

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

**Case Concerning the Immunities of
a Diplomatic Agent**

IN THE INTERNATIONAL COURT OF JUSTICE

Majan,

Applicant

versus

United Republic of Aristan,

Respondent

MEMORIAL FOR APPLICANT

February 1989

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JURISDICTION

The sovereign States of Majan and Aristan submit their dispute to this Court pursuant to article 36(1) of the Statute of the International Court of Justice, which provides that the jurisdiction of the Court comprises all cases which the parties refer to it. Thus, the Court has jurisdiction in the present controversy and may resolve all legal questions submitted by the parties.

STATEMENT OF FACTS

I

Majan is an independent State formerly governed by four colonial powers, including Aristan, which is now in the process of redevelopment.(C.1). Providence, the capital city of Majan, is known by Majan authorities to be the center of an illicit drug trafficking ring.(C.1). On 13 February 1988 Ambassador Guido Kitaro, Chief of Mission for the affluent and industrialized country of Aristan, left a diplomatic function where his presence was de rigueur and drove to meet with Marc Wilkey in Providence.(C.1). Wilkey, a national of Majan, is Kitaro's "contact" person for the purpose of selling illegal drugs.(C.1). Kitaro was smuggling large quantities of drugs into Majan in diplomatic pouches with the assistance of unknown confederates in the Aristani foreign ministry and delivering the drugs to Wilkey in exchange for large sums of United States' dollars.(C1,2).

At the 13 February meeting, Wilkey refused to pay Kitaro for the drugs and threatened to expose Kitaro's illegal activities if he did not turn the drugs over to Wilkey.(C.2). Wilkey then grabbed Kitaro's suitcase filled with drugs and began to run.(C.2). Kitaro, fearing public exposure and disgrace for his illegal acts, jumped in his car and ran down Wilkey and two other Majan nationals before losing control of his car and crashing into a wall.(C.2). The two innocent bystanders, Mrs. Simpson and her four-year-old daughter, Michelle, were killed instantly. Wilkey was critically injured.(C.2). Kitaro was found in his car unconscious and drugs were scattered about the scene.(C.2). The police investigation revealed that Kitaro was involved in illegal drug trafficking and was "obviously drunk" during the incident. The police did not administer an intoxication test or arrest Kitaro out of respect for his diplomatic immunity.(C.2).

The incident triggered an outpouring of criticism from the media and politicians.(C.2). Officials of Majan, frustrated by the continual and blatant

abuses of diplomatic immunity, demanded a solution to the problem.(C.2). The Majani National Assembly took action by passing a non-binding resolution calling for the immediate trial of Mr. Kitaro.(C.3).

II

On 18 February, Mr. Kitaro informed Manfred van Dyke, Minister of Foreign Affairs of Majan, that he was being recalled by his Government.(C.3). A diplomatic note sent by the Aristani Government stated Mr. Kitaro's immunity from prosecution would terminate at 12:01 a.m. February 21.(C.3).

Majan's Minister of Justice, Charles Akulu, held an international news conference on 20 February stating that the acts of Kitaro "are regarded by the law of Majan as among the most serious crimes," and that he was preparing charges against Kitaro for murder, attempted murder, drug trafficking, and smuggling.(C.3). Minister Akulu declared that Majan recognized Kitaro's diplomatic immunity while he was an accredited diplomat, but that once his status terminated he would be subject to prosecution for his illegal acts.(C.3,4).

III

In response, the Government of Aristan dispatched a Diplomatic Note on 22 February to the Majan Ministry of Foreign Affairs stating that:

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 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 Aristan 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. (C.4,5).

Majan's Minister of Foreign Affairs responded with a diplomatic Note to Aristan which pointed out that:

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. (C.5-7).

After Mr. Kitaro's diplomatic accreditation to Majan terminated, Majan proceeded with its announced intentions to bring charges against him by issuing an arrest

After Mr. Kitaro's diplomatic accreditation to Majan terminated, Majan proceeded with its announced intentions to bring charges against him by issuing an arrest warrant for murder, attempted murder, drug trafficking, and smuggling.(C.7).

IV

Upon his return to Aristan, Kitaro was publically dismissed from his post by Foreign Secretary, Christina Bocalandro.(C.7). One week later, Kitaro left Aristan to vacation in the Parrot Islands.(C.7). Based on a bilateral extradition treaty between Majan and Parrot Islands, Majan properly filed a demand for extradition of Kitaro from the Parrot Islands.(C.7). Complying with the provisions of the treaty, the Parrot Islands' authorities arrested Kitaro and turned him over to the authorities of Majan.(C.7).

In opposition to the actions taken by Majan, Aristan imposed a series of harsh economic sanctions against Majan.(C.8). Using its economic power and influence as an international power, Aristan coerced Majan's neighbors to impose strict economic sanctions, driving Majan's economy to the point of "near paralysis."(C.8).

On the day Kitaro's trial began, Aristan seized assets held by the International Monetary Union (IMU) which had been assigned to Majan through an administered deposit account.(C.8). IMU President Hans Zoff immediately protested the seizure as a violation of the IMU's immunity under general international law, although the seizure was proper under local Aristani law.(C.8,9).

The IMU is a regional monetary union with 61 members, including Majan.(C.8). The IMU is internationally organized to provide 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.(C.8). The IMU had previously deposited Majan's funds in an administered account in the First

Aristan has always recognized the independence of the IMU as a regional organization even though Aristan is not a member.(C.8). All 61 members of the IMU and 19 other non-member countries have bilateral treaties codifying the existence of the IMU as a regional organization and according its assets complete immunity.(C.8,9). The treaties all define "administered accounts" as "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." (C.9).

The IMU Charter allows any member State to represent the legal interests of the IMU before the International Court of Justice. (C.9). President Zoff has expressly recognized Majan's right to represent the IMU as well as its own interests before the International Court of Justice. (C.9).

SUBMISSIONS 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 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:

- I. 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.
- II. Declare that the IMU account assigned to Majan on an administered deposit account with the First Aristani National Bank is not immune from seizure.

QUESTIONS PRESENTED

I. Whether the Vienna Convention on Diplomatic Relations allows Aristan to claim immunity on behalf of its former diplomat, who committed murder and attempted murder, and engaged in drug trafficking and smuggling, where such crimes were committed on Majan's territory, before the former diplomat was recalled by the Aristan Government?

II. Whether Aristan breached its customary duty to accord immunity to the assets of the International Monetary Union by seizing those assets in an attempt to coerce concessions from Majan?

SUMMARY OF ARGUMENT

I

Majan acted consistently with its obligations under international law when it prosecuted Aristan's former Ambassador Kitaro for the crimes he committed on Majan's territory while accredited as a diplomat. The Vienna Convention on Diplomatic Relations allows a State to prosecute another State's former diplomat for crimes the diplomat committed while accredited. Under the doctrine of lex specialis derogat generalis the provisions in Article 39, paragraph 2 of the Convention supercede the more general Article 31 provisions. The textual interpretation of Article 39, in light of the Convention's object and purpose, reveals that a diplomat's immunity does not subsist with regard to non-official acts after his accreditation has been terminated and he has departed from the host State. Since drug smuggling and murder are not within the scope of a diplomat's official functions, Kitaro is not protected by diplomatic immunity and Majan may attempt to bring him to justice. Furthermore, this restrictive reading of the Vienna Convention on Diplomatic Relations is in accord with its codificatory nature and reflects the State practice which has arisen since the Vienna Convention on Diplomatic Relations was drafted.

II

The International Monetary Union (IMU), by virtue of its satisfaction of several objective prerequisites, possesses international legal personality. Furthermore, the IMU possesses personality as to Aristan, in particular, because Aristan has always recognized the IMU as a regional organization and has also allowed it to operate on Aristani territory. Since the IMU possesses international

personality, it is a subject of international law with the capacity to be a bearer of rights under international law.

One of the rights which the IMU is entitled to claim is immunity for its assets. This customary right arises from the fact the IMU's assets must be immune in order for it to carry out its functions. Furthermore, the IMU enjoys immunity because of its very nature as an international organization. In addition, Aristan is bound by the general principle of good faith to concede privileges and immunities to the IMU since it has consented to the IMU's presence in its territory.

No defenses are available to excuse Aristan's violation of the IMU's rights. The acta gestionis exception to immunity will not bar the IMU's claim since the IMU has entered into no commercial relations with Aristan and since Aristan is not an aggrieved party vis-a-vis the IMU. Furthermore, Aristan cannot justify its unlawful seizure of the IMU's assets on the basis that it is a permissible countermeasure because the IMU is an innocent third party to the dispute between Majan and Aristan and countermeasures may not be aimed directly at innocent parties.

ARGUMENT

I. MAJAN'S PROSECUTION OF FORMER AMBASSADOR KITARO IS CONSISTENT WITH ITS OBLIGATIONS UNDER THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS AND CUSTOMARY INTERNATIONAL LAW.

Majan, consistent with its obligations under the Vienna Convention on Diplomatic Relations, may bring Mr. Kitaro, a former ambassador, to justice. Article 39, paragraph 2 of the Vienna Convention¹ makes clear that the immunities accorded former diplomats do not subsist in respect to non-official acts even if those acts occurred while the diplomat enjoyed immunity.² This reading of the Vienna Convention provision is mandated by rules of treaty interpretation which are binding between Majan and Aristan.³ Furthermore, State practice preceding the Vienna Convention provides ample evidence that a restrictive interpretation of its Article 39, paragraph 2 provision is in accord with the codificatory nature of the Vienna Convention. In addition, recent State practice aimed at curbing the growing abuse of diplomatic immunity, supports the propriety of Majan's prosecution of Kitaro for the murders and drug smuggling he committed while on Majan's territory.

¹Vienna Convention on Diplomatic Relations, opened for signature, April 1961, 23 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95, art. 39(2) [hereinafter Diplomatic Relations Convention].

²Circular Note of March 21, 1984, Dep't of State File No. P84-0056-1827, reprinted in 78 Am. J. Int'l L. 657-58 (1984).

³Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, U.N. Doc. A/CONF.39/27, art. 31-32 [hereinafter Law of Treaties Convention].

A. Majan's Prosecution Of Kitaro Is Consistent With The Vienna Convention on Diplomatic Relations Provisions As Determined By The Rules Of Treaty Interpretation Which Are Binding Between Majan And Aristan.

Majan and Aristan are parties⁴ to the Vienna Convention on the Law of Treaties⁵ and are thus bound by the rules of treaty interpretation contained therein. The treaty interpretation provisions of the Convention are contained in Articles 31 through 33. These rules concerning the interpretation of treaties constitute one of the sections of the Convention which were adopted without a dissenting vote at the U.N. Conference on the Law of Treaties and consequently may be considered as declaratory of existing law.⁶ Under these treaty interpretation provisions, Majan was justified in invoking Article 39 of the Vienna Convention on Diplomatic Relations to bring Kitaro to justice for his crimes.

1. Majan's action is justified under the textual interpretation of Article 39 of the Vienna Convention on Diplomatic Relations.

Article 31, paragraph 1 of the Vienna Convention on the Law of Treaties states: "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 the light of its object and purpose."⁷ Thus, the Vienna Convention on the Law of Treaties adopted the textual approach⁸ to treaty interpretation and accorded

⁴Compromis, p. 10.

⁵Law of Treaties Convention, supra note 3, at 289.

⁶de Arechaga, International Law in the Past Third of a Century, 159-1 Recueil des Cours 42 (1978). See also D'Amato, Manifest Intent and The Generation by Treaty of Customary Rules of International Law, 64 Am. J. Int'l L. 892, 894 (1970).

⁷Law of Treaties Convention, supra note 3, art. 31 (1).

⁸See Fitzmaurice, The Law and Procedure of the International Court of Justice, Treaty Interpretation and Certain Other Treaty Points, 28 Brit. Y.B. Int'l L. 1-2 (1951).

primacy to the text of the treaty as the basis for its interpretation.⁹ As the International Law Commission noted in its Commentary to the Draft of Article 31, the provision "is based on the view that the text [of a treaty] must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation ab initio into the intentions of the parties."¹⁰

A textual interpretation of the Vienna Convention on Diplomatic Relations reveals that Majan has the right to prosecute Kitaro. While Article 31 to the Vienna Convention on Diplomatic Relations deals generally with a diplomat's immunity from the criminal jurisdiction of a host State, Article 39 specifically addresses the scope of a former diplomat's immunity after his accreditation is terminated is Article 39. Under the maxim lex specialis derogat generali,¹¹ the specific provisions of Article 39 have precedence over the general provisions in Article 31 and are pivotal in determining whether Kitaro can be prosecuted. Article 39 paragraph 2 of the Vienna Convention 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.¹²

⁹de Arechaga, supra note 6, at 43.

¹⁰Commentary to Article 27, [1966] II Y.B. Int'l L. Comm'n 220, U.N. Doc. A/CN.4/Rev.1.

¹¹"The specific prevails over the general." See L. Henkin, R.C. Pugh, O. Schachter & H. Smit, International Law 69 (2d Ed. 1987); L. McNair, The Law of Treaties 219 (1961); Fitzmaurice, The Law & Procedure of the International Court of Justice 1951-4: Treaty Interpretation and other Treaty Points, 33 Brit. Y.B. Int'l L. 236-8 (1957).

¹²Diplomatic Relations Convention, supra note 1, art. 39(2).

The meaning of Article 39, paragraph 2 is quite clear. The diplomat's immunity subsists indefinitely for actions taken in the scope of his diplomatic duties. For acts which were not performed in the exercise of his function as a diplomat, however, immunity ends when the diplomat leaves the country of accreditation, or after he has been given a reasonable time to do so. Thus, Majan can properly prosecute Kitaro unless he was fulfilling his diplomatic mission by engaging in drug smuggling and by attempting to murder his co-conspirator while in a drunken stupor.

In determining whether a diplomat's actions were "in the exercise of his functions as a member of the mission," a court should accept the statement of the sending government on the matter.¹³ Unless the government of Aristan is willing to admit that it sent Ambassador Kitaro to Majan to engage in drug trafficking and murder, in violation of international law, it may not claim immunity for Kitaro under a textual interpretation of Article 39, paragraph 2 of the Vienna Convention on Diplomatic Relations and Majan is free to prosecute the former ambassador for his illegal activities.

2. Majan's action is consistent with the object and purpose of the Vienna Convention on Diplomatic Relations.

While Article 31, paragraph 1 of the Vienna Convention on the Law of Treaties gives undisputed preeminence to the literal terms of a treaty provision, it also directs that these literal terms be read "in the light of [the treaty's] object and purpose."¹⁴ The object and purpose of the Vienna Convention on Diplomatic Relations as it relates to diplomatic immunity is embodied in its preamble¹⁵ which provides:

¹³Id.

¹⁴Law of Treaties Convention, supra note 3, art. 31.

¹⁵Pecararo, Diplomatic Immunity: Application of the Restrictive Theory of Diplomatic Immunity, 29 Harv. Int'l L.J. 533 (1988).

The State parties to the present Convention...[believed] that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations...[and realize] that the purpose of [diplomatic] privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.¹⁶

In order to effectuate this object and purpose, diplomatic immunity is extended so that diplomats may function in foreign States without fear of interference or reprisal.¹⁷ Thus, the underlying rationale for diplomatic immunity is functional necessity.¹⁸ The prosecution of Kitaro does not, however, threaten the object and purpose of the Vienna Convention on Diplomatic Relations. The ability of diplomats to represent their countries and fulfill the functions of their diplomatic missions without fear of reprisal is not endangered because the restrictive theory applies only to crimes committed in the course of non-official acts.¹⁹ Furthermore, the ability of States to prosecute diplomatic offenders would facilitate diplomatic functions. "Exemption from legal process in even the most egregious circumstances

¹⁶Diplomatic Relations Convention, supra note 1. See also Official Documents of the United Nations: Report of the International Law Commission, 53 Am. J. Int'l L. 230, 255 (1959); 4 G. Hackworth, Digest of International Law 513 (1942); Fasman, Ambassadors and Consuls Privileges, Immunities and Disabilities Whether or Not Accredited Minister Passing Through the United States on way to Post is Immune From Service of Process, 25 Chi-Kent L. Rev. 329, 330 (1947); Garretson, The Immunities of Representatives of Foreign States, N.Y.U.L. Rev. 67 (1966); Gurley, Compensation for "Victims of Diplomatic Immunity in the United States: A Claims Fund Proposal, 4 Fordham L. Rev. 135, 137-8 (1980-81).

¹⁷Larschan, The Abisinito Affair: A Restrictive Theory of Diplomatic Immunity? 26 Colum. J. Transnat'l L. 283,286 (1988).

¹⁸4 G. Hackworth, supra note 16, 18; C. Hurst, International Law: Collected Papers 174 (1950); Benedek, The Diplomatic Relations Act: The United States Protects its Own, 5 Brooklyn J. Int'l L. 379 (1979); O'Neil, A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978, 54 Tul. L. Rev. 661 (1980).

¹⁹Pecoraro, supra note 15, at 540; Wilson, Diplomatic Immunity From Criminal Jurisdiction: Essential to Effective International Relations, 7 Loy. L.A. Int'l and Comp. L.J. 113, 137 (1984).

creates a privileged class incompatible with the democratic climate of the modern state, as well as a symbolic irritant that breeds ill will and resentment antithetical to the ends of diplomacy."²⁰

B. The Restrictive Reading Of The Vienna Convention On Diplomatic Relations Is In Accord With Its Codificatory Nature.

The restrictive theory of diplomatic immunity, which Majan advocates, holds that diplomatic immunity from prosecution remains absolute with respect to official acts, but immunity for all other acts ceases as soon as a diplomat's official functions come to an end and he leaves the host country.²¹ Thus, the restrictive theory permits a host country to prosecute an offending diplomat should he later reenter the country.²² The restrictive theory has precedents in customary international law²³ arising before the Vienna Convention on Diplomatic Relations. Since the Vienna Convention on Diplomatic Relations represented a codification of customary international law,²⁴ its provisions must be read in light of the customary restrictions on diplomatic immunity. These restrictions indicate Majan

²⁰Id. See also Belotsky, The Effect of the Diplomatic Relations Act, 11 Cal. W. Int'l L.J. 354 (1981); Turan, The Devilish Demand of Diplomatic Immunity, Wash. Post, Jan. 11, 1976, at 6 col. 1; Gupte, Privileges for Diplomats Stir Resentment and May be Curbed, N.Y. Times, Jul. 18, 1978, Sec. II, at 8, Col. 4.

²¹Pecararo, supra note 15, at 533; Circular Note, supra note 2.

²²Id.

²³"Customary international law results from a general and consistent practice of States followed by them from a sense of legal obligation." Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179. See also The Paquete Habana, 175 U.S. 677 (1900); The Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser.A) No. 10.

²⁴Valdez, Privileges and Immunities Under the Vienna Convention on Diplomatic Relations and the Diplomatic Relations Act of 1978, 15 Int'l Law. 411, 412 (1981); E. Denza, Diplomatic Law 1 (1976). See generally, D'Amato, supra note 6; United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, 2 March-14 April 1961, at 2, 5, U.N. Doc. A/CONF.20/14.

did not breach any of its international obligations by seeking prosecution of Kitaro.

The traditional doctrine of diplomatic immunity held that a diplomat was absolutely immune from the criminal jurisdiction of the host State.²⁵ In the nineteenth century, however, the concept of absolute diplomatic immunity began to erode. Members of diplomatic missions were subjected to a host State's criminal proceedings in certain limited circumstances.²⁶ Several cases arising in the late 19th and early 20th centuries, most notably the English cases of Magdalena Steam Navigation Company v. Martin,²⁷ Musurus Bey v. Gadban,²⁸ and In re Suarez,²⁹ allowed members of diplomatic missions to be subjected to a State's civil and criminal jurisdiction after their appointments had ended where the diplomats had been granted a reasonable time to wind up their affairs and leave the country.³⁰ The fact that the offending act had taken place while the diplomat was protected by immunity was no bar to the proceedings, so long as the act was of a private nature and not performed in the exercise of diplomatic function.³¹

²⁵B. Sen, A Diplomat's Handbook of International Law and Practice 86-7 (1965), Marman, The Diplomatic Relations Act of 1978 and its Consequences, 19 Va. J. Int'l L. 131, 134 (1978), Barnes, Diplomatic Immunity From Local Jurisdiction: Its Historical Development Under International Law and Application in the United States, 43 Dep't St. Bull. 174 (1960).

²⁶Pecoraro, supra note 15, at 536.

²⁷121 Eng. Rep. 36 (1859) 2 E. & E. 94; See also E. Denza, supra note 24, at 247.

²⁸2 Q.B. 352 (1894); See also E. Denza, supra note 24, at 247.

²⁹1 Ch. 176 (1918); See also E. Denza, supra note 24, at 247.

³⁰Denza, supra note 24, at 247, Pecararo, supra note 15, at 533.

³¹Denza, supra note 24, at 247. This view was codified in Art. 39(2) of the Diplomatic Relations Convention, supra note 1, art. 39(2).

Later, in the early 20th century, States began to recognize a "public safety" exception to diplomatic immunity³² such that a diplomat could be brought to trial by a host State if his offending acts, occurring while he was protected by immunity, threatened the internal security of the host State.³³ For example, in 1916, an attache of the German Embassy, Wolf von Igel, was arrested by the United States and his papers were seized.³⁴ These papers allegedly contained evidence of von Igel's complicity in conspiracies against the neutrality of the United States.³⁵ The American Secretary of State, Robert Lansing, maintained the German government could not legally claim diplomatic immunity for von Igel, in part because of the seriousness of von Igel's crime.³⁶ Von Igel was held on bond until 1917, when diplomatic relations between the two countries were terminated. He then returned to Germany on parole.³⁷

After World War II, still another exception to absolute diplomatic immunity was recognized in customary law — the "war crimes" exception.³⁸ For instance, in the Danish case of In re Best,³⁹ Denmark brought charges against Best, the Reich plenipotentiary who had been appointed to establish diplomatic relations with

³²C. Wilson, Diplomatic Privileges and Immunities 82, 83 (1967).

³³Id.

³⁴Hackworth, supra note 16, 18, at 517-9; Wilson, supra note 32, at 83.

³⁵Wilson, supra note 32, at 83.

³⁶Id.

³⁷Rose v. The King 3 D.L.R. 618 (1946) provides another example of a State asserting that its own security must be given priority over granting diplomatic immunity to lawbreakers.

³⁸Wilson, supra note 32, at 85.

³⁹17 I.L.R. 434 (Den. S.Ct. 1950).

Denmark following the German occupation of that country in World War II.⁴⁰ The Danish government charged Best with murder and sabotage and tried him under the 1946 Danish War Crimes Act.⁴¹ The Danish Supreme Court rejected Best's claim of diplomatic immunity, noting that the Danish War Crimes Act applied to all persons regardless of whether they were entitled to diplomatic immunity.⁴²

Just prior to the adoption of the Vienna Convention on Diplomatic Relations, diplomatic immunity was subjected to more frequent challenges and it experienced further erosion.⁴³ While the earlier cases tended to involve breaches detrimental to a host State's security, the cases occurring just prior to the Vienna Convention's adoption show a remarkable willingness on the part of States to exercise municipal jurisdiction in a much broader range of circumstances. Host States did not, in all cases, exercise jurisdiction but they claimed the right to do so.⁴⁴ For example, in 1953, Greece denied diplomatic immunity to a First Secretary of the British Embassy in Athens. In Greek State v. X.,⁴⁵ the court held that diplomats could be tried and convicted of misdemeanors because, according to international law, misdemeanor proceedings "have no connection with the public character of the person entitled to immunity."⁴⁶ Switzerland also exercised

⁴⁰Wilson, supra note 32, at 85.

⁴¹Id.

⁴²Id. A case which reaches a result similar to Best is In re Abetz, 17 I.L.R. 279 (Fr. Ct. Cassation 1950).

⁴³See generally Marmon, supra note 25, at 134.

⁴⁴Wilson, supra note 32, at 81. See also Ling, A Comparative Study of the Privileges and Immunities of United Nations Member Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents, 33 Wash. & Lee L. Rev. 91, 104 (1976).

⁴⁵20 I.L.R. 378 (Greece Ct. First Instance 1953).

⁴⁶N. Spiropoulos, Public International Law, 121 et seq (1949). See also Wilson, supra note 32, at 88 n.49.

criminal jurisdiction over a diplomat when it convicted the Economic Counsellor of the Rumanian Legation for economic spying and financial crimes.⁴⁷ He was sentenced to 18 months in prison for his crimes. As these cases indicate, the Vienna Convention on Diplomatic Relations was drafted and adopted in an environment of ever increasing restrictions on diplomatic immunity. The action taken by Majan, and the textual interpretation of Article 39, paragraph 1 is consistent with the obvious will of States to restrict the scope of diplomatic immunity prior to the Vienna Convention.

C. Majan's Action Is In Accord With The Recent Practice Of States Parties to The Vienna Convention On Diplomatic Relations.

According to Article 31 of the Vienna Convention on the Law of Treaties, any subsequent practice in the application of a treaty or its provisions is to be taken into account when determining the proper interpretation to be given the treaty.⁴⁸ In recent years, States have recognized that proceedings could be brought against a diplomat after his immunity had expired even where the acts giving rise to liability occurred while the diplomat was accredited. This recent State practice further indicates that Majan has interpreted Article 39, paragraph 1 of the Vienna Convention on Diplomatic Relations⁴⁹ correctly and that they may prosecute Kitaro for his crimes.

In Epson v. Smith,⁵⁰ an English Court of Appeal allowed the plaintiff to proceed against a Canadian diplomat, holding that a diplomat's loss of immunity, whether by waiver, change in the law, or termination of the diplomatic appointment, meant that proceedings which had been stayed on the ground of immunity could be

⁴⁷N.Y. Times, Jul. 1, 1949, at 5.

⁴⁸Law of Treaties Convention, supra note 3, art. 31.

⁴⁹Diplomatic Relations Convention, supra note 1, art. 39(1).

⁵⁰2 A.E.R. 881 (1965).

revived.⁵¹ Sellers, L.J., said that "[r]emoval from the diplomatic employment occasioning the immunity would likewise remove the immunity in respect of acts done in a personal capacity and a subsisting action could proceed."⁵²

Similarly, the United States, itself a party to the Vienna Convention on Diplomatic Relations, has recently recognized that after a diplomat's immunity has terminated, he can be subjected to criminal charges for acts occurring while he was immune. In 1984, the U.S. State Department sent a circular note to all Chiefs of Missions in Washington which warned that:

[O]n the termination of criminal immunity, the bar to prosecution in the United States would be removed and any serious crime would remain as a matter of record. If a person formerly entitled to privileges and immunities returned to this country and continued to be suspected of a crime, no bar would exist to arresting and prosecuting him or her in the normal manner for a serious crime allegedly committed during the period in which he or she enjoyed immunity. This would be the case unless the crime related to the exercise of official functions, or the statute of limitations for the crime had not imposed a permanent bar to prosecution.⁵³

In 1987, the United States applied its restrictive view of diplomatic immunity in the Abisinito affair. In the Abisinito incident, a car driven by Papua New Guinea's Ambassador Extraordinary and Plenipotentiary to the United States, Kiatro Abisinito, hit four cars and injured two U.S. nationals.⁵⁴ The police report of the accident indicated that Abisinito was "obviously drunk."⁵⁵ Abisinito was recalled by his government, as required by diplomatic protocol.⁵⁶ A short time

⁵¹Id. at 883 (Sellers, L.J.)

⁵²Id. See also Denza, supra note 24, at 248.

⁵³Circular Note, supra note 2.

⁵⁴Larschan, supra note 17, at 283.

⁵⁵Id. at 284, citing Lynto, Envoy's Car Slams Into 4 Vehicles, Wash. Post, Feb. 14, 1987, at B1, col.2.

⁵⁶See 1 L. Oppenheim, International Law 790, 791 (H. Lauterpacht 8th ed. 1955); 4 J.B. Moore, A Digest of International Law 633, 634 (1906).

after the accident, the State Department brought the matter to the attention of the United States Attorney for the District of Columbia so that the incident could be investigated and Abisinuito prosecuted.⁵⁷ Two months later, the U.S. Attorney began to proceed with the indictment of Abisinuito.⁵⁸ In a Diplomatic Note, the Embassy of Papua New Guinea requested assurances from the U.S. State Department that any investigation or indictment would be quashed.⁵⁹ The State Department's response to this note indicates that the U.S. was prepared to enforce its authority to prosecute foreign diplomats subsequent to the termination of the diplomat's accreditation.⁶⁰ The State Department admitted in the Diplomatic Note that Abisinuito was immune from suit at the time of the accident,⁶¹ but added:

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 Department of State does not consider that, under the circumstances, Ambassador Abisinuito's driving at the time of the automobile accident may be characterized as "an act performed...in the exercise of his functions as a member of the mission." The United States, therefore, rejects the contention of Papua New Guinea that

⁵⁷Larschan, supra note 17, at 285; Oberdorfer, Papua New Guinea Recalls Diplomat, Wash. Post, Feb. 21, 1987, at B1, col. 1; Barker, Criminal Charge Possible for Envoy, Wash. Post, Feb. 15, 1987, at B1, col. 2.

⁵⁸Larschan, supra note 17, at 285.

⁵⁹Diplomatic Note of the Embassy of Papua New Guinea to the United States Department of State, Apr. 16, 1987, at 2. See also Larschan, supra note 17, at 290.

⁶⁰Larschan, supra note 17, at 292.

⁶¹Diplomatic Note, June 22, 1987, reprinted in 81 Am. J. Int'l L. 938-9 (1987). See also Larschan, supra note 17, at 292.

international law precludes the prosecution of this former diplomat for non-official acts committed during his period of accreditation.⁶²

The United States subsequently abandoned the charges against Abisinito, leading some commentators to suggest that the practice of the U.S. disaffirmed its earlier pronounced restrictive view.⁶³ A recent State Department publication reveals, however, that the United States is continuing to pursue its restrictive view. In the Department of State Guidance for Law Enforcement Officers with Regard to Personal Rights and Immunities of Foreign Diplomatic and Consular Personnel,⁶⁴ the Department unequivocally maintains that the United States government intends to prosecute former diplomats for criminal activities they committed while accredited if they return to the United States.⁶⁵ Furthermore, the United States makes clear that in the case of particularly serious crimes, the former host State may seek extradition of the offending ex-diplomat.⁶⁶ The United States view is:

[C]riminal immunity expires upon the termination of the diplomatic or consular tour of the individual enjoying such immunity, including a reasonable time to depart the U.S. territory. Thereafter if the law enforcement authorities of the United States can obtain personal jurisdiction over a person alleged to have committed criminal acts in the United States, normal prosecution may go forward....Additionally, in the case of serious crimes and with respect to foreign countries with which the United States enjoys an extradition relationship, it is not precluded under international law that international extradition may be effected.⁶⁷

⁶²Diplomatic Note, June 22, 1987, reprinted in 81 Am. J. Int'l L. 938-39 (1987).

⁶³See, e.g., Pecararo, supra note 15; Larschan, supra note 17.

⁶⁴27 I.L.M. 1617 (1988).

⁶⁵Id.

⁶⁶Id.

⁶⁷Id. at 1634.

Thus, the action by Majan in extraditing and prosecuting Ambassador Kitaro is in line with State practice and is a natural progression in the restrictions which have heretofore taken place.

II. ARISTAN'S SEIZURE OF THE INTERNATIONAL MONETARY UNION FUNDS ASSIGNED TO MAJAN ON ITS ADMINISTERED DEPOSIT ACCOUNT CONSTITUTES A VIOLATION OF ITS DUTIES UNDER CUSTOMARY LAW.

Aristan violated customary international law when it seized the account which the International Monetary Union (IMU) was administering on behalf of Majan. The IMU possesses several objective characteristics which endow it with international legal personality. Furthermore, the IMU has international personality vis-a-vis Aristan because Aristan has always recognized the IMU as a regional organization⁶⁸ and has allowed it to operate on Aristani territory. Since the IMU possesses international personality, it is a subject of international law with the capacity to be a bearer of rights and duties under international law.⁶⁹ One of the rights which the IMU enjoys under customary international law is immunity of its assets.

A. The IMU Is A Subject Of International Law And Enjoys Rights And Immunities Which Have Been Violated By Aristan.

International personhood is an objective concept which, in the case of international organizations, arises either from the unique structure of the organization or from the manner in which other international subjects treat the organization. The IMU can trace its international personality from either of these two sources and is thus a subject of international law which must be accorded the

⁶⁸Compromis, p.8.

⁶⁹G. Schwarzenberger, A Manual of International Law, (5th ed. 1967); Rama-Montaldo, International Legal Personality and Implied Powers of International Organizations, 44 Brit. Y.B. Int'l L. 111, 116-122 (1970).

rights which inure to that status. No distinction need be made between global and regional bodies.⁷⁰

1. The IMU possesses objective international personality which must be respected by all States.

Under general principles of international law, the structure of the IMU results in the organization possessing international legal personality.⁷¹ In Reparations for Injuries Suffered in the Service of the United Nations,⁷² this Court identified the structural preconditions which must be present before international legal capacity can attach to an organization. The Court held that the organization must: (1) be more than a center which coordinates state conduct;⁷³ (2) perform special tasks;⁷⁴ (3) possess an organizational infrastructure,⁷⁵ and (4) define the position of the members in relation to the organization, thus giving it a separate, independent legal existence.⁷⁶ The IMU meets all of these preconditions and therefore possesses international legal personality.

The first prerequisite -- that an organization be more than a coordinator of state conduct -- is easily satisfied.⁷⁷ All that need be shown is that an

⁷⁰Gormley, The Future Privileges and Immunities Required by the Personnel of Regional and International Organizations From the Jurisdiction of American Courts, 32 U. Cin. L. Rev. 131, 154 (1963).

⁷¹Seyerstead, Objective International Personality of International Organizations 46 et. seq. (1963).

⁷²Reparations for Injuries Suffered in the Service of the United Nations, (Adv. Op.) 1949 I.C.J. 174.

⁷³Id. at 178.

⁷⁴Id.

⁷⁵Id.

⁷⁶Id. at 178-179.

⁷⁷Lashbrook, Suits Against International Organizations in Federal Court: OPEC, A Case Study, 12 Cal. W. Int'l L.J. 310 (1982).

international organization is intended to be more than a "conference" of member States.⁷⁸ A mere "conference" exists where organizational policies are determined at conference meetings and then left to the individual members to implement in their own territories.⁷⁹ Since the IMU possesses legislative powers, provides for a centralized currency reserve, issues currency, maintains a common interest rate structure and exercises other powers and duties, it is more than a mere coordinator of State conduct.⁸⁰ These provisions also indicate that the Reparations "performance of special tasks" requirement is met. Furthermore, the treaty-making capabilities of the IMU, as evidenced by treaties it concluded with States other than its members, as well as its legislative powers, are indicia of an infrastructure which satisfies the third Reparations requirement.⁸¹ The IMU also has the power to define the position of the members in relation to the organization since it may enact common banking legislation and since members must obtain the IMU's express consent before representing the organizations's legal interests.⁸² Thus, the IMU meets the four Reparations requirements for international legal personality.

The IMU also possesses international legal personality because other international legal entities treat the IMU as an actor in the international arena. The International Law Commission has taken the position that the fact that other States treat an organization as having treaty making capacity is per se indicative

⁷⁸Id.

⁷⁹Id.

⁸⁰Compromis, p.8.

⁸¹Compromis, p.8-9.

⁸²Compromis, p.9.

of international legal personality.⁸³ Furthermore, the International Court of Justice indicated in Reparations that 50 sovereign States had the power to "bring into being an entity possessing objective international personality, and not merely personality recognized by them alone."⁸⁴ Thus, the IMU possesses international legal personality because it has entered into treaties with 61 sovereign States and because more than 80 sovereign States have recognized it as an actor in the international arena. The fact of IMU's possession of international legal personality was not one which Aristan was free to ignore. The IMU as an international person is a subject of international law and possesses rights, privileges and immunities which all States are bound to recognize.

2. Aristan is bound by its recognition of the IMU's personality.

Even if the IMU had failed to fulfill the objective prerequisites of international legal personality, Aristan would still be bound to recognize the IMU as a subject of international law since it has always regarded the IMU as a regional organization⁸⁵ and has allowed the IMU to fulfill its Charter duties on behalf of other sovereign States within Aristan's territory. This inductive approach to international personality depends upon the acceptance of that

⁸³13 M. Whiteman, Digest of International Law 29 (1968) (citing Consular Intercourse and Immunities [1959] Y.B. Int'l L. Comm'n 87, 96, U.N. Doc. A/CN.4/L.82/1959; Balladore Pallieri, La Formation des Traités dans la Pratique Internationale Contemporaine, 74-1 Recueil des Cours 469, 487-488 (1949); Carroz and Probst, Personalité Juridique Internationale et Capacité de Conclure des Traités de L'O.N.U. et des Institutions Spécialisées 86-87 (Paris 1953); Kasme, La Capacité de l'Organisation des Nations Unies de Conclure des Traités 35 (Paris 1960)). See also Rama-Montaldo, supra note 69, at 134; Fitzmaurice, The Law and Procedure of the I.C.J., 2 (1953).

⁸⁴Reparations for Injuries Suffered in the Service of the United Nations, (Adv. Op.) 1949 I.C.J. 174, 185.

⁸⁵Compromis, p.8.

personality by States which were not parties to the organization's formation.⁸⁶ Acceptance of an organization's personality need not be overt and express for international personality to arise. For example, Switzerland has tacitly accepted OPEC's international status by allowing OPEC to operate within Switzerland from 1960 to 1965, even though Switzerland has extended no official recognition to OPEC.⁸⁷ Similarly, Aristan has tacitly accepted the IMU's international legal personality by allowing the IMU to operate and fulfill its Charter duties within Aristan's borders. Therefore, the IMU has international legal personality vis-a-vis the Aristani government under the inductive approach to international personality.

B. The Funds In The Administered Deposit Account Which Aristan Seized Were The Property Of The IMU And Were Immune From Aristan's Municipal Jurisdiction.

Because the IMU possesses international legal personality, it is a subject of international law and is entitled to claim international rights and privileges.⁸⁸ One of the customary rights which the IMU is entitled to claim is an immunity for its assets.

1. The property seized by Aristan constitutes an international trust fund belonging to the IMU.

Any argument that the assets seized by Aristan were not the property of the IMU is baseless in light of the principles which have been recognized in international law relating to accounts similar to the one administered by the IMU. The account which Aristan seized was part of an international trust fund being

⁸⁶Lashbrook, supra note 77, at 306-12. See, e.g., Agreement on Judicial Status, Mar. 10, 1955, Switzerland-World Meteorological Association (WMO), 211 U.N.T.S. 278.

⁸⁷Lashbrook, supra note 77, at 306-12. See also Bowett, The Law of International Institutions 310 (3d ed. 1975).

⁸⁸Reparations for the Injuries Suffered in the Service of the United Nations, (Adv. Op.) 1949 I.C.J. 174.

administered by the IMU. Trust funds are unquestionably recognized in international law⁸⁹ and many organizations, including the International Monetary Fund, have established them.⁹⁰ According to the General Counsel and Director of the Legal Department of the International Monetary Fund, an international trust arises where "the organization undertakes to deal with assets transferred to it for the good of specified beneficiaries, [promises] that it will not mingle these assets with assets that are not impressed with a trust, and that it will not freely change the terms of its undertaking. An arrangement of this kind need not be called a Trust Fund...."⁹¹ The IMU's definition of an "administered account"⁹² is indistinguishable from this definition of a trust. The IMU "administered account" is an account administered by the IMU for the benefit of member states.⁹³ Only the IMU, not any beneficiary, may draw upon the account.⁹⁴ The IMU also pledges in its bilateral treaty to keep the administered account in an account "separate from the property and accounts of the organization."⁹⁵ Thus, the IMU's administered account constitutes a trust under general principles of international law.

⁸⁹See, e.g., Gold, Trust Funds in International Law: The Contribution of the International Monetary Fund to a Code of Principles, 72 Am. J. Int'l L. 856 [hereinafter Trust Funds]; J. Gold, A Second Report on Some Recent Legal Developments in the International Monetary Fund 19 (1977) [hereinafter Second Report]; 2 H. Schermers International Institutional Law 386 (1971); R. Edwards, Jr. International Monetary Collaboration 294 (1985).

⁹⁰Gold, Trust Funds, supra note 89; Gold, Second Report, supra note 89.

⁹¹Gold, Second Report, supra note 89, at 19. Note that this is Mr. Gold's personal view.

⁹²Compromis, p.9.

⁹³Id.

⁹⁴Id.

⁹⁵Id.

As an international trust, the IMU administered account is subject to the general principles which the international community, including the International Monetary Fund,⁹⁶ recognize as fundamental in the law of trusts. One of these general principles is that an international trustee, such as the IMU, "owns the resources of the trust fund as trustee" even though they must be "used in accordance with the trust instrument solely for the benefit of" the beneficiaries.⁹⁷ Thus, when Aristan seized the assets in the administered account which were earmarked for Majan, it seized the assets of the IMU.

2. Aristan Violated the IMU's Entitlement to Immunity.

Aristan's unlawful seizure of the IMU's assets violated the rights and privileges which the IMU enjoys under customary international law. Some of the IMU's rights are inherent and arise from the very fact that the organization has been determined to have international legal personality.⁹⁸ Other rights arise from the Charter of the organization insofar as it delineates the purpose and function of the organization.⁹⁹ The right of the IMU to claim immunity of its assets from Aristan's municipal jurisdiction arises from both sources.

a. Functional necessity dictates that IMU assets must be immune from seizure by any state.

Aristan's seizure of the IMU's assets violated the IMU's customary right to immunity from a municipal State's jurisdiction. Under the functional necessity doctrine, an international organization enjoys those rights which are necessary for

⁹⁶Gold, Trust Funds, supra note 89, at 862.

⁹⁷Id.

⁹⁸Rama-Montaldo, supra note 69, at 116-22.

⁹⁹Id. at 112-6.

it to perform the duties assigned to it in its constitutive instrument.¹⁰⁰ In order to function effectively, international organizations certainly require freedom and legal security for their assets.¹⁰¹ The justification for this immunity is "primarily the undesirability of having courts of many different countries determine, possibly in different senses, the legality of acts of the organization."¹⁰² A further justification arises from the "need to protect the organization against prejudice in national courts."¹⁰³ Both justifications apply to the IMU's administered account. If Aristan is allowed to prey upon the assets of the IMU, an innocent third party, in order to wring concessions from Majan, the viability of the IMU as an international trustee would be irreparably undermined. Member States would refuse to relinquish their assets to the IMU to be administered on their behalf, since the safety of the accounts would depend upon the whims of municipal predators like Aristan. The function of the IMU is inextricably intertwined with, and based upon, the assets which are held on behalf of member states.¹⁰⁴ Those assets must be deemed immune from seizure by municipal states if the IMU is to operate on an international plane.

b. Immunity from a State's municipal jurisdiction is an inherent right of entities which are subjects of international law.

In addition to its customary right to immunity arising from functional necessity, the IMU also enjoys a separate customary immunity from a municipal

¹⁰⁰Id. at 212; Lashbrook, supra note 77, at 312; I. Brownlie, Principles of Public International Law 682 (3d ed. 1979). See also Fedder, The Functional Basis of International Privileges and Immunities: A New Concept in International Organizations, 41 Am. J. Int'l L. 828, 847 (1947).

¹⁰¹Brownlie, supra note 100.

¹⁰²Bowett, supra note 87, at 311.

¹⁰³Id. at 311-2.

¹⁰⁴Compromis, p.8.

State's jurisdiction which arises from its very nature as an international organization. The inherent rights of international organizations are quite broad and in most respects parallel the rights enjoyed by sovereign States.¹⁰⁵

"[International organizations] are in principle, from a legal point of view, general subjects of international law, in basically the same manner as States."¹⁰⁶

As a result, customary norms have arisen which establish that one of an international organization's inherent rights is immunity from a State's municipal jurisdiction.¹⁰⁷ Thus, the IMU's assets are immune from the legal processes of the Aristani government solely by virtue of the IMU's status as an international organization.

c. The international legal duty of good faith precludes Aristan in particular from seizing the IMU's assets.

Aristan, in particular, is under a duty to concede privileges and immunities to the IMU based upon the general principle of good faith. Once a State has consented to the presence of an international organization on its territory, it is bound by the principle of good faith to extend all those privileges and immunities which are necessary for the proper functioning of the organization.¹⁰⁸ Aristan has consented to the IMU's presence in its territory, therefore the IMU is entitled to claim that are immune from the municipal jurisdiction of the Aristani government.

¹⁰⁵Seyersted, supra note 71, at 46 (discussing the views of Sereni, 2 Diritto Internazionale (1960) and B. Pallieri, Diritto Internazionale Pubbico (1962)).

¹⁰⁶Seyersted, supra note 71, at 28-9.

¹⁰⁷Taliva, 84-3 Recueil des Cours 304 (1953); G. Weissberg, The International Status of the United Nations 144 (1961).

¹⁰⁸Bowett, supra note 87, at 310.

C. Aristan Cannot Justify Its Actions Under The Commercial Activity Exception.

Any argument by Aristan that the IMU's immunity should be limited by the acta gestionis doctrine must be rejected. The acta gestionis exception to immunity holds that an international subject otherwise entitled to immunity loses that entitlement when it engages in commercial or proprietary actions.¹⁰⁹ It is unclear, however, whether or not the acta gestionis exception applies to international organizations.¹¹⁰ Furthermore, even if the commercial exception applied to international organizations, it could not operate as a bar to the IMU's immunity in this instance. The acta gestionis exception arose from the fear that absolute immunity would protect sovereign states from suit when they failed to live up to their contractual obligations with another party.¹¹¹ In those instances where the State had failed to fulfill its contractual obligations, the aggrieved party could interpose the claim that the State was engaging in commercial, non-sovereign activities to oppose the State's claim to immunity. Aristan cannot, however, raise the commercial activities exception. It entered into no commercial relations with the IMU. It is not an aggrieved party vis-a-vis the IMU. Therefore, the acta gestionis exception does not bar the IMU's entitlement to immunity.

D. Aristan's Seizure Of The IMU Assets Cannot Be Justified As A Countermeasure.

Aristan cannot claim that even though the IMU assets were immune, the seizure was nonetheless lawful as a countermeasure. The purported countermeasure in

¹⁰⁹The basis for this distinction was put forth in the "Tate Letter." Letter from Jack B. Tate, Acting Legal Advisor to the Department of State, to Philip Perlman, Acting Attorney General (May 19, 1952), reprinted in 26 Dep't St. Bull. 984 (1952).

¹¹⁰See, e.g., Gordon, International Organizations: Immunity, 21 Harv. Int'l L.J. 552 (1980).

¹¹¹Id.

question was directed against an innocent third party, the IMU, not the alleged offender. While countermeasures which indirectly have an adverse effect on third parties are permissible, countermeasures which are directly aimed at an innocent third party are illegal under international law.¹¹² This fundamental principle of international jurisprudence was clearly and precisely expressed by the Portugal/Germany Arbitration Tribunal in the Cysne case.¹¹³

In Cysne, Germany destroyed a Portuguese vessel in retaliation for Great Britain's having violated the Declaration Concerning the Laws of Naval War. The tribunal stated:

[R]eprisals which constitute an act in principle contrary to the law of nations are defensible only in so far as they were provoked by some other act likewise contrary to that law. Only reprisals taken against the provoking state are permissible. Admittedly, it can happen that legitimate reprisals taken against an offending state may affect the nationals of an innocent state. But that would be an indirect and unintentional consequence...[b]y contrast the measures taken by the German State...were aimed directly and deliberately against nationals of States innocent of the violations [and were]... contrary to the law of nations.¹¹⁴

In a similar manner, the reprisals taken by Aristan were aimed at the IMU, a completely innocent third party who had done nothing to provoke countermeasures from Aristan.

3. Aristan May Not Invoke Its Municipal Law Over Its International Obligations.

The fact the seizure of the IMU's assets was "lawful under Aristani law, which provides emergency economic powers to the Aristani Government"¹¹⁵ is

¹¹²Responsibility of Germany for Acts Committed Subsequent to 31 July 1919 and Before Portugal Entered Into the War, 2 R. Int'l Arb. Awards 1056 (1930).

¹¹³Id. See also Countermeasures in Respect of an Internationally Wrongful Act, [1979] Y.B. Int'l L. Comm'n 120-1, U.N. Doc. A/CN.4/Ser.A/1979/Add.1 (Part 2).

¹¹⁴Responsibility of Germany for Acts Committed Subsequent to 31 July 1919 and Before Portugal Entered Into the War, 2 R. Int'l Arb. Awards 1056 (1930).

¹¹⁵Compromis, p. 8

irrelevant in assessing Aristan's obligations under international law. It is an elementary principle of international law that every State has the duty to carry out in good faith its obligations arising under international law, and it may not invoke provisions in its municipal laws as an excuse for failure to perform this duty.¹¹⁶ This basic principle was most recently affirmed by this Court in Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947.¹¹⁷ In this Advisory Opinion, it was held that the United States could not raise its municipal anti-terrorism legislation as a defense for its failure to arbitrate its dispute with the United Nations concerning the status of the observer mission as mandated by section 21 of the United Nations Headquarters Agreement. Similarly, Aristan may not invoke its municipal legislation as a defense to the IMU's international legal claim to immunity.

CONCLUSION

For the foregoing reasons, the Applicant, Government of Majan, respectfully requests that this Honorable Court find, adjudge, and declare as follows:

1. That Majan may prosecute Aristan's former ambassador for murder, attempted murder, drug smuggling and trafficking under the Vienna Convention on Diplomatic Relations.
2. That Aristan breached its duty to accord immunity to the assets of the International Monetary Union.

¹¹⁶German Interests in Polish Upper Silesia, (Merits) 1926 P.C.I.J. (ser.A) No. 7, at 19, 22, 42; Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 I.C.J. 176; Norwegian Shipowners' Claims (Norway v. U.S.), 1922, 1 R. Int'l Arb. Awards 1079; Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, (Adv. Op.), 1988 I.C.J. 12.

¹¹⁷Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, (Adv. Op.), 1988 I.C.J. Reports 12.