

**INTERNATIONAL COURT OF JUSTICE**

**CASE CONCERNING THE IMMUNITIES OF  
A DIPLOMATIC AGENT**

**MAJAN**

**v.**

**UNITED REPUBLIC OF ARISTAN**

---

**MEMORIAL**

**SUBMITTED BY  
MAJAN**

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## I. LIST OF ABBREVIATIONS

Acad.	Academy, academie
Add.	Addition, additional
Am.	American
Ann.	Annual
Apr.	April
Arb.	Arbitral
Art(s).	Article(s)
Aug.	August
Brit.	British
Cal.	California
Can.	Canadian
Ch.	Chapter
Com.	Commerce
Comm'n	Commission
Cmd.	Command
Comp.	Comparative
Conf.	Conference
Court	International Court of Justice
Dec.	December
Dep't	Department
Doc.	Document
Ed., Eds.	Editor(s), editions
<i>E.g.</i>	<i>Exempli gratia</i> (for the sake of an example)
Eng.	English
<i>Et seq.</i>	<i>Et sequentes</i> (and the following)
Feb.	February
G.A.	General Assembly of the United Nations
G.A.O.R.	General Assembly Official Records
I.C.J.	International Court of Justice, Reports of Judgments, Advisory Opinions and Orders
I.L.C. (ILC)	International Law Commission
<i>Id.</i>	<i>Idem</i> (the same)
<i>I.e.</i>	<i>Id est</i> (that is)
I.M.U. (IMU)	International Monetary Union
I.M.F. (IMF)	International Monetary Fund
Int'l	International
J.	Journal

Jan.	January
L.	Law
Mar.	March
N., Nn.	Footnote(s) not used in cross-references
Neth.	Netherlands
No., Nos.	Number(s)
Nov.	November
O.A.S.	Organization of American States
Oct.	October
OPEC	Organization of Petroleum Exporting Countries
P.	Page in cross-references
Para.	Paragraph
P.C.I.J.	Permanent Court of International Justice
Proc.	Proceedings
Q.	Quarterly
Rep.	Reports
Res.	Resolution; Reserve
Rev.	Revised, Revision, Review
Sept.	September
Ser.	Series
Sess.	Session
Soc.	Society
Supp.	Supplement
T.I.A.S.	Treaties and Other International Acts Series (U.S.), 1945 - date
Transnat'l	Transnational
U.K.	United Kingdom
U.N.	United Nations
U.N.T.S.	United Nations Treaty Series, 1946 - date
U.S.A. (U.S.)	United States of America
U.S.T.	United States Treaties and Other International Agreements, Jan. 1, 1950 - date
V.	Versus (against)
Viz.	Videlicet (to with, namely, that is to say)
Vol.	Volume
W.	West(ern)
Y.B.	Yearbook
&	And

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(Part 2)

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[1949] I.C.J. 173 (Advisory Opinion of April 11th, 1949)

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### III. STATEMENT OF JURISDICTION

The Governments of Majan and the United Republic of Aristan have agreed to submit the present dispute to the International Court of Justice by special agreement, pursuant to Article 40, paragraph 1, of the Statute of the International Court of Justice, which provides:

Cases are brought before the Court, as the case may be, either by notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.

This compromis brings the case within the jurisdiction of the Court, as provided by Article 36, paragraph 1, of the Statute of the Court.

There is no dispute as to the jurisdiction of the Court.

#### IV. STATEMENT OF RELEVANT FACTS

On Friday, 13 February 1988, Ambassador Kitaro, chief of mission from the United Republic of Aristan, caused an accident in which two nationals of Majan were killed and one critically injured. It was known by then that the Ambassador was involved in drug transactions, the evidence of which was amply present on the scene of the accident.

Although the police report concluded that the Ambassador was "obviously drunk", no objective test was offered or administered out of respect for his diplomatic immunity. As a corollary the Government of Majan filed no charges for drunk driving.

On 18 February 1988, Ambassador Kitaro handed the Minister of Foreign Affairs of Majan, a Diplomatic Note, containing his recall by his Government and the termination of his immunity as from 12:01 a.m. 21 February.

Upon his return to Aristan, the Ambassador received a hearing and was dismissed from Aristan's foreign service. One week later, the Ambassador departed for a holiday in the Parrot Islands.

Several days after Mr. Kitaro's departure an arrest warrant was issued in Providence for the former Ambassador

Majan's Ministry of Foreign Affairs explained by Diplomatic Note that Majan recognizes the diplomatic immunity of the Ambassador, as long as he was accredited to Majan. But, it continued, once his mission was terminated his immunity would cease and the Ambassador could, thereafter, be prosecuted for acts which occurred while he enjoyed immunity. According to this Note, the former Ambassador's immunity would now be ruled by paragraph 2 of Article 39 of the Vienna Convention on Diplomatic Relations.

The former Ambassador Mr. Kitaro, was charged with drug trafficking and smuggling, murder and attempted murder.

Since Majan's law does not allow for trial *in absentia*, Mr. Kitaro was extradited by the Parrot Islands on request of the Government of Majan.

Prior to the trial, the Government of Aristan imposed a series of harsh economic sanctions upon Majan straining its economy and those of the

neighbouring States. Consequently, the economy of Majan has quickly degenerated to the point of near-paralysis.

As the trial against Mr. Kitaro started, subsequent to the earlier economic measures, the Government of Aristan seized assets the International Monetary Union (IMU) had assigned to Majan on an administered deposit account with the First Aristani National Bank.

Although no agreement exists between the IMU and Aristan, the latter has always regarded the former as a regional organization.

IMU President Hans Zoff immediately protested against the seizure and expressly agreed that the IMU would allow Majan exclusively to defend both its own and Majan's interests.

On 1 February 1989, the Governments of Majan and Aristan agreed to submit the dispute according to Article 36, paragraph 1 to the International Court of Justice.

## V. QUESTIONS PRESENTED TO THE COURT

The Government of Majan respectfully asks this honorable Court in accordance with Article 36, paragraph 1, of the Statute of the International Court of Justice to adjudge:

1. Whether in case of abuse, as in the present case, the immunities provided for in the Vienna Convention on Diplomatic Relations still apply subsequent to the termination of the diplomatic status of a member of the mission?
2. Whether the Government of Majan has violated paragraph 1 of Article 31 of the Vienna Convention on Diplomatic Relations?
3. Whether the Government of Majan may conduct criminal proceedings against Ambassador Kitaro after the termination of his mission for non-functional acts performed during his period of accreditation?
4. Whether the Government of Aristan violated the immunities pertaining to international organizations under general international law by seizing the assets held by the IMU?
5. Whether the seizure of an IMU account by the Government of Aristan can be justified under rules of general international law?

## VI. SUMMARY OF PLEADINGS

1. The Vienna Convention is a codification of long existing customary law. It is the theory of 'functional necessity' which underlies this Convention. The theory is based on the idea of interdependence of States, and their need for mutual freedom and non-interference in their relations. The wording of its Preamble states this in clear and unambiguous terms. It is for the efficient performance of the diplomat's functions that the immunities from the local jurisdiction of the receiving State are granted.

It is obvious that with respect to serious crimes that lack any functional or official basis, the Vienna Convention never was intended to provide for immunities after the diplomatic status of an agent has ceased.

2. The Government of Majan has not violated its obligations under the Vienna Convention on Diplomatic Relations. Majan has acted in accordance with the provisions laid down in this Convention, in particular with paragraph 1 of Article 31.

The Government of Majan fully recognizes and agrees that the diplomatic immunity provided for in the relevant article poses a bar to the exercise of jurisdiction of the receiving State's courts during the period of performance of diplomatic functions, including the reasonable period of time to depart.

Therefore, no actions were undertaken against the Ambassador who left Majan without an incident, in accordance with diplomatic law and practice.

3. In view of the non-official nature of the acts for which Mr. Kitaro is being prosecuted, the Government of Majan is legally entitled to prosecute, after the termination of his diplomatic status. His immunity is now governed by paragraph 2 of Article 39 of the Vienna Convention. From the wording of this article it can be derived that the immunities of a former diplomat do not subsist beyond his departure in respect to acts that, during the period of performance of diplomatic functions, were not performed in the exercise of functions as a member of the mission.

It is only during the period of accreditation, plus the reasonable time to leave the country, that diplomatic immunity can be invoked for acts outside the scope of official activities.

Since the immunity of the former Ambassador has ceased, he can only be prosecuted for non-official acts which occurred while he had diplomatic immunity.

The charges against Mr. Kitaro constitute serious violations of the law of the receiving State and of the accepted norms of civilized conduct expected from any State's representative.

Drug trafficking and smuggling but also murder and attempted murder are very serious crimes, and should not go unpunished if the perpetrator is found guilty on any or all charges.

4. With regard to the IMU and in view of the recognized factual circumstances, the Government of the United Republic of Aristan has violated the immunities pertaining to the International Monetary Union by seizing the funds contained in the special account of the First Aristani National Bank.

On the basis of the functions and purposes of the International Monetary Union, the organization should have been endowed with certain privileges and immunities on the part of Aristan.

Aristan has always regarded the IMU as an international organization, thus recognizing its immunities, which should have prevented the Government of the United Republic of Aristan to seize the account.

5. The counter-measure, as imposed by Aristan constituting an illegal act, might be justified by fulfilment of the generally recognized prerequisites.

It is demonstrated that the IMU, not being a party to the initial dispute, may not be affected by Aristan's alleged reprisal to the extent to which it is affected now.

Therefore, in the absence of any prior breach of international law by the IMU, the seizure of the IMU account by the Government of Aristan is not justifiable.

Assumptions made by the Government of Aristan, that Majan has breached its obligations, are incorrect. Majan asserts that the protests made by Aristan do not amount to an attempt, in good

faith, to solve the dispute. Moreover, the instituted reprisals are utterly disproportionate and constitute a violation of the self-contained character of the Vienna Convention on Diplomatic Relations.

As a consequence, the seizure of IMU assets by the Government of the United Republic of Aristan cannot be justified under the rules of general international law.

## VII. PLEADINGS AND AUTHORITIES

### PRELIMINARY REMARK

These pleadings consist of three parts containing two submissions.

In Part I the possibility of post-immunity prosecution will be dealt with; Part II concerns the violation of the immunity of the IMU.

In Part III it will be established that the Government of Aristan has violated its obligations under international law by the institution of reprisals against the IMU and Majan.

### PART I.

#### SUBMISSION ONE

#### POST-IMMUNITY PROSECUTION OF FORMER DIPLOMATS

##### A. General

In the present chapter, the Government of Majan will demonstrate to the Court that the prosecution of former Ambassador Kitaro is not a violation of its obligations under the U.N. Charter, the Vienna Convention on Diplomatic Relations<sup>1</sup>, the Vienna Convention on the Law of Treaties and general international law, in accordance with which the Government of Majan has always acted. This is clearly demonstrated by the events leading to this dispute.

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<sup>1</sup> Vienna Convention on Diplomatic Relations [hereinafter cited as the Vienna Convention]

**B. Functional Basis of the Vienna Convention  
on Diplomatic Relations**

It is generally recognized that accordance of immunities and privileges to foreign diplomats is governed by the principle of functionality.

The theory of functional necessity has been codified in the Vienna Convention, *inter alia* in Article 31. The tone is set in the Preamble which reads "that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the diplomatic missions as representing States"<sup>2</sup>.

Hence, the Vienna Convention is a functional instrument which means that the purpose underlying the granting of immunity is to help the diplomatic agent perform his functions free from intimidation or other interferences.

A list of functions to be conducted by a diplomat is provided for in Article 3 of the Vienna Convention. Even though this article is not considered exhaustive, it is obvious that the trafficking and smuggling of drugs never could be justified by reference to these functions<sup>3</sup>.

This signifies that while an individual enjoying diplomatic immunity can never be prosecuted for actions carried out in the context of his functions, immunity for actions performed in a private capacity constituting violations of the law of the receiving State only pertains for the period of accreditation and a reasonable period

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<sup>2</sup> Also Articles 27, 34, 37, and 38 of the Vienna Convention; see also [1958] 2 Y.B. INT'L L. COMM'N 95, U.N. Doc. A/CN.4/SER.A/1958/Add.1: "The Commission was guided by this third theory in solving the problems in which practice gave no clear pointers."

<sup>3</sup> Article 3(1)(d) of the Vienna Convention. These lawful means are meant to be submitted to municipal law, as BROWNLIE indicates: I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 348 (3rd ed. 1985).

thereafter in order to enable the diplomat to depart the receiving State's jurisdiction.

The "trafficking of narcotics" is regarded as an offence which can be put on the same level as other recognized "crimes against the law of nations"<sup>4</sup>.

The enormous social and economic costs and the threat to the international legal order posed by international drug trafficking have led to widespread international concern and co-operation in the struggle to suppress this illicit trade.

It is considered an obligation of every State towards the international community, and *Majan's* law is no exception to that, to see that crimes such as those for which Mr. Kitaro is currently standing trial should be condemned and suppressed. When such crimes are committed by an individual enjoying diplomatic immunity such as is the instant case, and when such immunity is abusively claimed as a shield against prosecution, the entire system of diplomatic law is threatened as a result.

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4 [1950] 2 Y.B. INT'L L. COMM'N 13, U.N. Doc. A/CN.4/SER.A/1950/Add.1; see also Article 36(2)(iv) of the Single Convention on Narcotic Drugs 1961, 520 U.N.T.S. 204; reaffirmed in U.N. Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances, E/Conf.82/15, 19 December 1988.

C. Mr. Kitaro's Abuse of Diplomatic  
Privileges and Immunities

It is generally recognized that diplomatic immunity is a corollary of the theory of functional necessity. It allows diplomats to carry out their functions within the framework of necessary security and confidentiality. This immunity, however, does not entitle diplomats to flout the local laws<sup>5</sup>. Mr. Kitaro has put Majani municipal law and the international rules of diplomatic intercourse aside. Very strong evidence indicates that the former Ambassador has delivered suitcases filled with drugs in exchange for large sums of money.

The frequent and flagrant abuse by Mr. Kitaro of his immunity under the Vienna Convention brought the Government of Majan to its firm decision to prosecute the former Ambassador.

Majan, respecting the provisions laid down in the Vienna Convention, adheres to the opinion that a diplomat who abused his diplomatic privileges by the commission of serious violations of municipal and international law should not be allowed to get away scot-free.

Such an individual should in any event be tried in his own country for the commission of serious crimes in the host State<sup>6</sup>.

However, despite these obligations, the Government of Aristan only issued a reprimand to Mr. Kitaro and allowed him to depart for holidays to the Parrot Islands a week later, and failed to even undertake an inquiry into the matter. Considering the grave nature of the crimes with which

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5 See Article 41 of the Vienna Convention.

6 See B. SEN, A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE 107 (1965); also Article 31(4) of the Vienna Convention.

Mr. Kitaro has been charged and the abuse of his immunity, the Government of Majan is convinced that it was fully entitled under international law to request extradition of Mr. Kitaro, and institute criminal proceedings against him.

#### D. Applicability of the Vienna Convention:

##### Before the Departure of Mr. Kitaro

Out of regard for its obligation as a receiving State to secure the inviolability of foreign diplomatic agents, provided for in Article 29 of the Vienna Convention, the Government of Majan, and its law enforcement organs, never attempted to obtain evidence or testimony from the Ambassador nor instituted usual proceedings like arrest or detention, during the period of his accreditation.

Mr. Kitaro's immunity clearly has been respected by Majan throughout the period in which he enjoyed diplomatic status.

The Vienna Convention provides for the immunities and privileges of diplomats with the purpose of ensuring the efficient performance of a diplomat's representational functions. Among these rights and privileges is the immunity from local jurisdiction.

"The reason for immunity is simple and basic: it is to assure that diplomatic representatives are able to carry out the official business of the governments without undue influence or interference from the host country."<sup>7</sup>

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<sup>7</sup> See S. Roosevelt, *Diplomatic Immunity and U.S. Interests*, 87 DEP'T OF STATE BULLETIN 29, 30 (Oct. 1987); E. DENZA, *DIPLOMATIC LAW* 4 (1976).

In the event an abuse of diplomatic immunity occurs during the period of accreditation, the Vienna Convention provides for a specific set of remedies, including the declaration of the abusing agent *persona non grata* by the receiving State.

The terms of Article 31 of the Vienna Convention prevented the Government of Majan from instituting criminal proceedings against the Ambassador, during his accreditation.

As it occurred, the need to declare Mr. Kitaro *persona non grata* became superfluous, because a note of recall was already handed over to the Foreign Minister of Majan, four days after the incident in which Mr. Kitaro was involved<sup>8</sup>.

There is equally no question of irregularities with regard to the period between the moment that Mr. Kitaro's mission ended as a result of his recall by the sending State, and his departure. This period, which is often referred to as the 'termination period', is governed by the provisions of Article 39(2) of the Vienna Convention.

The Majani Government has demonstrated its complete compliance with generally recognized international norms and standards of behavior, in accordance with diplomatic law and practice.

As a result of the fact that Majan completely observed its obligations under the Vienna Convention and related customary law, Mr. Kitaro was

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<sup>8</sup> D. O'CONNELL, *INTERNATIONAL LAW*, 899 (2nd ed. 1970): "There are many instances where recall ... even the criminal law."

allowed to depart Majan without let or hindrance, seven days after the deplorable event.

Majan has not in any way denied Mr. Kitaro's immunity during his accreditation. As will be demonstrated below, this immunity ceases after the diplomat has left the country, for the acts performed in a private capacity which violate local law.

#### E. Applicability of the Vienna Convention:

##### After the Departure of Mr. Kitaro

Following the extradition of Mr. Kitaro to Majan, the Government of Aristan issued a formal diplomatic protest against the institution of criminal proceedings.

In a reply by Diplomatic Note, the Government of Majan stated that

"(t)he Vienna Convention makes clear that the immunities of former diplomats do not subsist in respect to acts that, during the period of performance of diplomatic functions, were not performed in the exercise of functions as a member of the mission."<sup>9</sup> This is evident from the wording of Article 39(2) of the Vienna Convention.

"In the case of official acts the immunity is permanent, since it is that of the sending State. In respect of private acts the immunity is contingent and supplementary and it ceases when the individual concerned leaves

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<sup>9</sup> See Statement of the Problem at 6.

his post."<sup>10</sup> Majan does not deny the immunities the Vienna Convention provides for acts performed in an official capacity.

Under the circumstances, Ambassador Kitaro's conduct at the time of the incident cannot be characterized as "an act performed ... in the exercise of his functions as a member of the mission."<sup>11</sup>

Since Article 39(2) of the Vienna Convention provides for subsistence of immunities during some time after termination of accreditation, it follows that Articles 31 and 29 of the Vienna Convention can only relate to the period of accreditation plus, "a reasonable period of time in which to leave the country"<sup>12</sup>.

There is no indication whatsoever that Article 31 of the Vienna Convention entails the extension of a diplomat's immunity from criminal jurisdiction for acts performed outside his official functions to his life time<sup>13</sup>.

The Government of Majan does not consider that Mr. Kitaro's case in any way parallels that of the *United States Diplomatic and Consular Staff in Tehran Case*. For example, at the time this Court was being seised of by

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10 I. BROWNLIE, *supra* note 3, at 356 (notes omitted).  
See also, *Tate Letter*, reprinted in 26 DEP'T OF STATE BULLETIN 984 (1952);  
B. SEN, *supra* note 6, at 168; E. DENZA, *supra* note 7, at 248.

11 See Statement of the Problem, at 7.

12 See *Dickinson v. Del Solar*, [1930] 1 K.B. 376, in 6 BRIT. INT'L L. CASES 142 and *Empson v. Smith*, [1966] 1 Q.B. 426, in 8 BRIT. INT'L L. CASES 824.

See also the opinion of Mr. Verdross, [1958] 1 Y.B. INT'L L. COMM'N 152, U.N. DOC. A/CN.4/SER.A/1958: "A diplomatic agent must necessarily respect the laws of the receiving State, for, if he did not, he could be declared *persona non grata* and would even be liable to punishment on return to the receiving State after the expiry of his term as a diplomatic agent."

13 See E. DENZA, *supra* note 7, at 248. The leading English cases in which the principle was stated were *Magdalena Steam Navigation Company v. Martin*, *Musurus Bey v. Gadban* and *In Re Suarez*.

the United States of America the American hostages in Tehran were still diplomatic agents.

The fact that Mr. Kitaro was a diplomatic agent at the time of the incident does not preclude the Government of Majan from the prosecution now that he has ceased to be a diplomat.

#### F. New Developments in the Law Concerning Diplomatic Immunity.

From the foregoing, the Government of Majan submits that the clear meaning of the relevant provisions of the Vienna Convention and the purpose underlying the Convention<sup>14</sup>, i.e. the ensurance of the efficient and secure performance of the representational functions, provide for the complete immunity of the diplomatic agent from criminal jurisdiction for official acts and for immunity for acts performed in a private capacity for the duration of the agent's accreditation, but do not preclude prosecution for such private acts once the accreditation has been terminated.

However, if the Court should determine otherwise, the Government of Majan submits in the alternative that the law of diplomatic intercourse is subject to change and has in fact developed in such a way that it would permit prosecution of acts performed outside the official functions once diplomatic status has been withdrawn or accreditation has ceased.

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<sup>14</sup> See, Article 31(1) of the Vienna Convention on the Law of Treaties.

### The dynamic nature of the law

In the first place, the Government of Majan, submits that in conformity with Article 31(3) (b) of the Vienna Convention on Law of Treaties :

(T)he Vienna Convention on Diplomatic Relations can also be used as an example of how the international community adapts itself to existing situations. Even though most of the articles are based on well-established practices, the interpretation of some of them does not correspond to the original ideas of their authors.<sup>15</sup>

Hence, a treaty must be interpreted in the light of all relevant subsequent practice in the interpretation of the instrument, which conforms to the development of the law and to international reality, in the relations between States. Or, as the ILC suggested in its draft of the Vienna Convention, codification does not necessarily immobilize international law<sup>16</sup>; this signifies that later practice can influence or modify a written treaty.

### State practice

Considerable evidence in recent practice and interpretation indicates that the majority of States adhere to a functional approach of the relevant terms of the Vienna Convention on Diplomatic Relations.

Examples of recent State practice, evolving from situations in which diplomats have abused their immunities, illustrate this development in the perception of diplomatic law.

Evidence of this is provided *inter alia* in the Advice of the British Foreign Office. Here, the British Foreign Office instituted a full review of the Vienna Convention in the aftermath of the fatal shooting of a policewoman by a gunman in the Libyan Embassy, and the attempted

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15 See G. do Nascimento e Silva, *Diplomacy*, in: R. BERNHARDT (ed.), *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, Instalment 1 (1981), p. 84-85.

16 [1958] 1 Y.B. INT'L L. COMM'N. 89, U.N.Doc. A/CN.4/SER.A/1958/Add.1.

abduction of a Nigerian exile<sup>17</sup>. This resulted in the U.K. White Paper of April 1985. The common denominator was to implement a firmer policy in the application of the Convention<sup>18</sup>.

The Government of Majan also refers to the recent practice of the United States, in for example, its instruction for Law Enforcement Officers, where the State Department asserts:

This jurisdictional bar is, however, not a perpetual benefit for such person. With the exception of immunity for official acts (which subsists indefinitely), criminal immunity expires upon the termination of the diplomatic or consular tour of the individual enjoying such immunity, including a reasonable period of time for such person to depart the U.S. territory. ... Additionally, in the case of serious crimes ... it is not precluded under international law that international extradition may be effected.<sup>19</sup>

#### The emergence of a rule of customary law

In the second place, the Government of Majan submits that there is an emerging customary norm which permits post-immunity prosecution of diplomats who have abused their immunities.

In addition to the above mentioned examples, the Government of Majan points to the practice of the United States in their Second Restatement of U.S. Foreign Relations Law, as long ago as 1962, where the State Department stated unequivocally that the diplomat may be held liable for any unofficial acts once his accreditation is terminated.

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17 S. Roosevelt, *supra* note 7, at 30.

18 Miscellaneous No. 5 (1985), Cmnd. 9497, "Diplomatic Immunities and Privileges", Government Report on Review of the Vienna Convention on Diplomatic Relations.

19 U.S.: Dep't of State Guidance for Law Enforcement Officers with Regard to Personal Rights and Immunities of Foreign Diplomatic and Consular Personnel (February 1988), 27 INT'L LEGAL MATERIALS 1617 (1988).

This view was maintained in their recent Third Restatement of the U.S. Foreign Relations Law of 1986.

In 1984, even before the Abisinito Affair of 1987<sup>20</sup>, in which the Papua New Guinean ambassador to the United States was involved in a car accident, the U.S. Department of State notified the heads of foreign missions in Washington, that:

on the termination of criminal immunity the bar to prosecution in the United States would be removed and any serious crime would remain as a matter of record. If a person formerly entitled to privileges and immunities returned to this country and continued to be suspected of a crime, no bar would exist to arresting and prosecuting him or her in the normal manner for a serious crime allegedly committed during the period in which he or she enjoyed immunity. This would be the case unless the crime related to official functions, ....<sup>21</sup>

This is of especial relevance, since not only do these examples relate to the practice and attitude (as evidence of *opinio iuris*) of some of the most important States in terms of the law of diplomatic relations, but the absence of protests indicates that no State took exception or reserved its rights with regard to this interpretation.

There are important examples of State practice, combined with the absence of protests, which have created new customary law<sup>22</sup>.

It is known that he who does not protest, consents. Due to the fact that those States represented in Washington did not react, it will be taken that they approved to the creation of the new rule of post-immunity prosecution of former diplomats.

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20 B. Larschan, *The Abisinito Affair: A Restrictive View of Diplomatic Immunity?*, 26 COLUMBIA J. TRANSNATIONAL L. 283 (1988 no. 2).

21 See Circular Note of 21 March, 1984, Dep't of State File No. P84-0056-1827, reprinted in 78 AM. J. INT'L L. (1984), at pp. 657-658, reaffirmed in a Circular Note of 1987.

22 See, e.g., the 1945 Truman Proclamation in which was stated that unilateral actions of one State, and with the tacit approval of the rest of the international community, could establish a new legal regime with regard to the continental shelf.

Therefore, the Government of Majan has demonstrated to the Court, in the alternative, that either on the basis of Article 31(3)(b) of the Vienna Convention on the Law of Treaties and, or, the emergence of new customary rule of law that post-immunity prosecution is possible for non-official acts.

#### G. Conclusion

As a consequence of the foregoing, the Government of Majan rejects the contention of the United Republic of Aristan that international law precludes the prosecution of former diplomats for non-official acts committed during their period of accreditation. Thus, the Government of Majan may criminally prosecute Mr. Kitaro consistent with its obligations under the Vienna Convention on Diplomatic Relations.

PART II.

SUBMISSION TWO

THE SEIZURE CONSTITUTES A VIOLATION OF THE IMMUNITY OF THE IMU

A. Introduction

In this Part, Majan will give evidence that the United Republic of Aristan has violated international law by unlawfully seizing the assets of the IMU on an account with the First Aristani National Bank.

According to the Government of Aristan, the seizure of the assets of the IMU was legitimate under its municipal law which provides for emergency economic powers. However, it is generally recognized in international law that a State cannot invoke provisions of its own law in defense of an alleged breach of its obligations under international law<sup>23</sup>.

The Government of Majan will demonstrate to this Court that the seizure of the assets held by the IMU is in itself illegal, because the measure was not primarily directed against Majan, or at any rate, that the consequences of the act have an inordinate effect upon third parties, viz. the IMU, and violate the immunities of that organization.

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23 See, the Vienna Convention on the Law of Treaties 1969, Article 27; Article 13 of the Draft Declaration on the Rights and Duties of States, G.A. Res. 375 (IV) (1949).

See also, the *Alabama Claims* Arbitration, Moore, 1 Int.Arb. 653 (1872); *Case of the Free Zones of Upper Savoy and the District of Gex*, [1932] P.C.I.J. Reports, Ser. A./B., No. 46, at 167; and the Advisory Opinion in *The Greco-Bulgarian "Communities"*, [1930] P.C.I.J. Reports, Ser. B., No. 17, at 32.

## B. Immunity of the IMU in Relation to Aristan

The IMU, being created by a group of States and carrying out public functions, is an international organization possessing international legal personality<sup>24</sup>.

The possession of personality as such gives rise to certain obligations on the part of non-member States under international law, such as the accordance of those immunities which are necessary for the efficient performance of the functions of the organization.

The basis for the granting of these immunities is of a functional nature, *i.e.* to ensure the efficient and unhindered performance of public activities analogous to the purpose behind the granting of privileges and immunities in diplomatic law<sup>25</sup>.

The holding of public money accounts with banks outside the jurisdiction of the member States, *i.c.* Aristan, falls within the scope of the powers and public purposes of the IMU as a monetary authority<sup>26</sup>.

It is obvious that member States are generally obliged by the constituent charter of an organization to grant those immunities and privileges, which are necessary for its functioning.

The mere fact that Aristan has not concluded a treaty with the IMU does not mean, however, that the IMU does not possess any legal rights on the territory of Aristan.

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24 H. SCHERMERS, 2 INTERNATIONAL INSTITUTIONAL LAW, para. 1391-1392 (1972); *see also*, *Reparation for Injuries Suffered in the Service of the United Nations Case*, [1949] I.C.J. 185.

25 *See* D. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 346 (4th ed. 1982); I. BROWNLIE, *see supra* note 3, at 682; C. JENKS, INTERNATIONAL IMMUNITIES 17-20 (1961).

26 These purposes are: the issue of a single currency, a centralized currency reserve, a common interest rate structure by a common central bank. *See* Statement of the Problem, at 8.

A leading authority stated this duty as follows:

The rights which it is entitled to claim may be less extensive than those which it is entitled to claim in relation to its own members, but the organization cannot reasonably be regarded in relation to third States as a group of private persons with no legal status of any kind.<sup>27</sup>

The Government of Aristan should have accorded to the IMU those privileges and immunities which are indispensable for the efficient performance of its functions. Clearly the seizure of an IMU account seriously impairs such an essential functioning.

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27 C. JENKS, *see supra* note 25, at 33.

### C. Obligations Arising from Aristan's Conduct

In the event of the aforementioned grounds for international personality being rejected, Majan points to the *prima facie* evidence of Aristan's behavior relating to the status of the IMU: the Government of Aristan has "always regarded" the IMU as an international organization<sup>28</sup>.

In relation to the accordence of privileges and immunities to international organizations by non-member States, Professor Bowett asserts:

(T)hat once a State has consented to the presence of the United Nations on its territory for a particular purpose it is bound, by the principle of good faith, to extend all such privileges and immunities as are necessary for the proper functioning of the UN and the achievement of that purpose.  
*The same argument would be valid for any international organization.*<sup>29</sup>

By allowing the IMU to operate on its territory, Aristan is precluded from interfering with the legitimate functions of the IMU, due the creation of estoppel and, or acquiescence. Consequently it must grant those well-known and well-established privileges and immunities that the IMU needs to function effectively.

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28 See Statement of the Problem, at 8.

29 D. BOWETT, *see supra* note 25, at 348 (emphasis added). See also C.JENKS, *supra* note 25, at 34:

"Third states have, of course, no obligation to allow such an entity to operate on their territory, but if they allow to do so they must, it is suggested, respect the immunities appropriate to such entity."

It is well recognized in international law that the acts and the conduct of a State are capable of creating legal effects.

In both the *Legal Status of Eastern Greenland Case*<sup>30</sup> and in the *Temple of Preah Vihear Case*<sup>31</sup> it was stated by the Court, that a State can be bound by its behavior.

Both Majan and the IMU have firm grounds to rely on Aristan's respect for the IMU's immunities, since Aristan is bound by its previous conduct.

Consequently Aristan should be deemed to have consented by its conduct to the situation in which the IMU operates through a bank account with the First Aristani National Bank and cannot afterwards alter its position by seizing the assets held by the IMU.

The Government of Majan submits that Aristan is obliged to respect the inviolability of the IMU assets.

Since Aristan never objected to the presence of the IMU on its territory and indeed has "always regarded" it as a regional organization implying recognition of its status as a public international organization, it is submitted that both Majan and the IMU were entitled to rely on Aristan's respect for the IMU's functional immunities. Consequently, Aristan is not entitled to subsequently act at variance with its prior conduct. Therefore, the measure by the Government of Aristan in the form of the seizure of the IMU administered account constitutes an illegal act.

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30 *Legal Status of Eastern Greenland (Denmark v. Norway)*, [1933] P.C.I.J. Reports, Ser. A./B., No. 53, 46, at 51, 71.

31 See *Temple of Preah Vihear Case (Cambodia v. Thailand)*, [1962] I.C.J. 6, at 30-32.

PART III.

ARISTAN'S COUNTER-MEASURE STYLED AS A VIOLATION OF  
CUSTOMARY AND GENERAL INTERNATIONAL LAW

Even if the Court should determine that the Government of Aristan was not precluded from seizing the IMU assets, on the basis of either customary international law relating to functional immunity of international organizations or its own conduct, it is submitted and will be demonstrated that Aristan's seizure of the IMU assets on deposit in an Aristani bank, does not meet the generally recognized requirements for the lawful exercise of an alleged reprisal in retaliation.

A. Prerequisites for Justification of the Counter-measure

Employment of counter-measures is subject to four major prerequisites:

- (a) that the counter-measure be directed against and principally affects the alleged tortfeasor;
- (b) necessity, i.e. only if negotiations for the purpose of obtaining reparations have failed to obtain redress or under the particular circumstances would be inappropriate;
- (c) proportionality;
- (d) the obligations arising from treaties must also be taken into account<sup>32</sup>.

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32 See *Naulilaa Incident Arbitration Award*, relating to *Responsibility of Germany for damage caused in the Portuguese colonies in the South of Africa* (Portugal v. Germany) 2 REP. INT'L ARB. AWARDS 1011 (1928), [hereinafter cited as *Naulilaa Case*], reprinted in D. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 9 (3rd ed. 1983); see also O. ELAGAB, *THE LEGALITY OF NON-FORCIBLE MEASURES IN INTERNATIONAL LAW* 40 (1988).

Another recognized requirement, is the prior exhaustion of other remedies enumerated in Article 33 of the U.N. Charter<sup>33</sup>.

These prerequisites are to be considered cumulatively, since they are intended as safeguards against abuse of resort to counter-measures<sup>34</sup>.

On the basis of these requirements it can only be concluded that Aristan's alleged reprisal is unjustifiable and hence constitutes an internationally wrongful act.

#### B. The Non-Justifiability of the Reprisal

Aristan purportedly intends its reprisal to affect Majan's economy, through the seizure of an IMU account. Irrespective of whether the target of the reprisal is considered to be either the IMU or Majan, under all prerequisites the reprisal is not justifiable in either case.

##### 1. The alleged tortfeasor as target of the reprisal

There should be an internationally wrongful act committed by the entity (be it a State or an international organization) that becomes the target of the economic measure.

It is evident from the facts that the IMU, being no party to the initial dispute, has nevertheless borne the primary effects of the sanction imposed by the Government of Aristan.

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33 See A. Bleckmann, *Gedanken zur Repressalie* FESTSCHRIFT SCHLOCHAUER 194 (1981); though, publicists generally consider this criterion to be part of the second, the demand for redress.

34 See O. ELAGAB, *supra* note 32.

A reprisal is illegal in the absence of a prior act contrary to international law justifying it<sup>35</sup>. The IMU has committed no illegal act vis-à-vis Aristan.

At the same time, while Majan is supposedly the delinquent State, Aristan's seizure is still illegal, since Majan has also committed no violations of its obligation under international law as was demonstrated in Part I of the present Memorial.

## 2. Prior demand for redress

The second criterion, regarding the demand for redress, cannot be considered to have been met by the Government of Aristan.

In order to minimize the chances of abuse, any State contemplating reprisals should make some attempt to peacefully and amicably settle any possible dispute, unless such an attempt was rendered nugatory by an impending and irreversible threat to its rights or would be manifestly absurd under the circumstances.

Firstly, regardless whether Aristan considers that Majan's decision to institute criminal proceedings against Mr. Kitaro was an irreversible and immediate infringement of its rights, it can hardly be maintained that this justified its interference with the assets of the IMU. Aristan did not give prior notification, and no attempt was ever made to arrive at a settlement with the IMU.

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<sup>35</sup> See *Naulilaa Case*, *supra* note 32.

Secondly, although no explicit obligation rests upon Aristan to settle the dispute with Majan<sup>36</sup>, the Aristani Government has failed to enter into negotiations regarding the alleged violations of its rights by Majan.

As a consequence, Aristan's resort to counter-measures against Majan's alleged breach of international law was premature, unnecessary and in violation of the principles of good faith and reasonableness.

Consequently, the Government of Aristan did not have the right to seize the IMU assets which were deposited in an Aristani bank.

### 3. Proportionality of the reprisal

"(R)epprisals must be proportionate to the injury suffered, that is, they cannot result in losses and injury disproportionately greater than those caused by the delinquent State, and cannot involve the application of compulsion in an amount that goes beyond what would be reasonably necessary to secure a settlement."<sup>37</sup>

It is recognized that third parties might be affected by a reprisal, though this must be limited to an acceptable degree.

It should be noted that the reprisal taken by the Aristani Government victimizes all members of the IMU, because the functioning of the organization has been severely disrupted and the continuation of the measures threatens its capacity to perform its functions efficiently as a monetary authority. The effects this will have on the financial stability, the economic well-being and development of member States is self-evident.

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<sup>36</sup> Articles 2(3) and 33 of the U.N. Charter.

<sup>37</sup> K. Skubiszewski, *Use of Force by States. Collective Security. Law of War and Neutrality*, in: M. SOERENSEN (ed.), *MANUAL OF PUBLIC INTERNATIONAL LAW* 753 (1968).

The extent of the measures imposed, i.e. interference in regional and national economic and monetary policy, goes far beyond all sense of proportionality.

The effects of Aristan's reprisal on Majan far exceed any injury that was allegedly caused to the interests of Aristan by the prosecution of Mr. Kitano.

The seizure of the account held by the International Monetary Union, which will evidently result in economic disorder in Majan, stands in no relation to the trial of one individual involved in crimes as serious as trafficking and smuggling of drugs.

Furthermore, the Government of Majan wants to emphasize that the reprisal, i.e. the seizure of IMU funds, should not be seen separate from the economic measures taken in an earlier stage of the dispute.

#### 4. Treaty obligations

The final argument in establishing the non-justifiability of the reprisal imposed by Aristan, is to be derived from the obligations under the Vienna Convention itself. If it is Aristan's contention that Majan has violated (*quod non*) the Vienna Convention, these obligations are to be observed by Aristan too, since both Majan and Aristan are Parties to the Convention.

One of these obligations is to remain within the boundaries set forth by the Vienna Convention, where measures against allegedly unlawful conduct are concerned. Those measures mentioned by this Court in the *U.S. Diplomatic and Consular Staff in Tehran Case*, among which the *ultima ratio* is constituted by the breaking off of diplomatic relations, are evidently applicable to the current situation<sup>38</sup>.

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38 *U.S. Diplomatic and Consular Staff in Tehran Case*, [1980] I.C.J.40, para. 85.

It is the self-contained character<sup>39</sup> of diplomatic law, that poses a bar to the legitimate imposition of reprisals, in the way that Aristan did. This was meant by the International Court of Justice in its description of the closed nature of contemporary diplomatic law<sup>40</sup>. This applies to both the receiving and the sending State, because of the principle of reciprocity, which forms the basis of the Vienna Convention.

### C. Conclusion

In view of the foregoing, and with regard to the recognized and mutually agreed factual circumstances, the Government of Majan has demonstrated that its conduct in the situation in which Ambassador Kitaro has been charged and extradited, has been in full accordance with the Vienna Convention on Diplomatic Relations.

The Government of Aristan totally ignored the closed nature of the Vienna Convention. Instead of applying the diplomatic measures, as provided for in the Convention, e.g. termination of diplomatic relations, Aristan violated its obligations, and turned to disproportionate economic reprisals to the detriment of the IMU, and Majani and regional economic development.

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39 See B. Simma, *Self-Contained Regimes*, 16 NEIH. Y.B. INT'L L. 111 (1985).

40 See *U.S. Diplomatic and Consular Staff in Tehran Case*, *supra* note 38, at 40, para. 86; "(t)he rules of diplomatic law, in short, constitute a self-contained regime which ... specifies the means at the disposal of the receiving State to counter any such abuse."

VIII. SUBMISSIONS

For these reasons, *i.e.*, in view of the facts and arguments set forth in the preceding part of the present Memorial,

May it please the Court, rejecting all submissions to the contrary, to grant the following relief:

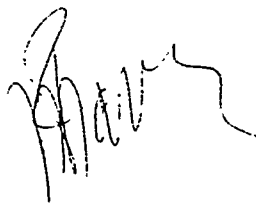
- I. the Court is requested to adjudge and declare that Majan may criminally prosecute Ambassador Kitaro consistently with its obligations under the Vienna Convention on Diplomatic Relations; and
  
- II. the Court is requested to adjudge and declare that the funds assigned to Majan on an administered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

Respectfully submitted,

On behalf of the Government of Majan,



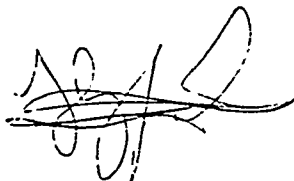
Rob F.J.M. Bongenaar



Monique Faverey



J.M.J. Maurice Maassen  
01 February 1989



Jeroen G. Pliester