IN THE

INTERNATIONAL COURT OF JUSTICE

AT THE

PEACE PALACE, THE HAGUE, NETHERLANDS

February, 1989

MAJAN

Applicant

v.

ARISTAN

Respondent

MEMORIAL FOR THE RESPONDENT

TABLE OF CONTENTS

LIST OF AUTHORITIES

TREATIES AND OTHER INTERNATIONAL AGREEMENTS

UNITED NATIONS MATERIALS

MUNICIPAL STATUTES

CASES

TREATISES, DIGESTS AND RESTATEMENTS

JOURNALS

Page ix unavailable at publication.

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 Court. Furthermore, in accordance with the aforesaid Article of the Statute, the courts jurisdiction "comprises all cases which the parties refer to it."

STATEMENT OF FACTS

1. The United Republic of Aristan and Majan are members of the United Nations and are parties to the **Vienna Convention on Diplomatic Relations.**
2. On February 13, 1988, Ambassador Guido Kitaro, chief of mission from Aristan was returning home from a diplomatic reception when he was involved in an automobile accident. The accident resulted in serious injury to Mark Wilkey, a known member of an illicit drug trafficking ring, and two innocent bystanders. At the time of the accident, Mr. Wilkey had been carrying a suitcase filled with drugs which was spewn about the scene.
3. Evidence provided by Majan indicates that Mr. Wilkey was Ambassador Kitaro's contact in the drug trafficking ring. Unbeknownst to Aristan, it is claimed by Majanian authorities that the drugs were smuggled into Majan by diplomatic pouch with the assistance of one or more unknown confederates in Aristan's foreign ministry.
4. The incident triggered an outpour of public criticism in Majan and the local news media and politicians seized the opportunity to vent their frustrations over repeated abuses of diplomatic immunity. A resolution was passed overwhelmingly in the Majanian National Assembly calling for the immediate criminal trial of Ambassador Kitaro. The charges against the Ambassador were based on the testimony of bystanders to the auto accident and on the speculations of police officials.
5. In accordance with diplomatic protocol, Aristan recalled Ambassador Kitaro and expressed its regret as to the accident's occurrence.

Ambassador Kitaro notified the Minister of Foreign Affairs of Majan that his immunity would terminate as from 12:01 a.m. 21 February.

6. Prior to the Ambassador's departure, Majan's Minister of Justice, Charles Akulu, announced that he was preparing criminal charges against the ambassador for murder, attempted murder, drug trafficking and smuggling. Mr. Akulu publicly stated that there was no doubt that under Majanian law Ambassador Kitaro was guilty and that the conviction could result in the death penalty being imposed.

7. Aristan immediately protested the Ambassador's arrest by diplomatic note requesting that assurances be given that Majan would honour its international obligations under the **Vienna Convention on Diplomatic Relations** and that any criminal investigation be quashed. In response, Majan rejected Aristan's contention that international law precluded that prosecution of a former diplomat for non-official acts committed during his period of accreditation.

8. Upon his return to Aristan, Ambassador Kitaro received a hearing and was dismissed from the foreign service.

9. Majan issued an arrest warrant for the ambassador soon after his departure but the law a Majan does not allow for trial in absentia. However, one week later, learning that ambassador Kitaro was visiting the Parrot Islands, Majan filed a demand for Ambassador Kitaro's extradition under a bilateral extradition treaty. Ambassador Kitaro was thereupon arrested and extradited back to Majan where he was imprisoned.

10. The Ambassador's trial date was set despite repeated protests by the Government of Aristan. Subsequently, Aristan imposed economic upon

Majan in an attempt to persuade Majan to release Ambassador Kitaro. On the day the trial began, the Government of Aristan froze assets of the International Monetary Union (IMU) assigned to Majan in a final effort to have Ambassador Kitaro released to its jurisdiction.

11. The seized funds were held in an administered deposit account with the First Aristani National Bank, a private bank wholly within the jurisdiction of Aristan's banking laws and regulations. The temporary seizure of these assets is legal under Aristani law. Bilateral agreements between the IMU and its members States may grant IMU deposits immunity but Aristan has never entered into such an agreement.
12. Majan is acting on behalf of the IMU following instructions from the IMU president to defend both the IMU's and its own interests.

QUESTIONS PRESENTED

1. Whether Majan breached the terms of the **Vienna Convention on Diplomatic Relations** by exercising criminal jurisdiction over Aristan's former ambassador.

3. Whether the I.M.U. account assigned to Majan on an administered deposit account with the Aristani National Bank is immune from seizure by Aristan.

SUMMARY OF ARGUMENT

1. The Immunity of Former Ambassador Kitaro Under the Vienna Convention on Diplomatic Relations

The conduct of an ambassador in the receiving State is a State-to-State matter. As such, there is no basis for Majan to bring an action against Ambassador Kitaro in his personal capacity. Diplomatic international law is a closed system which provides remedies to a receiving State when members of a foreign mission abuse their privileges and immunities. Majan has violated international law by unilaterally exercising jurisdiction over Ambassador Kitaro. The circumstances of this case and the suppression of Ambassador Kitaro's freedom warrant the granting of provisional measures.

Under the **Vienna Convention on Diplomatic Relations** and at customary international law, a diplomat is immune from the criminal jurisdiction of the receiving State. State practice confirms the position that a diplomat may not be subjected to the host State's jurisdiction for any acts, private or official, which occurred while he was accredited to that country. Any emerging trend towards restricting immunity has not yet crystallized into a customary rule of international law. Absolute diplomatic immunity is fundamental to the existence of diplomatic relations.

2. The I.M.U. Administered Account Assigned to Majan is Not Immune From Seizure

The funds in the administered deposit account is the property of the International Monetary Union (IMU). Under established principles of

international law, the IMU's immunities are restricted to those expressly set out in its constituent treaties which are not binding on third (non-member) States. Accordingly, the administered account is not immune from seizure in the territory of third States such as Aristan. It cannot be established that immunity would attach under local custom as there is no evidence of such practice. The fact that Aristan was aware of the existence of the account does not constitute acquiescence to the degree required to establish custom.

It cannot be argued that the account is protected by the sovereign immunity enjoyed by Majan. Without possession and control Majan does not have a sufficient interest in the property for sovereign immunity to attach. Even if immunity did attach, it would only be from judicial jurisdiction, not from executive acts.

Although it is arguable that the economic actions taken by Aristan against Majan are per se illegal under international law, such assertions are based on alleged customary rules which are grounded on evidence of practice as reflected in a series of U.N. resolutions. Evidence of State practice contrary to such assertions establishes that any such rules have not yet crystallized into customary law. Even if they have crystallized into custom, thus rendering Aristan's actions illegal per se, the actions would clearly be justified on the ground they constitute a valid reprisal.

ARGUMENT AND AUTHORITIES

I. AMBASSADOR KITARO IS IMMUNE FROM THE CRIMINAL JURISDICTION OF MAJAN

The principles of diplomatic immunity and inviolability are universally recognized concepts in international law.[1] "The inviolability of ambassadors is protected by divine and human law; they are sacred and respected so as to be inviolable not only when in an allied country but also whenever they happen to be in the forces of the enemy."[2] The paramount importance of inviolability is embodied in the **Vienna Convention on Diplomatic Relations**[3] (hereinafter referred to as the **Vienna Convention**) and was recognized by this court in the **Case Concerning United States Diplomatic and Consular Staff in Tehran.**[4] Inviolability is the personal immunity a diplomat enjoys from any form of arrest or detention. A consequence of diplomatic inviolability is exemption from the criminal and civil jurisdiction of the receiving State.[5] It is the responsibility of the receiving government to ensure against any form of interference with a diplomat's person, freedom,

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[1] H. Lauterpacht, **Oppenheim's International Law**, (8th ed., 1955) at 790; J.L. Brierly, **The Law of Nations**, (6th ed., 1963) at 254; C.J. Lewis, **State and Diplomatic Immunity** (2nd ed., 1985) at 172.

[2] Cicero, in W. Barnes, **Diplomatic Immunity From Local Jurisdiction: Its Historical Development Under International Law and Application in United States Practice**, 43 Department of State Bulletin, 1 August 1960 at 173.

[3] 500 U.N.T.S. 95, 23 U.S.T. 3227, TIAS 7502

[4] **(U.S.A. v. Iran)** [1980] I.C.J. Rep. 3; I.L.R. 530, para 86 at 19.

[5] J. Brown, **Diplomatic Immunity: State Practice Under the Vienna Convention on Diplomatic Relations** (1988) 37 Intl.& Comp.L.Q. 53 at 54; E. Denza, **Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations** (1979) at 136; Brierly, supra, note 1, at 256.

or dignity.[6] As a member of the Vienna Convention Majan is obligated to respect the inviolability entitled to Aristan's Ambassador Kitaro.

A. MAJAN'S ACTIONS ARE A BREACH OF THE INTERNATIONAL LAW GOVERNING DIPLOMATIC IMMUNITY

1. Diplomatic Immunity is Based on Comity Between Equal Sovereigns; Breaches of Proper Conduct are Addressed at a State-to-State Level

The conduct of a diplomatic agent in a receiving State is a matter between the governments of the sending and receiving States.[7] The position of ambassador, being void of individual identity is accorded immunity only as the representative of his State.[8] Any question of conduct of the individual holding the ambassadorial position is the responsibility of the sending State. This principle is codified in the Vienna Convention. Article 31(4) expressly states that the immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State. As the representative of Aristan, Ambassador Kitaro is subject only to its jurisdiction, and it is up to the government of Aristan to take whatever disciplinary action it deems

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[6] **Vienna Convention**, Art. 29.

[7] Bland, **Satow's Guide to Diplomatic Practice** (4th ed., 1957) at 175; Hardy, **Modern Diplomatic Law** (1968) at 9; Dembinsky, **The Modern Law of Diplomacy** (1988) at 202.

[8] As evidence of this, a waiver of immunity could only be given by the sending State, not the diplomatic agent: J. Moore, **Digest of International Law** (1906), at 678. The proposition that immunities belong to the government of the sending State is also supported by state municipal law: **Restatement of the Law: The Foreign Relations Law of the United States** (1987) Vol.1 at 460.

appropriate. Aristan has exercised its jurisdiction by conducting a domestic hearing which resulted in the Ambassador's dismissal from the foreign service.

Article 32 of the **Vienna Convention** provides that the sending State may waive the immunity of its diplomatic agent to allow the receiving State jurisdiction to prosecute.[9] However, without a waiver,[10] the receiving State does not have the right to prosecute or to take any punitive measures other than those provided by international law.[11] In the proceedings before this court, Aristan has not granted a waiver. As such, there is no provision in customary law or under the Vienna Convention which would allow Majan to exercise disciplinary action directly against the person occupying the position of ambassador.

2. Majan Has Failed to Utilize the Provisions Contained in the Vienna Convention on Diplomatic Relations to Meet the Case When Diplomats Allegedly Abuse Their Privileges and Immunities

This court, in its judgement in **A Case Concerning United States Diplomats and Consular Staff in Tehran (U.S.A. v. Iran)** has held that

> "The rules of diplomatic law... constitute a self-contained regime which, on the one hand lays down the receiving State's obligations regarding the privileges and immunities to be accorded to diplomatic missions and on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse."[12]

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[9] C.E. Wilson, **Diplomatic Privileges and Immunities** (1967) at 81.

[10] An exception exists for war crimes: **Re Abetz** [1950] 17 I.L.R. 279.

[11] H. Lauterpacht, supra, note 1, at 790.

[12] **U.S.A. v. Iran**, supra, note 4, at para 86.

Remedies are available to a receiving State which believes that a foreign diplomat has violated its laws or regulations.[13]

Article 9(1) of the **Vienna Convention** allows the receiving State to declare any member of the diplomatic staff of a foreign mission, persona non grata. The effect of this provision enables the receiving State to, without justification or prior notice, expel the suspected offender from its territory.[14] The receiving State also has the right to restrict the size of a diplomatic mission which it may do if it suspects that mission's activities.[15] Ultimately, a receiving State always maintains the right to break off diplomatic relations altogether.[16] If Majan suspects that other members of the Aristani mission have been engaging in drug smuggling, the appropriate action would be to limit the size of the mission to essential personnel only. Beyond that, it could break off diplomatic relations if that appeared to be the only method of halting the drug flow.

Majan's failure to utilize one of these remedies is evidence of a disregard for the provisions of the **Vienna Convention.** Furthermore, the Majanian National Assembly's resolution coupled with the announcement made by the Minister of Justice prior to Ambassador Kitaro's departure constitutes an attack on his dignity and is in itself a clear violation of

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[13] Ibid.

[14] Brown, supra, note 5, at 87.

[15] **Vienna Convention,** art. 11(1).

[16] **U.S.A v. Iran,** supra, note 4, para 85.

Article 29.[17] This court should not sanction Majan's actions by granting it the declaration it seeks.

B. IMMUNITY EXTENDS IN PERPETUITY FOR ALL OFFICIAL AND NON-OFFICIAL ACTS COMMITTED DURING THE PERIOD OF ACCREDITATION

1. Majan's Actions are Inconsistent with the Purpose and Object of Granting Immunity for Official and Non-official Acts

The purpose of granting absolute immunity for all acts is to allow diplomatic agents to function without undue influence or interference from the host country.[18] It is imperative that a diplomat's official functions are not compromised by the threat of charges being laid against him for private acts that either he or members of his family may have committed. The theory of functional necessity, embodied in the preamble of the Vienna Convention, dictates that diplomats must enjoy complete independence from the jurisdiction of the receiving State to ensure the efficient performance of their functions.[19]

Limits cannot be placed on immunities without compromising the

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[17] **Vienna Convention**, art. 29 states that "The receiving State shall treat him with due respect and shall take all appropriate steps to prevent an attack on his person, freedom or dignity."

[18] Hurst, **International Law: Collected Papers** (1950) at 13; Sen, **A Diplomat's Handbook of International Law and Practice** (2nd ed., 1979) at 106-8; **U.S.A. v. Iran**, supra, note 4, at 19; Wright, **Restricting Diplomatic Immunity to Deter Violent Crimes: A Proposal for Amending the Vienna Convention** (1987) 5 B.U.I.L.J. 177, at 200; O'Neill, **A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978** (1980) 54 Tul.L.Rev., at 668-9.

[19] Preamble to the **Vienna Convention on Diplomatic Relations** (Vienna Convention), supra, note 3; Farhangi, **Insuring Against Abuse of Diplomatic Immunity** (1986) 38 Stanford L.Rev. 1517, at 1521.

purpose for them. Riphagen, the Special Rapporteur of the International Law Commission on State Responsibility has stated, "Indeed, immunity has no meaning unless, within its scope, the State enjoying it, whatever it does, is free from interference by the State granting it."[20] If the receiving State were allowed to prosecute diplomats after their period of accreditation for acts committed during the period, the fundamental purpose of immunity is diluted.[21] A diplomat's position could still be compromised by the threat of prosecution upon the expiry of his term of office.

Article 31(1) of the **Vienna Convention on the Law of Treaties**[22] states that "a treaty shall be interpreted with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The prosecution of Ambassador Kitaro is contrary to the express purpose of the **Vienna Convention on Diplomatic Relations.**

2. Article 39 of the Vienna Convention Supports Aristan's Claim of Immunity for Ambassador Kitaro.

Diplomatic privileges and immunities[23] commence as of the moment a diplomatic agent takes up his post in the receiving State.[24] Article 39(2)

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[20] W.Riphagen, **State Responsibility: New Theories of Obligations in Interstate Relations** in: R.St.J.Macdonald/D.M.Johnstone (eds.), **The Structure and Process of International Law** (1983), 606,para.57.

[21] Dembinsky, supra, note 7, at 195-204; Sen, **A Diplomat's Handbook of International Law and Practice** (2nd ed., 1979) at 107; Kerely, **Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities** (1962) 56 A.J.I.L. 88 at 124.

[22] UN Doc. A/ CONF. 39/27, 8 I.L.M. 679 (1969).

[23] Article 31 of the **Vienna Convention** provides that a diplomat shall enjoy immunity from the criminal jurisdiction of the receiving State.

[24] **Vienna Convention** art. 39(1).

defines the duration of immunity.[25] The **Vienna Convention** is clear that a diplomat is entitled to immunity for all acts, both private and official, for the period he is an accredited member of the mission and for a reasonable termination period prior to his departure. To be consistent with the object and purpose of the **Vienna Convention**, the immunities accorded to accredited diplomats must extend in perpetuity so that official functions cannot be compromised by the threat of future reprisals. However, during the termination period, the individual is no longer the accredited diplomat to the receiving State, nor is he in a position to be compromised. As such, there is no reason to extend immunities , after he has left the country, for acts committed during this period. Only in the event that a diplomat continued to reside in the receiving State or returned unofficially after the termination period, would he become subject to the receiving State's jurisdiction for all subsequent acts[26] and non-official acts committed during the termination period.

Consistent with this interpretation, Aristan submits that the later statement of article 39(2) refers only to the termination period-- that is, immunity will continue only for any acts which may be performed in the exercise of official functions (for example, clearing out his office and assisting his successor to settle in). This is the only interpretation that is

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[25] Article 39(2) of the **Vienna Convention**: "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 in the exercise of his functions as a member of the mission, immunity shall continue to subsist."

[26] B. Sen, supra, note 18, at 169; see also dictum in **Dickson v. Del Solar** [1930] 1 K.B. 376.

consistent with State practice and agrees with the purpose behind the granting of immunity.[27]

3. The Vienna Convention on Diplomatic Relations is to be Interpreted in Light of Customary International Law

The preamble to the Vienna Convention states that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention. The preamble of a treaty is to be considered part of the treaty for the purposes of interpretation.[28] If it is determined by this court that a plain reading of article 39(2) is not consistent with the purpose and object of the treaty or with the absolute immunities accorded by other articles of the Convention,[29] customary international law may be used to clarify any ambiguities as to the duration of immunities.

Customary international law is evidenced by the general and consistent practice of States.[30] The practice must also be accepted as law in the opinio juris of the international community.[31] However, for a rule to be

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[27] This interpretation has recently been noted by B. Larschan, **The Abisinito Affair: A Restrictive Theory of Diplomatic Immunity** (1988), 26 Colum. J. Transnat'l L. 283, at 293.

[28] Article 32(1): **Vienna Convention on the Law of Treaties.** Both Aristan and Majan are parties to the treaty.

[29] Arts. 31,29 and 41.

[30] **Statute of the International Court of Justice,** (1977) U.N.Y.B. 1190, Art. 38(1)(b) refers to international custom, as evidence of a general practice accepted as law. see also Lauterpacht, supra, note 7, at 26; D.P. O'Connell, **International Law** (2nd ed., 1970) Vol.1 at 16.

[31] **Nicaragua v. U.S.A. (Merits),** [1988] 76 I.L.R. 1 (I.C.J.) at 432

established as custom, it is not necessary to have absolute conformity.[32] Inconsistencies in State practice may be treated as breaches of the law.[33]

4. State Practice Supports Aristan's Position That a Diplomatic Agent Cannot Be Subject to the Criminal Jurisdiction of the Receiving State for Serious Acts Committed During the Period of Accreditation

Violations and infractions of receiving States' laws and regulations occur frequently;[34] the majority of these being for minor offences.[35] In incidents of criminal violations, the usual course is for the sending State to recall the offender[36] or he is declared persona non grata and expelled[37] and the matter is closed. This practice is consistent with the concept that diplomatic law is a self contained regime.[38]

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[32] Ian Brownlie, **Principles of Public International Law** (3rd ed., 1979) at 6.

[33] Dembinsky, supra, note 7, at 15.

[34] C. Ashman and P. Trescott, **Diplomatic Crime** (1987). Violations varying in severity are discussed in detail; Wright, supra, note 18, at 183; Also, the U.S. State Dept. has recently stated "from Aug 1982 through Feb 1988, there were 147 criminal incidents in the Washington area involving diplomats, their staffs and dependents. The violations mostly involved shoplifting but also included murder, rape, and assault." **Washington Post**, 14 April 1988; for similar examples in Europe see article by Lazitch and Jelen, **L'Express** (Paris) 5 Nov 1982.

[35] For example, in 1982, foreign diplomats escaped prosecution on 246 violations of Canadian law, seven of which were criminal offences: H.M. Kindred et al., **International Law** (4th ed., 1987) at 351.

[36] Wilson, supra, note 9, at 90.

[37] C. Hill, **Constraining Diplomatic Representatives to Abide by the Local Law**, (1931), 25 Am.J.Int'l L. 256, at 263. For a recent example: An Iraqi diplomat fatally shot a French police officer and was deported: **The Times**, 3 August 1978.

[38] See above, Part I.A.2; see also M. Herdegen, **The Abuses of Diplomatic Privileges and Countermeasures not Covered by the Vienna Convention on Diplomatic Relations** (1986), 46 Zeitschrift Fur Auslandisches Offentliches

There are few cases of a receiving State exercising jurisdiction over a foreign diplomat or ex-diplomat. Sir Cecil Hurst has claimed that "no instance could be cited where such an agent had been subjected, without his governments consent, to the criminal jurisdiction of the country to which he was accredited."[39]

Exceptions[40] to the general practice of according indefinite immunity for acts committed while accredited have in most instances involved civil violations[41] or misdemeanors.[42] Other cases have dealt with administrative or clerical staff or lower-ranking military personnel,[43] not entitled to the same levels of immunities accorded diplomats.

The rules of immunity from criminal jurisdiction are also modified when an envoy's conduct threatens the safety or security of the host State.[44] The "national security doctrine" allows a diplomat's inviolability to be

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Recht Und Volkerrecht 734-457, 745.

[39] Barnes, **Diplomatic Immunity from Local Jurisdiction: Its Historical Development Under International Law and Application in U.S. Practice**, (1 August 1960) 43 Dept. of State Bulletin at 173-77, citing Sir Cecil Hurst, Les **Immunities Diplomatiques**, Academie de Droit International, Recueil des Cours, 12, 92.

[40] Denza, supra, note 5, at 247 claims there are numerous cases in which members of diplomatic missions were subjected to civil or criminal proceedings after their appointments had ended.

[41] All cases cited by Denza, Ibid, to support the proposition that immunity is not indefinite are civil and are therefore inapplicable with respect to a diplomat's immunity from the criminal jurisdiction of the receiving state: **Re Suarez**, [1917] 2 Ch 131; **Magdelena Steam Navigation Company v. Martin** (1959) 121 E.R. 36; **Musurus Bey v. Gadban** (1894) 2 Q.B. 352; **Empson v. Smith** (1965) 2 All E.R. 881; **Zoernsch v. Waldock** (1964) 2 All E.R. 256.

[42] **Greek State v. X**, [1953] 1 I.L.R. 378.

[43] Wilson, supra, note 5, at 87.

[44] Ibid., at 83.

circumvented to the extent needed to prevent the harm occurring.[45] Beyond that, the receiving State has no right to subject him to prosecution or to take any punitive measures other than those provided by international law.[46] The charges against ambassador Kitaro do not constitute an ongoing threat to the security of Majan or its citizens. Were this court to find that the activities of a member of Aristan's mission did pose such a threat, the appropriate response would be to secure the offenders and deport them.

C. A RESTRICTIVE THEORY OF IMMUNITY CANNOT BE SUPPORTED AS THE BASIS OF NEW CUSTOM

Majan cannot argue that an emerging trend of limiting diplomatic immunity to official functions has reached the status of new customary law. In the **North Sea Continental Shelf Cases**, the ICJ held that for a new customary rule to be formed, there must be a settled practice to such effect accompanied by the opinio juris sive necessitatis.[47] The fact that States make declarations as to the rules they purport to follow is not sufficient to prove the existence of customary international law.[48]

Evidence rebutting the existence of such a custom may be found in two recent examples. In the United Kingdom, following the incident

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[45] Rosalyn Higgins holds the view that while no right of self defence exists, the receiving state may use reasonable force to prevent the occurrence of a crime: R. Higgins, **U.K. Foreign Affairs Committee Report on the Abuse of Diplomatic Immunities and Privileges: Government Response and Report**, (1986) 80 Am.J.Int'l L. at 135.

[46] See above, Part I.A.1.; P. Sterling, **The Immunities of Diplomatic Agents**, (18 April 1958) Law Journal at 243.

[47] (1969) 41 I.L.R. 29 (I.C.J.), at 73-4.

[48] **Nicaragua v. U.S.A. (Merits)**, supra, note 23, at 431

involving the Libyan People's Bureau,[49] the British Foreign Office undertook a full review of the diplomatic immunities and privileges as contained in the Vienna Convention. The Committee's report concluded that it would be difficult to achieve any restrictive amendment to the Convention and it would not be in Britain's interest to do so.[50] The Committee recommended that a firmer policy of enforcement of the remedies provided by the Convention should be adopted.[51] In the United States, legislation has been introduced which would restrict immunity for administrative and technical staff with respect to crimes of violence. In a statement before the Senate Foreign Relations Committee, Ambassador Roosevelt, spokesperson for the Department of State, denounced the bill as being a violation of the United States commitment to the Vienna Convention.[52]

The assertion of Majan that it has the jurisdiction to prosecute Ambassador Kitaro for his former acts requires this court to extend the law far beyond its present limits. The modification of customary law is an evolutionary process.[53] In light of the divergent views as to the present state of the duration of immunities, the recent trend can only be de lege

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[49] April 17, 1984

[50] H.C. Foreign Affairs Committee, Paper No. 127, First Report, **The Abuse Of Diplomatic Immunities And Privileges**, Report With An Annex; Together With The Proceedings Of The Committee: R. Higgins, supra, note 45 at 138-9

[51] Ian Cameron, **First Report of the Foreign Affairs Committee of the House of Commons**, (1985) 34 Intl & Comp. L.Q. 610 at 615.

[52]. Selwa Roosevelt, **Diplomatic Immunity and U.S. Interests**, Department of State Bulletin, October 1987, 29-32 at 30.

[53] D.P. O'Connell, supra, note 30, at 19.

frenda and any practice based thereon is not evidence of custom.[54]

D. THE GOVERNMENT OF THE UNITED REPUBLIC OF ARISTAN IS ENTITLED TO AN ORDER OF PROVISIONAL MEASURES PROVIDING FOR THE IMMEDIATE RELEASE OF AMBASSADOR KITARO

Article 41 of the **Statute of the International Court of Justice** empowers this court with the right to grant provisional measures. In exercising this power, this court has considered the following factors: avoiding irreparable prejudice or harm to the rights at issue; preventing an aggravation of the dispute; and the urgency of the matter.[55] More recently, this court has held that where the rights, freedom and security of individuals is in issue, provisional measures cannot be denied.[56]

The rights at issue in the present dispute concern the life and freedom of Aristan's Ambassador Kitaro. Prejudice to rights has been deemed irreparable if it makes impossible the full execution of the impending judgement.[57] Aristan is requesting the immediate release its Ambassador because of the potential death penalty if he is found guilty, an outcome which is almost certain in light of the statements made by Majan's Justice Minister. The execution of Ambassador Kitaro would clearly prejudice the rights at issue should this court rule in Aristan's favour.

A provisional measure ordering the release of Ambassador Kitaro will

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[54] Ibid, at 30

[55] **Bernhardt, The Provisional Measures Procedure of the International Court of Justice**, (1980) 20 Va.J.Int.L. 557, at 595-600.

[56] **U.S.A. v. Iran**, supra, note 4, para 28 at 16.

[57] J. Sztucki, **Interim Measures in the Hague Court** (1983) at 105; This approach was first adopted in **South Eastern Greenland** [1933] P.C.I.J. Ser, A/B. No.53.

not prejudice the substantive issues in this case. Allowing Majan to proceed with its prosecution can only exacerbate matters. The respondent requests that this court find that the circumstances of this case warrant the granting of provisional measures.

II. THE I.M.U. ACCOUNT ASSIGNED TO MAJAN ON AN ADMINISTERED DEPOSIT ACCOUNT WITH THE FIRST ARISTANI NATIONAL BANK IS NOT IMMUNE FROM SEIZURE

A. THE ADMINISTERED ACCOUNT IS IMU PROPERTY WHICH IS NOT IMMUNE IN NON-MEMBER STATES

1. The Funds Assigned to Majan in the Administered Deposit Account With the First Aristani National Bank Are The Property of the International Monetary Union

The funds held in the administered account were deposited in the First Aristani National Bank by the IMU. The administration and drawing rights associated with these funds are vested exclusively in the IMU.[58] Although the funds are designated to be used in the interests of Majan, they are the legal property of the IMU.

2. The Assets of International Organizations Held in Non-Member States are Not Granted Immunity Under General International Law

International organizations, unlike States, do not come into existence directly by international law, rather they must be created by treaty.[59] Immunity attaches only to the extent it is granted in their constituent

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[58] Compromise at 9.

[59] H. Lauterpacht, supra, note 7, at 375-80.

agreements.[60] It is well established that a State is not bound by treaties to which it is not a party.[61] This principle applies equally to the constituent treaties of international organizations.[62] Such treaties can impose obligations on a third State only if it expressly accepts that obligation.[63] Aristan is not a signatory to a treaty with the IMU nor has it expressly accepted any obligation to grant immunity. Accordingly Aristan is not under any treaty obligation to confer immunity on the administered account.

It cannot be argued Aristan is obligated to accord immunity to the IMU under customary law. In order for Majan to establish a customary rule, it must show that there is a general practice which is accepted as law.[64] Showing mere abstention from attaching or seizing IMU accounts by non-member States is not enough. Only if such abstention is based on their being conscious of a duty to abstain would it be possible to speak of an international custom.[65] Eminent publicists agree that international custom

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[60] N.A.M. Green, **International Law** (3rd ed., 1987) at 60; Brownlie, supra, note 24, at 682-3; Bindschedler, "International Organizations, General Aspects", in: Bernhardt (ed.) (1981) 5 **Encyclopedia of Public International Law** 119 at 130.

[61] **Vienna Convention on the Law of Treaties,** supra, note 22, Art. 34; **International Status of South-West Africa** (1950), I.C.J. Rep. 128 at 165.

[62] Brownlie, supra, note 32, at 691-2; **Vienna Convention on the Law of Treaties Between States and International Organizations,** 21 March 1986, 25 I.L.M. 543, Art. 34.

[63] **Vienna Convention on the Law of Treaties,** supra, note 22, Art.35; **Vienna Convention on the Law of Treaties Between States and International Organizations,** supra, note 62, Arts. 35-36.

[64] **Statute of the International Court of Justice,** supra, note , Art. 38(1)(b).

[65] **The Case of the S.S. Lotus (France v. Turkey)** [1927] P.C.I.J., Ser. A., No.10, at 28; Brownlie, supra, note , at 8.

does not grant immunity to the assets of international organizations held in third States.[66] This proposition is supported by the general practice of concluding special agreements defining the necessary immunities of international organizations when they operate in a non-member States.[67] The IMU itself recognizes the need for such agreements, having entered into bilateral treaties with approximately 20 non-member States.[68]

3. The Provisions Granting Immunity in the Bilateral Treaties Concluded Between the IMU and States Do Not Give Rise to a Rule of Customary International Law

The bilateral treaties entered into by the IMU are not declarative of existing customary law[69], nor do they give rise to new custom. Treaties, like other forms of State practice, must be accompanied by opinio juris in order to create customary law.[70] This court has stated in the North Sea Continental Shelf Case that the practice of States bound by a treaty can lend only little support to the question of opinio juris.[71] Such practice may

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[66] D.W. Bowett, **The Law of International Institutions** (4th ed., 1982) at 347-8; Brownlie, supra, note 32, at 682; N.A.M. Green, supra, note 60, at 60; (1969) 45 Am. Jur. (2d) at 382, s. 41.

[67] For example, the agreement between the U.N. and Switzerland [1946] 1 U.N.T.S. 163-181 governing the immunities of the European Office of the U.N.; I.B.R.D. and Switzerland [1951] 216 U.N.T.S.; I.L.O. and Mexico [1955] 208 U.N.T.S. 207; Council of Europe and France [1956] 249 U.N.T.S. 207; W.H.O. and Egypt described in: **The Interpretation of the Agreement Between the World Health Organization and Egypt** [1982] 62 I.L.R. 451 (I.C.J.) at 467.

[68] Compromise, at 8-9.

[69] see above Part II.A.2.

[70] Akehurst, **Custom as a Source of International Law**, (1974-75) 47 Brit.Y.B. Intl.L. 1, at 44; **North Sea Continental Shelf Cases** [1969] I.C.J. Rep. 3, at 44-5; Bernhardt, **Encyclopedia of International Law**, Vol.17, at 65.

[71] **North Sea Continental Shelf Case**, supra, note 70, at 44.

be merely a result of a duty to comply with treaty obligations.[72]

This view is supported by article 38 of the **Vienna Convention on the Law of Treaties**[73] which provides: "Nothing in Articles 34 to 37 precludes a rule set fourth in a treaty from becoming binding upon a third State as a customary rule of law recognized as such." The words "recognized as such" were added at the Vienna Conference in order to emphasize that rules laid down in treaties could not automatically transmute themselves into customary law.[74] There must be evidence that the treaty provisions have crystallized into customary law.[75] In this case there is no evidence that treaty provisions granting immunity to international organizations have crystallized.

The omission of particular clauses from treaties by general consensus may be evidence of an obligatory acceptance of the principles in question.[76] However, this is not the case with respect to the IMU treaty provisions. Detailed special agreements conferring immunity on the administered accounts are still entered into with non-member States.[77] This is strong evidence that a compulsory customary rule has not yet developed.

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[72] Ibid.

[73] supra, note 22.

[74] United Nations Conference on the Law of Treaties, Official Records, First Session, pp. 197-201, and Second Session pp.63-72.

[75] Akehurst, supra, note 78, at 49.

[76] Schwarzenberger and Brown, **A Manual of International Law** (6th ed., 1976) at 26.

[77] Compromise, at 8-9.

4. The Account is Not Immune Under Regional or Local Customary Law

This Court has held that the onus is on the party relying on a regional custom to prove it is established in such a manner that it has become binding on the other side.[78] For Majan to argue the existence of a regional customary rule according immunity to the IMU it must show a constant and uniform practice by all States in question.[79] While a general rule of customary law does not require the consent of all states, this is not true for regional custom.[80] Majan must show either express or tacit consent by Aristan for the rule to be imposed.[81] Opinio juris[82] must also be established.[83]

Even if it can be established that Aristan belongs to the region, there is no evidence it has consented to such a customary rule. Nor can it be argued that Aristan has tacitly consented to any such rule by acquiesing to the existence of the account. There must be cogent evidence of acquiescence to the principle issue to constitute evidence of custom.[84] At most, Aristan may have acquiesced to the existence of the account, not to

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[78] **Assylum Case (Columbia v. Peru)** [1950] I.C.J. Rep. 266; **North Sea Continental Shelf Case**, supra, note 70.

[79] **Assylum Case**, supra, note 78, at 276-8; **North Sea Continental Shelf Cases**, supra, note 70; **Nicaragua v. U.S.A. (Merits)**, supra, note 31, at 431-2.

[80] **North Sea Continental Shelf Case**, supra, note 70, at 130-1.

[81] Ibid.

[82] The conviction felt by states that a certain form of conduct is required by international law [or by regional custom as in this instance]: M. Akehurst, **A Modern Introduction to International Law** (6th ed., 1987) at 29.

[83] **Asylum Case**, supra, note 78, at 276-78.

[84] Brownlie, supra, note 32, at 165.

its immunity.

B. THE ADMINISTERED DEPOSIT ACCOUNT IS NOT PROTECTED BY SOVEREIGN IMMUNITY ENJOYED BY MAJAN

There is a well established presumption against the limitation of a State's sovereignty.[85] Any exclusion or limitation of territorial jurisdiction, such as the granting of immunity to a foreign State, runs counter to this presumption and therefore must be proven strictly.[86] Thus, the onus is on Majan to prove sovereign immunity attaches to the administered account.

Without possession and control[87] Majan does not have a sufficient interest in the property for sovereign immunity to attach.[88] In the alternative, if Majan can attach its immunity to the account, it is limited to immunity from judicial jurisdiction.[89] In this case the seizure was an executive action by the Government of Majan, not a judicial action. Even if the account has immunity from Aristan's jurisdiction, this immunity is

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[85] Schwarzenberger, **International Law: International Courts and Tribunals**, (3rd., 1957) at 192; Brownlie, supra, note 32, at 289; **Lotus Case**,supra, note 65, at 18.

[86] Schwarzenberger, supra, note , at 192.

[87] Compromise, at 9.

[88] **Draft Articles on Jurisdictional Immunities of States and Their Properties**, Adopted by the ILC 20 June 1986 [1986] 2 Yrbk.I.L.C. Pt.2, at 8.

[89] U.S.A.- **Foreign Sovereign Immunities Act**, (21 October 1986) 90 Stat. 2891, s.1611(b)(1); Canada- **State Immunity Act**, (1982) S.C. c.95, s.11(4); U.K.- **U.K. State Immunity Act**, Stats U.K. 1978, c.33, s.14(4); Singapore- **Singapore State Immunity Act** (26 October 1979) ss.16(4), 15; Pakistan- **The Pakistani State Immunity Ordinance**, (1981) Ordinance No. VI, ss. 15(4), 14; **Second Report on Jurisdictional Immunities of States and Their Property** [1980] 2 Y.B.Int'l.L.Comm. Pt.1, 199.

limited to acts jure imperii under the doctrine of restrictive immunity.[90] In this case there is no evidence the account is for "public" or "sovereign" purposes as opposed to a "private or commercial" use.

C. THE SEIZURE OF THE ADMINISTERED ACCOUNT AND THE ECONOMIC SANCTIONS IMPOSED ON MAJAN ARE LEGAL ACTIONS UNDER INTERNATIONAL LAW

1. The Actions Do Not Violate Aristan's Duties and Obligations Under the U.N. Charter

The seizure was not an act of aggression under article 39 of the U.N. Charter. The definition of aggression, as set out by General Assembly resolution, specifically restricts the term to situations involving the use of armed force.[91] Acts of economic nature do not rise to the level of aggression referred to in article 39.[92] The "use of force", as set out in article 2(4) of the Charter, similarly does not apply to economic measures. In 1945 a proposal made by Brazil to extend the prohibition in article 2(4) to cover economic actions was rejected.[93] Furthermore, in the course of debates in the Committee on Friendly Relations, the consensus that emerged

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[90] Ibid.; **Trendex v. Central Bank of Nigeria** [1977] 1 Q.B. 529 (C.A.); **I Congresso del Partido** [1983] 1 A.C. 244 (H.L.); Italy, Belgium, France, Greece, Egypt, Jordon only grant immunity to foreign states with respect to sovereign functions: **Banque Centrale de Turquie v. Weston** [1984] 64 I.L.R. 417 (Switz.) at 421; Brownlie, supra, note 32, at 327.

[91] **U.N.G.A. Resolution 3314 on the Definition of Aggression**, G.A. Res 3314, 29 U.N.G.A.O.R., supp. 31, at 142, reprinted in (1975), 69 Am.J. Int'l L. 480.

[92] Ibid.

[93] Doc 784, I/1/27, 6 UNCIO Docs. 331, 334-35 (1945); R.B. Lillich, **Economic Coercion and the New International Economic Order** (1976), 16 Va.J.Int'l.L. 233, at 235: The vote rejecting the proposal was 26 to two.

that the article should not be extended to cover economic coercion.[94]

2. The Actions Do Not Violate Customary International Law

It has been contended that economic coercion per se is illegal under the traditional concept of non-intervention.[95] This proposition is based on certain U.N. resolutions which include: the General Assembly Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States(1965)[96] and the Declaration of Friendly Nations (1970).[97] However, while declarations and resolutions contribute to the evolution of norms of international law, they do not create legal obligations or rights for any State.[98] A vote for a resolution or acquiescence without a vote, simply expresses a governments policy and intentions on the subject matter.[99] Although resolutions are constitute evidence of State practice, there is evidence of practice which is contrary to the assertion of a custom establishing the illegality of economic coercion. The blocking or freezing of foreign assets held within domestic territory and the use of economic

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[94] **Report of the Special Commission on Friendly Relations**, 24 U.N. G.A.O.R., supp.19, at 12, U.N. Doc. A/7619 (1969), Derek W. Bowett, **Economic Coercion: Past and Present**, (1976) 16 Va.J.Int'l L. 245, at 245.

[95] Lillich, supra, note 93, at 236.

[96] G.A. Res.2131, 20 U.N. G.A.O.R. Supp.14 at 11, U.N. Doc. A/6220 (1965), reprinted in (1966) 60 Am.J.Int'l L. 662.

[97] G.A. Res.2625, 25 U.N. G.A.O.R., Supp.28, at 121, U.N. Doc. A18028 (1970), reprinted in (1971) Am.J.Int'l L. 243. For more resolutions see infra, note .

[98] H.M. Kindred, supra, note 35, at 202; Brownlie, supra, note 32 at 14.

[99] Kindred, Ibid, at 202.

sanctions are relatively widespread vehicles for foreign policy.[100]

The evidence of widespread use of economic sanctions as countermeasures combined with the fact that it has not been shown Aristan signed or acquiesced[101] to the resolutions, leads to the conclusion that Aristan's actions did not violate customary International law.

In the alternative, if the resolutions have been incorporated into customary law, Aristan submits it is not interfering with the rights established in these resolutions. Aristan is not interfering with Majan's "choice of political, social or economic system."[102] It is responding to Majan's serious breach of international law.

D. IN THE ALTERNATIVE, IF ARISTAN'S ACTIONS WERE ILLEGAL, THEY ARE JUSTIFIED ON THE GROUNDS THAT THEY CONSTITUTE A VALID REPRISAL AGAINST MAJAN'S ILLEGAL ACTS

If this court finds the seizure and economic countermeasures imposed by Aristan to be in violation of international law, Aristan submits they are justified as valid acts of reprisal.[103] A reprisal is recognized as an act, otherwise illegal, taken against another State as a measure of self help in

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[100] In the U.S., asset freezes are political weapons invoked in response to international crises. Traditionally, U.S. has used asset freezes to block foreign government assets within the jurisdiction of the U.S., e.g. North Korea (1950), The Peoples Republic of China (1950-79), Cuba (1962), North Vietnam (1975), Rhodesia (1970s-80): Robert Carswell, **Economic Sanctions and the Iran Experience** (1982) 60 F. Affairs 247 at 259-60.

[101] see "acquiescence" above, Part II.A.4.

[102] **Declaration on the Establishment of a New Economic Order** G.A.Res. 3201 (S-VII), 1 May 1974, UNGAOR 6th Special Sess., Supp. 1 (A/9559); **Charter of Economic Rights and Duties of States** G.A.Res. 3281 (XXIX), 12 Dec 1974, UNGAOR 29th Sess, Supp. 31 (A/19631); **Declaration of Friendly Nations,** supra, note 97; **Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States,** supra, note 96.

[103] Lauterpacht, supra, note 1, at 39-41; M. Akehurst, **A Modern Introduction to International Law** (6th ed., 1987) at 403-4: reprisals are recognized in international law.

retaliation to an alleged breach of international law.[104] There are several examples of State practices in the nature of reprisals.[105] A valid act of reprisal must meet three conditions:[106]

1. A nation must be responding to a prior international delinquency by the other party.
2. The nation must have made a prior request for redress which has been denied.
3. The response must be proportionate.

Under the first requirement, Aristan is responding to the prior illegal detention and prosecution of Ambassador Kitaro by Majan. With respect to the second requirement, Aristan's diplomatic note and repeated protests to the Majani government constitute ample evidence of a prior request for redress. All of these attempts were either denied or ignored.[107]

The proportionality of any countermeasures must be measured against the importance of the principles arising from the breach.[108] In the case before this court, Majan's conduct constitutes a serious breach of the

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[104] H. Lauterpacht, supra, note 1, at 136-44; G. Schwarzenberger, A Manual of International Law (5 ed., 1967) at 184.

[105] For example, the economic countermeasures taken by the US against Iran to secure the release of the hostages were classified as legal under international law on the basis they were valid reprisals: **Queens Office Tower Associates v. Iran Airlines**, [1987] 72 I.L.R. 239 (Iran-U.S. Claims Tribunal) at 250; France also considered trade sanctions against New Zealand in the **Rainbow Warrior (N.Z. v. France)** [1987] 74 I.L.R. 241 at 264; see also **Nicaragua v. U.S.A.**, supra, note 23, at 403-404.

[106] Bowett, supra, note 66, at 251-2.; Schwarzenberger, supra, note 104, at 150-1.

[107] Compromise

[108] **Case Concerning the Air Services Agreement of 27 March 1946 (U.S. v. France)**, [1979] 54 I.L.R. 304 (Arbitral Tribunal) at 338.

Vienna Convention on Diplomatic Relations and the fundamental principles of comity and the equality of States which form the basis of international law. Majan has also clearly violated Article 29 of the **Vienna Convention** and disregarded the appropriate remedies available to it.[109] Given the fundamental role and importance of diplomatic immunity to the relations among States, Aristan's temporary seizure of the I.M.U. account and economic countermeasures are both proportionate and justified.

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[109] See above Part I.A.2.

CONCLUSION

It is respectfully requested that this Court:

1. DECLARE that Ambassador Kitaro is immune from the criminal jurisdiction of Majan.

2. DECLARE that the I.M.U. account assigned to Majan on an administered deposit account with the First Aristani National Bank is not immune from seizure.

3. DECLARE that the actions taken by Aristan, subsequent to Ambassador Kitaro's detention constitute valid and reasonable reprisals

4. ORDER that Ambassador Kitaro be released immediately and that all criminal charges against him be dismissed.

5. DENY all of Majan's claims; and

6. GRANT Aristan such further relief as this Court may deem just.

Agents For Aristan