TJR:jmb/510

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :

v. : CRIMINAL NO. 88-516-03

BAHRUDIN BIJEDIC, :
a/k/a "Burri"

GOVERNMENT'S MEMORANDUM OF
LAW IN RESPONSE TO DEFENDANT'S MOTION TO
RECOGNIZE THE APPLICABILITY OF CONSULAR IMMUNITY

INTRODUCTION

Defendant, Bahrudin Bijedic, a/k/a "Burri", was at all times relevant to this case, Consul-General of Yugoslavia. (Indictment ¶ 3). Bijedic has filed a motion requesting "this Court to enter an order the effect of which shall recognize, acknowledge and grant Mr. Bijedic the right to decide whether or not he will exercise the right of immunity appertaining to the Office of the Consulate General of Yugoslavia, for the charge now pending in this cause." (Motion, page 1).[1] In

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[1] Bijedic is incorrect in his assertion that he, as an individual, has the right to assert a waiver of immunity which may apply to him under a treaty between his government and the U.S. Bijedic's immunity can only be waived by his government since a treaty creates obligations only as between states and not between a state and the nationals of the other state. See United States ex rel. Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir.), cert. denied, 421 U.S. 1000 (1975). Moreover, Article 45 of the Vienna Convention on Consular Relations provides that it is the sending state that can waive immunity. This is because immunities exist to benefit states and not individuals. See Preamble to the Vienna Convention on Consular Relations.

support of his motion, Bijedic raises three issues, which the Government addresses in this Memorandum. The Government submits that one of the three issues cannot be decided at this time since it raises questions of fact which must be decided at the trial of the case.

For the convenience of the Court, the Government has filed an appendix with this Memorandum, which contains photocopies of some of the international law authority relied upon by the Government, which may not be easily accessible to the Court.[2] A copy of this Appendix has been served on counsel for Mr. Bijedic.

ARGUMENT

I. THE DEFENDANT IS NOT ENTITLED TO A HIGHER LEVEL OF IMMUNITY BECAUSE OF THE MOST FAVORED NATION CLAUSE OF THE U.S. - SERBIAN CONSULAR CONVENTION: THE GOVERNMENT OF YUGOSLAVIA HAS NOT FORMALLY REQUESTED MOST FAVORED NATION TREATMENT UNDER THIS CLAUSE. RECIPROCAL TREATMENT FOR U.S. CONSULAR OFFICERS IN YUGOSLAVIA, REQUIRED BOTH UNDER THE PLAIN MEANING OF THE TREATY AND CONSISTENT U.S. GOVERNMENT PRACTICE, HAS NOT BEEN PROVIDED, AND THE CLAUSE IS, THEREFORE, NOT IN EFFECT.

In general, international treaty obligations are state to state obligations and, absent specific provisions that permit an individual to invoke, only states can invoke the

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[2] References to the Appendix in this Memorandum are noted as "App.".

obligations, not individuals. In this case, the Government of Yugoslavia has not requested most favored nation (hereinafter "MFN") treatment for its consular officers in the United States. Even if it had done so, the United States Government has consistently limited the extension of most favored nation clauses relating to privileges and immunities in consular conventions to those situations in which the government of the other State provides formal, express assurances that it will grant to U.S. officers the privileges or immunities that it is seeking here. Again, such assurances have not been given by the Yugoslav Government and U.S. consular officers in Yugoslavia do not enjoy privileges and immunities beyond those set forth in the Vienna Consular Convention. The requirement of reciprocity is confirmed by the plain language of the U.S. - Serbian Consular Convention, U.S. practice under that convention, and practice under consular MFN clauses generally, and is consistent with the concept of reciprocity, which is a basic underlying principle integral to the ability of states to carry on diplomatic and consular relations.

A. THE PLAIN LANGUAGE OF THE U.S. - SERBIA CONSULAR CONVENTION STATES THAT THE MOST FAVORED NATION CLAUSE APPLIES RECIPROCALLY.

The U.S.-Serbia Consular Convention that the defendant is seeking to invoke in this case, provides in pertinent part:

> The consuls-general, consuls, vice-consuls and consular agents of the two High Contracting parties shall enjoy reciprocally, in the states of the other, all the privileges, exemptions, and immunities that are enjoyed by the officers of the same rank and quality of the most favored nation.

Article II, Convention Defining the Rights, Immunities and Privileges of Consular Officers, October 14, 1881, United States - Serbia, 22 Stat. 968, T.S. No. 320 (emphasis added). This Convention is still in force, see U.S. Department of State, Treaties in Force (Dept. of State Pub. 9430) at 252 (1988). A complete copy of the Convention is found in the Appendix (App. 56a-60a).

The language of the MFN clause quoted above clearly conditions the invocation of MFN rights on reciprocity. In interpreting treaties, the analysis of a treaty "must begin ... with the text of the treaty and the context in which the written words are used." Maximov v. United States, 373 U.S. 49, 53-54 (1963); Air France v. Saks, 470 U.S. 391, 396-97 (1985).[3] Here, the defendant has ignored the written text of the treaty in arguing that the clause applies automatically and

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[3] See also, Article 31(1) of the Vienna Convention on the Law of Treaties: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." This convention, 8 I.L.M. 679 (1969), is an international convention setting forth international law on, inter alia, the interpretation of treaties. The U.S. has signed, 9 I.L.M. 654 (1970), but has not yet ratified this treaty; it is awaiting Senate advice and consent to ratification. (App. 61a-64a).

is self-executing. (Defendant's motion at 6). The plain language of the treaty is, thus, contrary to this defendant's interpretation.

Moreover, no reciprocity actually exists in this case, because personnel serving at the U.S. consulate in Yugoslavia receive only the lower level of privileges and immunities provided by the Vienna Convention on Consular Relations.

Reciprocity is an appropriate and permissible standard under U.S. and international law for determining the treatment to be accorded consular personnel in the United States. The concept of reciprocity is deeply engrained in the custom and history of the exchange of diplomatic and consular representatives, arising out of the concept that the best method to assure desirable treatment for one's own government personnel in a foreign country is to treat that foreign country's representatives in this country reciprocally. Moreover, where desirable treatment is not given, often the best method of persuasion, short of breaking diplomatic relations, is to deny reciprocal treatment to that foreign state's representatives. One commentator notes that "the real sanction of diplomatic law is reciprocity. Every State is both a sending and a receiving State. Its own representatives abroad are hostages and even on minor matters their treatment will depend on what the sending State itself accords." E. Denza, Diplomatic Law 2 (1976).

That countries may choose to grant each other reciprocal advantages in the area of consular and diplomatic immunities that are not given to third states, is expressly addressed and permitted in the Vienna Conventions on both Consular and Diplomatic Relations. Thus, Article 72 of the VCCR provides:

> 1. In the application of the provisions of the present Convention the receiving State shall not discriminate between States.
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> 2. However, discrimination shall not be regarded as taking place:
>
> (a) where the receiving State applies any of the provision of the present Convention restrictively because of a restrictive application of that provision to its consular posts in the sending State;
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> (b) <u>where by custom or agreement States extend to each other more favorable treatment</u> than is required by the provisions of the present Convention.

(Emphasis added.) <u>See also</u> Article 47 of the Vienna Convention on Diplomatic Relations (VCDR), done at Vienna, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 (same principle applies in diplomatic relations). Thus, the VCCR permits states to extend to each other higher immunities than those provided for in the VCCR itself, but very clearly envisions that such extensions are to be granted on a

reciprocal basis. In addition several U.S. statutes explicitly permit and authorize more or less favorable treatment for diplomatic and consular personnel and missions based on reciprocity. See 22 U.S.C. 254c (section 4 of the Diplomatic Relations Act of 1978), 22 U.S.C. 4301 et seq. (the Foreign Missions Act).

B. THE U.S. GOVERNMENT HAS MAINTAINED A CONSISTENT POLICY AND PRACTICE OF PERMITTING THE EXTENSION OF MOST-FAVORED NATION TREATMENT UNDER CONSULAR CONVENTIONS, INCLUDING THE SERBIAN CONVENTION, ONLY AFTER THE OTHER STATE HAS PROVIDED FORMAL WRITTEN ASSURANCES OF RECIPROCAL TREATMENT TO U.S. PERSONNEL SERVING IN THAT STATE.

United States Government statements of policy and practice regarding most favored nation clauses in consular conventions are entitled to great weight in the determination of the proper interpretation and application of treaty provisions. Sumitomo Shoji America, Ltd., Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the government agencies charged with their negotiation and enforcement is entitled to great weight.") See also, O'Connor v. United States, 479 U.S. 27, 32-33 (1986) (consistent application of an international agreement by the Executive Branch is a factor entitled to great weight); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

As set forth in Declaration of Mary V. Mochary, Principal Deputy Legal Adviser of the Department of State, attached hereto to as Exhibit "A", that consistent interpretation has been to accord MFN treatment under consular conventions on the basis of actual reciprocity, and only after the other government has formally assured the United States that reciprocal treatment is granted. This has been the government's interpretation not only for expressly reciprocal agreements like the U.S. - Serbia Convention, but even for those agreements that do not include reciprocity in the text.

In addition to consular treaties, MFN clauses frequently appear in commercial treaties, where they provide for such things as MFN treatment for import of the goods of one party into the territory of the other, or that nationals are entitled to MFN treatment with regard to doing business in the territory of the other. Until 1923, the general practice of the U.S. Government was to consider all MFN clauses in U.S. international agreements as "conditional," that is, as requiring reciprocity on the part of the country claiming the benefits of a treaty between the United States and a third country. See generally, 5 G. Hackworth, Digest of International Law, 271-75 (1943) (App. 187a-192a). In 1923, however, the U.S. changed its position and adopted the unconditional most favored nation clause in its commercial treaties. This change was occasioned by the U.S. belief that

the principle of automatic equality of treatment and one uniform practice for all trading partners was in its commercial interest. Id. at 271-272.

The U.S. Government, however, did not change its view that MFN clauses in consular conventions were conditioned on the basis of reciprocity. Thus, in 1931, the Department of State stated: "The recent change in our treaty-making policy as regards matters of commerce does not affect earlier treaties which do not contain these unconditional most-favored-nation clauses .... At no time have the favored national provisions in our Consular Conventions been construed by the Department as other than conditional provisions." Id. at 274. In response to a 1931 inquiry from Switzerland about the application of an MFN clause in an 1850 treaty with that country, the Department wrote:

> This Department has consistently held that the most-favored-nation clause with respect to rights and privileges of consular officers does not embrace unconditionally specific rights and privileges which are granted on the basis of reciprocity to consular officers of third countries, but that the right to enjoy such specific rights and privileges is embraced in the most-favored-nation clause in the event that the country whose consular officers assert such rights or

> privileges thereunder accords in fact the same rights and privileges to American consular officers in their territories.

Id. at 275.[4]

In addition to the Swiss inquiry, there are numerous instances of U.S. refusals to extend automatically MFN treatment to consular officers on the basis of MFN clauses in consular conventions, despite the change in practice after 1923 with regard to commercial MFN clauses. The Digest of International Law lists examples from Italy (1925), France (1926), Denmark (1926), Spain (1927), Latvia (1928), Italy (1930), and Japan (1939). See, 4 G. Hackworth, Digest of International Law, 701-05; 784-85 (1942) (App. 178a-186a).

Of particular importance is an instance in 1930 involving interpretation of the MFN clause of the U.S. - Serbia Consular Convention, the clause at issue in this case. In a diplomatic note to the Department of the Yugoslav Legation regarding the privilege of duty free importation of articles

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[4] As the agency of the U.S. government responsible for foreign affairs, the Department of State is the official recipient of correspondence and communications from foreign governments on matters concerning treatment of foreign diplomatic and consular representatives in the United States. This channel of communication is expressly recognized in international law as the appropriate means in Article 41(2) of the VCDR, which provides that "all official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through their Ministry for Foreign Affairs of the receiving State...." The Department of State is also responsible for negotiating and implementing international agreements in this area. Thus, the incidents of U.S. practice and policies in this area are contained almost exclusively in Department of State records and publications.

for personal use, the Department cited Article II of the 1881 Convention, and stated:

> The Department of State does not, however, consider that Yugoslav consular officers assigned to the United States are entitled under the most-favored-nation clause of the Convention to exemption from duty on articles imported for their personal or family use unless it be shown that a like privilege is extended to American consular officers in Yugoslavia. Upon receipt of information from the Yugoslav Legation that American consular officers assigned to Yugoslavia are accorded this privilege, the Department of State will take steps with a view to having such benefit extended to Yugoslav consular officers assigned to the United States, under the most-favored-nation clause of Article II of the Consular Convention concluded between the United States and Serbia in 1881.

Id. at 704 (emphasis added).

The majority of consular conventions in force containing MFN clauses were undertaken by the U.S. in the latter part of the 19th century and the early part of the 20th century. It is important to understand that during this period essentially the same level of limited immunities were afforded all foreign consular representatives servicing at consulates in the Unites States.[5]

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[5] Consular representatives traditionally have received lower levels of privileges and immunities than diplomatic representatives, as a result of historically different functions performed by consular officers, which did not require a high degree of protection. Thus, while most diplomatic personnel received full criminal immunity, extensive civil

The incentive to invoke MFN clauses increased greatly in the 1960s. At that time the U.S. ratified several bilateral consular conventions which dramatically increased privileges and immunities for consular personnel of certain states, such as the U.S.S.R. and Poland, where it was clearly in the national interest of the U.S. to assure a higher level of privilege and immunities for U.S. consular officers assigned to these states. See, L. Lee, Vienna Convention on Consular Relations, 133-34 (1966).[6] This meant that MFN clauses in consular conventions took on a new importance, because these clauses, if properly invoked, could be a vehicle through which virtually complete immunity from U.S. jurisdiction could be granted. As the grant of privileges and immunities of any type in the United States creates an extraordinary situation where the recipient is raised above the law applicable to ordinary residents of the U.S., particularly so where the recipient receives complete immunity, the U.S. is careful to extend such

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immunity, and complete inviolability from arrest or detention, consular personnel in the U.S. have enjoyed only official acts immunity, and limited, if any, inviolability. These differences have been codified in the Vienna Conventions on Diplomatic and Consular Relations, which are now the law of the United States on diplomatic and consular immunity, in the absence of any special agreement.

[6] Lee points out that "the conclusion of the Soviet-United States Consular Convention in 1964 was an important landmark in consular law for introducing a revolutionary feature to the consular immunity from local jurisdiction: Henceforth, consular officers and employees who are nationals of the sending state will not only be immune from local jurisdiction with respect to official activity ... but also 'enjoy immunity from the criminal jurisdiction of the receiving state.'")

privileges and immunities only where there is a clear basis under treaty or express grant of legislation in absence of a treaty. Thus, the requirement that reciprocity be guaranteed as a condition to extend most favored nation treatment in the area of consular privileges and immunities continued in U.S. practice and policy as a means of ensuring the clear legal authority to do so.

The Executive and Congress were well aware that these new bilateral agreements might increase the interest of other governments in invoking the MFN clauses to attain higher privileges and immunities. The U.S. Government made clear to Congress that it would continue to accord MFN treatment only where conditions of actual reciprocity were met. See Consular Convention with the Soviet Union: Hearings Before the Senate Comm. on Foreign Relations, 89th Cong., 1st Sess. 23-24 (1965) (App. 262a-264a); Consular Convention with the Soviet Union: Hearings Before the Senate Comm. on Foreign Relations, 90th Cong., 1st Sess. 3-4, 12, 18, 143, 159, 299 (1967) (App. 265a-275a).

Other contemporaneous U.S. statements and practice make clear that the U.S. Government continued to require the guarantee of reciprocal treatment before according another government's consular personnel most favored nation treatment. For example, during Senate consideration of the Vienna Convention on Consular Relations in 1969, the Department of State was asked about the effect of MFN clauses on provisions

in that treaty. In responding that bilateral MFN clauses would not affect the VCCR, the Department specifically stated "that many United States bilateral consular treaties having the most-favored-nation clause specifically require reciprocity before such clause takes effect. Other earlier United States treaties do not have such a condition of reciprocity. The Department of State has, however, for many years made reciprocity a prerequisite for according such most-favored-nation treatment with regard to these earlier treaties." S.Exec. Rep. No. 91-9, 91st Cong., 1st Sess. 19 (1969) (App. 280a).[7]

Recent examples of inquiries from foreign governments regarding MFN clauses and the treatment accorded thereunder, and Department of State responses to those inquiries, are

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[7] Several other contemporaneous examples are set forth in International Law Commission [ILC] documents. (The International Law Commission is a 25 member commission established in 1947 by the United Nations General Assembly to promote the progressive development of international law and its codification.) In discussions of an ILC working paper on MFN clauses, the U.S. delegate noted that "the paper referred to the shift of the United States of America from the conditional to the unconditional type of most-favored-nation clause. That departure from previous practice related to commercial relations and had not been accompanied by a similar shift with regard to consular relations." [1968] 1 Y.B. Int'l L. Comm'n 186, U.N. Doc. A/CN.4/SER.A/1968. (App. 209a-210a). A 1969 ILC report on the MFN clause discussed the clause in treaties relating to consuls, took note that the practice of referring to reciprocity in such MFN clauses is widespread under international law, and recognized that "the conditional interpretation of the most-favored-nation clause still prevails in the practice of the United States, inasmuch as most-favored-nation treatment is subject to materially reciprocal treatment being accorded by the country invoking the provision." [1969] 2 Y.B. Int'l L. Comm'n 166-67, U.N. Doc. A/CN 4/213 (App. 211a-215a).

further evidence that formal assurances of reciprocity are required before the U.S. will extend MFN treatment.

The U.S. Government accorded MFN treatment in two cases in which the foreign government expressly guaranteed that the U.S. would receive the same treatment in its country. An Exchange of Notes (App. 286a-288a) contains the request of the Government of the Philippines to invoke an MFN clause for heightened immunity for its consular officers in the United States, and confirmed that "consular officers of the United States enjoy reciprocally in the Philippines rights, privileges, exemptions and immunities no less favorable in any respect than those that are enjoyed by Polish consular officers in the United States." The U.S. response provides that the request "is granted on the basis of the representations and guarantee of reciprocity set forth in the Embassy's note." See also, M. Nash, 1978 Digest of United States Practice in International Law, 605-06 (1980) (App. 199a-203a). (MFN treatment for property tax exemption granted to Chile, on assurances of reciprocal treatment; U.S. stated in its note of response that "continued exemption ... will be based upon the strictest reciprocity.") These examples illustrate, again, the long held principle that foreign governments must formally request the extension of MFN treatment and provide guarantees

of reciprocal treatment in order to receive MFN treatment for consular officers.[8]

The U.S. has declined to extend MFN treatment in other cases. In 1975, the Austrian Government sent a diplomatic note to the Department seeking heightened immunity for its consular officers in the United states on the basis of an MFN clause. The U.S. responded that it would be prepared to grant such immunity "on the condition that United States consular personnel serving in Austria will receive the same immunities requested for Austrian consular officers in the United States." E. McDowell, 1975 Digest of International Law 257-58 (1976) (App. 196a-198a). As described in Cocron v. Cocron, 84 Misc. 2d 335, 338, 375 N.Y.S. 2d 797, 803-04 (1975), the Austrian Government's response did not acknowledge

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[8] An important practical reason underlying the U.S. insistence on formal exchanges of notes with foreign governments is the need for the U.S. to have a record of the level of privileges and immunities to which a foreign state's officials are entitled. Department of State publications and officials provide constant advice to law enforcement authorities and the public on treatment to be accorded diplomatic and consular officials in the United States. For example, the Department of State publishes a booklet listing recognized consular officials in the United States twice a year, and sets forth the immunities accorded consular officers in its Preface. This preface specifically lists those states with which we have entered into special bilateral conventions or reciprocal agreements under MFN clauses providing for greater privileges and immunities for consular personnel; Yugoslavia is not one of those states. Foreign Consular Offices in the United States, Department of State Publication 7846, at i-ii (September, 1988) (App. 98a-100a). See also, Guidance for Law Enforcement Officers, Department of State Publication 9533, at 7 n.5 (March 1987) (App. 72a-97a) (listing states whose consular officers are accorded special treatment and noting that the U.S. has entered into a bilateral agreement with the Philippines to provide greater immunity to consular officers).

reciprocal treatment for U.S. consular personnel in Austria, but objected to the Department's requirement of reciprocity. The court noted that: "it is clear that, based upon the above notes, the State Department has not extended immunity to the defendant in this case." However, because the State Department did not take a formal position in the case denying immunity under the MFN clause to the defendant, the court undertook its own examination of the question, finding:

> First, the most-favored-nation clause does not embrace, unconditionally, the specific rights and privileges which are granted on the basis of reciprocity to the consular officers of third countries; the country whose consular officers assert such rights and privileges must, in fact, accord the same rights and privileges to American consular officers in their territories. The United States Department of State has interpreted the most-favored-nation clause of consular treaties as containing such a qualification of reciprocity even though not expressly included in the treaty (47 Iowa L.Rev. 672). This interpretation is in accord with the State Department's position in this case as regards the most-favored-nation clause of the United States - Austria Treaty. Thus, until the Austrian government acknowledges reciprocity, this most-favored-nation clause is not to be given effect here so as to confer the immunity requested by the defendant.

Id. 84 Misc. 2d at 339-40; 375 N.Y.S. 2d at 805 (emphasis added).

Other recent examples of U.S. Government practice include correspondence with Thailand in 1981, (App. 282a-285a), in which the U.S. responded to a request from Thailand to extend MFN treatment for sales tax exemption by requiring an assurance of reciprocity, and correspondence with Sweden in 1988, (App. 289a-294a), in which the U.S. responded to a request for heightened immunity by pointing out the requirement for reciprocity.

In addition, the Fourth Circuit recognized U.S. practice with regard to the condition of reciprocity in refusing to extend heightened privileges and immunities to a consular officer from Thailand convicted on drug charges. U.S. v. Chindawongse, 771 F.2d 840, 848 n. 10 (4th Cir. 1985), cert. denied, 474 U.S. 1085 (1986).[9]

As set forth in the Declaration of Mary V. Mochary, attached as Exhibit "A", the Government of Yugoslavia has never invoked the most favored nation clause of the United States -

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9 But see Risk v. Norway, No. C-88-1435-WWS, slip. op. (N.D.Cal. filed Aug. 5, 1988), appeal filed, (App. 330a-334a) where the District Court found that a Norwegian consular officer was entitled to heightened privileges and immunities under an MFN clause. Although the Government believes this case was incorrectly decided, the case is also distinguishable. The Department of State had issued to the Norwegian consul a specific document purporting to entitle him to MFN treatment with regard to privileges, the Government of Norway arguably invoked the MFN clause by filing a statement in the case providing that U.S. consular officers enjoy heightened immunity in Norway, and the court rejected Chindawongse because it believed there was no authority for the Chindawongse court's statement on State department practice. Cf. U.S. v. Tarcuanu, 10 F.Supp. 445 (S.D.N.Y. 1935) (court permitted consul of Romania to invoke MFN clause, without mention of whether reciprocity existed).

Serbian Convention. Nor has the Government of Yugoslavia ever provided the necessary formal assurances guaranteeing that United States personnel serving at U.S. consulates in Yugoslavia are entitled to reciprocal treatment. Under these circumstances, consular officers of Yugoslavia in the United States such as defendant Bijedic are entitled only to the privileges and immunities accorded to consular officers by the Vienna Convention on Consular Relations.

C. MOST FAVORED NATION TREATMENT CAN ONLY BE INVOKED BY THE GOVERNMENT OF YUGOSLAVIA, AND NOT BY AN INDIVIDUAL.

In general, a treaty creates obligations only as between the states that are parties and not between one party and the nationals of the other party, or between the nationals of the two parties. Thus, absent an express provision in a treaty, an individual cannot, on his/her own, seek to activate a portion of the treaty. Absent a provision to the contrary, international agreements, even those directly benefiting private persons, do not create private rights or provide for a private cause of action in domestic courts. A. McNair, Law of Treaties 323 (1961); 14 M. Whiteman, Digest of International Law 293-94 (1970) (App. 193a-195a); Restatement (Third) of Foreign Relations Law of the United States, section 907 comment a and reporter's note 1 (1986). As stated in United States ex. rel. Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir.), cert. denied, 421 U.S. 1001 (1975): "[E]ven where a treaty provides certain

benefits for nationals of a particular state - such as fishing rights - it is traditionally held that 'any rights arising from such provisions are, under international law, those of states and ... individual rights are only derivative through the states.'", quoting Restatement (Second) of the Law of Foreign Relations, § 115, comment e (1965). Thus, treaties do not generally confer privately enforceable rights in the absence of treaty language clearly manifesting such intent. See generally, Head Money Cases, 112 U.S. 580, 598-99 (1884); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) Bork, J. concurring), cert. denied, 470 U.S. 1003 (1985); Dreyfus v. von Finck, 534 F.2d 24-29 (2d Cir. 1976); L. Henkin, Foreign Affairs and the Constitution 224 (1972).

The U.S. - Serbia consular convention does not provide the individual consular officer with the right to invoke any of its provisions. Although consular officers would derive benefits from invocation of the MFN clause of the convention, it is clear that such benefits are not granted for the personal benefit of the officer, but to ensure that each state is able to perform efficiently the functions of the consular mission in the other state. Accordingly, the defendant is not the proper entity to invoke the MFN clause of this convention.

II. DEFENDANT'S CLAIM OF IMMUNITY UNDER THE VIENNA CONVENTION ON CONSULAR RELATIONS MUST BE DENIED

A. Introduction

Defendant's counsel has filed a motion requesting this court to enter an order holding that Bijedic enjoys immunity from prosecution under the Vienna Convention on Consular Relations, 21 U.S.T. 77 (App. 7a-55a). The Government submits that defendant does not have immunity under this Treaty for his conduct in this case. However, for the reasons that follow, the Court cannot decide, at this pre-trial stage, the question of whether the defendant is immune from prosecution under the Vienna Convention on Consular Relations. This is because the question of immunity raises factual questions which are intermeshed in the general issue to be tried to the jury, and thus, pursuant to Federal Rule of Criminal Procedure 12(b), cannot be determined prior to trial.

B. Vienna Convention on Consular Relations

As is conceded by the defendant, Bahrudin Bijedic does not enjoy diplomatic status in the United States, which would confer upon him immunity for the commission of any crimes in the United States. See Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, 3240; U.S. Department of State Treaties of Force (Dept. of State Pub. 9430) at 289 (1988) (App. 65a-71a). The official records of the Department of State indicate that Bijedic is not a diplomat. Mr. Bijedic,

however, was recognized by the United States as Consul General of Yugoslavia at Chicago, on January 21, 1986 and continued to serve in that capacity at least until his arrest on December 1, 1988. (See Certification of Richard Gookin, Associate Chief, Protocol, the original of which has been filed with the Clerk of Court, a copy can be found at App. 1a-6a).

The Vienna Convention on Consular Relations, 21 U.S.T. 77, T.I.A.S. 6820 (1963) (the "VCCR"), is a multilateral convention to which approximately 140 states, including the United States and Socialist Federal Republic of Yugoslavia, are parties. It codifies international law regarding consular functions and immunities. The VCCR is binding on the United States effective December 24, 1969. See U.S. Department of State, Treaties in Force (Dept. of State Pub. 9430) at 279 (1988) (App. 68a).

Article 43 of the VCCR sets forth the immunity from jurisdiction accorded consular officers in the United States:

ARTICLE 43

Immunity From Jurisdiction

> 1. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.

Thus, in order to determine whether a consular officer is immune in a particular case, the Court must determine whether the acts alleged are "acts performed in the exercise of

consular functions". The Vienna Convention defines consular functions in Article 5, which provides:

CONSULAR FUNCTIONS

Consular functions consist in:

(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;

(b) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;

(c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested;

(d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;

(e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;

(f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an admini-

strative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State;

(g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending State in cases of succession mortis causa in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;

(h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;

(i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals, are unable at the proper time to assume the defence of their rights and interests;

(j) transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending

State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State;

(k) exercising rights of supervision and inspection provided for in the laws and regulations of the sending State in respect of vessels having the nationability of the sending State, and of aircraft registered in that State, and in respect of their crews;

(l) extending assistance to vessels and aircraft mentioned in subparagraph (k) of this Article and to their crews, taking statements regarding the voyage of a vessel, examining and stamping the ship's papers, and without prejudice to the powers of the authorities of the receiving State, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen in so far as this may be authorized by the laws and regulations of the sending State;

(m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

Whether a particular action or activity would be considered an exercise of a person's consular functions is a matter for judicial determination. See United States v. Chindawongse, 771 F.2d 840, 848 (4th Cir. 1985), cert. denied, 474 U.S. 1085 (1986); Milhaupt, The Scope of Consular Immunity under the Vienna Convention on Consular Relations: Towards a Principled Interpretation, 88 COLUM.L.REV. 841 (1988) (App. 101a-123a). The State Department has also opined that it is for the courts to determine the question of whether a particular act by a consular officer was within his "official function." In October of 1978, the Embassy of the Socialist Federal Republic of Yugoslavia asked the Department of State for information relating to the scope of consular immunity for official activities, referred to in Article 43 of the VCCR. In essence, Yugoslavia inquired how the applicability of Article 43 of the VCCR to a particular case might be determined, construed, or interpreted. The Department of State, replied, in an aide memoire dated October 28, 1978, which also discussed the threshold question of recognized or accepted consular functions under international law. Its substantive paragraphs read:

* * *

> The Department of State reads this provision as requiring judicial and administrative authorities in the receiving state to refrain from exercising jurisdiction over consular officers and consular employees once it is established that the activity giving rise to

> the judicial or administrative proceeding was performed in an official capacity and in pursuit of the exercise of accepted consular functions.
>
> Regarding the scope of the immunity provided, the Department regards itself as being in a position to give advice to sending states concerning whether a particular activity qualifies as a recognized consular function. Reference is made for this purpose to applicable international agreements, whether of a bilateral or multilateral nature. A listing of consular functions is, for example, contained in article 5 of the Vienna Convention. Such a list would be supplemented by any consular functions recognized as acceptable through mutual agreement between two states or through mutually recognized state practice.
>
> Nevertheless, it is the Department's view that, in the vast majority of cases, it is only the trier of facts which is in a position to make the determination as to the "official" nature of the activity. To this end, the State Department does not normally make a certification or other finding, intended to be binding on the affected receiving state authority, that any particular activity by a consular official does or does not constitute an "official act."

M. Nash, 1978 Digest of United States Practice in International Law, 629-630 (1980) (emphasis added) (App. 199a-203a).[10]

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[10] As noted earlier in this Brief, the courts have stated that pronouncements and interpretations given to treaty provisions by the Department of State are entitled to great deference. Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982); United States v. Guinand, 688 F.Supp. 774, 775 (D.D.C. 1988).

C. The Issue of Whether Bijedic's Actions Were Performed in the Exercise of Accepted Consular Functions Must be Deferred Until Trial.

Begin here

The Government will prove at trial that the defendant, Bahrudin Bijedic, knowingly joined a conspiracy to launder United States currency belonging to Americans through Yugoslavia, which he believed to be derived from unlawful activity. Bijedic knew that the purpose for laundering the money through Yugoslavia was to assist the Americans to evade the payment of taxes due to the United States and to avoid government reporting requirements relating to currency transactions. In August of 1988, Bijedic contributed to conspiracy by knowingly permitting coconspirators to store $500,000 in United States currency at the Yugoslavian Consulate in Chicago and by permitting them to affix consulate seals on a trunk storing the cash. In addition, on August 11, 1988, Bijedic personally escorted the $500,000 in cash to Chicago's O'Hare International Airport, to assure that the currency was placed with the crew's luggage on a Yugoslavian-owned airplane, which later transported the money to Yugoslavia. The evidence will further show that on December 1, 1988, the day of his arrest, Bijedic and his co-conspirators attempted to assist Americans to launder an additional $2,000,000 in cash through Yugoslavia for the purpose of preventing the payment of taxes to the United States Government and to conceal the true source of the money. This conduct by Bijedic was obviously not

performed in the exercise of a consular function, as recognized in Article 5 of the VCCR or by accepted practice in the international community.

There is little case law that serves as a guide in developing useful criteria for determining whether particular criminal conduct is within the scope of a consular function. In the context of a civil case, the Department of State has advised a court that an act is performed in the exercise of a consular function, first, if there is a logical nexus between the act and the function, and second, if the act can reasonably be considered part of a course of action appropriate to the performance of the function. See Brief of the United States as amicus curiae in Gerritsen v. Escobar y Cordova, No. CV 85-5020, page 12-13 (C.D. Cal., filed August 27, 1988) (App. 295a-315a).[11] Therefore, while an act amounting to a serious crime would not be, per se, outside the scope of a consular function, the seriousness of the crime would be a fact the court could weigh in determining whether the act was within the scope of the consular function. Cf. L. v. The Crown, 68 I.L.R. 175 (New Zealand Supreme Court 1977) (App. 124a-129a) (consular official's sexual assault against passport applicant found to

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[11] In a Statement of Interest of the United States filed in the case of Indiana v. Strom, No. 45 603-8801-CF-00010 (Super. Ct., Ind.), the government similarly advised the court that in deciding a claim of immunity under the VCCR, the court should determine "(1) whether the alleged conduct falls within the outer perimeter of a recognized consular function; and (2) whether there is a clear logical nexus between the alleged conduct and a recognized consular function." (App. 328a-329a).

be "as unconnected with the duty to be performed by the consular officer as an act of murder.") In determining the applicability of "official acts" immunity, the court should consider all of the facts and circumstances as a whole; the absence or presence of any one factor should not be determinative. Therefore, considering all the facts of a particular case, an act that substantially deviates from a course of action appropriate to the performance of the function would not be an act performed in the exercise of that function.

Bijedic argues that the actions for which he is accused fall within two distinct functions recognized by Article 5 of the VCCR. Specifically, the defendant cites to subparagraphs (b) and (e) of Article 5, which states that consular functions consist of:

> (b) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;
>
> (e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;

With respect to the function recognized in subparagraph (b), it is clear that Bijedic's conduct does not further economic and commercial relations between the United States and Yugoslavia. If anything, Bijedic's conduct was

designed to harm relations between the two countries, since Bijedic was informed that the purpose of sending the large sums of cash to Yugoslavia, was to evade federal currency reporting requirements and payment of income taxes owed to the United States. Regarding the second function cited by Bijedic, it is also evident that Bijedic was not assisting nationals of his country, but rather United States citizens, engaging in criminal activities and seeking to launder money. It is true that one of the defendants, Vjekoslav Spanjol, holds both United States and Yugoslavian citizenship, but the evidence will show that Bijedic knew the money being sent to Yugoslavia belonged to the Americans, not Spanjol. Furthermore, Bijedic's actions cannot reasonably be considered part of a course of action appropriate to the performance of either of the two functions cited by the defendant. On the contrary, Bijedic's actions substantially deviate from a course of action appropriate to the performance of any function recognized by the VCCR. If Bijedic's conduct were construed to be immunized, it could permit consulates of foreign governments located in the United States to become havens or conduits through which American drug dealers and gangsters would launder their money. Some countries, hungry to receive hard United States currency and hostile to the United States, would be eager to assist Americans in hiding their ill-gotten gains from the United States government.

Consular immunity under the VCCR is not intended to benefit the individual. The VCCR states in its Preamble that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States."[12] Thus, one commentator has suggested that the determinative question under the VCCR "is not whether the defendant consular officer deserves immunity solely because he would have been unable, without the act, to perform the function, but whether the consular process would be impeded if consular officers were amenable to the jurisdiction of the receiving state for such acts." See Milhaupt, supra, 88 COLUM.L.REV. at 857-58 (emphasis in original). Application of this principle leads one to the inescapable conclusion that protection of the consular process does not require granting immunity to a consular officer who knowingly conspires to assist Americans to launder United States currency to avoid the payment of taxes owed to the receiving state. Cf. United States v. Chindawongse, 771 F.2d 840, 848 n.10 (4th Cir. 1985), cert. denied, 474 U.S. 1085 (1986) (no immunity under VCCR for conspiracy to distribute heroin); United States v. Coplon, 84 F.Supp. 472, 474 (S.D. N.Y. 1949) (no immunity, pursuant to 22 U.S.C. § 288d, for United Nations employee for conspiracy to

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[12] Consistent with this Preamble, Article 55 of the VCCR makes it clear that it is each consular officer's duty "to respect the laws and regulations of the receiving State."

commit espionage, since acts did not fall within defendant's function as employee of the U.N.).

The immunity issue before the Court, however, is a mixed question of law and fact, not a purely legal one. To determine the applicability of immunity under the VCCR, the Court must apply the facts developed at trial to the language of the Treaty and the interpretations of that document rendered by other courts and the Department of State. See Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963); Brown v. Allen, 344 U.S. 443, 507 (1953). The Court cannot perform that task at this stage, but must wait at least until the close of the Government's case-in-chief.

Federal Rule of Criminal Procedure 12(b)(1) states that: "Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion." A defense is thus "capable of determination" if trial of the facts surrounding offense would be of no assistance in determining the validity of the defense. United States v. Covington, 395 U.S. 57, 60 (1969). Rule 12(e) allows the district court, "for good cause", to postpone determination of the motion to the trial. In United States v. Gallagher, 602 F.2d 1139 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980), the Third Circuit cautioned trial judges to consider on a motion to dismiss the indictment, only those objections that are "capable of determination without the trial of the general issue," and that evidentiary questions should

not be determined at that stage. 602 F.2d at 1142, citing United States v. Knox, 396 U.S. 77 (1969).

This issue of "official acts" immunity is directed to the Court's jurisdiction. See Article 43 of the VCCR. When an objection to the jurisdiction of the Court can only be determined by the existence of certain facts, not admitted by the defendant, the determination of jurisdiction should be deferred until the trial of the merits. Wright v. United States, 158 U.S. 232, 238 (1895); United States v. Ayarza-Garcia, 819 F.2d 1043, 1048 (11th Cir.), cert. denied, ____ U.S. ____ 108 S.Ct. 465 (1987); Price v. United States, 68 F.2d 133, 134 (5th Cir.), cert. denied, 292 U.S. 632 (1934). In United States v. Bryan, 72 F.Supp. 58 (D.D.C. 1947), aff'd 167 F.2d 241 (D.C. Cir.), cert. denied, 334 U.S. 843 (1948), the Court ruled that when a motion to dismiss an indictment raises a mixed question of law and fact, such as the issue before this Court, it should not be decided at the pretrial stage, because such "matters can be determined only at the trial on the facts". 72 F.Supp. at 64.

The Government's request to the court that it defer ruling on the immunity issue under the VCCR until the trial of this case is consistent with a recent federal criminal case against a consular officer. In United States v. Chindawongse, 771 F.2d 840 (4th Cir. 1985), cert. denied, 474 U.S. 1085 (1986), the defendant, the vice-consul of Thailand in Chicago, was convicted after a jury trial. In its opinion, the Court of

Appeals addressed the defendant's immunity under the VCCR based on the entire evidence at trial. It does not appear that the issue was decided by the district court prior to trial. There have been decisions in other contexts where courts have decided the immunity issues under the VCCR prior to trial, but in those cases, the facts pertinent to the determination of immunity were stipulated to by the parties or were otherwise undisputed. See Gerritsen v. Escobar y Cordova, slip op., No. CV 85-5020 (C.D. Cal., filed September 16, 1988) (App. 130a-146a); Commonwealth v. Jerez, 390 Mass. 456, 457 N.E. 2d 1105 (1983); Indiana v. Strom, slip op., No. 45603-8801-CF-00010 (Super. Ct., Ind., filed September 30, 1988) (App. 147a-159a); Vermont v. Kent-Brown, slip op., no. 1501-4-88 (Vt. Dist. Ct., filed July 15, 1988) (App. 160a-173a). In the case before the court, however, the defendant is charged with a large-scale and complex conspiracy to defraud the United States, in violation of 18 U.S.C. § 371. Proof of the defendant's role in this offense, and that the offense did not involve the performance of consular functions, will depend on the presentation of testimony, documents and numerous tape recordings. This evidence, and inferences to be drawn from it, will be disputed by the defendant. This factual dispute cannot be resolved by this Court pre-trial.

For all the above reasons, the Government submits that the Court cannot determine the defendant's claim of immunity under the VCCR until the trial of this case.

Therefore, the motion should be denied, without prejudice to the defendant's right to raise the claim of immunity at the close of the government's case, pursuant to Federal Rule of Criminal Procedure 29.

III. WHETHER OR NOT THE CRIME CHARGES IN THIS CASE IS GRAVE WITHIN THE MEANING OF ARTICLE 41(1) OF THE VIENNA CONVENTION ON CONSULAR RELATIONS IS NOT RELEVANT TO WHETHER THE DEFENDANT IS IMMUNE FROM THE JURISDICTION OF THE COURT; ARTICLE 41 ONLY ADDRESSES THE PERSONAL FREEDOM OF A CONSULAR OFFICER FROM ARREST OR DETENTION, WHILE ARTICLE 43 ADDRESSES IMMUNITY FROM JURISDICTION.

The defendant argues that the acts allegedly committed by the defendant do not constitute a grave crime within the meaning of Article 41 of the Vienna Consular Convention, that a consular officer not placed under arrest may not be tried, and that the defendant therefore is entitled to immunity under the Vienna Convention based on the alleged failure to charge a grave crime.

By making this assertion, the defendant has confused the distinct concepts of "inviolability" and "immunity." His argument is the reddest of herrings because the text of the treaty, both in its plain language and written context, as well as the treaty's negotiating history, show that whether or not the crime charged here is grave is not relevant to the issue of the defendant's immunity. We have already shown that a consular officer's immunity from criminal jurisdiction is

limited to "acts performed in the exercise of consular functions." Article 41 provides a separate protection to consular officers -- its extends to them "personal inviolability" which it defines as "freedom from arrest or detention."[13]

The analysis of a treaty begin with the plain language of its text. Maximov, 373 U.S. at 53-54; Air France, 470 U.S. at 396-97. Article 43 of the VCCR, entitled "Immunity from jurisdiction," provides, in pertinent part:

> 1. Consular officers and consular employees shall not be amenable to the jurisdiction of the receiving State in respect of acts performed in the exercise of consular functions.

The plain language of this article, which specifically addresses immunity, nowhere mentions that its immunity is limited to grave crimes; in fact, the term "grave crime" does not appear in this article.

Article 41 of the VCCR, entitled "Personal inviolability of consular officers," provides, in pertinent part:

> 1. Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.

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[13] Moreover, even if this issue were relevant, the United States has consistently and publically interpreted the term "grave crime" to apply to any felony. As the defendant is charged with a felony in this case, his argument fails on his additional ground. See, infra, at 41 n. 14.

> 2. Except in the case specified in paragraph 1 of this Article, consular officers shall not be committed to prison or liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.
>
> 3. If criminal proceedings are instituted against a consular officer, he must appear before the competent authorities....

First, the plain language of this article does not mention immunity from jurisdiction at all. Instead, the article discusses inviolability, which is defined in the first paragraph as freedom from arrest or detention pending trial. The fact that this privilege is provided in certain instances pending trial emphasizes the point that this article is not about immunity at all, for how could a trial go forward if this article was intended to provide immunity from jurisdiction in non-grave crimes? Clearly, the only logical reading of this paragraph is that it is limited to what it plainly states: freedom from arrest or detention, except for grave crimes and pursuant to judicial decision.

This interpretation is confirmed by the negotiating history of the Vienna Convention on Consular Relations. In the draft articles prepared by the International Law Commission in 1961 as the basis for the 1963 conference which resulted in the creation of the Vienna Convention on Consular Relations, the commentary on paragraph 1 of Article 41 provided that:

> It should be pointed out that this paragraph by no means excludes the institution of criminal proceedings against a consular official. The privilege under this paragraph is granted to consular officials by reason of their functions. The arrest of a consular official hampers considerably the functioning of the consulate and the discharge of the daily tasks....
>
> It would therefore be inadmissible that a consular officer should be placed under arrest or detention pending trial in connection with some minor offence.

[1961] 2 Y.B. Int'l L. Comm'n 116. During the discussion of this article at the Vienna Conference, the delegate from the United Kingdom pointed out that "while Article 43 (Immunity from jurisdiction) provided immunity in respect to official activities, article 41 was concerned only with personal inviolability." Official Records, United Nations Conference on Consular Relations, vol. I, p. 360, U.N. Doc. A/CONF.25/16 (emphasis added) (App. 228a).

It is also important to examine a treaty provision in the context in which the written words are used. Maximov, 373 U.S. at 53-54. When the other paragraphs of this article are taken into consideration, it is further apparent that the article does not address immunity of a consular officer from the criminal jurisdiction of the receiving State. For example, paragraph 2 states that consular officers can be sentenced to prison terms for any crime, including non-grave crimes, "in execution of a judicial decision of final effect." Yet, if

this article confers immunity from jurisdiction for non-grave crimes, why would the article address and expressly permit prison terms for such crimes?

Similarly, paragraph 3 of Article 41 states that a consular officer must appear if criminal proceedings are instituted against him, without reference to whether the criminal proceedings involve a grave or non-grave crime. Yet how could criminal proceedings ever exist for non-grave crimes if this article granted immunity from jurisdiction for them? Thus, the defendant's interpretation of paragraph 1 cannot be reconciled with other parts of the article.

It is also important to look at the context of this article as it compares to other articles of the Vienna Consular Convention. In this treaty there is a specific article that squarely expresses immunity from jurisdiction of consular personnel: Article 43. The existence of this article and its content do not make any sense if one adopts the defendant's argument that Article 41 provides immunity to consular officers for non-grave crimes, because Article 43, in limiting immunity to acts performed in the exercise of consular functions, would be flatly inconsistent with Article 41. If Article 41 were intended to be a special exception to Article 43, as defendant may attempt to argue, why is there no specific reference to Article 41 in Article 43? The best answer, indeed the only answer, is that defendant's attempted interpretation is not correct. Article 41 is limited to the grant of freedom from

arrest, detention, prison terms and other restrictions on personal freedoms in non-grave crimes, and does not relate to consular immunity from jurisdiction.[14]

CONCLUSION

For all the above reasons, and in the interest of justice, the United States respectfully requests that defendant's motion be denied, without prejudice to the

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[14] As the government has demonstrated, the defendant's argument on grave crime is not relevant to the defendant's immunity. The Vienna Consular Convention does not define the meaning of the term "grave crime." Nonetheless, the U.S. has consistently and publicly interpreted the term "grave crime" to apply to any felony; this interpretation is appropriate under the VCCR, and is supported by the Treaty's negotiating history. (The Associate Chief of Protocol's certification of the defendant's status, done in his official capacity, confirms this position). The extensive negotiating history of this provision makes clear that the negotiators rejected any definition requiring a certain number of years of imprisonment. Moreover, there was no discussion concerning whether the term should be limited to crimes that are dangerous or threaten harm, contrary to the defendant's assertion. See Official Records of the United Nations Conference on Consular Relations, U.N. Doc. A/CONF. 25/16 (App. 216a-261a). Several states also noted at the Vienna Conference that it is up to the receiving State to determine what would constitute a grave crime. See Id. (Pakistan at p. 365; Byelorussia p. 52; India p. 53.) The United States Government, through the Department of State, as the agency responsible for implementing the Vienna Consular Convention, has consistently applied the term grave crime in the United States as including all felonies. See S. Exec. Rep. 91-9, 91st Cong. 1st Sess., 14 & 8 (App. 278a-279a). Guidance for Law Enforcement Officers: Personal Rights and Immunities of Foreign Diplomatic and Consular Personnel, Department of State Publication 9533, at 7 (March 1987) (App. 83a) ("Consular officers may be arrested pending trial provided that the underlying offense is a felony and that the arrest is made pursuant to a decision by a competent judicial authority (e.g., a warrant issued by an appropriate court)").

defendant's right to raise his claim of immunity under the VCCR, at the close of the Government's evidence.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	CRIMINAL NO. 88-516-03
BAHRUDIN BIJEDIC, a/k/a "Burri"	:	

DECLARATION OF MARY V. MOCHARY

I, Mary V. Mochary, hereby declare pursuant to 28 U.S.C. section 1746 as follows:

1. I am the Principal Deputy Legal Adviser of the Department of State. I have served in this capacity since 1988. Before assuming the position of Principal Deputy Legal Adviser in 1988, I had previously served as Deputy Legal Adviser, beginning in 1985. In the absence of the Legal Adviser, I serve as the Acting Legal Adviser. I submit this declaration to advise the court of the interpretation of the Department of State of the United States - Serbia Consular Convention of 1881, particularly with reference to the most favored nation clause in that treaty. My declaration is based on my personal knowledge and on upon information provided to me in my official capacity.

EXHIBIT "A"

2. My responsibilities as Principal Deputy Legal Adviser include the interpretation and the implementation of international law and treaties of the United States Government, including those that relate to privileges and immunities enjoyed by foreign government officials in the United States. I am the senior supervising attorney in the Department of State with respect to the Department's interest in the indictment of Bahrudin Bijedic.

3. I have reviewed the Department of State's practice and policy with regard to the invocation of most favored nation clauses in consular conventions and treaties, including its practice and policy with regard to Article II of the United States - Serbia Consular Convention. I have confirmed that the consistent interpretation of the Department of State has been to accord most favored nation treatment under consular conventions only upon the request of a foreign government, only on the basis of actual reciprocity, and only after the other government has formally assured the United States that it will in fact grant reciprocal treatment to equivalent United States Government personnel serving in that country. This has been the Department's intepretation not only for expressly reciprocal agreements, such as the United States - Serbia Convention, but also for agreements that do not expressly include reciprocity in their texts.

4. The Government of Yugoslavia has never invoked the most favored nation clause of the United States - Serbian Convention. Nor has the Government of Yugoslavia ever provided the necessary formal assurances guaranteeing that United States personnel serving at U.S. consulates in Yugoslavia are entitled to reciprocal treatment. Under these circumstances, consular officers of Yugoslavia in the United States such as defendant Bijedic are entitled only to the privileges and immunities accorded to consular officers by the Vienna Convention on Consular Relations.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on March 17, 1989

Mary V. Mochary

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the Government's Memorandum of Law in Response to Defendant's Motion to Recognize the Applicability of Consular Immunity and Appendix by United States Mail, postage prepaid, to Michael C. Goode, Esquire, 3500 West Devon Avenue, Lincolnwood, Illinois 60645 on this 21st day of March, 1989.

Thomas J. Rueter

THOMAS J. RUETER
Assistant United States Attorney