

**IN THE  
INTERNATIONAL COURT OF JUSTICE  
AT THE  
PEACE PALACE, THE HAGUE, NETHERLANDS**

**February, 1989**

**MAJAN**

*Applicant*

**v.**

**ARISTAN**

*Respondent*

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**MEMORIAL FOR THE APPLICANT**

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**JURISDICTION**

The governments of Aristan and Majan have agreed to submit the present dispute to the International Court of Justice. The parties have submitted to the court pursuant to Article 36(1) of the Statute of the International Court of Justice. In accordance with the aforesaid Article of the Statute, the Court's jurisdiction "comprises all cases which the parties refer to it."

**QUESTIONS PRESENTED**

1. Whether the United Republic of Aristan is entitled to the provisional measures that it has requested.
2. Whether Majan may criminally prosecute former Ambassador Kitaro, consistently with its international obligations under the Vienna Convention on Diplomatic Relations.
3. Whether the I.M.U. assets assigned to Majan on an administered deposit account with the Aristani National Bank are immune from seizure by the government of Aristan.
4. Whether Aristan's measures of self-help violated customary international law.

SUMMARY OF FACTS

The United Republic of Aristan is an affluent industrialized country. Majan is a poor developing country, plagued by drug abuse, with a history of domination by colonial powers including Aristan.

On February 13, 1988 Ambassador Guido Kitaro, Aristan's most senior diplomat in Majan, met a Majan national (Wilkey) following a diplomatic reception in Majan at which his presence was de rigueur. Wilkey was Kitaro's contact in an illicit drug trafficking ring. Unbeknownst to the Aristani authorities, the drugs were smuggled into Majan from time to time by diplomatic pouch, with the assistance of one or more unknown confederates in Aristan's foreign ministry.

At the meeting, Wilkey refused to pay for the drugs and threatened to expose Kitaro if he did not surrender them. Wilkey grabbed the drug-filled suitcase and ran. Kitaro jumped into his car and in a panic ran down Mr. Wilkey and two bystanders, injuring Wilkey and killing the bystanders. Out of respect for the Ambassador's diplomatic immunity he was neither questioned about this incident nor subjected to a sobriety test, although the police report stated that the Ambassador was "obviously drunk" at the time of the accident.

The incident triggered a public outcry over repeated abuses of diplomatic immunity. A non-binding resolution was introduced and passed in the Majan National Assembly calling for the immediate criminal trial of Ambassador Kitaro.

On February 18, 1988 Ambassador Kitaro called on the Minister of Foreign Affairs of Majan and expressed his profound personal regret over the incident, as well as that of his Government. He then handed over a

Diplomatic Note which stated that he was being recalled by his Government and that his immunity would terminate at 12:01a.m. on February 21.

Prior to the Ambassador's departure on February 20, Majan's Minister of Justice held a news conference, attended by the international press, to announce that he was preparing charges against the ambassador for murder, attempted murder, and drug trafficking and smuggling.

There ensued an exchange of Diplomatic Notes. The Government of Aristan alleged that if Majan were to pursue any form of criminal investigation, indictment or trial of Ambassador Kitaro it would be a breach of Majan's international obligations under the Vienna Convention on Diplomatic Relations. In response, Majan contended that while Ambassador Kitaro was entitled to immunity at the time of the incident, he was no longer an accredited diplomat in Majan and therefore his immunity was governed by Article 39, paragraph 2 of the Vienna Convention on Diplomatic Relations. Accordingly, Ambassador Kitaro had become subject to prosecution for any non-official acts committed during his diplomatic posting in Majan.

Several days after Ambassador Kitaro's departure, a warrant for his arrest was issued in Majan, on charges of murder, attempted murder, and drug trafficking and smuggling.

Upon his return to Aristan, the Ambassador received a hearing and was dismissed from Aristan's foreign service. One week later, the Ambassador was extradited to Majan from the Parrott Islands, where he was enjoying a vacation.

The Ambassador's trial was set to begin in due course despite repeated protests and the imposition of economic sanctions by the Government of the

United Republic of Aristan.

On the day the trial began, the Government of Aristan seized the assets the International Monetary Union (I.M.U.) assigned to Majan on an administered deposit account with the First Aristani National Bank, a private, commercial institution in Robinette, the capital city of Aristan. Under Aristani law the seizure was lawful.

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

No agreements exist between the I.M.U. and Aristan, although Aristan has always regarded the I.M.U. as a regional organization. However, more than 80 countries, including the I.M.U.'s 61 member States, have bilateral treaties recognizing the I.M.U. as a regional organization and according its assets complete immunity. Each bilateral treaty contains an identical article which refers to "administered accounts" in the following terms: "An 'administered account' is an account administered by the I.M.U. 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 I.M.U."

Pursuant to a provision in the I.M.U.'s Charter, the organization has expressly agreed to allow Majan to defend both its own and the I.M.U.'s interests before this Court.

**SUMMARY OF ARGUMENT****1. The Immunity of Former Ambassador Kitaro Under the Vienna Convention on Diplomatic Relations.**

Under Article 39 of the Vienna Convention on Diplomatic Relations Majan has jurisdiction to prosecute former Ambassador Kitaro for non-official acts committed during his period of diplomatic accreditation in Majan.

While diplomats are immune from both the prescriptive and enforcement jurisdiction of the receiving State with regard to their official acts, they are immune from only the enforcement jurisdiction with regard to their non-official acts. Thus diplomats are not relieved from liability for their non-official acts and they may be prosecuted for these acts upon the expiration of their diplomatic immunity. As the actions which form the basis of the charges against former Ambassador Kitaro cannot be characterized as "official acts" Majan may now prosecute Ambassador Kitaro. This interpretation of the relevant provisions of the Vienna Convention is supported by the travaux preparatoires and by subsequent state practice in the application of the Vienna Convention. Furthermore, such an interpretation is consistent with the theory and purpose behind the granting of diplomatic immunity.

If there is any doubt as to the proper interpretation of the Vienna Convention on Diplomatic Relations, this Court should interpret the Convention in a reasonable manner and allow Majan to prosecute the Ambassador for these serious crimes. To permit absolute and permanent immunity for non-official acts would hinder the efficient conduct of diplomatic relations.

## 2. The I.M.U. Administered Account Assigned to Majan is Immune from Seizure.

The arrest and prosecution of Mr. Kitaro are legal acts. Any retaliatory measures taken by Aristan must also be legal, under the doctrines of self-help and retorsion. There are several reasons why Aristan's measures are illegal, and cannot qualify as a valid retorsion.

First, the assets seized by Aristan are owned by the International Monetary Union, an independent, international legal personality. The I.M.U. is not a party to the dispute between Aristan and Majan. Consequently, its assets cannot be seized in retaliation for Majani actions.

Second, the seizure of immune assets is prima facie illegal. I.M.U. assets are immune from seizure. These assets are held for a sovereign purpose -- to finance central banking functions. Such functions are protected by immunities in customary international law. Moreover, immunities for international financial organizations are established in customary international law.

Third, even if the funds are owned by Majan, they are protected by sovereign immunity. The funds are held for a widely recognized public purpose -- central banking. They are therefore immune even under the restrictive immunity doctrine.

Fourth, Aristan's combined measures of retorsion include both asset seizure and economic coercion. Aristan has used economic weapons with such devastating effect on Majan and third states that the principle of non-intervention has been violated.

Finally, even if the assets are deemed not to be immune, they cannot legally be seized. Any taking of property without compensation is prima

facie illegal in international law. No suggestion of compensation has come from Aristan. The seizure of I.M.U. assets is therefore illegal on this ground, and cannot be a valid retorsion.

If this court deems that Majan cannot legally prosecute former Ambassador Kitaro, Aristan's actions cannot be justified as a valid reprisal. There are two primary reasons for this contention.

First, the assets are owned by the I.M.U. There is no precedent in international law for a state to take measures of reprisal against a third party to any dispute.

Secondly, reprisal requires that acts taken by one State to redress a wrong caused by another State must be proportional to the original alleged violation. On the facts before this Court, Aristan has already undertaken a wide range of economic measures against Majan, with devastating effect. These measures are themselves illegal, and more than outweigh the harm done by the prosecution of a single Aristani national for smuggling drugs into Majan. In these circumstances, there is no possible justification in international law for the subsequent seizure of property.

ARGUMENT AND AUTHORITIES

PROVISIONAL MEASURES

This Court has denied a request for provisional measures where it was designed to obtain an interim judgment on the merits of the case.<sup>1</sup> In the present case, Aristan's request that all charges be dropped and Ambassador Kitaro be released seems designed precisely to obtain such an interim judgment on the substantive issue before this Court. In addition, Ambassador Kitaro's release could render impossible execution of a judgment in favour of Majan, should the Ambassador flee the jurisdiction and take refuge in a state with which Majan has no extradition treaty.

Nonetheless, as Majan is primarily concerned with obtaining justice, Majan has no objection to the Court granting provisional measures provided that these measures include appropriate provisions to protect Majan's interests in this case. Therefore, the state of Majan respectfully requests that any provisional measures be granted only on the condition that the Government of Aristan grant an undertaking that Ambassador Kitaro will be returned to Majan's jurisdiction if the Court concludes that he may be legally prosecuted in Majan.

- I. UNDER THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS MAJAN HAS JURISDICTION TO PROSECUTE FORMER AMBASSADOR KITARO FOR NON-OFFICIAL ACTS COMMITTED DURING HIS DIPLOMATIC ACCREDITATION IN MAJAN
- A. AMBASSADOR KITARO'S IMMUNITY WITH RESPECT TO NON-OFFICIAL ACTS COMMITTED WHILE HE WAS AN ACCREDITED DIPLOMAT IN MAJAN TERMINATED ON FEBRUARY 21ST, 1988.

The Vienna Convention on Diplomatic Relations States That Privileges and Immunities Normally Cease at the Moment When the Diplomat Leaves the Receiving State.

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<sup>1</sup> Chorzow Factory Case, (Germany v. Poland)(Interim Measures of Protection) (1927) P.C.I.J. Ser. A, No. 12. at 10-11.

A treaty is to be interpreted with reference to its ordinary meaning and object.<sup>2</sup>

Article 31 of the Vienna Convention on Diplomatic Relations (hereinafter the Vienna Convention) grants diplomats complete immunity from the criminal jurisdiction of the receiving State during the period of accreditation. This immunity does not provide permanent protection from prosecution.<sup>3</sup> Article 39 of the Vienna Convention expressly deals with the duration of diplomatic privileges and immunities. Paragraph 2 provides that immunity shall subsist after the diplomat leaves the receiving State only with respect to acts performed in the exercise of the diplomat's functions as a member of the mission (which shall be referred to as "official acts").<sup>4</sup>

**The Travaux Préparatoires of the Vienna Convention Indicate that Immunity With Respect to Non-Official Acts is of Limited Duration.**

A treaty may be interpreted with reference to work carried out during

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<sup>2</sup> Vienna Convention on the Law on Treaties, opened for signature 22 May 1969, 60, U.N. Doc. A/Conf. 39/27, Article 31: "1. 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"; see also H. Lauterpacht, *Oppenheim's International Law* (8th ed., 1955) at 952.

<sup>3</sup> J.L. Brierly, *The Law of Nations* (1963) at 262-63; I. Brownlie, *Principles of Public International Law* (1979) at 356; E. Denza, *Diplomatic Law* (1976) at 248.

<sup>4</sup> Vienna Convention on Diplomatic Relations, 500 U.N.T.S. 95, Article 39, paragraph 2: "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."

its preparation.<sup>5</sup> The preparatory work of the Vienna Convention shows that diplomatic immunity was not intended to provide diplomats with permanent immunity from criminal jurisdiction. The limited duration of privileges and immunities expressed in Article 39 was considered to be well established at international law, and it generated only minimal debate during its drafting and adoption.<sup>6</sup>

In resolving any ambiguities in the existing law relating to the duration of privileges and immunities, the International Law Commission relied upon the draft convention developed at Harvard Law School in 1932.<sup>7</sup> Article 29 of the Harvard draft provides that the privileges and immunities granted to diplomats are essentially coterminous with their diplomatic functions.<sup>8</sup> The commentary accompanying this provision emphasizes the distinction between prescriptive and enforcement jurisdiction, official acts being immune from both types of jurisdiction but non-official acts being immune

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<sup>5</sup> Vienna Convention on the Law of Treaties, Article 32 : "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

- a) leaves the meaning ambiguous or obscure; or
- b) leads to a result which is manifestly absurd or unreasonable."

<sup>6</sup> Summary Records of the Tenth Session, 463rd meeting, Y.B. Int'l L. Comm'n [1958] at 172; U.N. Conference on Diplomatic Intercourse and Immunities (1961), Official Records, Vol.I, Tenth Plenary Meeting, at 37.

<sup>7</sup> Diplomatic Intercourse and Immunities, Doc. A/CN.4/98, in Documents of the Eighth Session, Y.B. Int'l L. Comm'n [1956-II] at 142.

<sup>8</sup> Draft Convention on Diplomatic Privileges and Immunities, Article 29: "When the functions of a member of a mission have been terminated, a receiving state shall continue to accord to him and to the members of his family the privileges and immunities provided for in this convention, until such persons have had reasonable opportunity to leave the territory of the receiving state." Harvard Law School Research in International Law (1932) at 133-34.

only from the latter. In the case of non-official acts, the incompetence of the local courts is ratione personae, and therefore ceases when the diplomat loses his accreditation.<sup>9</sup> Once the diplomat is no longer immune from the enforcement jurisdiction of the receiving State he may be prosecuted even for acts committed while he was entitled to immunity.<sup>10</sup>

This interpretation of Article 39(2) is supported by the International Law Commission's rejection, during deliberations on a draft version of the Vienna Convention, of a proposed amendment to Article 39 which would have granted permanent immunity from the jurisdiction of the receiving State for all acts committed by a diplomat during his accreditation in that state.<sup>11</sup>

**Majan's Interpretation of Article 39(2) is Consistent with the Purpose and Doctrine Behind the Granting of Diplomatic Immunity.**

The preamble to the Vienna Convention states that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States." The drafters of the Vienna Convention clearly recognized functional necessity as the predominant justification for the granting of diplomatic privileges and immunities.<sup>12</sup>

The functional necessity doctrine acknowledges that privileges and immunities are granted because they are viewed as necessary to ensure the

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<sup>9</sup> Ibid., at 136.

<sup>10</sup> Ibid., at 137; supra, note 3.

<sup>11</sup> Summary Records of the Ninth Session, 411th meeting, Y. B. Int'l L. Comm'n [1957] at 142.

<sup>12</sup> Report of the International Law Commission in its 10th Session, 13 U.N. GAOR Supp. (No. 9) at 17, U.N. Doc. A/3859 (1958)

efficient conduct of diplomatic relations.<sup>13</sup> If diplomats were subject to the jurisdiction of the receiving State they might be vulnerable to harassment or coercion by the receiving State, and the diplomatic process might thus be impeded. For this reason, diplomats are granted virtually absolute immunity during their accreditation. However, when a diplomat is no longer accredited the rationale for granting immunity for acts not connected with his official functions disappears. Permitting the prosecution of former diplomats for non-official acts will not hinder the efficient functioning of the diplomatic mission; it will simply deter criminal acts.<sup>14</sup>

The functional necessity doctrine focuses on the need to facilitate the process of diplomatic relations. Privileges and immunities are granted to facilitate the functioning of diplomatic missions, not to benefit the individuals employed by such missions. This emphasis on the process rather than the individual is evident in the provisions of the Vienna Convention. It is apparent in the preamble, in the list of the functions of diplomatic missions,<sup>15</sup> and in the distinction which the Convention draws between the official and non-official acts of the various levels of diplomatic personnel.<sup>16</sup> Majan's contention that Article 39(2) provides permanent immunity for official acts but only temporary immunity for non-official acts is therefore

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<sup>13</sup> See S. Wright, *Diplomatic Immunity: A Proposal For Amending the Vienna Convention to Deter Violent Criminal Acts*, 5 *Bost. Univ. Int'l L.J.* 177 at 200-03; R.A. Wilson, *Diplomatic Immunity From Criminal Jurisdiction: Essential to Effective International Relations*, 7 *Loy. L.A. Int'l & Comp. L.J.* 113 at 117-18; T. O'Neill, *A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978*, 54 *Tul. L. Rev.* 661 at 667-72.

<sup>14</sup> Wilson, *supra*, note 13 at 137-38.

<sup>15</sup> Vienna Convention, *supra*, note 4, Art. 3.

<sup>16</sup> *Ibid.*, Art. 37, 38, 39.

consistent with the functional necessity theory and the purpose of granting diplomatic immunity.

**Customary International Law Supports Majan's Contention that Diplomatic Immunity with Respect to Non-Official Acts is of Limited Duration.**

The preamble to the Vienna Convention states that in the case of ambiguities in the Convention customary international law shall prevail.<sup>17</sup> Customary international law supports Majan's view of diplomatic immunity.<sup>18</sup> Cases which are adjudicated tend to be civil rather than criminal. There is no reason in principle to distinguish between criminal and civil actions. The Vienna Convention does not distinguish between immunity from civil and from criminal jurisdiction. Immunity from both types of action is dealt with in the same provisions.<sup>19</sup>

**Subsequent State Practice Indicates that the Diplomatic Immunity Granted in the Vienna Convention is Not To Be Interpreted as a Grant of Permanent Immunity.**

Subsequent state practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation may be taken into account in determining the meaning of the contents of the

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<sup>17</sup> Vienna Convention, supra, note 4 : "...Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention."

<sup>18</sup> *Marshall v. Critico*, 9 East. 444; 103 E.R. 643; *In Re Suarez* [1917] 2 Ch. 131; *The Empire Chang and Others*, A.D. 1919-1922 No. 205; *Laperdrix and Penquer v. Kouzouboff and Belin*, A.D. 1925-1926, No. 241; *Bank of Portugal v A. De Santos Bandeira*, A.D. 1929-1930, No. 201; *Dickinson v. Del Solar* [1930] 1 K.B. 376; *In Re Garcia Y Garcia*, A.D. 1931-32, No. 180; *In Re Holguin*, A.D. 1933-34, No. 163; *Norton v. General Accident, Fire and Life Insurance Co.*, A.D. 1938-1940, No. 163. See also R.G. Jones *Termination of Diplomatic Immunity*, *Brit. Y. B. Int'l L.*, (1948) 262, at 268; O'Neill, supra, note 13 at 663.

<sup>19</sup> See Vienna Convention, supra, note 4, Art. 31, 39.

particular treaty.<sup>20</sup> Cases applying the Vienna Convention concur with the earlier cases in stating that immunity from criminal jurisdiction for non-official acts is procedural and temporary.<sup>21</sup> Current U.S. practice clearly accords with the view of diplomatic immunity expressed above.<sup>22</sup>

**Leading Publicists Accept that Diplomatic Immunity for Non-Official Acts is Temporary.**

Publicists have accepted that immunity for non-official acts is procedural and temporary.<sup>23</sup> Diplomats may be subjected to criminal prosecution for non-official acts committed while they were entitled to immunity after the termination of their diplomatic status.<sup>24</sup> The wording in the Vienna Convention is cited as the legal basis for this view.

**B. AMBASSADOR KITARO'S ACTS CANNOT BE CHARACTERIZED AS ACTS COMMITTED IN THE EXERCISE OF HIS FUNCTIONS AS A DIPLOMAT**

It is submitted that the actions that form the basis of the charges against Ambassador Kitaro cannot be characterized as acts committed "...in

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<sup>20</sup> Vienna Convention on the Law of Treaties, supra, note 2, Article 31, Paragraph 3(b).

<sup>21</sup> *Empson v. Smith* [1966] 1 Q.B. 426; *Zoernsch v Waldock* [1964] 1 W.L.R. 675; *Diplomatic Immunity from Suit Case*, (1970) 61 I.L.R. 498; *Shaw v. Shaw* [1979] 3 All E.R. 1.

<sup>22</sup> See, for example, Lynton, *Envoy's Car Slams Into 4 Vehicles*, Wash. Post, Feb. 14, 1987, at B1, col 2; Oberdorfer, *Papua New Guinea Recalls Diplomat*, Wash. Post, Feb. 15, 1987, at B1, col.2, discussing U.S. preparations to prosecute Ambassador Kiatro Abisinio of Papua New Guinea for "failing to pay full time and attention to driving".

See also S. Roosevelt, *Diplomatic Immunity and U.S. Interests*, (Oct./1987) 87 Dept. of State Bul. No 2127, 29, at 31.

<sup>23</sup> American Law Institute, *Restatement of the Law: The Foreign Relations Law of the United States*, (1987) at 458: Para, 464.

The Restatement view has been accepted by the U.S. Department of State, see Circular Note of March 21, 1984, reprinted in 78 Am. J. Int'l L. [1984] at 657-58.

<sup>24</sup> Restatement, ibid., at 469.

the exercise of his functions as a member of the mission",<sup>25</sup> and therefore immunity with respect to these acts does not continue after the expiration of his diplomatic functions. Although it may be argued that a car accident can occur in the course of official functions,<sup>26</sup> the facts before the Court do not describe such a situation. The fact that the incident in question prompted former Ambassador Kitaro's dismissal suggests that Aristan did not consider the Ambassador's actions to have been committed in the exercise of his diplomatic functions. In the alternative, if this court holds that the car accident did occur during the course of former Ambassador Kitaro's official functions, it is submitted that Majan would still have jurisdiction to prosecute for the drug trafficking and smuggling charges as these acts were not related to the accident.

**C. THE CIRCUMSTANCES OF THIS CASE REQUIRE THAT THIS COURT PERMIT MAJAN TO PROSECUTE FORMER AMBASSADOR KITARO**

**This Court Should Not Permit the Vienna Convention on Diplomatic Relations to be Used as a Tool to Facilitate the Perpetration of Serious Offences.**

The crimes of drug trafficking and smuggling, murder and attempted murder are serious crimes, almost universally condemned.<sup>27</sup> Crimes related to drug trafficking are of particular concern to developing countries such as Majan as the illicit drug trade stifles the economic growth of such countries. International condemnation of drug-related offences is illustrated

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<sup>25</sup> *L. v. The Crown* [1977] 68 I.L.R. 175 at 179.

<sup>26</sup> See E. L. Kerley, *Some Aspects of the Vienna Convention on Diplomatic Intercourse and Immunities*, (1982) 56 Am. J. Int'l L. 88, at 121. Cf. *Re Cummings*, (1958) Vol. 2, 26 I.L.R. 549 and Denza, *supra*, note 3 at 236.

<sup>27</sup> *United Nations Declaration on the Control of Drug Trafficking and Drug Abuse*, G.A.Res. 142, 39 U.N. GAOR Supp. 51, U.N. Doc. A/39/710.

by thirteen multilateral treaties concluded to date.<sup>28</sup> In addition, ESOC has established a standing Commission on Narcotic Drugs,<sup>29</sup> and the United Nations General Assembly has expressed the view that the illicit trade in narcotic drugs is "a grave international crime against humanity."<sup>30</sup>

In view of the global concern over the problem of drug trafficking, and the international framework of obligations to deal with this problem, this Court should not interpret the Vienna Convention in a manner which would undermine international efforts to control the illicit drug trade.

**This Court Should Recognize Majan's Legitimate Interest in Protecting the Welfare of Its Citizens and Its Economy and Provide a Remedy.**

It may be argued that Majan should have pursued other remedies available under the Vienna Convention before extraditing and prosecuting former Ambassador Kitaro. It is submitted that, in fact, no other remedy would be adequate for the circumstances in question. A persona non grata declaration would merely remove one person from an extensive drug trafficking operation. Prosecution of Ambassador Kitaro will not only deter this type of conduct, but it may also reveal the identities of other persons involved in this drug trafficking operation.

The Government of Aristan did not offer to waive Ambassador Kitaro's immunity (under Article 32 of the Vienna Convention). Neither has Aristan

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<sup>28</sup> See generally M.C. Bassiouni, *The International Narcotics Control Scheme*, in M.C. Bassiouni (ed.), *International Criminal Law* (1986); S.K. Chatterjee, *Legal Aspects of International Drug Control*, (1981); *The Single Convention on Narcotic Drugs, 1961*, U.N. Doc. E/Conf.34/22 (1961); *United Nations Convention Against Illegal Traffic in Narcotic Drugs and Psychotropic Substances, signed Dec. 20, 1988*.

<sup>29</sup> First Session, 1946.

<sup>30</sup> See note 27, supra.

commenced criminal proceedings in its own jurisdiction. If the respondent's view of immunity is accepted, the message will be clear-- that diplomats may engage in the most reprehensible conduct with impunity. This Court should not send such a message to the diplomatic community.

**The Circumstances of Diplomacy in the 1980s Require a Restricted View of Immunity.**

The Vienna Convention was drafted at a time when the diplomatic community was considerably smaller, and abuses were less frequent, than they are in the present day. The drafters of the Convention did not discuss the problem of dealing with serious criminal acts committed by diplomats.<sup>31</sup> The circumstances in which the Vienna Convention now operates require a restrictive view of diplomatic immunity, and such a view is a permissible interpretation of the Convention.

The Vienna Convention was itself part of a gradual trend towards restricting immunity.<sup>32</sup> The Convention provided for a narrower grant of immunity than that which had been previously accorded by many states. This trend towards restricting diplomatic immunity has been mirrored in the restriction of foreign and domestic sovereign immunity.<sup>33</sup>

A restrictive interpretation of the Vienna Convention would provide the means required to deal with the problem of abuses of diplomatic immunity without resorting to the radical changes in the law which have been proposed in some states.<sup>34</sup> A restrictive view of diplomatic immunity will

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<sup>31</sup> Wright, *supra*, note 13 at 207.

<sup>32</sup> *Ibid.* at 195-203.

<sup>33</sup> O'Neill, *supra*, note 13 at 672-79.

<sup>34</sup> T.W. Pecoraro, *Diplomatic Immunity: Application of the Restrictive Theory of Diplomatic Immunity*, 29 Harv. Int'l L.J. 533 at 538-39.

fulfill the purpose of the Vienna Convention by facilitating the peaceful and harmonious conduct of diplomatic relations among states.

**II. THE FUNDS ASSIGNED TO MAJAN ON AN ADMINISTERED DEPOSIT ACCOUNT WITH THE I.M.U. ARE IMMUNE FROM SEIZURE BY THE GOVERNMENT OF ARISTAN**

**A. THE FUNDS SEIZED BY ARISTAN BELONG TO THE INTERNATIONAL MONETARY UNION, AN INDEPENDENT ORGANIZATION WITH INTERNATIONAL LEGAL PERSONALITY.**

International organizations are entitled to international legal personality.

International legal personality is the independent capacity to possess international rights and duties.<sup>35</sup> Whether a particular organization has international legal personality is determined objectively.<sup>36</sup> There is no requirement for an express provision in the organization's constitution,<sup>37</sup> or in national legislation<sup>38</sup> recognizing the organization's personality. Rather, it exists where certain preconditions are satisfied -- viz., where there is "an international agreement creating an association of States endowed with at least one organ which expresses a will detached from member States and possessing defined aims or purposes to be attained through the fulfillment

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<sup>35</sup> *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] I.C.J. Rep. 174 at 179.

<sup>36</sup> *Reparation*, ibid. at 178. See Dr. M. Rama-Montaldo, *International Legal Personality and Implied Powers of International Organizations*, (1970), XLIV Brit. Y.B. Int'l. L. 111 at 112; C.N. Okeke, *Controversial Subjects of International Law*, (Forward by Sir G.G. Fitzmaurice) (1974) at 181-85.

<sup>37</sup> Schermers, *International Institutional Law* (1980) at 790, para. 1410.

<sup>38</sup> Ibid., at 792, para. 1413.

of functions or powers".<sup>39</sup> It must be intended to operate on an international plane. It is able to conclude treaties.<sup>40</sup> Once established, the personality is founded on 'general and customary international law'.<sup>41</sup>

**The I.M.U. is an Independent Organization With Objective International Personality.**

The I.M.U. was created by international agreement between 61 Member States. It has central organs, and directs its Members' central banking and monetary authority functions.<sup>42</sup> It has financial autonomy, and a distinct existence. It has concluded bilateral treaties with Member and Non-Member States.<sup>43</sup> It must operate on an international plane.

**The Assets Seized by Aristan are Owned and Controlled by the I.M.U., and Are Covered by the Immunities of the I.M.U.**

Reference to similar treaties can help to establish the ownership of the I.M.U. account.<sup>44</sup> International personality enables an organization to bring suit in domestic courts,<sup>45</sup> maintain obligations,<sup>46</sup> and own property<sup>47</sup>

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<sup>39</sup> Rama-Montaldo, supra, note 36 at 144, citing Reparation, supra, note 35.

<sup>40</sup> Rama-Montaldo, ibid., at 178-79. Vienna Convention on the Law of Treaties Between States and International Organizations or Between Organizations, adopted March 26, 1986, A/Conf. 129/15, Art. 6. Voting: 67 in favour, 1 against, 23 abstentions; abstentions primarily included U.S.S.R. and Warsaw Pact countries. International Legal Materials, Vol. XXV, No. 3, (May, 1986) 543 at 549; See also L. Kunz, The Changing Law of Nations; Essays on International Law (1968) at 525.

<sup>41</sup> Rama-Montaldo, ibid., at 119; Schermers, supra, note 37 at 791, para. 1413(2).

<sup>42</sup> Compromis, at 8.

<sup>43</sup> Ibid., at 9.

<sup>44</sup> Interpretation of the WHO-Egypt Agreement (Adv. Opinion) [1980] I.C.J. Rep. 94, 126; Constitution of IMCO [1960] I.C.J. Rep. 169.

<sup>45</sup> Reparation, supra, note 35.

independently of its members. It may act as an "international trustee"<sup>48</sup> for its Members.<sup>49</sup> In domestic trust law, ownership in the property may be divided between the trust beneficiary and the trustee.<sup>50</sup> The special accounts held by international organizations are nevertheless considered "property and assets" of the Organization, and are covered by its various immunities.<sup>51</sup>

**B. ASSETS HELD BY THE I.M.U. CANNOT BE SEIZED IN RETALIATION FOR THE ACTS OF ITS MEMBER STATES.**

**Aristan Must Justify its Seizure Under the Doctrines of Self-help and Retorsion.**

Customary international law recognizes the right to self-help. States may take measures of self-help in retaliation against either legal but unfriendly, or illegal, acts by another state.<sup>52</sup> When the prior alleged

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<sup>46</sup> *Maclaine Watson & Co. v. Dept. of Trade, (International Tin Council Case)*, [1988] 3 W.L.R. 1033.

<sup>47</sup> D.P. O'Connell, *International Law, Second Edition*, (1970) at 100.

<sup>48</sup> See J. Gold, "Trust Funds in International Law : The Contribution of The International Monetary Fund to a Code of Principles", (1978) 72 Am. J. Int'l Law 856.

<sup>49</sup> *International Monetary Fund*, 1 U.N.T.S. 39, (Art. XXII); *Multilateral Investment Guarantee Agency, Convention Establishing the Multilateral Investment Guarantee Agency* (1985) (Annex 1, Art. 2, 3); *Bank of International Settlements*, 104 U.N.T.S. 441, para. 10.

<sup>50</sup> Gold, *supra*, note 48 at 863.

<sup>51</sup> *Ibid.*; see also *International Monetary Fund*, *supra*, note 49, Art. XXVII(b); *Multilateral Investment Guarantee Agency, Convention Establishing the Multilateral Investment Guarantee Agency* (1985) (Art. 45); *Bank of International Settlements*, 104 U.N.T.S. 441, para. 10; *Convention on the Privileges and Immunities of the Specialized Agencies* 33 U.N.T.S. 262 (Art. 1(iv)).

<sup>52</sup> Georg Schwarzenberger and E.D. Brown, *A Manual of International Law*, (6th Ed.)(1976) at 150.

wrong is a legal action, States must justify retaliatory action in terms of retorsion.<sup>53</sup> Retorsion is a legal but unfriendly act of retaliation taken against acts of the same character.<sup>54</sup>

Majan has legally asserted criminal jurisdiction over former Ambassador Kitaro; accordingly, Aristan's retaliatory actions must be legal, under the doctrine of retorsion.

**The I.M.U. has Not Injured Aristan in Any Way. The Unprovoked Seizure of its Accounts in Retaliation for Majani Activities is Illegal, and is Not a Valid Retorsion.**

Retaliatory action must be taken directly against the party which committed the original alleged wrongdoing. Unprovoked attacks, military or otherwise, taken in retaliation against an independent, third party to a dispute are themselves illegal, and cannot be part of a valid retorsion.

**C. THE I.M.U.'S ASSETS ARE IMMUNE FROM SEIZURE BY ANY FOREIGN GOVERNMENT. THE SEIZURE OF IMMUNE ASSETS IS PRIMA FACIE ILLEGAL<sup>55</sup> AND CANNOT BE JUSTIFIED UNDER THE DOCTRINE OF RETORSION.**

**The Scope of the Immunities Which Must be Accorded Particular Organizations Are Objectively Determined Through the Functional Necessity or Inherent Rights Doctrines.**

Under the functional necessity doctrine, the rights and duties of an international legal person are defined by its purposes and functions as specified or implied in its constituent documents and developed in

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<sup>53</sup> Ibid.

<sup>54</sup> Ibid., at 566; K. J. Partsch, Retorsion, (1986) 9 Encyclopedia of Public International Law 335 at 335.

<sup>55</sup> See especially reference to statements by Foreign Ministers Pineau (France, 1956) and Lloyd (Britain, 1956) following the Egyptian nationalization of the Suez Canal Company, reported by R. Delson, Nationalization of the Suez Canal Company: Issues of Public and Private International Law [1957] 57 Columbia Law Review 755 at 771, cited Ian Brownlie, supra, note 3 at 539.

practice.<sup>56</sup>

Under the inherent rights doctrine, any international legal person is inherently endowed with all the legal capacities of a State, insofar as they are not limited by an organization's purposes or constituent documents.<sup>57</sup>

**Both the Functional Necessity and Inherent Rights Doctrines Lead to the Conclusion that the I.M.U. Must be Accorded Immunity to Cover its Assets, Including the Administered Deposit Account.**

The I.M.U. is a regional,<sup>58</sup> supra-national<sup>59</sup> central bank. It exercises sovereign functions.<sup>60</sup> Bilateral treaties concluded between the I.M.U. and

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<sup>56</sup> Reparation, supra, note 35; D.W. Bowett, *The Law of International Institutions*, (Fourth Ed.), (1982), 345-46; Rama-Montaldo, supra, note 36 at 112-114; Brownlie, supra, note 3 at 682; I. Detter, "Law-making by International Institutions", (1965) at 21; O'Connell, supra, note 47 at 109.

<sup>57</sup> *Certain Expenses of the United Nations* (Art. 17, Para. 2 of the Charter)(Advisory Opinion) [1962] I.C.J. Rep. 151, 34 I.L.R. 280 (E. Lauterpacht, Editor); F. Seyersted, "Objective International Personality of Intergovernmental Organizations : Do Their Capacities Really Depend on the Conventions Establishing Them?", (1964) *Indian Journal of International Law* at 28-29; also Okeke, supra, note 36 at 184-85; Rama-Montaldo, supra, note 36 at 116 et. seq.

<sup>58</sup> "Sectional organization", Georg Schwarzenberger, *International Law As Applied By International Courts and Tribunals*, Vol III, (1957), cited H. Schermers, supra, note 37 at 23, para. 32-33.

<sup>59</sup> Schermers, ibid., at 28-29, para. 42.; Kunz, supra, note 40, at 608-09.

<sup>60</sup> On the concept of "divisible sovereignty", see Lauterpacht, supra, note 2, at 120-23, ss 66-69; Brownlie, supra, note 3, at 64; P.B. Moring, *An Internationalist Approach to International Legal Personality* [1982] 15 *Vanderbilt J. Int'l L.* 309 at 323-25; and General Assembly Resolution 2145 [October 27, 1966, 21 U.N. GAOR, Supp. (No. 16) 2], *South-west Africa Trusteeship*. On the ability of international organizations to exercise sovereign functions, F. Morgenstern, *Legal Problems of International Organizations*, (1986). On banking functions specifically, see Charles Collyns, "Alternatives to the Central Bank in the Developing World", IMF Occasional Paper 20, Washington, July 1983, citing Saleh Nsouli, "Monetary Integration in Developing Countries", 18 *Finance and Development* (a publication of the IMF and the World Bank) at 41; R. W. Edwards Jr., *International Monetary Collaboration* (1985) at 644; also P. de Grauwe, "Political Union and Monetary Union", published in *Currency Competition and Monetary Union*, P. Salin, Editor (1984) at 261.

its member states and 19 non-members expressly call for immunities covering the I.M.U.'s accounts<sup>61</sup>. Moreover, as a central bank, the I.M.U. must maintain accounts in foreign nations.<sup>62</sup> National<sup>63</sup> and international<sup>64</sup> consensus has been reached on the necessity of immunities in these circumstances.

Under the inherent rights doctrine, legal capacities equal to those of a state are inherent in the I.M.U.'s legal personality. I.M.U. members have placed no apparent restrictions on the I.M.U.'s control over central banking policy. Immunities analogous to those which would attend the central banking function if it continued to be performed by the individual agencies of its members therefore continue to inhere in the banking function when it is transferred to the I.M.U.<sup>65</sup>

**Immunities Which are Functionally Implied in the Constituent Documents of a Major International Organization are Guaranteed in Third Party States.**

This Court has held that where fifty states...create an international legal personality, its rights and privileges must be recognized by states

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<sup>61</sup> *Compromis*, at 9.

<sup>62</sup> See *Edwards*, *supra*, note 60.

<sup>63</sup> See the State Immunities Acts, for example U.S. : Foreign Sovereign Immunities Act of 1976, Public Law 94-583, October 21, 1976, 90 Stat. 2891, ss 1611(b)(1); Canada : State Immunity Act, S.C. 1982, c. 95, s. 11(4) (subject to limitations set out in 11(5)); U.K. : U.K. State Immunity Act 1978, Stats. U.K. 1978, c. 33; Singapore : The Singapore State Immunity Act [26 October, 1979] ss. 16(4), 15; Pakistan : The Pakistani State Immunity Ordinance 1981, Ordinance No. VI of 1981, ss. 15(4), 14; South Africa : The South African Foreign State Immunities Act 1981 ss. 15(3), 14.

<sup>64</sup> Articles 3(c), 23(c), draft Convention on Jurisdictional Immunities of States and Their Properties, adopted 1986 by the International Law Commission, Supp. 10 (A/41/10).

<sup>65</sup> See *supra*, notes 63 and 64.

outside the membership.<sup>66</sup> The court's holding has far-reaching implications for regional organizations.<sup>67</sup> Sixty-one states, representing the vast majority of regional governments, have created the I.M.U. to have objective international personality. Its immunities must be observed in third states.

**The Immunities of International Financial Organizations in Non-member States are Well-established in Customary International Law.**

Obligations may accrue to a state on the basis of a treaty to which it is not a party as a result of the operation of customary international law.<sup>68</sup> International organizations require a minimum of freedom and legal security in order to function effectively.<sup>69</sup> They are not territorially based; as a result, independence and lack of effective sanctions through reciprocity are special problems for organizations which are not faced by States.<sup>70</sup> Accordingly, necessary immunities as defined or implied in constituent documents of major organizations,<sup>71</sup> especially financial organizations,<sup>72</sup> are

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<sup>66</sup> Reparation, supra, note 35, at 185.

<sup>67</sup> H. Kindred et. al., International Law, Chiefly as Applied and Interpreted in Canada (4th Ed.), (1987), at 84.

<sup>68</sup> Vienna Convention on the Law of Treaties, supra, note 2, Art. 38.

<sup>69</sup> Brownlie, supra, note 3 at 682.

<sup>70</sup> Bowett, supra, note 56 at 345; Schermers, supra, note 37 at 794, para. 1419.

<sup>71</sup> Charter of the United Nations, 1977 U.N.Y.B. 1181, Art. 105; General Convention on the Privileges and Immunities of the United Nations, I U.N.T.S. 15; Convention on the Privileges and Immunities of the Specialized Agencies, supra, note 51, Art. 4,5,7.

<sup>72</sup> International Monetary Fund, supra, note 49, Art.IX; International Bank for Reconstruction and Development, 2 U.N.T.S. 134, Art. VII; International Development Agency 415 U.N.T.S. 3, Art. VII; African Development Bank, 510 U.N.T.S. 3, Art. 52-54; Inter-American Development Bank, 389 U.N.T.S. 69, Art. XI(3),(4),(6); West African Monetary Union, Art. 4, cited Peaslee, II International Governmental Organizations : Constitutional Documents, at 1368.

recognized in non-member states as a matter of customary law.<sup>73</sup> International organizations are specifically exempt from the operation of municipal laws concerning requisition, confiscation, or expropriation of property, and laws restricting the holding or transfer of currency, since the operation of such laws would prejudice the independence of the organization.<sup>74</sup>

**Immunities Specifically Accorded the I.M.U. in the Course of its Functions as a Supra-national Central Bank and Monetary Authority have Crystallized into a Rule of Customary Law.**

For a rule to be established as customary, corresponding state practice must be general and uniform<sup>75</sup>, though it need not be in absolutely rigorous conformity with the rule.<sup>76</sup> A pattern of bilateral treaties, all framed in the same way, is strong evidence of customary law.<sup>77</sup> Provisions for immunities necessary to perform organizational functions are common form in constitutions of international organizations.<sup>78</sup>

State practice shows that the I.M.U.'s immunity is established in

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<sup>73</sup> Schermers, *supra*, note 37 at 794, para. 1418, and 795 para. 1421, citing F. Schroer, *De l'application de l'immunité juridictionnelle des états étrangers aux organisations internationale*, (1971) 75 RGDIP 712; Giovanni Porru v. FAO of the United Nations, U.N.J.Y. 1969 at 238 (Rome Court of First Instance).

<sup>74</sup> Schermers, *ibid.* at 793, para. 1416, 1417(3) and (5).

<sup>75</sup> North Sea Continental Shelf Cases, [1969] I.C.J. Rep. 3, at 43, 86, 229, 246.

<sup>76</sup> Military Activities In and Against Nicaragua, [1986] I.C.J. Rep. 14 at 98.

<sup>77</sup> Brownlie, *supra*, note 3, at 5, 13-14; A. D'Amato, *The Concept of Custom in International Law*, (1971), Chapter 5, cited M. Akehurst, "Custom as a Source of International Law", (1974-1975) Brit. Y.B. Int'l L. 1 at 42.

<sup>78</sup> Bowett, *supra*, note 56 at 346.

customary law. Eighty states have expressly recognized the I.M.U.'s immunity in similar bilateral treaties. A vast majority of regional states have thus uniformly accepted a rule according immunity to I.M.U. assets.

**Aristan has Acquiesced in the Rule.**

Individual states may avoid obligations under a rule of customary international law by clearly expressing their opposition to it.<sup>79</sup> By contrast, once a State has consented to the presence of an international organization in its territory for a particular purpose, it is bound, by the principle of good faith, to extend all privileges and immunities as are necessary, and for the achievement of its purpose.<sup>80</sup>

Aristan has always regarded the I.M.U. as a regional organization. It has neither expressed nor hinted at opposition to immunities accorded the I.M.U. as a rule of customary law. Instead, it has allowed the I.M.U. to operate unhindered in its territory. Aristan's withdrawal of rights previously recognized de facto violates the principle of good faith.

**D. IN THE ALTERNATIVE, THE ASSETS ARE OWNED BY MAJAN AND ARE PROTECTED BY MAJAN'S SOVEREIGN IMMUNITIES.**

**Majani Assets are Accorded Absolute Immunity, and Cannot be Legally Seized by the Government of Aristan.**

International law is governed by the concept of the equality of sovereigns.<sup>81</sup> The joint principles of non-intervention and par in parem non habet imperium are expressions of sovereign equality.<sup>82</sup> Absolute

<sup>79</sup> Schwarzenberger, supra, note 58, Vol. I at 128.

<sup>80</sup> Bowett, supra, note 56 at 348.

<sup>81</sup> Lauterpacht, supra, note 2 at 263, para. 115; Brownlie, supra, note 3, at 287, 323.

<sup>82</sup> Lauterpacht, ibid., at 264, para. 115a; Brownlie, supra, note 3 at 323-324.

immunity for State assets flows from these principles.<sup>83</sup> Although this immunity is primarily from the jurisdiction of local courts, it has other facets, including attachment and seizure, and the comprehensive governmental power of a State.<sup>84</sup> If the account seized by Aristan is deemed to be owned by Majan, it is covered by the absolute immunity accorded Majan as a sovereign power.

**Even Under the Restrictive Immunity Doctrine, Immunity Would Attach to the Funds Seized by Aristan, Since they are Held for Public Purposes.**

The distinction between public activities (iure imperii) and private activities (iure gestionis) is prevalent in municipal law.<sup>85</sup> It has been codified in Foreign Sovereign Immunities Acts<sup>86</sup>, wherein sovereign immunity is restricted to public activities carried out by states.<sup>87</sup> Central banking and monetary authority functions, even when carried out by a separate entity, are expressly reserved as public acts.<sup>88</sup> The administered deposit account is held for these functions. It is therefore protected from seizure even under the restrictive immunity doctrine.

**E. EVEN IF THE ADMINISTERED DEPOSIT ACCOUNT IS NOT IMMUNE, ARISTAN'S SEIZURE IS AN ILLEGAL ACT.**

**Aristan's Seizure of the Administered Deposit Account is a Taking at International Law.**

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<sup>83</sup> Brownlie, ibid.; *The Schooner Exchange v. McFaddon* 7 Cranch. 116 (1812); *The Parlement Belge*, 5 P.D. 197 (1880).

<sup>84</sup> Brownlie, ibid., at 326, 343; H. Steinberger, "State Immunity", (1986) 10 *Encyclopedia of Public International Law* 428.

<sup>85</sup> Brownlie, ibid., at 327.

<sup>86</sup> Ibid. at 328.

<sup>87</sup> O'Connell, supra, note 47 at 845 et. seq.

<sup>88</sup> See municipal Foreign State Immunities Acts, supra, note 63.

A "taking of property" includes not only an outright taking of property, but also any unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property after a reasonable period of time after the inception of such interference.<sup>89</sup>

**Aristan's Taking of Funds in the Administered Deposit Account Cannot be Part of a Valid Retorsion Because it is an Illegal Act.**

International law sets a minimum standard of justice and equity below which States cannot fall in their treatment of foreign persons or property.<sup>90</sup> When the standard is breached, the foreign party must receive prompt, effective, and full compensation from the host State<sup>91</sup>, whether or not that State is entitled to base its claim on a "national emergency".<sup>92</sup>

Aristan has failed to provide compensation to the I.M.U. for the seized funds. The seizure is therefore illegal at international law.

**Aristan's Combined Economic Coercion and the Seizure of any Alien Assets is a Single Response to Majan's Activities.**

The seizure of I.M.U. assets is only the second stage in a retaliation which includes severe economic sanctions. The entire retaliatory action must be considered to determine its status as a valid retorsion.

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<sup>89</sup> Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, Article 10, reprinted (1961) 55 Am. J. Int'l L. 577.

<sup>90</sup> Schwarzenberger, *supra*, note 58 at 200-206.

<sup>91</sup> Schwarzenberger and Brown, *supra*, note 52 at 84; Lauterpacht, *supra*, note 2 at 352, para. 156; Brownlie, *supra*, note 3; Chorzow Factory Case, (Germany v. Poland)(Indemnity -- 1928) 1928 P.C.I.J., Ser. A., No. 17, 47.

<sup>92</sup> Norwegian Shipowners' Claims, (Norway v. United States) (1922), 1 R.I.A.A. 307 at 338.

**Aristan's Measures of Economic Coercion Violate the Principle of Non-intervention and are Illegal Under General Principles of International Law.**

The traditional duty of non-intervention has been expounded by eminent publicists<sup>93</sup> and recognized by the General Assembly.<sup>94</sup> It is violated when a powerful State uses economic measures to coerce the sovereign will of another, usually weaker State, or to influence its internal affairs or foreign policy.<sup>95</sup> Such coercion may be justified only if authorized by the United Nations.<sup>96</sup> Resolutions adopted by the General Assembly condemn unauthorized coercion.<sup>97</sup> Near unanimous adoption makes these resolutions strong evidence of customary law.<sup>98</sup> Members of the

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<sup>93</sup> Brownlie, *supra*, note 3 at 287; D.W. Bowett, *Economic Coercion and Reprisals by States*, 13 Va. Jnl. Int'l L. 1; R. B. Lillich, *Economic Coercion and the 'New Economic Order': A Second Look at Some First Impressions*, 16 Va. J. Int'l Law 233.

<sup>94</sup> "No state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state." *Declaration on the Inadmissibility of Intervention*, G.A. Res. 2131, 20 UN GAOR, Supp 14, at 12, UN Doc. A/6220 (1965), Cf. Res. 380 (V), cited O'Connell, *supra*, note 47, Vol. I at 299.

<sup>95</sup> Bowett, *supra*, note 93 at 3-5; Lillich, *supra*, note 93 at 238; *Declaration on Principles of Friendly Relations*, G.A. Res. 2625, 25 U.N. GAOR, Supp. 28 at 123, U.N. Doc. A/8028 (1970); on non-intervention generally see H. Kindred et. al., *supra*, note 67 at 25.

<sup>96</sup> United Nations Charter Art. 41, cited Bowett, *ibid.*, at 6.

<sup>97</sup> General Assembly Resolutions condemning economic intervention: *Declaration on the Inadmissibility of Intervention*, *supra*, note 94, see esp. Articles 1,2, adopted 190-0, U.K. abstaining; *Declaration on Principles*, *supra*, note 95; *Resolution on Permanent Sovereignty over Natural Resources*, G.A. Res. 3171, 28 U.N. GAOR, Supp. 30, U.N. Doc. A/9030 (1974), Paragraphs 4,6, adopted by near unanimous vote; *Charter of Economic Rights and Duties*, G.A. Res. 3281, 29 U.N. GAOR, Supp. 31 at 50, U.N. Doc. A/9631 (1974), Art. 32.

<sup>98</sup> D.W. Bowett, *International Law and Economic Coercion*, 16 Va. J. Int'l L. (1976) 245 at 246; On the legal effects of U.N. resolutions in general: *Southwest Africa Cases*, 1966 I.C.J. 4 at 446; *Military Activities in and Against Nicaragua (Nicaragua v. United States)*, *supra*, note 73 at 99-100.

General Assembly are bound to consider adopted resolutions in good faith.<sup>99</sup>

Aristan is using economic coercion to subvert Majan's sovereign capacity to determine its own foreign relations policy. The sanctions imposed have effectively deprived Majan of its inviolable right to political and economic independence. Aristan has further ignored its responsibility to obtain United Nations authorization, and has violated its obligation to consider the U.N. resolutions regarding economic coercion in good faith.

**Aristan Has Further Violated the Principle of Non-Intervention by Coercing Third States to Sever Trade with Majan.**

All persons and things within the territory of a State fall under its territorial supremacy.<sup>100</sup> By severing trade between Majan and third States in the region, Aristan has violated the territorial integrity of third States.

**F. ARISTAN'S MEASURES OF ECONOMIC COERCION AND ASSET SEIZURE ARE NOT A VALID REPRISAL.**

**Ambassador Kitaro's Prosecution for Drug Smuggling and Murder is Both Legally and Morally Proper. It Could not Justify a Valid Reprisal.**

A reprisal is an act, illegal in itself, which is permitted as a means of retaliation against a prior illegal act on the part of another state.<sup>101</sup> It must be proportional to the original injury suffered at the hands of another

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<sup>99</sup> *Southwest Africa, Voting Procedure Case* [1955] I.C.J. Rep. 67 at 118-119 (Judge Lauterpacht).

<sup>100</sup> Lauterpacht, *supra*, note 2, at 325. For bases of jurisdiction to prescribe, see *The American Law Institute, Restatement of the Law: The Foreign Relations Law of the United States*, Vol. 1 (1987) at para. 402, 237-244.

<sup>101</sup> Schwarzenberger and Brown, *supra*, note 52 at 150-51; 566.

state.<sup>102</sup> At worst, Majan's acts could be considered unfriendly, but legal; they could not be considered illegal.

**Even if Majan's Actions Were Illegal, Aristan's Retaliatory Sanctions Violate the Requirement for States Which Have Allegedly Been Wronged to Choose a Proportional Act in Reprisal.**

Aristan has selected economic reprisals measures so severe as to deprive Majan of its political independence. Interference with a state's sovereignty or independence is the most serious international offence possible. It is prohibited by Article 2(4) of the U.N. Charter<sup>103</sup> and the general principle of non-intervention<sup>104</sup>. Aristan's economic sanctions alone provide a disproportionate response to Majan's valid exercise of jurisdiction over an Aristani criminal. Additional acts by Aristan, such as attaching I.M.U. assets, further violate the proportionality principle. Therefore, Aristan's combined measures of reprisal are invalid.

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<sup>102</sup> *Naulilaa Case (Portugal v. Germany)*, (1933) 2 R.I.A.A. 325; see generally Schwarzenberger and Brown, *supra*, note 52 at 150-151; Brierly, *supra*, note 3, at 401.

<sup>103</sup> See A. D'Amato, *International Law : Prospect and Process* (Dobbs Ferry, New York, Transnational Publishers, 1987), Chapter 3.

<sup>104</sup> See *supra*, notes 93-98.

**CONCLUSION**

For the reasons stated above, it is respectfully requested that this Court:

1. **DECLARE** that Majan may prosecute Ambassador Kitaro consistently with its obligations under the Vienna Convention on Diplomatic Relations.
2. **DECLARE** that the assets held by the IMU. for the benefit of Majan on an administered deposit account with the First Aristani National Bank are immune from seizure by the Government of Aristan.
3. **DECLARE** that Aristan's combined measures of economic sanctions and asset seizure are illegal at international law.
4. Order that Aristan release the funds in the administered deposit account.
5. Deny all of Aristan's claims; and
6. Grant Aristan such further relief as this Court may deem just.

Respectfully submitted,

**Agents for Majan**