

INTERNATIONAL COURT OF JUSTICE

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

MAJAN

V.

UNITED REPUBLIC OF ARISTAN

MEMORIAL

**SUBMITTED BY THE
UNITED REPUBLIC OF ARISTAN**

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I. LIST OF ABBREVIATIONS

Acad.	Academy, academie
Add.	Addition, additional
Am.	American
A.m.	<i>Ante meridiem</i>
Ann.	Annual
Arb.	Arbitral
Aug.	August
Brit.	British
Cal.	California
Comm'n	Commission
Cmd.	Command
Comp.	Comparative
Conf.	Conference
Court	International Court of Justice
Dec.	December
Dep't	Department
Doc.	Document
Ed.	Editor, edition
E.g.	<i>Exempli gratia</i> (for the sake of an example)
E.T.S.	European Treaty Series
G.A.	General Assembly of the United Nations
GAOR	General Assembly Official Records
I.C.J.	International Court of Justice, Reports of Judgments, Advisory Opinions and Orders
<i>Id.</i>	<i>Idem</i> (the same)
<i>I.e.</i>	<i>Id est</i> (that is)
IMU	International Monetary Union
Int'l	International
J.	Journal
L.	Law
Neth.	Netherlands
No.	Number
Nov.	November
Oct.	October
Proc.	Proceedings
Q.	Quarterly

Rep.	Reports
Res.	Resolution; Reserve
Sept.	September
Ser.	Series
Sess.	Session
Soc.	Society
St.	State
Supp.	Supplement
T.I.A.S.	Treaties and Other International Acts Series (U.S.A.), 1945-date
Transnat'l	Transnational
U.K.	United Kingdom
U.N.	United Nations
UNCIO	United Nations Conference on International Organization
U.N.T.S.	United Nations Treaty Series
U.S.A. (US)	United States of America
U.S.T.	United States Treaties and Other International Agreements, Jan. 1, 1950-date
V.	Versus (against)
VCLT	Vienna Convention on the Law of Treaties
Viz.	Videlicet (to with, namely, that is to say)
West.	Western
Y.B.	Yearbook

II. INDEX OF AUTHORITIES

A. OFFICIAL DOCUMENTS

1. Treaties

Charter of the United Nations, U.N. Doc. DPI/511-175 M (2-80)

Statute of the International Court of Justice, U.N. Doc. DPI/511-175 M (2-80)

Interim Arrangement on Privileges and Immunities of the United Nations Concluded Between the Secretary General of the United Nations and the Swiss Federal Council 1946, 8 U.N.T.S. 163

Convention on Privileges and Immunities of the United Nations 1946, 4 U.N.T.S. 15

Agreement regarding the Headquarters of the United Nations 1947, 147 U.N.T.S. 11

Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221

Vienna Convention on Diplomatic Relations 1961, 500 U.N.T.S. 95. T.I.A.S. 7502

Vienna Convention on Consular Relations 1963, 596 U.N.T.S. 261

Vienna Convention on the Law of Treaties 1969, 1155 U.N.T.S. 331

2. Resolutions of the General Assembly of the United Nations

G.A. Res. 2625 (XXV): Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, Oct. 24, 1970, 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1970)

G.A. Res. 2200: International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171

G.A. Res. 217 A (III): Universal Declaration of Human Rights, Dec. 10, 1948, 3 U.N. GAOR, Part I, Res., at 71

3. *International Law Commission*

[1958] 1 Y.B. INT'L L. COMM'N, at 146-154, U.N. Doc.A/CN.4/SER.A/1958

[1958] 2 Y.B. INT'L L. COMM'N, at 98-99, U.N. Doc.A/CN.4/SER.A/1958/Add.1

[1966] 2 Y.B. INT'L L. COMM'N, at 253, U.N. Doc.A/CN.4/SER.A/1966/Add.1

[1979] 2 Y.B. INT'L L. COMM'N, at 115-122, U.N. Doc.A/CN.4/SER.A/
1979/Add.1 (Part 2)

[1985] 1 Y.B. INT'L L. COMM'N, at 103-115, U.N. Doc.A/CN.4/SER.A/1985

[1985] 2 Y.B. INT'L L. COMM'N, at 103-113, U.N. Doc.A/CN.4/SER.A/
1985/Add.1 (Part 1)

4. *Miscellaneous*

Summary Report of the 11th Meeting of the Committee 1/1, Doc. 784 1/1/27, June 5, 1945, 6 UNCIO 334 (1945)

United States International Organizations Immunities Act, Public Law 79-291, Dec. 29, 1945, A/AC. 154/212

Special Committee on Friendly Relations, U.N. Doc.A/AC. 125, 1970, at 34

United States Foreign Sovereign Immunities Act, Public Law 94-583, Oct. 21, 1976, A/AC. 154/212

United States Diplomatic Relations Act, Public Law 95-393, Sept. 30, 1978, A/AC. 154/212

United Kingdom Report on Review of the Vienna Convention on Diplomatic Relations and Reply to "The Abuse of Diplomatic Immunities and Privileges" (April 1985), Miscellaneous No. 5, Cmnd. 9497

B. INTERNATIONAL JURISPRUDENCE

1. Cases

Reparation for Injuries Suffered in the Service of the United Nations,
[1949] I.C.J. 173 (Judgment of April 11, 1949)

*Legal Consequences for States of the Continued Presence of South Africa
in Namibia (South West Africa) notwithstanding Security Council
Resolution 276 (1970)*, [1971] I.C.J. 4 (Advisory Opinion of January 26,
1971)

*Aegean Sea Continental Shelf Case: Request for the Indication of Interim
Measures of Protection*, [1976] I.C.J. 3 (Order of Sept. 11, 1976)

United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran),
[1980] I.C.J. 4 (Judgment of May 24, 1980)

2. Arbitrations

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 1013 (1928)

Case Concerning the Air Services Agreement of 27 March 1946 (U.S. v. France) [1978], 54 INT'L L. REP. 303 (Lauterpacht 1979)

3. *Miscellaneous*

Bolasco v. Walter, Tribunal of Luxembourg, Sept. 26, 1957, 24 INT'L L.
REP. 525 (Lauterpacht 1961)

C. LITERATURE

1. Books, Treatises and Digests

W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1966,II)

D.W. BOWETT, LAW OF INTERNATIONAL INSTITUTIONS (4th ed. 1982)

I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (3rd ed. 1985)

F. CASTBERG, THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1974)

D.P. O'CONNELL, INTERNATIONAL LAW (2nd ed. 1970, I)

E. DENZA, DIPLOMATIC LAW (1976)

I. DETTER, LAW MAKING BY INTERNATIONAL ORGANIZATIONS (1965)

7 DIGEST OF INTERNATIONAL LAW (M.M. Whiteman, 1970)

F.E. DOWRICK (ed.), HUMAN RIGHTS: PROBLEMS, PERSPECTIVES AND TEXTS (1979)

O.Y. ELAGAB, THE LEGALITY OF NON-FORCIBLE COUNTER MEASURES IN INTERNATIONAL LAW (1988)

C.G. FENWICK, INTERNATIONAL LAW (3rd ed. 1948)

M. HARDY, MODERN DIPLOMATIC LAW (1968)

D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW (3rd ed. 1983)

D.A. IJALAYE, THE EXTENSION OF CORPORATE PERSONALITY IN INTERNATIONAL LAW (1978)

C.W. JENKS, INTERNATIONAL IMMUNITIES (1961)

J.A. JOYCE, HUMAN RIGHTS: INTERNATIONAL DOCUMENTS (1978, I)

D.B. MICHAELS, INTERNATIONAL PRIVILEGES AND IMMUNITIES (1971)

NASCIMENTO E SILVA, DIPLOMACY IN INTERNATIONAL LAW (1972)

A.H. ROBERTSON, HUMAN RIGHTS IN EUROPE (2nd ed. 1977)

A.H. ROBERTSON, HUMAN RIGHTS IN THE WORLD (2nd ed. 1982)

E. SATOW, SATOW'S GUIDE TO DIPLOMATIC PRACTICE (5th ed. 1979)

H.G. SCHERMERS, INTERNATIONAL INSTITUTIONAL LAW (1972, II)

M.N. SHAW, INTERNATIONAL LAW (2nd ed. 1986)

C.E. WILSON, DIPLOMATIC PRIVILEGES AND IMMUNITIES (1967)

E. ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES
(1984)

2. Journals and Articles

W. Barnes, *Diplomatic Immunity from Local Jurisdiction: Its Historical Development Under International Law and Application in United States Practice*, 43 DEP'T STATE BULLETIN 173, (Aug. 1, 1960)

L.J. Bouchez, *Nature and Scope of State Immunity from Jurisdiction and Execution*, 10 NETH. Y.B. INT'L L. 3 (1979)7

D.W. Bowett, *Economic Coercion and Reprisals by States*, 13 VIRGINIA J. INT'L L. (fall 1972, I)

R. Carswell, *Economic Sanctions and the Iran Experience*, 60 FOREIGN AFFAIRS 247 (fall 1981)

Y. Dinstein, *Diplomatic Immunity from Jurisdiction: Ratione Materiae*, 15 INT'L AND COMP. L. Q. 76 (1966)

L.C. Green, *Trends in the Law Concerning Diplomats*, 19 CAN. Y.B. INT'L L. 132 (1981)

D.W. Greig, *The Abuse of Diplomatic Privilege*, AUSTRALIAN INT'L L. NEWS 447 (1984)

R. Hatano, *Traffic Accidents and Diplomatic Immunity*, 12 JAPANESE ANN. INT'L L. 18 (1968)

R. Higgins, *The Abuse of diplomatic privileges and immunities: Recent United Kingdom Experience*, 79 AM. J. INT'L L. 641 (1985)

C. Hurst, *Les Immunités Diplomatiques*, 12 ACAD. DE DROIT INT'L RECUEIL DES COURS 119 (1926)

C.W. Jenks, *The Legal Personality of International Organizations*, 22 BRIT. Y.B. INT'L L. 267 (1945)

J.F. Lalive, *Swiss Law and Practice in Relation to Measures of Execution Against the Property of a Foreign State*, 10 NETH. Y.B. INT'L L. 153 (1979)

- B. Larschan, *The Abisinio Affair: A Restrictive Theory of Diplomatic Immunity?*, 26 COLUMBIA J. TRANSNAT'L L. 283 (1988, no. 2)
- E.C. Lashbrooke jr., *Suits Against International Organizations in Federal Court: OPEC, a Case Study*, 12 CAL. WEST. INT'L L. J. 305 (1982)
- R. P. Lewis, *Sovereign Immunity and International Organizations: Broadbend v. OAS*, 13 J. INT'L L. AND ECONOMICS 675 (1979)
- J. Polakas, *Economic Sanctions: An Effective Alternative to Military Coercion?*, 6 BROOKLYN J. INT'L L. 289 (1980)
- M. Rama-Montaldo, *International Legal Personality and Implied Powers of International Organizations*, 44 BRIT. Y.B. INT'L L. 111 (1970)
- G.B. Roberts, *Self-Help in Combatting State-Sponsored Terrorism: Self Defence and Peacetime Reprisals*, 19 CASE WEST. RES. J. INT'L L. 243 (1987, II)
- S. Roosevelt, *Diplomatic Immunity and U.S. Interests*, 87 DEP.T ST. BULLETIN 29 (Oct. 1987)
- H.G. Schermers, *Liability of International Organizations*, 1 LEIDEN J. INT'L L. 3 (1988)
- S.M. Schwebel, *Aggression, Intervention and Self-Defence in Modern International Law*, 136 ACAD. DE DROIT INT'L RECUEIL DES COURS 413 (1972, II)
- F. Seyersted, *Is the International Personality of Intergovernmental Organizations Valid vis-à-vis Non-Members?*, 4 INDIAN J. INT'L L. 233 (1964)
- K.R. Simmonds, *The "Rationale" of Diplomatic Immunity: Gosh v. D'Rozario*, 2 INT'L AND COMP. L. Q. 1204 (1962)

3. *Miscellaneous*

A UNIFORM SYSTEM OF CITATION (latest ed.)

BLACK'S LAW DICTIONARY (5th ed. 1979)

III. STATEMENT OF JURISDICTION

The Governments of the United Republic of Aristan and of Majan 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 or agreement or by written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated."

This compromise 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 February 13, 1988, Ambassador Kitaro, chief of mission from the United Republic of Aristan accredited in Majan caused a serious accident after he had left a diplomatic reception at which his presence was *de rigueur*. Two people were killed and one person was critically injured.

Drugs in plastic bags were found at the scene and the Majani police filed a report in which they concluded that the ambassador was engaged in drug trafficking at a time he was obviously drunk, although no objective test was offered or administered.

The incident triggered an outpouring of criticism from the local news media. A non-binding resolution was introduced and passed overwhelmingly in the Majan National Assembly calling for the immediate criminal trial of Ambassador Kitaro.

On February 18, 1988 Ambassador Kitaro expressed, in addition to his previous profound personal regret, that of the Aristani Government. He also handed the Minister of Foreign Affairs of Majan a Diplomatic Note, containing his recall by his Government and the termination of his immunity from 12:01 a.m. on February 21.

Prior to the Ambassador's departure on February 20, 1988, Majan's Minister of Justice stated publicly that Ambassador Kitaro was guilty of all charges.

On February 22, 1988, the Government of Aristan, concerned by the intention of the Government of Majan to prosecute Ambassador Kitaro, dispatched a Diplomatic Note to the Majani Ministry of Foreign Affairs in which it was pointed out that according to Article 31(1) Vienna Convention on Diplomatic Relations, a diplomatic agent shall enjoy immunity from criminal jurisdiction. The Government of Aristan asked the Government of Majan to honour its international obligations under the Vienna Convention on Diplomatic Relations.

On the basis of Article 39(2) of the Vienna Convention on Diplomatic Relations, the Government of Majan concluded that the ambassador was not

entitled to immunity after the termination of his accreditation for acts committed during his period of accreditation.

Several days after Ambassador Kitaro's departure, an arrest warrant was issued.

After his return to Aristan Ambassador Kitaro received a hearing and was dismissed from the Aristani foreign service.

While on holiday on the Parrot Islands, Ambassador Kitaro was arrested and extradited to Majan. Despite repeated protests by the Government of Aristan the ambassador's trial was set to begin in due course.

Prior to the trial, the Government of Aristan undertook counter-measures against the Majani Government in the form of economic sanctions.

On the day the trial began, the Government of Aristan, acting on the basis of emergency economic powers, seized the assets on an account which was administered by the International Monetary Union (IMU) and assigned to Majan. This account was a deposit account with a private commercial Aristani Bank.

Although no agreement exists between the IMU and Aristan, IMU President Mr. Hans Zoff protested the seizure as a violation of the IMU's immunity under general international law.

Majan was exclusively allowed to defend both its own and the IMU interests.

On February 1, 1989, the Parties agreed to submit their dispute by Special Agreement to the International Court of Justice.

V. QUESTIONS PRESENTED TO THE COURT

The United Republic of Aristan 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 all criminal charges against Ambassador Kitaro should be dismissed because of the absolute character of diplomatic immunity from criminal jurisdiction?
2. Whether the seizure of the IMU account is in accordance with Aristan's obligations under international law?
3. Whether the United Republic of Aristan has met the requirements for the legitimate use of counter-measures to affirm its legal rights?

VI. SUMMARY OF PLEADINGS

1. The prosecution of Ambassador Kitaro by Majan is a violation of the basic principle of diplomatic law providing for the absolute immunity of diplomats from the criminal jurisdiction of the receiving State provided for in the Vienna Convention on Diplomatic Relations to which both, Applicant and Respondent, are high contracting Parties.

Although diplomats have the duty, according to Article 41 of the Vienna Convention on Diplomatic Relations, to respect the laws of the receiving State, this does not mean that a violation of this duty would affect the immunity given in Article 31(1).

A former diplomat cannot be prosecuted for crimes committed during his accreditation in the receiving State. Therefore, the interpretation by Majan of Article 39(2), Vienna Convention on Diplomatic Relations, on the basis of which the Majani Government is prosecuting Ambassador Kitaro is invalid.

The Vienna Convention on Diplomatic Relations is a self-contained regime. This diplomatic immunity is not instituted to benefit individuals but to maintain unfettered relations between States.

Majan did not use the available means for redress provided for within the system in prosecuting Ambassador Kitaro.

Due to the atmosphere in which the Majani Minister of Justice already proclaimed Ambassador Kitaro guilty of all charges and the probable imposition of the death penalty, the Aristani Government has serious doubts about the fairness of the trial Ambassador Kitaro will receive.

The unilateral alteration by Majan of its international obligations seriously impairs the basic principle of absolute diplomatic immunity from criminal jurisdiction.

2. The United Republic of Aristan did not violate its obligations under international law in seizing the account administered by the IMU.

Admitting that the IMU has a certain international legal personality does not imply that absolute immunity to the assets of the IMU has to be granted by the United Republic of Aristan.

The United Republic of Aristan has no bilateral treaty with the IMU, as a result of which it is under no obligation to grant complete immunity to assets of the IMU. Moreover, on the basis of the Articles 34 and 35 of the Vienna Convention on the Law of Treaties, Aristan is not bound by any provision in the existing bilateral treaties between the IMU and other States.

The Aristani measure was not directed against the IMU and did not substantially harm the IMU, because the IMU is merely an administrator of the account seized. Majan is the exclusive beneficiary of the account. Also the basic functioning of the IMU is not involved.

3. After repeated fruitless protests the United Republic of Aristan was forced to take action. The seizure, therefore, has to be regarded as an economic counter-measure.

The United Republic of Aristan was entitled to take the economic counter-measure, which is a recognized right under general international law.

The U.N. Charter and the Vienna Convention on the Law of Treaties do not prohibit the taking of an economic counter-measure.

The Aristani Government has firmly met the three traditionally accepted prerequisites for the legitimate and justified taking of counter-measures.

VII. PLEADINGS AND AUTHORITIES

CHAPTER I. ALL CRIMINAL CHARGES AGAINST AMBASSADOR KITARO SHOULD BE DISMISSED BECAUSE OF THE ABSOLUTE CHARACTER OF DIPLOMATIC IMMUNITY

A. Introduction

As both Applicant (Majan) and Respondent (Aristan) are parties to the Vienna Convention on Diplomatic Relations¹ without reservation, they are bound to act according to this convention².

The Government of Aristan in no way condones the crimes of which their former ambassador is accused. Nevertheless, the Government of Aristan wants to stress the utter importance of the fundamental principle of exemption of diplomats from jurisdiction in criminal cases, in order to maintain unfettered relations among States³.

The Government of Aristan is of the opinion that complete immunity of diplomatic personnel from criminal jurisdiction is fundamental to diplomatic relations. Diplomats could not perform their duties if they faced criminal liability under local law or if they could be harassed by the receiving State's institution of criminal proceedings. Moreover, the diplomat's own immunity would be meaningless if the diplomat could be

1 Vienna Convention on Diplomatic Relations [hereinafter cited as Vienna Convention], 500 U.N.T.S. 95, 23 U.S.T. 3227, TIAS 7502.

2 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 [hereinafter cited as VCLT]. According to Article 26 of this Convention, to which both Majan and Aristan are parties without reservations, a treaty is binding; *pacta sunt servanda*.

3 C. E. WILSON, DIPLOMATIC PRIVILEGES AND IMMUNITIES 80 (1967).

prosecuted for actions committed during his accreditation, after his accreditation had come to an end.

The threat of a future prosecution would prevent the diplomat from working without the "fear of intimidation, interference or reprisal"⁴.

B. Absolute Character of Immunity

1. Article 31(1) of the Vienna Convention

According to Article 31(1) of the Vienna Convention, diplomatic agents shall enjoy immunity from the criminal jurisdiction of the receiving State. This reflects an age old practice and conviction on the part of States with differing cultural traditions and political systems.

Contrary to immunity from administrative and civil jurisdiction, immunity from criminal jurisdiction is without exception; this immunity is absolute and unqualified.

The International Law Commission left no doubt about the meaning of Article 31(1).

"The immunity from criminal jurisdiction is complete, whereas the immunity from civil and administrative jurisdiction is subject to the exceptions stated in the text."⁵

In addition, this point of view is supported by the writings of numerous eminent authorities. Hence, both the theory and practice of international law determine that diplomatic agents cannot be tried or

⁴ B. Larschan, *The Abisinio Affair: a Restrictive Theory of Diplomatic Immunity*, 26 COLUMBIA J. TRANSNAT'L L. 294 (1988).

⁵ [1958] 2 Y.B. INT'L L. COMM'N 98, UN Doc. A/CN.4/SER.A/1958/Add. 1.; see, also, NASCIMENTO E SILVA, *DIPLOMACY IN INTERNATIONAL LAW* 120 (1972).

punished by local courts for committing a crime in any circumstance whatsoever⁶.

As stated in the Preamble of the Vienna Convention, the purpose of privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States⁷.

Diplomats have been given a special international legal status in order to safeguard the independent exercise of their functions⁸.

The Government of Aristan is of the opinion that diplomatic immunity has fulfilled its purpose only because it is an absolute principle insofar as the criminal jurisdiction of the receiving State is concerned.

State practice on this subject confirms that immunity from criminal jurisdiction is still regarded by States as of an absolute character.

"The immunity of diplomatic agents from criminal jurisdiction is so universally recognized that one authority on the subject has declared that no instance can be cited where such an agent has been subjected,

6 C.E. WILSON, *supra* note 3, at 80; other publicists concur. Satow notes that such immunity extends to any "ordinary crime", in E. SATOW, *SATOW'S GUIDE TO DIPLOMATIC PRACTICE* 124 (5th ed. Lord Gore-Booth 1979); Fenwick concludes that public ministers are "completely immune" from criminal jurisdiction, in C.G. FENWICK, *INTERNATIONAL LAW* 469 (3rd ed. 1948); I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 355 (3rd ed. 1979).

7 Preamble Vienna Convention, *supra* note 1, at 96.

8 See *Bolasco v. Walter*, Tribunal of Luxembourg, Sept. 26, 1957, 24 INT'L L. Rep. 525-526 (Lauterpacht 1961); The Acting Legal Adviser (Jack B. Tate) to the Attorney General (Tom C. Clark), letter, Dec. 21, 1948, M.S. Department of State, file 501. AC/12-1048; E. SATOW, *supra* note 6, at 124.

without his Government's consent, to the criminal jurisdiction of the country to which he was accredited."⁹

There has been no change in either the practice or the attitude of States regarding the absolute character of diplomatic immunity from criminal jurisdiction, despite the concern and outrage resulting from a number of incidents in which diplomats have been suspected of involvement in serious violations of local law¹⁰.

2. Article 41(1) in relation to Article 31(1)

Diplomats have according to Article 41(1), Vienna Convention, the duty to respect the laws and regulations of the receiving State. However, this obligation does not signify that the immunity enjoyed by diplomats is conditional upon their good behaviour or compliance with the host State's local laws. The clear purpose of the Vienna Convention is to safeguard the diplomatic agent completely from the criminal jurisdiction of the receiving State, unless the sending State voluntarily decides to waive immunity. The duty to 'respect' the laws of the receiving State is obviously something less than a duty to obey them¹¹. In any event, the

9 W. Barnes, *Diplomatic Immunity from Local Jurisdiction: Its Historical Development Under International Law and Application in United States Practice*, 43 DEP'T STATE BULLETIN 177, Aug. 1, 1960, citing C. Hurst, *Les Immunités Diplomatiques*, 12 ACAD. DE DROIT INT'L RECUEIL DES COURS 164 (1926); see, also, C.E. WILSON *supra* note 3, at 80; SIR E. SATOW, *supra* note 6, at 124.

10 See, e.g., R. Higgins, *The Abuse of Diplomatic Privileges and Immunities*, 79 AM. J. INT'L L. 643-645 (1985): describing the incident regarding the shooting of a police woman outside the Libyan People's Bureau in London on 17 April 1984 and *supra* note 4, at 293: in this case the United States State Department was unable to cite a single example of State practice, deviating from the principle of absolute criminal immunity.

11 C. Hurst, *supra* note 9, at 142: "L'obligation qui leur incombe de respecter ces lois ne provient d'aucune obligation de leur obéir".

diplomat's immunity from criminal jurisdiction is not impinged by violation of local criminal law¹².

It would also be contrary to the absolute character of immunity from criminal jurisdiction which is provided for in the Vienna Convention, if the duty provided for in Article 41(1) affected or in any way diminished the immunities which are provided for in Article 31(1). The principle of absolute immunity from the exercise of criminal jurisdiction would be open to abuse if it were not absolute and unconditional.

Once more the Government of Aristan, although it in no way condones the crimes allegedly committed by Ambassador Kitaro, wants to emphasize that in the light of absolute immunity, "the security of Ambassadors takes priority over the punishment of a particular crime"¹³.

Hence, even in cases of violation of Article 41(1), absolute immunity from any form of criminal prosecution remains.

C. The Impossibility of Retro-active Jurisdiction

The Government of Majan agrees with the analysis of the status of Ambassador Kitaro at the time of the incident. However, Majan derives from Article 39(2), Vienna Convention, that the immunities of former diplomats do not subsist in respect to acts committed during the period of performance of diplomatic functions which were not performed in the exercise of functions as a member of the mission.

12 E. DENZA, *DIPLOMATIC LAW* 264 (1976); R. Higgins, *supra* note 10, at 649, states more specifically: "At the same time, it is not correct that when a diplomat violates this duty, he loses immunity"; [1958] 1 Y.B. INT'L L. COMM'N, at 150, U.N. Doc. A/CN.4/SER.A/1958: confirmative observation by Mr. Yokota (Japan).

13 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 254 (1966, II).

This interpretation of Article 39(2), Vienna Convention, by the Majani Government is not in accordance with the placement of the provision in the context of the Vienna Convention or with the *travaux preparatoires*¹⁴. According to Article 39(2), Vienna Convention, immunities of a diplomat cease when his functions have come to an end. After the termination of his accreditation immunities are no longer required, since immunities are only granted to ensure efficient performance of the functions of diplomatic missions as representing States¹⁵. Nevertheless Article 39(2), Vienna Convention, grants restricted immunities to a diplomat, although his accreditation has come to an end, until he leaves the receiving country.

The term 'subsist' in the last sentence of this article does not at all indicate that the receiving State can prosecute a diplomatic agent, after the termination of his accreditation, for an act committed during the period for which he enjoyed absolute immunity from criminal jurisdiction. On the contrary, there can be no doubt that the term 'subsist', in the context and placement of that provision, relates to acts committed during the period that immunities have ceased by agents who have not yet left the receiving State (termination period).

Hence, Article 39(2), Vienna Convention, "does not deny continuing immunity for any acts committed during the earlier period. Those acts remain immune forever"¹⁶.

14 See, e.g., [1958] I Y.B. INT'L L. COMM'N, *supra* note 12, at 149-150.

15 Vienna Convention, *supra* note 1, at 96.

16 B. Larschan, *supra* note 4, at 293; see, also, *infra* at 8.

D. The Self-Contained Character of the Vienna Convention

As was pointed out by this honorable Court in the *US Staff Case*, the system of the Vienna Convention is a self-contained regime¹⁷.

The Government of Majan, therefore, should have used the available means for 'redress' provided for within the system.

For the purpose of providing a solution in case of abuse of diplomatic functions the only possibility to prosecute a former diplomat for criminal acts committed while accredited, is provided for in Article 32(1), Vienna Convention.

While Article 31(4) states that immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State, Article 32(1) provides a means for the receiving State to prosecute a diplomatic agent, viz. through the waiver of immunity by the sending State.

Only the sending State has the authority to decide whether or not to grant a waiver of immunity. Hence, it is left to the complete discretion of the sending State, whether the diplomat will be subject to prosecution by the Authorities of the receiving State.

If the immunity of an agent, in case of an alleged crime, is not waived by the sending State, there is another possibility for the receiving State to take sanctions against the diplomat.

According to Article 9, Vienna Convention, the receiving State can declare the diplomatic agent *persona non grata*¹⁸.

¹⁷ See *United States Diplomatic and Consular Staff in Tehran (US v. Iran)* [hereinafter cited as *US Staff Case*], [1980] I.C.J. 40 (Judgment of May 24, 1980).

¹⁸ See, e.g., *US Staff Case*, *supra* note 17, at 40.

In such a case, "the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission"¹⁹.

If a diplomatic agent is declared *persona non grata* and "the sending State refuses or fails within a reasonable period to carry out its obligation under paragraph 1 of Article 9, the receiving State can only refuse to recognize the person concerned as a member of the mission"²⁰.

The Government of Aristan has recalled Ambassador Kitaro, according to diplomatic usage²¹. Ambassador Kitaro was *not* declared *persona non grata* by the Government of Majan.

Strictly speaking, the receiving State can only refuse to recognize or deal with the member of the mission concerned. The Vienna Convention does not provide any powers for the receiving State to 'dismiss' him or 'declare his functions to be terminated'.

A minority of authorities supports the opinion that if a diplomatic agent refuses to leave or returns voluntarily to the country where he was declared *persona non grata*, he can be prosecuted for crimes committed while he enjoyed immunities. However, it should be stressed that this point of view was not adopted at the Vienna Conference and does not constitute the prevailing interpretation²².

19 Vienna Convention, *supra* note 1, at 102.

20 *Id.*.

21 B. Larschan, *supra* note 4, at 283.

22 See, e.g., [1958] I Y.B. INT'L L. COMM'N, *supra* note 12, at 152: Mr. Verdross (Austria) stated: "a diplomatic agent... would even be liable to punishment on return to the receiving State after the expiry of his term as a diplomatic agent". This opinion, however, was not adopted by the Commission; see, also, M. HARDY, MODERN DIPLOMATIC LAW 58 (1968): "If a diplomatic agent fails to leave the country after such a declaration [*persona non grata*], he can be brought before the Courts and punished in the normal way".

Even if this interpretation would have been generally accepted by the majority, it would not be applicable in the instant case because the Government of Majan did not declare Ambassador Kitaro *persona non grata*. More importantly, he did not return to Majan voluntarily. On the contrary, Ambassador Kitaro was recalled to Aristan and without the consent of the Aristani Government unvoluntarily returned to Majan through extradition by the Parrot Islands.

**E. Under the Circumstances Due Process of Law
is not Guaranteed in Majan**

Apart from the fact that Majan has no right whatsoever to prosecute Ambassador Kitaro, the Government of Aristan submits that there is also a justified concern regarding the fairness of the trial he can be expected to receive.

According to the Universal Declaration of Human Rights, which both Applicant and Respondent have subscribed to, everyone has the right to a fair and impartial trial²³. While not in itself constituting a legally binding instrument, there can be no doubt that the principles contained in the Declaration have become binding in law as a result of either the emergence of custom, or as general principles of law²⁴.

The Declaration has had an indisputably great influence upon the constitutions of many States and upon the subsequent development and reinforcement of the international recognition and protection of human

23 Article 10, Universal Declaration of Human Rights 1948, G.A. Res. 217 A (III), 3 U.N. G.A.O.R., Part I, Res., was adopted by the U.N. General Assembly on 10 December 1948, without a dissenting vote.

24 M.N. SHAW, INTERNATIONAL LAW 179 (2nd ed. 1986).

rights and procedural safeguards through various human rights treaties²⁵.

Due to the pressure of public opinion the Majani Minister of Justice, Charles Akulu, publicly declared Ambassador Kitaro "guilty of all charges" even before a trial was set in motion.

This gave rise to serious doubts about the prospects for a fair and impartial trial under the circumstances.

Moreover, the possibility that the death penalty might well be imposed makes it unacceptable for the Aristani Government to tolerate the prosecution of Ambassador Kitaro by Majan.

According to Article 31(4), Vienna Convention, Aristan has the exclusive right to prosecute its former diplomats. In such cases the usual procedure is to consider the strength of available evidence²⁶.

Majan never responded to our repeated protests and never provided the Aristani Government with any evidence, so there was no possibility to conclude a joint agreement by the two nations involved, in order to institute criminal proceedings against the ambassador in accordance with the principles of due process²⁷.

25 See, e.g., E. Schwelb, 'The Influence of the Universal Declaration of Human Rights on International and National Law', PROC. AM. SOC. INT'L L. 219 (1959); Dissenting Opinion of Judge Tanaka, in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, [1971] I.C.J. 6, 288, 293 (Advisory Opinion of June 21, 1971); Article 6, Convention for the Protection of Human Rights and Fundamental Freedoms 1950, E.T.S. No. 5, 213 U.N.T.S. 221; Article 14, The International Covenant on Civil and Political Rights 1966, 999 U.N.T.S. 171.

26 See, e.g., U.K. Report on Review of the Vienna Convention on Diplomatic Relations and Reply to "The Abuse of Diplomatic Immunities and Privileges" 23 (April 1985).

27 See, e.g., 'Haiti' affair, New York Times, April 15, 1958, at 1, 36; *id.*, June 27, at 14: In this case two Haitian diplomats in the USA were involved in a murder case. One of them was returned to and prosecuted in Haiti, by joint agreement of Haiti and the USA.

F. Conclusion

No waiver of immunity has been requested or granted and there is no decision yet as to whether Ambassador Kitaro will be prosecuted in Aristan.

Hence, the Government of Aristan subscribes to the position which this Court stated in the *US Staff Case*, that absolute immunity from (criminal) jurisdiction is unqualified²⁸. Furthermore, there are no reported international or municipal cases in which an ambassador has been made to face prosecution after his accreditation had been terminated for an act which occurred while he was accredited, without the consent of his Government²⁹, notwithstanding the fact that there have been instances in which diplomats have committed acts, both in an official and non-official capacity which constitute violations of the criminal law of host States³⁰. This consistent State practice supports both the customary and conventional character of the obligation to respect the principle of absolute diplomatic immunity from criminal jurisdiction. The *raison d'être* for the existence of this right lies in its necessity for the maintenance of diplomatic relations and the prime importance thereof to peaceful and orderly international intercourse.

Unilateral alteration by the Majani Government of this age-old international obligation, presents a serious threat to the entire system of diplomatic law.

28 *US Staff Case*, *supra* note 17, at 37, 42-43.

29 See, e.g., E. SATOW, *supra* note 6, at 124.

30 See, e.g., *supra* note 10.

CHAPTER II. THE SEIZURE WAS IN ACCORDANCE WITH ARISTAN'S
OBLIGATIONS UNDER INTERNATIONAL LAW

A. Introduction

The wrongful act committed by Majan, being an 'act of State' directed against Aristan, forced the Government of Aristan, after repeated fruitless protests, to reply with an act of State in the form of a counter-measure. Both parties in the dispute are High Contracting Parties to the Vienna Convention on Diplomatic Relations. As stated above, the Government of Aristan considers the absolute immunity of diplomats provided for in Article 31 of the Vienna Convention, as the fundamental principle governing diplomatic relations³¹. Therefore, the Government of Aristan regards this violation of Article 31, as a grave violation by Majan of its obligations *vis-à-vis* Aristan.

From the standpoint of the Vienna Convention, the conduct of an ambassador in the receiving State is not a matter between the former and the latter, but rather a *State-to-State* matter.

Hence, this measure has been taken in the light of reciprocity, in order to induce the Majani Government to comply with the law³².

The measures taken were, in the light of the circumstances and the recognized facts, both necessary and proportionate and constituted a lawful counter-measure.

31 This opinion was confirmed by this Court in the *US Staff Case*, *supra* note 17, at 40.

32 See, e.g., E. ZOLLER, PEACETIME UNILATERAL REMEDIES: ANALYSIS OF COUNTERMEASURES 50 (1984); also, O.Y. ELAGAB, THE LEGALITY OF NON-FORCIBLE COUNTERMEASURES IN INTERNATIONAL LAW 62 (1988).

B. Immunity of International Organizations in General

It goes without saying that the Government of Aristan is aware that under contemporary international law international organizations like the IMU possess a certain international legal personality. This international personality, however, does not at all imply that such an organization enjoys specific rights³³.

The basis of the functions and powers in general is another one than international personality³⁴.

The Government of Aristan is unaware of any rule of international law that grants absolute immunity to assets of an international organization, in general³⁵. The possession of international legal personality does not *per se* create (a whole range of) immunities for the organization³⁶.

33 See, e.g., I. DETTER, *LAW-MAKING BY INTERNATIONAL ORGANIZATIONS* 21 (1965) and D.P. O'CONNELL, *INTERNATIONAL LAW* 109 (2nd ed. 1970, I).

34 See M. Rama-Montaldo, *International Legal Personality and Implied Powers of International Organizations*, 44 *BRIT. Y.B. INT'L L.* 148 (1970); *id.*, at 144: moreover he states that "the principle of functional limitation has no influence on the extent of the personality."

35 See I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 682 (3rd ed. 1985).

36 See *Reparation for Injuries Suffered in the Service of the United Nations Case*, [1949] *I.C.J.* 180 (Judgment of 24 May 1949); H.G. Schermers, *Liability of International Organizations*, 1 *LEIDEN J. INT'L L.* 12 (1988): "Assets of the organization should be seizable, except those necessary for the running of the organization, such as the archives."

C. The Measure and its Effects

1. The measure was not directed against the IMU

The President of the IMU, Mr. Hans Zoff, protested the seizure as a violation of the IMU's immunity under general international law.

The assets seized were held on an administered account. According to a provision mentioned in each bilateral treaty between members/non-members and the IMU an 'administered account' is an account administered by the IMU for the *exclusive benefit* of a member in an account kept separate from the property and accounts of the organization, and which may not be drawn upon by the beneficiary but only by the IMU. Hence, the IMU is only administrator of the assets.

In what way has the IMU been impaired by the Aristani measure ?

It is submitted that the IMU has suffered no impairment of its functions or appreciable harm as a result of the Aristani Government's counter-measure. The only party which is harmed by the seizure of the assets is Majan, since Majan is the exclusive beneficiary of the account. The account which was seized, was kept separate from the property and accounts of the IMU. The functioning of the IMU as an organization is in no way obstructed by the counter-measure of Aristan.

It is, therefore, submitted that the measure was only directed against Majan, and also mainly affected Majan.

2. Aristan is under no obligation to grant immunities
to the administered account.

The IMU account does not enjoy immunity vis-à-vis Aristan.

In case of the existence of a bilateral treaty with the IMU, a State is irrespective of membership obliged to grant immunities to the organization according to the terms set out in the relevant treaty.

In all cases there is a provision in each specific bilateral treaty with the IMU, by which the signatory grants complete immunity to the assets of the IMU and the IMU is recognized as a regional organization³⁷.

Aristan is neither a member nor does it have a bilateral treaty with the IMU. Consequently, on these grounds there is no obligation for Aristan to grant complete immunity to the assets of the IMU.

The general rule is that international agreements bind only the parties. To others it is *res inter alios acta*³⁸.

The Convention on the Law of Treaties, to which both Applicant and Respondent are parties without reservation, also states in Article 34:

"A treaty does not create either obligations or rights for a third state without its consent."³⁹ This, of course, is in accordance with the fundamental principles of the sovereignty and independence of States, which puts forward that States must consent to rules before they can be bound by them⁴⁰.

Article 35 of the VCLT, however, states that an obligation for a third State could arise from a provision of a treaty if the parties so intend and if the third State explicitly accepts that obligation in writing.

37 See M. Rama-Montaldo, *supra* note 34, at 143.

38 M.N. SHAW, *supra* note 24, at 475.

39 See the Vienna Convention on the Law of Treaties, *supra* note 2.

40 M.N. SHAW, *supra* note 24, at 475.

Because it is the IMU practice to conclude bilateral treaties in which immunities are granted explicitly, there is no indication whatsoever that the parties to these bilateral treaties with the IMU intended to bind third States, nor has Aristan expressed any commitment to a bilateral treaty in writing.

Hence, on the basis of these provisions of the VCLT, Aristan is not obliged to grant the IMU immunity from seizure for its assets.

Moreover, it is submitted that the question of the alleged immunity of the assets seized is irrelevant since, with regard to the character of the account, the Aristani measures hardly affect the IMU but directly affect Majan.

**D. The Seizure of the Majani Account is not in Violation of
Aristan's Obligations Under International Law**

The United Republic of Aristan respectfully submits that the seizure of the IMU account is not in violation of Aristan's obligations under international law.

The seizure is a counter-measure directed against Majan.

CHAPTER III. THE ARISTANI COUNTER-MEASURE

A. Introduction

The former Aristani Ambassador to Majan was arrested and extradited to Majan by the Parrot Islands and is now being tried for acts committed while accredited to Majan.

This serious breach of international law, in particular the Vienna Convention on Diplomatic Relations, forced the Government of Aristan to take economic sanctions against Majan. Because our repeated protests were ignored by the Majani Authorities and that Government went ahead with the institution of criminal proceedings, we were forced to take appropriate measures in the form of seizing Majani assets on an administered deposit account with the First Aristani National Bank.

The seizure was lawful under Aristani law which provides emergency economic powers to the Aristani Government.

B. The Nature of the Seizure of the Majani Account

Under IMU Administration

Having established that the measure was not directed against the IMU and that the seizure is not precluded by the existence of any legal obligation incumbent upon Aristan *vis-à-vis* the IMU, the Government of Aristan will now describe the legal basis of the seizure.

It is well established in general international law that the property of States held in other countries is immune from execution, when this

property is used in the exercise of sovereign acts. In this case, however, Majan cannot invoke the right to State immunity due to the nature of the dispute. The measure has to be regarded as a counter-measure by Aristan as a reaction to a prior illegal act of State by Majan⁴¹.

C. The Right to Take a Counter-Measure

1. General

The Government of Aristan is of the opinion that a violation of any legal obligation calls for a social reaction⁴².

Despite repeated protests by the Government of Aristan, no reply was received from the Government of Majan. Redress by other means was unfeasible. Therefore, the purpose of the Aristani measure is to induce the Majani Government to comply with the law.

Moreover, the Government of Aristan has the right to take counter-measures. For example, the legitimacy of reprisals, other than armed reprisals as measures applicable against States which have committed international offences, was in no way denied by the representatives of the governments which participated in the preparation of the 'Declaration on Principles of International Law Concerning Friendly

41 See [1979] 2 Y.B. INT'L L. COMM'N, at 115, U.N. Doc. A/CN.4/SER.A/1979/Add.1 (part 2): the Commission stated that the wrongfulness of an act of State is precluded if the act constitutes a measure legitimate under international law, in consequence of an internationally wrongful act of that other State.

42 See E. ZOLLER, *supra* note 32, at 3.

Relations and Co-operation among States in Accordance with the Charter of the United Nations'⁴³.

On the contrary, it was recognized by these representatives, both explicitly and implicitly⁴⁴. Moreover, the taking of non-armed reprisals is a recognized right under general international law⁴⁵.

2. Economic measures under the U.N. Charter

The UN-Charter does not explicitly prohibit economic counter-measures. According to the *travaux préparatoires* of the U.N. Charter in 1945, the Committee rejected an amendment that included economic measures in the word 'force' in Article 2(4) of the Charter⁴⁶.

The consensus of the Special Committee on Friendly Relations was that the word 'force' as used in Article 2(4) of the Charter connoted armed force, and hence could not be stretched to include economic pressure⁴⁷. Consequently, Article 2(4) does not impose any constraint on economic

43 G.A. Res. 2625 (XXV), Oct. 24, 1970, 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc.A/8028 (1970).

44 See [1979] 2 Y.B. INT'L L. COMM'N, *supra* note 41, at 116,118; see also, the *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 1025-1026 (1928) [hereinafter cited as *Naulilaa Case*]: the Tribunal stated that it is legitimate to take reprisals in case of an earlier act, contrary to the law of nations.

45 See for examples of State practice O.Y. ELAGAB, *supra* note 32, at 38-39; *US Staff Case*, *supra* note 17, at 55: contrary to Judge Morozov in his dissenting opinion, this Court paid no attention to the alleged unlawfulness of the (non-armed) actions taken by the US; see, *infra*, at 20-21.

46 See Summary Report of the 11th Meeting of the Committee 1/1, Doc. 784 1/1/27, June 5, 1945, 6 UNCIO 334 (1945); Charter of the United Nations, U.N. Doc. DPI/511-175 (2-80).

47 See U.N. Doc. A/AC. 125, 1970, at 34.

sanctions⁴⁸. The Declaration on Friendly Relations is generally considered as constituting a reflection of customary law even by those authorities which have expressed criticism of some of its provisions⁴⁹.

3. The Vienna Convention on the Law of Treaties

On the basis of Article 60(2) of the VCLT, the aggrieved party is entitled to suspend or even terminate the operation of a treaty as a consequence of its breach.

4. Jurisprudence of this Court

According to this Court in the *US-Staff Case*, the Vienna Convention constitutes a self-contained regime⁵⁰.

The Majani Government did not seek redress within this closed system, and therefore acted in violation of the Vienna Convention⁵¹. By this act the Government of Majan seriously infringed the basic principle of the Vienna Convention which guarantees diplomats immunity from criminal jurisdiction in the receiving State⁵².

Hence, the Aristani Government was justified in suspending the operation of the Vienna Convention concerning the means of redress within that closed system and was entitled to seek redress outside the system⁵³.

48 D.W. Bowett, 13 VIRGINIA J. INT'L L. 9 (fall 1972); Bowett states that "there has been no agreement within the United Nations that economic reprisals are illegal under the Charter".

49 S.M. Schwebel, *Aggression, Intervention and Self-Defence in Modern International Law*, 136 ACAD. DE DROIT INT'L RECUEIL DES COURS 459-461 (1972, II).

50 See *US Staff Case*, *supra* note 17, at 40.

51 See *supra*, at 8, 9, 10 of the present Memorial.

52 In the *US Staff Case*, *supra* note 17, at 40, this Court emphasized the fundamental character of diplomatic immunity.

53 See [1966] 2 Y.B. INT'L L. COMM'N, at 253.

The right to do so was implicitly recognized by this Court in the *US-Staff Case* since the Court did not condemn the economic counter-measures taken by the US Government against Iran as a reaction to the illegal arrest and detention of US diplomats by the Iranian revolutionary students with the complicity of the Iranian Government.

Moreover, the Aristani submission is supported by this Court's Namibia Advisory Opinion that one of the basic principles governing international legal relations is that a party which violates or does not fulfill its obligations under a particular relationship cannot be recognized as retaining the rights which it claims to derive from the relationship⁵⁴.

In conclusion, the Government of Aristan had the right to take a counter-measure against Majan in reaction to the violation of an international obligation by Majan⁵⁵.

D. Legality of the Counter-Measure Itself

An economic counter-measure is not contrary to international law if three traditionally accepted preconditions are met⁵⁶.

⁵⁴ See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, [1971] I.C.J. 45 (Advisory Opinion of January 26, 1971).

⁵⁵ See, also, *Case Concerning the Air Services Agreement of 27 March 1946 (US v. France)* [1978], 54 INT'L L. REP. 337 (Lauterpacht, 1979) [hereinafter cited as *Air Services Award*].

⁵⁶ See, e.g., D.W. BOWETT, *supra* note 48, at 9-10 and O.Y. ELAGAB, *supra* note 32, at 35-36; also, the *Naulilaa Case*, *supra* note 44, at 1027-1028.

i The target State must be guilty of a prior international delinquency against the claimant State.

This Court stated in the *US Staff Case* that the measures taken by the U.S. were taken in reaction to what the U.S. believed to be flagrant and manifest violations of international law by Iran⁵⁷.

It can be derived from this statement that the Aristani counter-measure would not have been justifiable in the absence of prior wrongful conduct which provoked it. As has been demonstrated in Part One of this Memorial, Majan is guilty of a prior breach of the Vienna Convention by which Aristan was directly affected.

ii Redress by other means must be either exhausted or unavailable.

Repeated protests by the Government of Aristan were ignored by the Majani Government. Also the Majani authorities never requested a waiver of immunity of Ambassador Kitaro, nor did they request the Government of Aristan to prosecute Ambassador Kitaro or provide the Aristani Government with the means to do so, which would be in accordance with the Vienna Convention⁵⁸. Once Ambassador Kitaro had been extradited to Majan and criminal proceedings instituted, it was clear that only the taking of serious action could prevent Majan from putting Ambassador Kitaro on trial and possibly executing him. Therefore the taking of an economic counter-measure was the only appropriate means for Aristan⁵⁹.

57 *US Staff Case*, *supra* note 17, at 28.

58 *Id.*, at 40.

59 See, e.g., U.N. Charter Article 2(4), *supra* note 46 and the *Air Services Award*, *supra* note 55, at 340: the Tribunal stated that international law does not consider that countermeasures are prohibited even during negotiations with respect to the duty to negotiate.

iii The measures must be limited to the necessities of the case and proportionate to the wrong done.

The severity of the breach of a fundamental principle of international law by Majan justifies the Aristani counter-measure which cannot reasonably be qualified as disproportionate. The effects of the measure are in no way disproportionate to the effects of the prior breach⁶⁰.

Seizure of the assets is not irreversible and does not mean impossibility of restitution⁶¹.

Consequently, the Government of Aristan has firmly met the above three preconditions.

E. Effects on Third Parties

In case of counter-measures it is unavoidable that certain rights of third parties are infringed. Of course, this does not mean that a counter-measure which is otherwise lawful will be illegal merely because it has infringed the rights of an innocent third party⁶².

If a third party is affected by a counter-measure, that would be an indirect and unintentional consequence which, in practice, the wronged State will always try to avoid or to limit as far as possible⁶³.

This suggests that it will be necessary to take into account the overall intention and effect of a counter-measure in assessing its

60 See *Air Services Award*, *supra* note 55, at 338: the Tribunal emphasized the relationship between the effects of the breach and the effects of the counter-measures.

61 *Aegean Sea Continental Shelf Case: Request for the indication of interim measures of protection*, [1976] I.C.J. 10-11 (Order of Sept. 11, 1976); *infra*, at 24.

62 See, e.g., O.Y. ELAGAB, *supra* note 32, at 113.

63 See Y.B. INT'L L. COMM'N, *supra* note 41, at 121.

justifiability. The measure undertaken by Aristan was intended to affect Majan directly. The possible indirect effect upon the IMU, therefore, does not detract from the legality of the measure taken.

State practice provides numerous instances in which the freezing and blocking of assets was used as a counter-measure against a previous wrongful act of another State⁶⁴. The majority of these cases suggests that alien property may be frozen as a counter-measure. Seizure can be regarded as similar to freezing, since it does not preclude the possibility of restitution.

F. Conclusion

Proceeding from the foregoing, the United Republic of Aristan has met the requirements for the legitimate use of lawful counter-measures to affirm its legal rights, namely by acting in accordance with the Vienna Convention, the U.N. Charter, the Vienna Convention on the Law of Treaties, judicial decisions, State practice and doctrine⁶⁵.

64 See, e.g., O.Y. ELAGAB, *supra* note 32, at 106-108.

65 See Y.B. INT'L L. COMM'N, *supra* note 41, at 119-120.

VIII. SUBMISSIONS

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

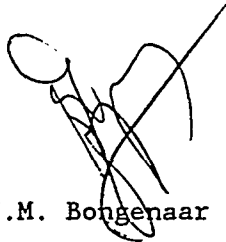
May it please the Court, rejecting all submissions to the contrary, to grant the following relief:

- I. the Court is requested to adjudge and declare that Ambassador Kitaro is immune from criminal prosecution under the Vienna Convention on Diplomatic Relations and grant provisional measures providing for the release of Ambassador Kitaro and the dismissal of all criminal charges against him.

- II. the Court is requested to adjudge and declare that the IMU account assigned to Majan on an administered deposit account with the First Aristani National Bank is not immune from seizure.

Respectfully submitted,

On behalf of the Government of the United Republic of Aristan,

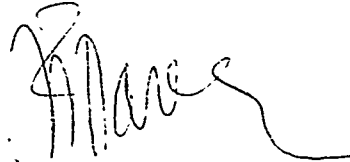


Rob F.J.M. Bongenaar

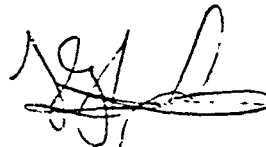


J.M.J. Maurice Maassen

01 February 1989



Monique Faverey



Jeroen G. Pliester