatic Relations and have consistently refused to prosecute whenever the claim of diplomatic immunity is raised.[28]

History is replete with examples to show this state practice.[29] A former Minister of El Salvador to Great Britain, while in transit in the United States was detained by local authorities in Maryland and fined for a traffic violation. Subsequently, the State Attorney General ordered a refund and declared that the arrest was improper.[30]

In Re Argoud, the accused, a French National, was abducted in Munich and brought to Paris. The Federal Republic of Germany, did not claim reparation, hence the Court, after recognizing Germany's right to such a claim, ruled that the illegal seizure did not rob the French court of its jurisdiction. In Afouneh vs. Attorney General . . . the Supreme Court stated: "Where a fugitive is brought back by kidnapping, or by other irregular means, and not under an extradition treaty, he cannot, although an extradition treaty exists between the two countries, set up in answer to the indictment the unlawful manner in which he was brought within the jurisdiction of the court. It belongs exclusively to the government from whose territory he was wrongfully taken to complain of the violation of its rights. . ."

[27] Harvard Research Draft Convention on Jurisdiction with Respect to Crime, p. 621, 653.

[28] Bland, Statow's Guide to Diplomatic Practice, 4th ed. (1957), p. 181.

[29] Lauterpacht, Oppenheim's International Law, Vol. 1, 8th ed. (1955), p. 791.

[30] G.H. Hackworth, Digest of International Law, vol. 4, p. 516.

In 1584, the Spanish Ambassador in England, Mendoza, plotted to depose Queen Elizabeth; he was ordered to leave the country. Similarly, the French ambassador in England, L'Aubespine, conspired against the life of Queen Elizabeth; he was simply warned not to commit a similar act again. In 1654, the French Ambassador in England, De Bass, conspired against the life of Cromwell; charges were dropped on the condition that he leave the country within twenty-four hours.[31]

In Great Britain in 1983, 100,000 fixed penalty motor car notices were cancelled and four violent crimes dismissed. In addition, twenty thefts and two drug offenses were not prosecuted because of claims of diplomatic immunity.[32]

Third, *Restitutio in Integrum* is the principal remedy in the present situation. The rules on international responsibility can be reduced to two propositions: (1) the breach of any international obligation constitutes an illegal act or an international tort, and (2) the commission of an international tort involves the duty to make reparation.[33]

The receiving State's breach of international law in prosecuting the Ambassador entails a state responsibility to make reparation. It is submitted that *restitutio in integrum* is the principal form of remedy; and reparation consists of the obligation to re-establish, as far as possible, the situation as it would probably have existed had the wrongful act not been committed.[34]

In the Lawler Incident, an escaped convict was arrested by the British warden across the border in Spain. The British officers acknowledged, ". . . the duty of the State, into whose territory the individual, thus wrongfully deported, was conveyed, to restore the aggrieved State, upon its request to that effect, as far as possible to its original position."[35]

This principle was also applied in the Martini Case, wherein reparation and restitution took the form of an annulment of a judicial decision contrary

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[31] Phillimore, Commentaries upon International Law, 3rd ed;. 4 vols. (1879-1888). Sections 160-165.

[32] C.J. Lewis, State and Diplomatic Immunity, 2nd ed. 91985), p. 174.

[33] Schwarzenberger, Manual of International Law, 1957, p. 173.

[34] Chorzow Factory Case (Indemnity) (1928) PCIJ Series. A No. 17, 29; ILC Draft Articles on State Responsibility. Articles 1-4, YBILC (1984, Volume I) 259. The Chorzow case involved Poland's expropriation of a factory at Chorzow in direct violation of the Geneve Convention of 1922 between Germany and Poland regarding Upper Silesia. The Court ruled that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."

[35] 1 McNair 78, See also Vicenti, 1 Hackworth, Digest of International Law, p. 621 (1920); and the Savarkar case, Scott, Hague Court Reports, p. 275.

to international law.[36] Furthermore, the International Court of Justice ordered the return of the articles seized by Thailand in Cambodian territory in violation of international law.[37]

For their part, most publicists, including Lauterpacht, Schwarzenberger and de Arechaga,[38] agree that *restitutio in integrum* is the principal remedy in cases of breach of international law. As was discussed earlier, the confirmed detention of the Ambassador places the national security of the sending State in jeopardy. The numerous state secrets and confidential information in his possession may be extracted from him by the authorities of the receiving State, especially since the relationship of the two countries is greatly strained. It is therefore imperative and in furtherance of this principle of *restitutio in integrum* that the Ambassador be released and all charges against him be dismissed.

By virtue of Article 41 of the Statute of the International Court of Justice, the sending State seeks, as a provisional measure, the immediate release of their Ambassador. Further, the sending State seeks the dismissal of all charges against their Ambassador and such other reliefs that the Court may deem proper and equitable in the premises.

With regard to the issue of the seizure of the funds of the receiving State by the government of the sending State, the proponents of the sending State posit that such an order is consistent with international law.

First of all, the imposition of economic sanctions is a valid means of reprisal recognized under international law. This is further submitted to comment as follows. The practice of States show that the imposition of economic sanctions is a valid means of reprisal. As early as in 1839, Great Britain, then involved in a dispute over alleged violations of treaty rights and obligations by the Kingdom of the Two Sicilies, placed an embargo on all vessels of that State found in ports under British authority and ordered the seizure of all Neapolitan and Sicilian ships.[39] The suspension by Chinese citizens of trade and business relations with Japan in 1931 was found by the Lytton Commission as a lawful reprisal.[40] The German Court in the Indonesian Tobacco Case declared that "reprisals are, however . . . a legal institution recognized in international law."[41]

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[36] 25 AJIL (1931) 554.

[37] (1962) ICJ 6.

[38] See Lauterpacht, Private Law Sources and Analogies in International Law (1927) p. 149, Schwarzenberger, International Law As Applied by International Courts and Tribunal, Vol. 1 (1957), pp. 653-657; de Arechaga, "International Responsibility," in Sorensen (ed) Manual of Public International Law (1968) 531, at pp. 564-568.

[39] Von Glahn and Gerhard, Law Among Nations, 3rd ed, p. 501.

[40] Von Glahn, op. cit. at p. 504.

[41] 28 I.L.R. 16, 38 Court Appeals, Bremen (1959).

Recent impositions of economic reprisals were made in 1973 when the Arab States imposed an oil embargo, and in 1981 when the United States froze the Iranian assets. All these sanctions assert the continuing legality of economic reprisals in international law.

The United Nations Charter prohibits reprisals involving the use of force but not reprisals involving the imposition of economic sanctions.

Article 2 (4) of the United Nations Charter provides:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."

Article 2 (4) prohibits the use of armed force, whether amounting to war or not. It does not, however, prohibit political pressure, such as the refusal to ratify a treaty or the severance of diplomatic relations, or economic pressure, such as a trade boycott or the blocking of a bank account.[42] A proposal by Brazil during the draft of Article 2 (4) that the provisions should include economic measures was rejected.[43] Moreover, learned publicists, such as Goodrich, Hambro, and Simons, unequivocally support the view that economic sanction does not come under the prohibition of Article 2 (4), which is to be understood as directed against the use of armed force.[44] Therefore, economic, as well as diplomatic and financial sanctions, reprisals, not involving the threat or use of military force, remains legal under the United Nations Charter.[45]

The 1970 Declaration of Principles of International Law only expressly prohibits reprisals involving the use of armed forces,[46] thereby supporting

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[42] D. J. Harris, Cases and Materials on International Law, 3rd ed. (1983), p. 641.

[43] 6 U.N.C.I.O., Documents 335.

[44] Charter of the United Nations (3rd ed., 1969), p. 49. Article 2(4) of the Charter:

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations.

See also Delanis, 12 Vanderbilt J. Trans. L. 101 (1979).

[45] Kunz, Josef L., "Sanctions in International Law," 54 Am. J. Int'l. Law 324, at p. 332.

[46] Par. 6 of the Section on the Use of Force, 1970 Declarations of Principles, G.A. Resn. 2625 (xxv), October 24, 1970: "States have a duty to refrain from acts of reprisal involving the use of force."

the view that Article 2 (4) of the United Nations Charter does not extend to economic pressure. The proposition that reprisals involving the use of force are illegal significantly excludes economic reprisals.

Secondly, the seizure order is a valid exercise of sovereign power consistent with international law. Customary international law recognizes economic sanctions as an act of complete State discretion.

Professor Charles J. Lewis defines the act of State as a prerogative act of policy in the field of foreign affairs performed by the government in the course of its relationship with another State or its subjects.[47]

The economic measures imposed by a State on another not only do not involve the use of force, but are usually carried out by a State by virtue of its sovereignty and discretionary power.[48] Since there are no treaty agreements that would otherwise restrict the sending State from exercising its full sovereign powers within its territory, it is free to impose economic restrictions consistent with its policy objectives.

The idea of sovereign equality does not deny the actual differences which exist among the States of the world.[49] Sovereign equality refers to legal equality but not economic equality. Existing economic inequalities may of course give a State an advantage over a weaker State. But it is difficult to see how such inequalities, which arise from differences in situation, can be evened out without changing the entire structure of international society and transferring powers inherent in States to international organizations.[50]

Ideas to restrict a State's ability to undertake economic sanctions have not attained the status of international law.. This is because there are no sufficient criteria in international law to determine what constitutes unlawful economic reprisals,[51] especially, when the acts sought to be restrained are inherent exercises of sovereignty. Any limitations arising from international law must not unreasonably interfere with the State's prerogative in achieving its economic and foreign policy objectives.[52]

The closest standard laid out with respect to necessity and proportionality of an act of State against another is the standard in the Caroline case

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[47] C. J. Lewis, State and Diplomatic Immunity, 2nd ed. (1985), p. 3.

[48] Whiteman, Digest of International Law, Vol. 5 (1963) p. 830.

[49] Jessup, Philip C., Ambassador at Large, "Democracy Must Keep Constant Guard for Freedom" address, Colgate University Conference on American Foreign Policy, Hamilton, NY., July 26, 1951, XXV Bulletin Dept. of State, no. 632, Aug. 6, 1951, pp. 220-221.

[50] See note 45, supra.

[51] D. W. Bowett, "Economic Coercion and Reprisals by States", 13 Ba. J.I.L. 1 at p. 4.

[52] M. Sornarajah, The Pursuit of Nationalized Property (1986), pp. 176-183.

and the Naulilaa case.[53] But the standard laid out alluded to armed agression and armed reprisal, respectively. Even with this standard, there has been no objective evaluation in international law with respect to legality of economic measures.[54] Hence, there is no rule in international law which declares unequivocally that economic reprisals are *per se* illegal.[55]

The economic sanction imposed by the sending State on the receiving State was a valid sovereign act within its jurisdiction and is consistent with international law. It was intended to compel a satisfactory settlement of the dispute created by the receiving State's unlawful behavior and to deter it from any future violation of international law. The sending State's reprisal to the receiving State's continued breach of international law, as well as the persistent refusal of the latter to redress its wrongful act, is a legal act under international law.

Finally, the agents for the sending State assert that the regional monetary union (IMU) enjoys no immunity within the territory of such state. Under international law, international organizations do not enjoy the privileges and immunities accorded to a sovereign state.

This is a result of the accepted principle that the attributes of legal personality of international organizations are limited by the treaty creating each of these international agencies.[56]

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[53] The Caroline Case, [29 B.F.S.P. 1137-1138, 30 B.F.S.P. 195-196], involved the seizure of an American ship, The Caroline, by the British during the Canadian rebellion in 1837. The ship was fired upon and subsequently sent over the Niagara Falls. Two US nationals were killed. The legality of the acts of the Great Britain were defended based on the standard of 'the necessity of self-defense, instant and overwhelming, leaving no choice of means and no moment of deliberation.' The Naulilaa Case, [2 R.I.A.A. 1012], concerned two German soldiers who were killed by Portuguese soldiers in the Portugese colony of Angola during the First World War. Portugal was then a neutral state. In retaliation, Germany destroyed Portugese properties, including the Fort at Naulilaa, in Angola. The Court, in reaching its decision set up the following standards for a valid reprisal:

1. A. previous act, contrary to international law was commited against the claimant;

2. An unsatisfied demand, hence the use of force is only justified if absolutely necessary; and

3. Proportionality between the reprisal and offense.

See also Tucker, Robert W., "Reprisals and Self-defense", 66 Am. J. Int'l. Law 586.

[54] Lillich, Richard B., "Economic Coercion and the New International Economic Order: A Second Look at Some First Impressions", 16 Va. J.I.L. 234 at pp. 238-239.

[55] Bowett, 13 ba. J.I.L. 1 at p. 9.

[56] Von Glahn and Gerhard, Law Among Nations, 3rd ed., p. 134.

According to Professor Brownlie. "the existence of a legal personality in an organization does not connote a whole range of legal capacities, and the constituent instrument remains the prime determinant of specific powers in the matter of relations with third States."[57] In relation with non-member States, the general rule is that only States who are parties to a treaty are bound by the obligations contained in it. This rule applies in principle to the consituent instruments of organizations of States.[58] An exception to the rule appears in Article 2 (6) of the Charter of the United Nations.[59] This exception rests on the special character of the United Nations as an organization concerned primarily with the maintenance of peace and security in the world and including in its membership the great powers, as well as the vast majority of States.[60]

Unlike the United Nations, international public corporations such as the International Monetary Fund and the World Bank do not possess the status accorded to international persons.[61] These entities are currently referred to as supranational corporations. Thus far, at least it has not appeared necessary to the community and immunities pertaining to international persons such as States.[62]

Therefore, if even entities such as the International Monetary Fund and the World Bank are not accorded privileges and immunities pertaining to international persons, the IMU, being a mere regional monetary union with only 61 member States,[63] cannot claim the privileges and immunities belonging to international persons.

Relatedly, the other reason that may be cited in support of the sending State's position, is that the recognition of IMU by such sending State as a regional monetary organization simply grants it legal personality. Any immunity accorded to international organizations is granted on the basis of treaty and not customary law.[64] The recognition of IMU is unlike that of a State. The recognition of a State accords privileges and immunities to that State by the recognizing State, because the privileges enjoyed by a State are inherent sovereign rights. Customary international law and general principles

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[57] Brownlie, Principles of Public International Law, 3rd ed. (1979), p. 692.

[58] Id. at p. 691.

[59] Article 2(6) states: "The Organization shall ensure that states which are not members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of peace and security."

[60] Id. at pp. 691-692.

[61] Von Glahn, op. cit., note 53 at p. 137

[62] Ibid.

[63] Compromis, p. 8.

[64] Brownlie, op. cit., note 54 at p. 682.

of international law recognize such rights. In the case of international organizations, customary international law does not recognize its immunities as a matter of right.[65] The recognition of IMU by the sending State as gional monetary organization merely grants it a legal personality but does not confer it immunity.

Second, the Vienna Convention on the Law of Treaties provides that third States are not bound by treaties without their consent.[66]

The only exceptions provided in the Vienna Convention on the Law of Treaties are the following:

a. Article 35 Treaties providing for Obligations for Third States: An obligation arises for a third State from a provision of treaty if the Parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing,
b. Article 36 Treaties providing for Rights for Third States: 1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides, and
c. Article 38 Rules in a Treaty becoming binding on Third States through International Custom: Nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

None of the three exceptions is applicable in this case. No obligations under the IMU treaties have been expressly accepted in writing by the sending State. Moreover, there is no customary rule conferring immunities upon international organizations.[67] The sending State, not being a party to any agreement with respect to IMU, is therefore not under the duty to grant immunity to IMU's assets.

Simply stated the IMU only enjoys the immunity granted in its treaty, and this only binds the States that are signatories to it.

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[65] Ibid.

[66] Art. 34. of the Vienna Conventions on the Law of Treaties provides: A treaty does not create either obligations or rights for a third State without its consent.

[67] See note 60, supra.

CONCLUSIONS

These, in sum, are the most compelling arguments that may be presented by the sending State in such a case of international law conflict. The subject matter and the multifarious issues anent to it are, no doubt, still subject to even more controversial interpretation. But this should properly be left to the otherwise *"laissez-faire"* and still future formation of international law precepts. This whole notation has been confined to the extant rules and principles of international law.

From the authorities and arguments herein presented, it is submitted that the Ambassador is immune from criminal prosecution under the Vienna Convention on Diplomatic Relations and that his continued detention is contrary to international law; furthermore, the IMU account assigned to the receiving State on an administered deposit account, in a bank within the jurisdiction of the sending State, is not immune from seizure.

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