

**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 RESPONDENT

February 1989

TABLE OF CONTENTS

INDEX OF AUTHORITIES	iii
JURISDICTION	viii
STATEMENT OF FACTS	ix
SUBMISSIONS TO THE COURT	xv
QUESTIONS PRESENTED	xvi
SUMMARY OF ARGUMENT	xvii
ARGUMENT	1
I. MAJAN'S PROSECUTION OF THE ARISTANI DIPLOMAT CONSTITUTES A GRAVE VIOLATION OF ARISTAN'S NATIONAL SOVEREIGNTY AND A BREACH OF CONVENTIONAL AND CUSTOMARY LAW.	1
<u>A. Majan's Prosecution Of The Aristani Ambassador Is A Violation Of The Vienna Convention On Diplomatic Relations.</u>	3
1. Majan's unauthorized assertion of criminal jurisdiction over the Aristani diplomat constitutes a breach of Article 31 of the Vienna Convention on Diplomatic Relations.	3
2. Majan's assertion of criminal jurisdiction over the Aristani diplomat is not authorized under Article 39 of the Vienna Convention on Diplomatic Relations.	6
<u>B. Majan's Actions In Imprisoning And Criminally Prosecuting The Aristani Ambassador Are A Violation Of Customary International Law.</u>	10
<u>C. Majan's Unlawful Assertion Of Criminal Jurisdiction Constitutes A Breach Of Good Faith And "Pacta Sunt Servanda" In Violation Of The Vienna Convention on the Law of Treaties.</u>	12
II. ARISTAN'S SEIZURE OF THE ASSETS THE INTERNATIONAL MONETARY UNION ASSIGNED TO MAJAN IN THE ADMINISTERED DEPOSIT ACCOUNT IS IN ACCORD WITH ARISTAN'S CONVENTIONAL AND CUSTOMARY OBLIGATIONS UNDER INTERNATIONAL LAW.	12
<u>A. Aristan's Seizure Of The Funds Assigned To Majan Is Justified As A Countermeasure Under Customary Norms And General Principles Of Law</u>	13
<u>B. Aristan's Seizure Of The Funds Assigned To Majan Is A Proper Exercise Of Its Territorial Sovereignty.</u>	15
1. Aristan is under no conventional duty to restrict its sovereignty by granting immunity to the International Monetary Union.	16

2. Aristan is under no customary duty to restrict its sovereign rights by granting immunity to the International Monetary Union.	16
<u>a. The IMU does not possess objective international personality binding on Aristan.</u>	18
<u>b. The principle of "pacta tertii" precludes imposition of the international personality of the IMU upon Aristan.</u>	19
<u>c. The international personality of the IMU is not binding on Aristan under the inductive doctrine of personality.</u>	20
<u>d. The inherent rights doctrine does not require Aristan to grant immunity to the funds assigned to Majan.</u>	21
<u>e. The functional necessity doctrine does not require Aristan to grant immunity to the funds assigned to Majan.</u>	22
<u>f. The customary law of foreign sovereign immunity does not impose a duty upon Aristan to grant the IMU immunity for the funds in the administered deposit account.</u>	23
CONCLUSION	25

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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

The United Republic of Aristan is a large industrialized country which was one of four colonial powers to have governed Majan. Majan is a poor, developing country plagued drug abuse (C.1). Majan officials knew that some drugs were smuggled into Majan by an Aristani diplomat(C.1). Aristan was unaware, however, that its diplomat was engaged in illicit activities and that he smuggled the drugs into Majan by diplomatic pouch with the assistance of one or more unknown confederates in Aristan's foreign ministry(C.1). Once the drugs reached Majan, a national of Majan, Marc Wilkey, would meet the diplomat, Ambassador Guido Kitaro, Chief of Aristan's diplomatic mission in Majan, who would deliver a suitcase containing the drugs(C.1). Mr. Wilkey always paid the Ambassador large amounts of United State's dollars in exchange for the drugs (C.1,2)

On February 13, 1988, Ambassador Kitaro, attended a diplomatic reception where his presence was de rigueur(C.1). He left the reception to meet Mr. Wilkey in Majan's capital city of Providence to consummate another drug transaction(C.1). After Kitaro arrived with the drugs, Mr. Wilkey refused to pay him. Wilkey explained that if the Ambassador did not give him the drugs, he would expose the Ambassador to public disgrace(C.2). Mr. Wilkey then snatched Ambassador Kitaro's suitcase and fled(C.2). Ambassador Kitaro, shaken by Mr. Wilkey's threats, jumped in his car, and in a panic, hit Mr. Wilkey and two others before crashing into a wall(C.2).

Ambassador Kitaro was found in his car unconscious(C.2). Mr. Wilkey was critically injured. The two bystanders were killed(C.2). Drugs from the suitcase Mr. Wilkey was carrying were found scatttered about the scene of the accident(C.2). Police interviewed bystanders, but neither the police nor any other

governmental official interviewed Kitaro concerning the incident (C.2). The police report alleged that the Ambassador was engaged in drug trafficking while "obviously drunk" (C.2). However, no test was offered or administered to the Ambassador out of respect for his diplomatic immunity (C.2).

II

The incident produced an outpouring of criticism from local news media and politicians who were concerned over repeated abuses of diplomatic immunity (C.2). As a result of the criticism, a non-binding resolution was passed in Majan's National Assembly to prosecute the Ambassador under Majan's criminal law (C.3). Majan's Minister of Justice, Charles Akulu, announced to the international press that charges were being filed against the ambassador for murder, attempted murder, drug trafficking, and smuggling (C.3). Minister Akulu announced that "these acts are regarded by the law of Majan as among the most serious crimes and could result in the death penalty (C.3). Based on the evidence, there seems to be no doubt that, under our law, Ambassador Kitaro is guilty of all charges." (C.3). Mr. Akulu acknowledged that Ambassador Kitaro had diplomatic immunity, but stated that he only had immunity for the time he was accredited to Majan. Once the Ambassador's mission terminated, his immunity would cease, and he could, thereafter, be prosecuted for acts which occurred while he had immunity (C.3,4)

On February 18, 1988, Ambassador Kitaro met with Manfred van Dyke, Majan's Minister of Foreign Affairs, to express his regret, as well as the regret of the Aristani government concerning the incident (C.3). The Ambassador also notified Minister van Dyke by Diplomatic Note that, in accordance with diplomatic protocol, he was being recalled by Aristan and that his diplomatic status would terminate as of 12:01 a.m. February 21, 1988 (C.3).

III

Aristan was alarmed by Majan's announcement that it intended to prosecute the Ambassador (C.4). Therefore, on February 22, the Government of Aristan dispatched a Diplomatic Note to the Majani Minister of Foreign Affairs, through its Embassy in Providence, which stated 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 Kitano 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 the 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 the 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)

In response, Majan's Ministry of Foreign Affairs replied as follows by a

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 had, 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 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.5,6,7)

IV

After the exchange of Notes, and after the Ambassador had departed Majan, a warrant for was issued for his arrest charging him with murder, attempted murder, drug trafficking, and smuggling (C.7). Majan's law does not allow for trial in absentia (C.7)

Once in Aristan, Foreign Secretary Christina Bocalandro dismissed Ambassador Kitaro from Aristan's foreign service following a hearing and extensive press coverage concerning the incident (C.7). One week later, the Ambassador left Aristan to vacation in the Parrot Islands (C.7). Majan learned that the Ambassador was in the Parrot Islands and immediately filed a demand for his extradition under a bilateral treaty between the two states (C.7). Under the terms of the treaty, the Parrot Islands arrested the Ambassador and extradited him to Majan, where he was imprisoned (C.7)

Despite Aristan's repeated protests concerning the Ambassador's imprisonment, Majan continued to prepare for the Ambassador's trial (C.8). Aristan then imposed a series of economic sanctions, straining the economy (C.8). Aristan also encouraged Majan's neighboring countries to stop the trade into and out of Majan. These sanctions slowed Majan's economy to a mere trickle (C.8)

Majan proceeded to try the Ambassador, and on the day of the trial, Aristan seized Majan's assets in an administered deposit account held by the International Monetary Union (IMU) in the First Aristani National Bank, a private, commercial institution in Robinette, Aristan's capital city (C.8)

The IMU is a regional monetary union in which Majan and 60 other sovereign States are members (C.8). 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 (C.8)

Aristan is not a member of the IMU, but has always regarded the IMU as a regional organization (C.8). 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 (C.8,9). These bilateral treaties refer to "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 the accounts of the organization, and which may not be drawn upon by the beneficiary but only by the IMU." (C.9)

The seizure of funds was lawful under Aristani law, which provides emergency economic powers to the Aristani Government (C.8). However, IMU President Hans Zoff protested the seizure as a violation of the IMU's immunity under general international law (C.9). Since the IMU Charter states that if expressly agreed, any member State may represent the legal interest of the IMU before the International Court of Justice, President Zoff agreed that Majan would be allowed to exclusively defend both its own and the IMU's interest before the Court (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 Majan breached its duty to accord absolute immunity from criminal jurisdiction to the Aristani ambassador under the Vienna Convention on Diplomatic Relations, the Vienna Convention on the Law of Treaties, and customary law?

II. Whether Aristan's seizure of the funds held by the IMU in the administered deposit account for the exclusive benefit of Majan is justified as a non-violent and proportional countermeasure which necessarily implicates the rights of a third party in order to impose a sanction against Majan the offending State?

III. Whether Aristan is justified under the rules of international law in exercising its sovereign right of absolute territorial jurisdiction to seize funds held in an administered deposit account for the exclusive benefit of a particular State by a regional commercial organization, such as the IMU, when such organization is not recognized by the territorial State.

SUMMARY OF ARGUMENT

I

Diplomatic immunity ensures respect for international relations and national sovereignty. The need for such respect has resulted in the grant of absolute immunity for diplomats from the criminal jurisdiction of the receiving State. This rule of absolute immunity is embodied within the Vienna Convention on Diplomatic Relations, as well as customary law. As a party to the Diplomatic Relations Convention and a subject of international law, Majan is under an obligation to grant immunity to the Aristani diplomat.

The grant of diplomatic immunity from criminal jurisdiction expressed in Article 31 of the Diplomatic Relations Convention is absolute. The ordinary meaning of this language and the object and purpose of the Diplomatic Relations Convention dictate this interpretation. State practice also supports the absolute nature of diplomatic immunity from criminal jurisdiction. Majan has intentionally violated its duty to grant immunity to the Aristani ambassador.

Article 39 of the Diplomatic Relations Convention does not limit or terminate the absolute immunity from criminal jurisdiction granted in Article 31. A proper interpretation of Article 39 in context and in light of the object and purpose of the Diplomatic Relations Convention requires that this provision be limited solely to the termination of immunity for acts which occur after the cessation of the diplomat's accreditation period. It cannot in good faith be extended to terminate the immunity which attached to acts occurring in the accreditation period. Thus, Majan has committed a breach of the Diplomatic Relations Convention by attempting to prosecute the Aristani diplomat.

The absolute prohibition of criminal jurisdiction by a receiving State over a diplomat embodied in the Diplomatic Relations Convention is also a basic principle of customary international law. Majan has violated this customary duty in addition to its conventional obligations.

The fundamental rule of pacta sunt servanda, as it exists under the Vienna Convention on the Law of Treaties and customary law requires States to perform their treaty obligations in good faith. Majan has intentionally breached its conventional duties in violation of this duty of good faith. Majan should be ordered to release the Aristani diplomat and drop all charges against him.

II

Aristan's action in seizing the administered deposit account assigned by the International Monetary Union to Majan is in accordance with international law. Under the customary law of countermeasures, a State may take retaliatory action against a State which has injured it through wrongful conduct. The impact of such a reprisal upon a third party will not negate the propriety of the sanction when such third party involvement was necessary to punish the offending State. By refusing to release the Aristani diplomat, Majan has forced Aristan to implicate the IMU in its countermeasure. The involvement of the IMU, however, does not negate the propriety of Aristan's action.

Aristan's seizure of the funds assigned to Majan in the First Aristani National Bank was a proper exercise of its territorial sovereignty. Absent a conventional or customary duty to restrict its territorial jurisdiction, Aristan is under no duty to grant immunity to the IMU funds assigned to Majan. No conventional duty exists obligating Aristan to accord any rights to the IMU. Likewise, no such customary duty can be found. The IMU, a regional banking

organization, does not possess objective personality binding upon Aristan. The IMU can fulfill its purposes by obtaining express recognition of its personality solely from those international subjects with which it deals. There is no inherent need for it to be unconditionally recognized by the entire international community.

Absent such a limitation, the doctrine of objective personality conflicts with the fundamental principle of pacta terti. Pacta terti ensures that a treaty cannot impose duties upon a nonparty State without its consent. As international organizations are created by treaty, the extension of the doctrine of objective personality to regional organizations not recognized by a State violates this norm. Thus, the IMU possesses no objective personality, and absent personality, possesses no international rights.

Likewise, the inductive doctrine of personality imposes no obligation on third States to accept organizations as subjects of international law. Inductive personality is dependent upon the will of States involved. Only those States which choose to accept the personality of the organization must accord international rights to it. Aristan does not recognize the IMU and is thus under no duty to accord immunity to it.

Even assuming that the IMU possessed an international personality binding upon Aristan, no rule of international law requires Aristan to grant immunity to funds held in this type of account. The inherent rights doctrine of organizational powers does not provide an inherent right of immunity. Rather, international immunities are generally governed by conventional obligations and not customary duties. Absent such a customary immunity, Aristan is under no duty to grant immunity to the funds assigned to Majan through the IMU.

The functional necessity doctrine of organizational powers grants each organization only those powers necessary to fulfill the purposes expressed in its constituent instrument. Applying this doctrine to the IMU, no right of immunity

exists. The functions of the IMU center on banking and investment activities. The administered deposit accounts it holds need not be absolutely immune from the jurisdiction of the State in which they are deposited to achieve these goals.

Neither the IMU nor Majan can claim immunity for these funds under the customary doctrine of foreign sovereign immunity. International organizations do not possess the requisite sovereignty upon which such immunity is based. Furthermore, sovereign immunity does not preclude the exercise of jurisdiction as a legitimate countermeasure to a prior wrongful act. Thus, Aristan has acted in accordance with international law in seizing the fund in the administered deposit account.

ARGUMENT

I. MAJAN'S PROSECUTION OF THE ARISTANI DIPLOMAT CONSTITUTES A GRAVE VIOLATION OF ARISTAN'S NATIONAL SOVEREIGNTY AND A BREACH OF CONVENTIONAL AND CUSTOMARY LAW.

International law rests upon the basic premise of sovereign equality of states.¹ Respect for sovereignty is essential to the conduct of relations between independent sovereign States. To ensure such respect, the law of nations has developed diplomatic immunity.² Diplomatic immunity consists of "the freedom from local jurisdiction accorded under international law by the receiving State to duly accredited diplomatic officers...."³ The concept of diplomatic immunity may be traced back to the usages and customs of ancient times.⁴ It is founded upon States' consent, is essential to orderly international relations and is given on the understanding that it will be reciprocally accorded.⁵ The necessity of safeguarding persons charged with the conduct of foreign relations, so that they may properly protect their countries' interests, and the recognition of the mutual

¹U.N. Charter, art. 2, § 1. See also Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28), U.N. Doc. A/8082 (1970), reprinted in 9 I.L.M. 1292 (1970); "By sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States." Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 43. See also Island of Palmas (U.S. v. Neth.), 11 R. Int'l Arb. Awards 828 (1928).

²Wilson, Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations, 7 Loy. L.A. Int'l & Comp. L.J. 113 (1984); B. Sen, A Diplomat's Handbook of International Law and Practice 80 (1965).

³Barnes, Diplomatic Immunity from Local Jurisdiction: Its Historical Development Under International Law & Application in United States Practice, 43 Dep't St. Bull. 173 (1960).

⁴"There are two maxims in the law of nations relating to ambassadors which are generally accepted as established rule: The first that ambassadors must be received and second that they must suffer no harm." H. Grotius, De Jure Belli ac Pacis (1625). See also Barnes, supra note 3, at 173.

⁵E. Satow, A Guide to Diplomatic Practice 175 (N. Bland 4th ed. 1957).

advantages to be gained by so doing are the primary forces compelling the observance of diplomatic immunity.⁶ Few principles of international law are more universally recognized.⁷ The fundamental nature of diplomatic immunity is reflected by its codification in the Vienna Convention on Diplomatic Relations in 1961,⁸ and its application in customary norms as evidenced by State practice.⁹

Receiving States are obligated to respect the sovereignty and dignity of the sending State by granting immunity from jurisdiction to its diplomats. Majan, however, has deliberately violated these fundamental principles of sovereignty, equality and reciprocity by extraditing, imprisoning, and initiating prosecution of the Aristani diplomat. These actions constitute a breach of the Vienna Convention on Diplomatic Relations, of the Vienna Convention on the Law of Treaties, and of customary international law. Such unilateral disregard for the law of diplomatic immunity poses a grave threat to international intercourse and cannot go unchecked.

⁶Barnes, supra note 3, at 176. See also Marman, The Diplomatic Relations Act of 1978 and its Consequences, 19 Va. J. Int'l L. 132 (1978).

⁷Young, The Development of the Law of Diplomatic Relations, 40 Brit. Y.B. Int'l L. 141 (1964); Garretson, Immunities of Representatives of Foreign States, 41 N.Y.U.L.Rev. 68 (1966); Wilson, supra note 2, at 113.

⁸Vienna Convention on Diplomatic Relations, opened for signature 18 April 1961, 23 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95 [hereinafter Diplomatic Relations Convention]. For a discussion of the Convention's codificatory nature, see D'Amato, Manifest Intent and the Generation by Treaty of Customary Rules of International Law, 64 Am. J. Int'l L. 892 (1970); E. Denza, Diplomatic Law 2 (1976).

⁹"The Court...shall apply:... (b) international custom, as evidence of general practice accepted as law...." Statute of the International Court of Justice, 59 Stat. 1055, T.S. 993, 3 Bevans 1179. See also The Paquete Habana, 175 U.S. 677 (1900); L. Henkin, R. Pugh, O. Schachter, & H. Smit, International Law: Cases and Materials 37 (2d ed. 1987).

A. Majan's Prosecution Of The Aristani Ambassador Is A Violation Of The Vienna Convention On Diplomatic Relations.

Basic rules of treaty interpretation dictate that "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."¹⁰ Applying these principles, Majan has violated the textual language and the object and purpose of the Vienna Convention on Diplomatic Relations.

1. Majan's unauthorized assertion of criminal jurisdiction over the Aristani diplomat constitutes a breach of Article 31 of the Vienna Convention on Diplomatic Relations.

Article 31(1) of the Vienna Convention on Diplomatic Relations ("Diplomatic Relations Convention"), to which both Aristan and Majan are parties, provides that "a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State."¹¹ Immunity does not mean that the diplomat is under no obligation to observe the laws of the receiving State. As Article 41 of the Diplomatic Relations Convention provides, "[i]t is the duty of all [diplomats] to respect the laws and regulations of the receiving State."¹² To enforce this obligation, the receiving State is provided with the remedies of "a formal complaint to [the diplomat's] government; an official request to that government for his recall, or a declaration that he is persona non grata and an order for him

¹⁰Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 U.N.T.S. 331, U.N. Doc. A/CONF.39/27, art. 31(1) [hereinafter Law of Treaties Convention]; Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. Reports 4, 8.

¹¹Diplomatic Relations Convention, supra note 8, art. 31(1).

¹²Id., art. 41(1).

to leave the country forthwith."¹³ The sending State may also waive the diplomats immunity to allow trial in the receiving State or it may assert its own criminal jurisdiction.¹⁴ These diplomatic sanctions can be used to enforce the obligation of respect for the laws of the receiving State. In no circumstances, however, can the receiving State unilaterally arrest, imprison, or prosecute a diplomat.¹⁵

Article 31(1) of the Diplomatic Relations Convention expresses an absolute immunity from criminal jurisdiction. This Court affirmed the absolute nature of diplomatic immunity in its decision in The United States Diplomatic and Consular Staff in Tehran.¹⁶ This Court asserted 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 of...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.'"¹⁷

The conclusion that Article 31(1) provides absolute diplomatic immunity from any type of criminal jurisdiction is supported by State practice. For example, following the shooting of one of its constables by a Libyan diplomat, the United Kingdom pursued its remedies of diplomatic sanctioning by severing relations with

¹³Barnes, supra note 3, at 177, (citing J. Moore, A Digest of International Law 678 (1906)). See Commentary to Draft Articles on Diplomatic Intercourse and Immunities, [1958] 2 Y.B. Int'l L. Comm'n 91, U.N. Doc. A/CN.4/SER.A/1958/Add.1 [hereinafter Commentary to Draft Articles on Diplomatic Relations].

¹⁴Diplomatic Relations Convention, supra note 8, art. 32(1).

¹⁵J. Moore, A Digest of International Law 678 (1906); I. Brownlie, Principles of Public International Law 343 (2d ed. 1973); 1 L. Oppenheim, International Law 790 (Lauterpacht 8th ed. 1955).

¹⁶United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 7.

¹⁷United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 7, 37.

Libya, closing the mission, and escorting the Libyan diplomats out of the country.¹⁸ It did not attempt to assert criminal jurisdiction against them, as such actions would violate the Vienna Convention. In a statement to Parliament, British Secretary Leon Brittan stated that Britain would observe scrupulously its obligations under the Vienna Convention on Diplomatic Relations and that the Convention, which grants immunity to diplomats and embassies, prevented the capture of the suspect.¹⁹ British Foreign Secretary Geoffrey Howe described the severance of diplomatic relations and expulsion of the diplomats as the "right response, the only response that could be given in the circumstances."²⁰ The United States of America subsequently applauded the British actions, describing them as "totally appropriate."²¹ These statements and actions illustrate the acceptance of Article 31(1) by the international community as expressing an absolute grant of diplomatic immunity from criminal jurisdiction in the receiving State.

In addition to State practice, the ordinary meaning of the language, as well as the object and purpose, of the Diplomatic Relations Convention support the absolute immunity interpretation of Article 31(1). The plain meaning of the text is clear, with no ambiguities, restrictions or exceptions indicated. In contrast, Article 31 grants only limited diplomatic immunity from civil or administrative jurisdiction. The context of these provisions, read together, illustrate an intent to limit civil jurisdictional immunity but not criminal. This conclusion is further supported by the object and purpose of the Diplomatic Relations Convention.

¹⁸United Press International, Apr. 25, 1984; The Times (London), Apr. 18, 1984, at 1, col. 1.

¹⁹Reuters North European Service, Apr. 25, 1984; United Press International, Apr. 25, 1984.

²⁰United Press International, Apr. 23, 1984.

²¹Reuters Limited, Apr. 23, 1984.

The purpose of diplomatic relations immunity is to allow diplomats to function in the receiving State without fear of interference or reprisal.²² "[O]n no other basis than that of exemption from...local jurisdiction would sovereign States...send their representatives to the headquarters of another State."²³ In exchange for this non-interference with its diplomats, the sending State likewise accords immunity to the diplomats it receives.²⁴ As the United States Secretary of State, Cordell Hull, explained, "it is obvious that the unhampered conduct of official relations between countries and the avoidance of friction and misunderstanding which could lead to serious consequences are dependant in large measure upon a strict observance of the law of nations regarding diplomatic immunity."²⁵ Thus, Article 31(1) is properly interpreted as dictating the absolute prohibition of the exercise of criminal jurisdiction over diplomatic agents by the receiving State.

2. Majan's assertion of criminal jurisdiction over the Aristani diplomat is not authorized under Article 39 of the Vienna Convention on Diplomatic Relations.

Majan, however, claims that the absolute grant of immunity in Article 31 is restricted in Article 39 of the Diplomatic Relations Convention. Article 39, paragraph 1, governs the point in time at which a diplomat's right to immunity for his subsequent acts arises. Paragraph 2 goes on to discuss the point at which such

²²Diplomatic Relations Convention, supra note 8, Preamble.

²³C. Hurst, International Law: Collected Papers 174 (1950).

²⁴"In respect of all these matters we were constantly reminded of the importance of reciprocity -- namely, that the privileges and immunities operate to provide a very real protection for our diplomats and their families overseas...." H.C. Foreign Affairs Committee, First Report, reprinted in Higgins, The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience, 79 Am. J. Int'l L. 641, 650 (1985).

²⁵Statement of Secretary Hull, reprinted in Reeves, Editorial Comment: The Elkton Incident, 30 Am. J. Int'l L. 95 (1936).

a right to immunity is terminated. It 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 case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

Majan interprets this provision as a rule of retroactive termination for the immunity which attached to acts during the accreditation period. Such interpretation, while it may seem to reflect the language of the final clause in paragraph 2, has no support in the legislative history of Article 39 and is contrary to the object and purpose of the Diplomatic Relations Convention, as well as State practice applying it.

A treaty must be read in its entirety, giving its language ordinary meaning in its context, including its object and purpose.²⁶ Reading paragraphs 1 and 2 of Article 39 together in context, these provisions are logically interpreted as governing the inception and cessation of the "immunity period," which parallels the inception and cessation of the diplomatic status. Acts occurring subsequent to cessation of the diplomatic status and the immunity period would not be protected. As to prior acts which occurred during the immunity period, however, a termination of diplomatic status would not remove the bar to prosecution. Once immunity has attached to the act of a diplomat, that immunity is absolute.

The travaux preparatoires to the Diplomatic Relations Convention provide no support for the novel position advocated by Majan. The Commentary to the Draft Articles of the International Law Commission preceding the Convention fail to explain or even discuss the notion of retroactive termination of immunity Majan

²⁶Law of Treaties Convention, supra note 10, art. 31(1).

claims is embodied in paragraph 2.²⁷ If such an effect were intended by the drafters, it seems as though it would be emphasized in a separate provision or at least discussed in the Commentary, especially in light of the object and purpose of the Diplomatic Relations Convention. The purpose of diplomatic immunity is to encourage peaceful cooperation among States and to allow diplomats to function without fear of interference or reprisal.²⁸ If a receiving State could effect a termination of that immunity by declaring the diplomat persona non grata and then assert jurisdiction over him, the entire Convention would be rendered meaningless. Such a conclusion presents an absurdity and conflicts with the basic premise that a treaty must be interpreted in good faith.²⁹

Furthermore, State practice illustrates that Article 39 is not interpreted by the international community as removing the immunity which attached to acts occurring during the diplomat's accreditation period. "If a diplomatic agent commits an ordinary crime in the country to which he is accredited, he cannot be tried or punished by the local courts. No case can be cited where, without his

²⁷The Commentary relating to Article 39(1) and (2) contains only the following remarks: "The first two paragraphs of this article deal with the times of commencement and termination of entitlement and termination of entitlement in the case of persons entitled to privileges and immunities in their own right. In the case of persons who derive their entitlement from such persons, other dates may apply, viz. the dates of commencement and termination of the relationship which constitutes the grounds of the entitlement. As regards paragraph 2, the question had been raised whether exemption from import duties should not cease immediately on the termination of functions. The Commission did not take that view. It was in any event clear that, as regards export duties, these should continue until the person concerned had had time to make arrangements for his departure. Similarly, in the case of import duties also, there are cases calling for exemption, e.g. where goods have been ordered prior to only any knowledge of appointment to another post." Commentary to Draft Articles on Diplomatic Relations, supra note 13.

²⁸Larschan, The Abisinio Affair: A Restrictive Theory of Diplomatic Immunity?, 26 Colum. J. Transnat'l L. 282, 286 (1988).

²⁹Law of Treaties Convention, supra note 8, art. 31(1).

consent or that of his government, such a course has been followed."³⁰ The Libyan-British incident illustrates this position. Article 39 states that termination shall occur "at the moment the [diplomat] leaves the country...."³¹ The Libyans involved in the shooting were expelled from British territory, but the British government took no steps to exercise its criminal jurisdiction after that time. In fact, British officials stated that no diplomat would be detained or tried and that the British would honor the Vienna Convention.³² In a similar incident in 1978, a French policeman was killed by gunfire from the Iraqi Embassy in Paris. The French President's spokesperson acknowledged that the diplomatic immunity covered the suspects and that the French government could not prosecute them.³³

State practice shows that immunity ceases only with respect to future acts. Only one nation, the United States, has contemplated the restrictive view of immunity argued here by Majan. The United States, however, in fact refused to follow through with its announced intention to assert criminal jurisdiction when faced with the opportunity. In the recent Abisinito affair, the ambassador of Papua New Guinea seriously injured two American nationals.³⁴ The ambassador was recalled by his government in compliance with diplomatic protocol. The United States then issued a statement that the diplomatic immunity of the ambassador terminated along with his accreditation and that the United States intended to

³⁰Larschan, supra note 28, at 289 (citing E. Satow, A Guide to Diplomatic Practice 124 (Gore-Booth 5th ed. 1979)).

³¹Diplomatic Relations Convention, supra note 8, art. 39(2).

³²United Press International, Apr. 22, 1984; Reuters Limited, Apr. 23, 1984.

³³The Times (London), Aug. 3, 1978, at 5, col. 1.

³⁴Lynton, Envoy's Car Slams Into 4 Vehicles, Wash. Post, Feb. 14, 1987 at B1, col. 2. See generally Larschan, supra note 28, at 222.

bring formal charges against him.³⁵ No such action, however, was ever taken, indicating that the absolute character of immunity has been ultimately recognized by the United States.

Majan's desire to punish Ambassador Kitaro cannot supercede the absolute nature of diplomatic immunity. Aristan does not condone, nor is it defending, the actions of Ambassador Kitaro. Rather, the issue of diplomatic immunity presented here implicates two sovereign States and is a government-to-government matter which cannot focus solely on the actions of the a ambassador. The purpose of diplomatic immunity, as stated by the Preamble of the Diplomatic Relations Convention, "is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States."³⁶ The law of diplomatic immunity balances the interests in sovereignty and reciprocity of the receiving and sending States by providing the diplomatic sanctioning measures of persona non grata and expulsion. Majan has refused to utilize these mechanisms, resorting instead to the assertion of criminal jurisdiction in a deliberate violation of its treaty obligations under the Vienna Convention on Diplomatic Relations.

B. Majan's Actions In Imprisoning And Criminally Prosecuting The Aristani Ambassador Are A Violation Of Customary International Law.

The Vienna Convention of Diplomatic Relations represents a codification of the rules of customary international law.³⁷ In addition, as this Court recognized in Military and Paramilitary Activities In and Against Nicaragua, despite the

³⁵Barker, Criminal Charge Possible for Envoy, Wash. Post, Feb. 15, 1987, at B1, col. 2.

³⁶Diplomatic Relations Convention, supra note 8, Preamble. See also Barnes, supra note 3, at 179; Benedek, The Diplomatic Relations Act: The United States Protects its Own, 5 Brooklyn J. Int'l L. 379, 384 (1979).

³⁷United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, 2 March-14 April 1961, at 2, 5, U.N. Doc. A/CONF.20/14.

existence of a treaty, customary law is independently applicable and continues to govern disputes and international relations.³⁸ Thus, Majan's actions in violating the Diplomatic Relations Convention also constitute a grave breach of the customary law of absolute and permanent diplomatic immunity.

Diplomatic immunity is a fundamental principle of international law. "[I]t exists by virtue of the law of nations...and for such universally accepted principles no authority need be cited."³⁹ Custom has always recognized diplomatic immunity.⁴⁰ For example, the earliest statutory enactments of such immunity in the United States provided "any ambassador...authorized and received as such by the President is absolutely immune from arrest, imprisonment, or seizure of his property."⁴¹ This statutory rule of absolute immunity for diplomatic agents was accepted as a basic principle of international law in The Schooner Exchange v. M'Faddon.⁴² Likewise, most commentators support absolute diplomatic immunity from criminal prosecution by a receiving State.⁴³ This immunity is necessary to maintain public order and to preserve free and uninterrupted international relations.⁴⁴ Majan has breached the customary law of immunity by arresting and imprisoning the Aristani diplomat.

³⁸Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶156.

³⁹Letter from United States Secretary of State Elihu Root to the Secretary of Commerce and Labor, Mar. 16, 1906, reprinted in 4 G. Hackworth, Digest of International Law 513 (1942).

⁴⁰H. Grotius, supra note 4.

⁴¹22 U.S.C. §252 (1976) (repealed 1978). See also Respublica v. DeLongchamps, 1 U.S. (1 Dall.) 111 (1784); Garretson, supra note 7, at 73 (noting the United States position has always supported absolute immunity).

⁴²11 U.S. (7 Cranch) 116, 138-39 (1812).

⁴³Wilson, supra note 2, at 128 n.112.

⁴⁴D. Michaels, International Privileges and Immunities 47, 50 (1971).

C. Majan's Unlawful Assertion Of Criminal Jurisdiction Constitutes A Breach Of Good Faith And "Pacta Sunt Servanda" In Violation Of The Vienna Convention on the Law of Treaties.

"One of the most fundamental rules of international law is that treaties must be performed in good faith; the rule of pacta sunt servanda."⁴⁵ This rule was expressly referred to by the Tribunal in the North Atlantic Coast Fisheries arbitration as "the principle of international law that treaty obligations are to be executed in perfect good faith."⁴⁶ Article 26 of the Vienna Convention on the Law of Treaties codifies this fundamental principle. It provides that "every treaty in force is binding upon the parties to it and must be performed by them in good faith."⁴⁷ Majan has intentionally breached its duties to grant diplomatic immunity to Aristan's ambassador. In doing so, it has violated the Vienna Convention on the Law of Treaties as well as its customary duty to perform its treaty obligations in good faith. Majan should, therefore, be ordered to release Ambassador Kitaro and dismiss all charges against him.

II. ARISTAN'S SEIZURE OF THE ASSETS THE INTERNATIONAL MONETARY UNION ASSIGNED TO MAJAN IN THE ADMINISTERED DEPOSIT ACCOUNT IS IN ACCORD WITH ARISTAN'S CONVENTIONAL AND CUSTOMARY OBLIGATIONS UNDER INTERNATIONAL LAW.

Aristan has seized the funds assigned to Majan in the Aristani National Bank as a legal response to Majan's flagrant violation of international law. The impact of this action upon the International Monetary Union ("IMU"), an entity never recognized by, and possessing no international rights or immunities as to Aristan, will not invalidate Aristan's right to sanction Majan. Aristan is under no

⁴⁵Hyde, International Law 1369, 1454 (2d ed. 1945). See also Kunz, Meaning and Range of the Norm "Pacta Sunt Servanda", 39 Am. J. Int'l L. 180 (1945).

⁴⁶North Atlantic Coast Fisheries, Hague Court Reports 184 (1916). See also Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, 1932 P.C.I.J. (Ser. A/B) No. 44.

⁴⁷Law of Treaties Convention, supra note 10, art.26.

international duty, whether conventional or customary, to grant immunity to the funds assigned to Majan by the IMU. Aristan's legitimate action to protect its sovereign rights did not violate any of its international obligations.

A. Aristan's Seizure Of The Funds Assigned To Majan Is Justified As A Countermeasure Under Customary Norms And General Principles Of Law.

A State injured by another State's violation of international law is entitled to take measures against the offending State.⁴⁸ Aristan has done so by implementing an economic reprisal directed at Majan. Reprisals are "acts of retaliation for violations of international law causing injury to the State exercising the reprisal"⁴⁹ which seek to obtain reparation, to punish or to coerce the offending State.⁵⁰ Three conditions must be complied with to effect a legitimate reprisal: (1) the act of the offending State must have been illegal, (2) the retaliating State has been unable to obtain redress, and (3) a reasonable degree of proportionality must be shown to exist between the initial offense and the retaliatory action.⁵¹ The actions of Aristan in seizing the funds assigned to Majan fall within the scope of these conditions. Majan has committed grave breaches of both conventional and customary international law and has failed to comply with requests for the release of the Aristani diplomat. These acts created a justification for the proportionate countermeasure of seizing the Majani assets in the administered deposit account.

⁴⁸Draft Articles on State Responsibility [1979] 2 Y.B. Int'l L. Comm'n 93, 115-22, U.N. Doc. A/CN.4/SER.A/1979/Add.1 (Part 2) [hereinafter Draft Articles on State Responsibility]. See also L. Henkin, R. Pugh, O. Schachter, & H. Smit, *supra* note 9, at 541.

⁴⁹A. Hershey, The Essentials of Public International Law 343 (1904); J. Brierly, The Law of Nations 415 (6th ed. 1963).

⁵⁰E. Zoller, Peacetime Unilateral Remedies 47 (1984).

⁵¹Naulilaa Incident Arbitration, 2 R. Int'l Arb. Awards 1011 (1928).

The impact of the seizure upon the IMU does not negate the propriety of the sanction against Majan. As noted by the International Law Commission, the action of a State which applies a legitimate countermeasure against another State may nevertheless cause injury to a third party.⁵² Where such an indirect infringement is necessary to inflict the sanction upon the offending State, it will be considered a justifiable action.⁵³ Aristan's seizure of the funds in the account presents precisely such a necessary and indirect infringement. The earlier attempts of Aristan to gain redress for its injuries were unsuccessful,⁵⁴ leaving Aristan with no option but to seize the funds in its territory. By refusing to release the Aristani diplomat, Majan has forced Aristan to implicate a third party in its efforts to enforce its sovereign rights.

State practice illustrates the propriety of economic sanctions having such broad effects. For example, after the American diplomatic and consular personnel in Iran were taken hostage in 1979, the United States retaliated by freezing Iranian deposits in American banks.⁵⁵ The presidential order authorizing the freeze was of a broad sweeping nature which inevitably implicated the rights of third parties.⁵⁶ In particular, the rights of the International Monetary Fund, a

⁵²Draft Articles on State Responsibility, *supra* note 48, at 120.

⁵³Naulilaa Incident Arbitration, 2 R. Int'l Arb. Awards 1011, 1056-751. See also Draft Articles on State Responsibility, *supra* note 48, at 120.

⁵⁴Compromis, p. 8.

⁵⁵United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 9-14. See also Gordon, Trends: The Blocking of the Iranian Assets, Int'l Law., 659 (1980); Norton & Collins, Reflections on the Iranian Hostage Settlement, 67 A.B.A.J. 428 (1981).

⁵⁶The order applied to "property and interests in property of the government of Iran...which are in or come within the the possession or control of persons subject to the jurisdiction of the United States." Exec. Order No. 12,1770, 44 Fed. Reg. 65,729 (1979).

globally recognized international organization, were affected.⁵⁷ This impact, however, did not negate the propriety of the sanction. The International Monetary Fund did not protest the seizure⁵⁸ nor did this Court condemn the seizure in its decision regarding the Tehran hostage-taking incident.⁵⁹

B. Aristan's Seizure Of The Funds Assigned To Majan Is A Proper Exercise Of Its Territorial Sovereignty.

Each sovereign State has an absolute and exclusive jurisdiction over its territory and those who enter therein.⁶⁰ As stated in the The Schooner Exchange v. M'Fadden,⁶¹ "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."⁶² Limitations upon this absolute right can only be created by the will of the territorial State. This Court held in the Case of the S.S. Lotus that "the rules of law binding upon States...emanate from their own free will as expressed in conventions or usages generally accepted as expressing principles of law....Restrictions upon the independence of States cannot therefore be presumed."⁶³ Any limitations upon the territorial jurisdiction of Aristan, such as the grant of immunity to the IMU, must be based on its express consent through the creation of a conventional obligation or its implied consent through the creation of customary law. Absent such consent, Aristan is under no duty to surrender its

⁵⁷Gordon, supra note 55, at 673-76.

⁵⁸Id.

⁵⁹United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3.

⁶⁰I. Brownlie, supra note 15, at 287.

⁶¹11 U.S. (7 Cranch) 116 (1812).

⁶²Id. at 116.

⁶³Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) No. 10.

right of territorial jurisdiction over the funds in the First Aristani National Bank.

1. Aristan is under no conventional duty to restrict its sovereignty by granting immunity to the International Monetary Union.

Aristan is not a member of the IMU. It is not a party to the IMU Charter nor has it entered into any bilateral agreements with that entity.⁶⁴ There are no multilateral agreements governing the recognition, rights or personality of the IMU which could be binding upon Aristan. Aristan is thus under no conventional duty to restrict its territorial jurisdiction by granting immunity to the assets assigned to Majan through the IMU.

2. Aristan is under no customary duty to restrict its sovereign rights by granting immunity to the International Monetary Union.

International organizations are used by States to foster intergovernmental cooperation.⁶⁵ Despite their widespread use,⁶⁶ the rights and duties of such entities under customary international law are uncertain.⁶⁷ International personality, an attribute which entitles an organization to rights and duties

⁶⁴Compromis, p. 8-9.

⁶⁵An international organization may be defined as an intergovernmental entity, set up by means of a treaty concluded by States, to engage in cooperation in a particular field and which has its own organs that are responsible for engaging in independent activities. Relations Between States and Inter-governmental Organizations, First Report of the Special Rapporteur, [1963] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/1963/Add.1 (citing P. Reuter & J. Combacau, Institutions et relations internationales 278 (3rd ed. 1985)).

⁶⁶Relations Between States & International Organizations, Second Report of the Special Rapporteur, [1985] 1 Y.B. Int'l L. Comm'n 283, U.N. Doc. A/CN.4/L.383 and Add. 1-3 [hereinafter [1985] Report of the Special Rapporteur on International Organizations]; For a partial list of these organizations, see D. Bowett, The Law of International Institutions xi-xiv (3d ed. 1975).

⁶⁷Brownlie, supra note 15, at 677-78; [1985] Report of the Special Rapporteur on International Organizations, supra note 66, at 286.

directly accorded by international law to its subjects,⁶⁸ is not an inherent characteristic of every international organization.⁶⁹ The IMU, a commercial banking entity, regional in scope, does not possess an objective international personality which customary international law mandates Aristan to respect.

Furthermore, even if Aristan were to accept that the IMU enjoys some characteristics of a subject of international law, Aristan would still not bound to extend immunity to the funds assigned to Majan. As this Court noted in Reparations for Injuries Suffered in the Service of the United Nations, "the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights...."⁷⁰ Thus, while a sovereign State may possess immunity for its assets, there is no customary right of immunity which extends to all types of assets held by an international organization which has not been recognized by the territorial state. Neither the inherent powers nor the functional necessity doctrine imposes on Aristan such a customary duty to accord immunity to the funds assigned to Majan by the IMU.

⁶⁸F. Kirgis, International Organizations in Their Legal Setting: Documents, Comments & Questions 7 (1977). An organization which possesses international personality is said to be "a subject of international law...capable of possessing international rights and duties, [with] capacity to maintain its rights by bringing international claims." Hahn, Euratom: The Conception of International Personality, 71 Harv. L. Rev. 1001, 1045 (1957); Jenks, The Legal Personality of International Organizations, 22 Brit. Y.B. Int'l L. 267 (1945); Kunz, Privileges and Immunities of International Organizations, 41 Am. J. Int'l L. 849 (1947).

⁶⁹"States are inclined to regard international organizations as a necessary evil: they must be accepted and kept under control; they must be grudgingly granted the powers and competences necessary for their functions." [1985] Report of the Special Rapporteur on International Organizations, supra note 66, at 298. See also Rama-Montaldo, International Legal Personality and Implied Powers of International Organizations, 44 Brit. Y.B. Int'l L. 111, 117 (1970).

⁷⁰Reparations for Injuries Suffered in the Service of the United Nations, (adv. Op.) 1949 I.C.J. 174, 178-9.

a. The IMU does not possess objective international personality binding on Aristan.

The doctrine of objective personality was relied upon by this Court in its Advisory Opinion on the Reparations for Injuries Suffered in the Service of the United Nations.⁷¹ Referring to the personality of the United Nations, this Court held that a group of States representing the vast majority of the international community could create an entity possessing objective legal personality.⁷² The rationale of the opinion, however, is intimately tied to the unique status of the United Nations in the international community and cannot be extended to lesser organizations.⁷³

As expressed by the French representative in the International Law Commission, "it [is] necessary to distinguish as between the major administrative and political organizations, such as the United Nations and its specialized agencies, and the ever-increasing number of organizations of an operational character which performed banking or commercial operations."⁷⁴ The IMU represents precisely such an operative, commercial banking organization. It is a regional entity with limited and narrow functions created by a select group of states to achieve greater efficiency and development of their banking legislation and economic activities.⁷⁵

⁷¹Reparations for Injuries Suffered in the Service of the United Nations, (adv. Op.) 1949 I.C.J. 174.

⁷²Id. at 185.

⁷³Bowett, supra note 66, at 302-3; Brownlie, supra note 15, at 692; Reparations for Injuries Suffered in the Service of the United Nations, (Adv. Op.) 1949 I.C.J. 174, 179; Relations Between States and International Organizations, Preliminary Report of the Special Rapporteur, [1983] Y.B. Int'l L. Comm'n 242, 244, U.N. Doc. A/Cn.4/370/1983 [hereinafter [1983] Preliminary Report of the Special Rapporteur on International Organizations].

⁷⁴[1977] Y.B. Int'l L. Comm'n 208, 209, U.N. Doc. A/CN.4/304/1977.

⁷⁵Compromis, p. 8-9.

The IMU can fulfill its purposes by obtaining express recognition of its personality solely from those international subjects with which it deals. There is no inherent need for it to be unconditionally recognized by the entire international community.

b. The principle of "pacta tertii" precludes imposition of the international personality of the IMU upon Aristan.

Absent a limitation, the doctrine of objective personality conflicts with the fundamental principle of pacta tertii governing treaties and third parties.⁷⁶ International organizations are created by treaty. Their functions and purposes are derived from such constituent treaty instruments. Pacta tertii ensures that a treaty or other international agreement cannot impose duties upon a nonparty State without its consent.⁷⁷ The rule protects the sovereign equality and independence of States and is universally recognized.⁷⁸ Furthermore, it is confirmed in the Vienna Convention on the Law of Treaties to which both Aristan and Majan are parties.⁷⁹ Article 35 specifically requires the written express consent of a third State before obligations arising from a treaty will be binding upon it. The extension of the doctrine of objective personality to regional organizations disregards this conventional norm. States representing a minority of the international community should not be allowed to force recognition of their common policies on nonparty States merely by creating an international organization.

⁷⁶[1985] Report of the Special Rapporteur on International Organizations, supra note 66, at 290, 298.

⁷⁷Law of Treaties Convention, supra note 10, art. 34.

⁷⁸See, e.g., Island of Palmas (U.S. v. Neth.), 2 R. Int'l Arb. Awrds, 831, 837 (1928); Free Zones of Upper Savoy and the District of Gex, (Fr. v. Switz.) 1932 P.C.I.J. (ser. A/B) No. 46, at 141 (June 7); Territorial Jurisdiction of the International Commission of the River Oder (U.K., Czech., Den., Fr., W. Ger., Swed. v. Pol.), 1929 P.C.I.J. (Ser. A) No. 23, at 19-22 (Sept. 10); North Sea Continental Shelf Case (W. Ger. v. Den.; W.Ger. v. Neth.), 1969 I.C.J. Rep. 3, at 25-26.

⁷⁹Law of Treaties Convention, supra note 10, art. 34-35; Compromis, Appendix.

Thus, Aristan has no duty under international law to recognize the personality of the IMU, and absent recognition, need not accord it immunity.

c. The international personality of the IMU is not binding on Aristan under the inductive doctrine of personality.

The inductive doctrine of international personality is adopted by most States and international commentators.⁸⁰ It views personality of the organization as dependent upon the will of the States involved.⁸¹ Under this doctrine, third States are under no duty to accept the organization as a subject of international law and need not consent to dealings with, nor recognize actions of, the organization.⁸² Only those States which choose to accept the personality of the organization must accord international rights to it. "If international personality is not recognized by a third-party State the organization has no rights or privileges within the municipal law of the third-party State since the organization is not recognized as a juridical person."⁸³ This approach compensates for the inherent differences between universal entities such as the United Nations and regional organizations such as the IMU and avoids conflict with the principle of pacta terti.

Applying the inductive theory, Aristan is under no duty to recognize the International Monetary Union. The IMU possesses international personality as to its member States and the nineteen non-member States which have recognized its

⁸⁰[1985] Report of Special Rapporteur on International Organizations, supra note 66, at 298.

⁸¹Id.

⁸²Lashbrooke, Suits Against International Organizations in Federal Court: OPEC, A Case Study, 12 Cal. W. Int'l L.J. 305, 312 (1982).

⁸³Id.

rights by bilateral treaty.⁸⁴ As to third States, however, the IMU is not a subject of international law. Thus, Aristan is under no duty to recognize any rights the IMU may have in the administered deposit account.

d. The inherent rights doctrine does not require Aristan to grant immunity to the funds assigned to MaJan.

Even assuming that the IMU's international personality were binding upon Aristan, no rule of customary international law requires Aristan to grant immunity to funds held in this type of account. International scholars have developed two views as to the source of organizational powers. Under the inherent rights doctrine, the powers of an organization are deemed to be inherent in the organization itself, while according to the functional necessity doctrine, each organization enjoys only those rights that are necessary for its effective operation.⁸⁵

The international community has not accepted the view that customary law accords all organizations an identical set of inherent powers.⁸⁶ As stated by Bowett, "it may be difficult to argue that privileges and immunities vest by virtue of a rule of customary law." It is generally agreed that the right to contract, to undertake legal proceedings and to make treaties should be granted to all subjects

⁸⁴Compromis, p.8-9.

⁸⁵Rama-Montaldo, supra note 69, at 117 (citing Carroz and Probst, Personnalite juridique internationale et capacite de conclure des traites de l'ONU et des institutions specialisees 86 (1953)).

⁸⁶Statements of the delegates to the International Law Commission illustrate the position of most states. The ILC Report on the study of relations with international organizations noted that "the view was expressed that in undertaking such a task, the Commission should base its approach on the principle of functionalism...." Relations between States and International Organizations, [1978] Y.B. Int'l L. Comm'n 263, U.N. Doc. A/CN.4/311/1978/Add.1 (part 1); Reparations for Injuries Suffered in the Service of the United Nations, (Adv. Op.) 1949 I.C.J. 174, 180.

of international law.⁸⁷ These rights are reflected in custom and State practice regarding international organizations. There is, however, no similar right of absolute immunity from seizure for accounts of the type seized by Aristan. "Unlike the immunities of interstate diplomats, international immunities have been regulated almost exclusively by conventional law. As a result, international custom has not yet made any appreciable contribution in that branch of law."⁸⁸ Absent such an inherent right, Aristan is under no duty to grant immunity to the funds assigned to Majan.

e. The functional necessity doctrine does not require Aristan to grant immunity to the funds assigned to Majan.

In order to function effectively, international organizations require certain powers.⁸⁹ Customary law acknowledges this need through the doctrine of functional necessity, granting an organization only those powers necessary to fulfill the purposes expressed in its constituent document.⁹⁰ As stated by this Court in the Reparations case, "the rights and duties of the Organization must depend upon its purposes and functions as specified or implied in its constituent documents...."⁹¹ Each international organization is accorded different powers thereby precluding any general customary law of immunity.

Applying the doctrine of functional necessity to the International Monetary Union, there would be no immunity for the assets in the administered deposit

⁸⁷Bowett, supra note 66, at 302, 304-22.

⁸⁸Preuss, The International Organizations Immunities Act, 40 Am. J. Int'l L. 332, 333 (1946) (noting the United States' position of no customary right of organizational immunity).

⁸⁹Brownlie, supra note 15, at 682.

⁹⁰Fedder, The Functional Basis of International Privileges & Immunities: A new concept in International Law and Organization 9 Am. U.L. Rev. 60, 62 (1960).

⁹¹Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 180.

account. The inclusion of a separate immunity clause in bilateral treaties with the member States indicates that the Charter of the IMU does not contain such an express right. Likewise, no implied right of immunity can be found. The purpose of the IMU is to facilitate development of the economies of its members through investments, controlled expenditures, and the stability of a common currency. To achieve these goals, the IMU must be able to implement common banking regulations, issue its own currency, contract with third parties for investment opportunities, and control the withdrawal of funds placed into the administered deposit accounts.⁹² There is no need, however, for these administered accounts to be absolutely immune from the municipal laws of the States in which the IMU deposits them. A different result might be reached for the assets held in the IMU's currency reserve, but the administered account is merely for the convenience of the member States. There is no functional need to erect a barrier of immunity for assets which have not been surrendered to the beneficial use of the IMU. Thus, the IMU has no customary immunity under the doctrine of functional necessity which can be extended to prevent the seizure of funds assigned to Majan in the administered deposit account.

f. The customary law of foreign sovereign immunity does not impose a duty upon Aristan to grant the IMU immunity for the funds in the administered deposit account.

The absolute jurisdiction of States over their territory has been consensually restricted by the doctrine of foreign sovereign immunity. As stated in the The Schooner Exchange v. M'Faddon, "all sovereigns have consented to a relaxation...of that complete exclusive territorial jurisdiction, which has been stated to be an attribute of every nation."⁹³ State immunity is based on

⁹²Compromis, p.8.

⁹³11 U.S. (7 Cranch) 116, 136-37 (1812). See also The Parlement Belge (1879) 4 P.D. 129; 5 P.D. 197, 219 (1880).

considerations of sovereignty and reciprocity.⁹⁴ The grant of immunity to international organizations, however, cannot be justified on these grounds.⁹⁵ Organizations are not sovereign nor do they operate on a level equal to States. Organizations possess no territorial jurisdiction, making reciprocity meaningless in this context.⁹⁶ This is particularly true when the organization in question is not recognized by the territorial State. Thus, Aristan cannot be deemed to have consented to grant immunity to the IMJ on the basis of customary sovereign immunity.

In addition, the sovereign immunity of Majan would not bar the seizure of the funds assigned to it by the IMJ. Aristan has acted in retaliation for the violation of its sovereign rights by Majan. It has aimed a legitimate and proper economic sanction at Majan. The concept of sovereign immunity has no bearing upon the law of countermeasures. For example, when the United States froze the assets of Iran held within its banks, it did not concern itself with the sovereign immunity of Iran.⁹⁷ Thus, Aristan need not rely upon any "exception" to or restriction of the law of sovereign immunity to justify the countermeasure against Majan.⁹⁸

⁹⁴Rama-Montaldo, supra note 69, at 152.

⁹⁵Id. "The basis of State immunities is the principle of sovereign equality, whereas the foundation of privileges and immunities of international organizations is functional necessity."

⁹⁶"Whatever sensitive foreign policy matters may dictate judicial discretion with respect to allowing suit against a particular foreign sovereign, they should not be considerations when dealing with an international organization...." Lashbrooke, supra note 82, at 317. See also Kunz, supra note 68, at 828.

⁹⁷Gordon, supra note 55.

⁹⁸See, e.g. discussion of commerciality exception in Letter of Jack B. Tate, Acting Legal Advisor, Dept. of State, 26 Dep't St. Bull. 984 (1952) (outlining United States' adoption of restricted sovereign immunity); Victory Transport Inc. v. Comisaria General De Abastecimientos Y Transportes, 336 F.2d 354 (2d Cir. 1964).

CONCLUSION

For the foregoing reasons, the United Republic of Aristan respectfully requests that this Honorable Court find, adjudge, and declare as follows:

1. That the arrest and attempted prosecution of the Aristani Ambassador by Majan constitutes a breach of international law;
2. That Majan is obligated to release and dismiss all charges against the Aristani Ambassador.
3. That Aristan has violated no duty under international law by seizing the funds assigned by the IMU to Majan in the administered deposit account.