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INTERNATIONAL LAW  
MOOT COURT COMPETITION  
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1989 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

Case Concerning the Immunities of  
a Diplomatic Agent\*

Majan

v.

United Republic of Aristan

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The Governments of Majan and the United Republic of Aristan have submitted the following matter by special agreement to the International Court of Justice pursuant to Article 36, paragraph 1, of the Statute of the Court. No question of the jurisdiction of the Court is at issue. The Appendix contains a list of relevant treaties to which both States are Parties. The Applicant is the Government of Majan. The Respondent is the Government of the United Republic of Aristan.

This is a hypothetical problem drafted exclusively for use in the 1989 Jessup Competition. The Problem is not intended to portray actual situations.

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1989 PHILIP C. JESSUP INTERNATIONAL  
LAW MOOT COURT COMPETITION

Case Concerning the  
Immunities of a Diplomatic Agent

THE PROBLEM

In the late evening of Friday, 13 February 1988, Ambassador Guido Kitaro, chief of mission from the United Republic of Aristan, an affluent industrialized country, had just left a diplomatic reception at which his presence was de rigueur. He drove along a main thoroughfare of Providence, the capital city of Majan -- a poor developing country, plagued by drug abuse, which had been dominated in turn by four colonial powers, including Aristan. He parked at a dimly lit corner where he met Marc Wilkey, a national of Majan. Mr. Wilkey was, in fact, Ambassador Kitaro's contact in what authorities of Majan knew to be an illicit drug trafficking ring. Unbeknownst to the authorities of Aristan, the drugs were smuggled into Majan from time to time by diplomatic pouch, with the assistance of one or more unknown confederates in Aristan's foreign ministry. The drug transactions -- always for large amounts of U.S. dollars and involving drugs ultimately sold to the local intelligentsia -- had invariably taken place without incident. In the past, Ambassador Kitaro would deliver a large suitcase filled with drugs to Mr. Wilkey, who would hand the ambassador an envelope stuffed with large denominations of U.S.

dollars. This time, however, Mr. Wilkey told Ambassador Kitaro that he would not pay him and that, unless the ambassador gave him the drugs, he would expose him to public disgrace. This caught Ambassador Kitaro, considered to be a rising star in Aristan's foreign ministry, off guard, and for a brief moment, he was stunned. Mr. Wilkey grabbed the drug-filled suitcase and began running along the thoroughfare. Ambassador Kitaro jumped in his car and -- in a panic -- ran down Mr. Wilkey and two bystanders before crashing into a wall. Mr. Wilkey was critically injured but the two bystanders, Mrs. Simpson and her 4-year-old daughter, Michele, were killed. Drugs in plastic bags which had fallen from the suitcase were spewn about the scene.

Ambassador Kitaro was found in his car unconscious. When police and emergency workers arrived at the scene they interviewed bystanders who had witnessed the accident. Neither the police nor any other governmental official interviewed the ambassador regarding the incident. The police report filed after the investigation concluded that the ambassador was engaged in drug trafficking at a time when he was "obviously drunk" (although no objective test was offered or administered out of respect for his diplomatic immunity).

The incident triggered an outpouring of criticism from the local news media and certain politicians, who were frustrated over repeated abuses of diplomatic immunity. A non-

binding resolution was introduced and passed overwhelmingly in the Majan National Assembly calling for the immediate criminal trial of Ambassador Kitaro. Various members of the Government were called before the foreign affairs committee of the National Assembly to outline how the Government intended to handle the matter.

On Wednesday, 18 February, the ambassador called on Manfred van Dyke, the Minister of Foreign Affairs of Majan, and expressed, in addition to his previous profound personal regret, that of his Government. Ambassador Kitaro then handed Foreign Minister van Dyke a Diplomatic Note which stated that, in accordance with diplomatic protocol, he was being recalled by his Government and that his immunity would terminate as from 12:01 a.m. 21 February.

Prior to the ambassador's departure on 20 February, Majan's Minister of Justice, Charles Akulu, held a news conference to announce that he was preparing charges against the ambassador for murder, attempted murder, and drug trafficking and smuggling. "These acts are regarded by the law of Majan as among the most serious crimes and could result in the death penalty," Minister Akulu told a crowded news conference attended by the international press. "Based on the evidence, there seems to be no doubt that, under our law, Ambassador Kitaro is guilty of all charges." Minister Akulu went on to say that while Majan recognized that the ambassador

had diplomatic immunity so long as he was accredited to Majan, once his mission was terminated his immunity would cease; he could, thereafter, be prosecuted for acts which occurred while he had immunity.

Concerned by the apparent intention of the Government of Majan to indict its ambassador, the Government of Aristan dispatched on 22 February a Diplomatic Note to the Majani Ministry of Foreign Affairs, through its Embassy in Providence, which observed in relevant part:

The Government of the United Republic of Aristan calls to your attention Article 31, paragraph 1, of the Vienna Convention on Diplomatic Relations, to which both the United Republic of Aristan and Majan are High Contracting Parties. Article 31 provides that "[a] diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State." At the time of this most regrettable incident, Ambassador Kitaro was accredited to Majan as the United Republic of Aristan's Ambassador Extraordinary and Plenipotentiary and, therefore, entitled to "immunity from the criminal law jurisdiction of Majan."

The Government of the United Republic of Aristan also wishes to call to the attention of the Ministry of Foreign Affairs the recent decision in Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S.A. v. Iran), in which an unanimous International Court of Justice condemned the violation of diplomatic immunity by Iran. The Court stated that it

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

terms: "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State."

In no case has a distinction been drawn between "prescriptive," "adjudicative" and "enforcement" jurisdiction. Thus, it is beyond question that it would be a grave breach of the international law governing diplomatic immunity if Majan were to pursue any form of criminal investigation, indictment, or trial of an ambassador for acts which occurred while the ambassador had immunity.

It is clear that, under the Vienna Convention, the conduct of an ambassador in the receiving State, from a criminal law standpoint, is not a matter between the ambassador and the Government of the receiving State, but, rather, is a State-to-State matter. Therefore, as far as the receiving State is concerned, it is international law, including custom, which governs the acts of an ambassador in the receiving State. The Government of Majan is unaware of any basis in treaty or general international law for the extension of receiving State criminal law to measure the acts of an accredited ambassador during his accreditation, and no basis for applying the law to acts performed during that time after the termination of that accreditation.

While in no way condoning the incident, the Government of the United Republic of Aristan views with profound concern the actions of the Government of Majan through its Ministry of Justice. The Government of the United Republic of Aristan requests that assurances be given to the Embassy of the United Republic of Aristan that Majan will honour its international obligation to the United Republic of Aristan under the Vienna Convention, and that any criminal investigation or indictment under Majan's municipal law be quashed.

In response, Majan's Ministry of Foreign Affairs replied as follows by Diplomatic Note:

The Ministry of Foreign Affairs concurs in the analysis of the status of Ambassador Kitaro's immunity at the time of the incident. Ambassador Kitaro has, however, been withdrawn and is no

longer accredited to Majan as the United Republic of Aristan's Ambassador. Accordingly, his immunity in Majan is now governed by paragraph 2 of Article 39 of the Vienna Convention, which provides:

When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in the 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.

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

The International Court of Justice decision in Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S.A. v. Iran) is not inconsistent with the above provisions regarding the immunity status of former diplomats. As can be seen from the portion of the judgment quoted in the Government of the United Republic of Aristan's Note, the hostages were "diplomatic agents" at the time being addressed by the court. These members of the U.S. mission to Iran had not been expelled or withdrawn and, on the contrary, their imprisonment precluded absolutely the possibility of their departure "within a reasonable period of time" or otherwise. The Ministry of Foreign Affairs does not consider that Ambassador Kitaro's case in any way parallels that of the hostages in Tehran.

In summary, diplomatic immunity is a bar to the exercise of jurisdiction over certain persons by the receiving State's courts that exists during the period of performance of diplomatic functions, including a reasonable period of time to depart the receiving State upon the termination of such functions. Except for actions or prosecutions

arising in connection with the exercise of their functions, all jurisdictional immunities that such persons previously enjoyed expire at the completion of this period. The concept of total exoneration or pardon for acts committed while in a status affording the individual criminal immunity is unknown in international law. The Ministry of Foreign Affairs does not consider that, under the circumstances, Ambassador Kitaro's conduct at the time of the incident may be characterized as "an act performed . . . in the exercise of his functions as a member of the mission." Majan, therefore, rejects the contention of the United Republic of Aristan that international law precludes the prosecution of this former diplomat for non-official acts committed during his period of accreditation.

Several days after his departure and the exchange of Notes, an arrest warrant was issued in Providence for the ambassador on the charges of murder, attempted murder, and drug trafficking and smuggling. Majan's law does not allow for trial in absentia.

Upon his return to Aristan, the ambassador received a hearing and was dismissed by Foreign Secretary Christina Bocalandro from Aristan's foreign service amid a flurry of press coverage. One week later, the ambassador departed for a holiday in the Parrot Islands. When the Government of Majan learned of the ambassador's presence in the Parrot Islands, it filed a demand for his extradition under a bilateral extradition treaty, the terms of which left no margin to question such a demand. The Parrot Islands thereupon arrested the ambassador and promptly extradited him to Majan, where he was imprisoned.

Despite repeated protests by the Government of the United Republic of Aristan, the ambassador's trial was set to begin in due course. Prior to the trial, Aristan imposed upon Majan a series of harsh economic sanctions, straining Majan's economy. Moreover, because Aristan was a large economic power and an international financial center, it was able to exert pressure on Majan's neighbors -- slowing to a trickle the trade into and out of Majan. The economy of Majan quickly degenerated to the point of near-paralysis.

On the day the trial began, the Government of Aristan seized the assets the International Monetary Union (IMU) assigned to Majan on an administered deposit account with the First Aristani National Bank, a private, commercial institution in Robinette, the capital city of Aristan. The seizure was lawful under Aristani law, which provides emergency economic powers to the Aristani Government.

The IMU is a regional monetary union in which Majan and 60 other sovereign States are members. The IMU provides for a centralized currency reserve, a single currency issued by a common central bank, a common interest rate structure, free transfer of funds within the union, and common banking legislation.

No agreements exist between the IMU and Aristan, although Aristan has always regarded the IMU as a regional organization. However, more than 80 countries, including

the IMU's 61 member States, have bilateral treaties recognizing the IMU as a regional organization and according its assets complete immunity. Each bilateral treaty contains an identical article which refers to "administered accounts" in the following terms: "An 'administered account' is an account administered by the IMU for the exclusive benefit of a member in an account kept separate from the property and accounts of the organization, and which may not be drawn upon by the beneficiary but only by the IMU."

IMU President Hans Zoff immediately protested the seizure as a violation of the IMU's immunity under general international law. Under the IMU's Charter, any member State may represent the legal interests of the IMU before the International Court of Justice, provided that the IMU expressly agrees. In this matter, President Zoff expressly agreed that the IMU would allow Majan exclusively to defend both its own and the IMU's interests.

Pursuant to Article 36, paragraph 1, of the Statute of the Court, the case was referred to the International Court of Justice. Both Parties are members of the United Nations. On 1 February 1989, the two Governments agreed that the following issues should be submitted to the Court:

The Government of Majan asks the Court to:

- I. Declare that the Government of Majan may criminally prosecute Ambassador Kitaro consistently with its obligations under the Vienna Convention on Diplomatic Relations.
- II. Declare that the funds assigned to Majan on an administered deposit account with the IMU are immune from seizure by the Government of Aristan.

The Government of the United Republic of Aristan asks the Court to:

- III. Declare that Ambassador Kitaro is immune from criminal prosecution under the Vienna Convention on Diplomatic Relations and grant provisional measures providing for the release of Ambassador Kitaro and the dismissal of all criminal charges against him.
- IV. Declare that the IMU account assigned to Majan on an administered deposit account with the First Aristani National Bank is not immune from seizure.

APPENDIX

Treaties to which both the State of Majan  
and the State of the United Republic of Aristan  
Are Parties without Reservation

United Nations Charter.

Statute of the International Court of Justice.

Vienna Convention on Diplomatic Relations, 500  
U.N.T.S. 95, 23 U.S.T. 3227, TIAS 7502.

Vienna Convention on the Law of Treaties, U.N.  
Doc. A/CONF. 39/27, p. 289.