

IN THE INTERNATIONAL COURT OF JUSTICE

March 1986

Between:

MISRA

Applicant

and

AVON

Respondent

MEMORIAL FOR RESPONDENT

Team 6-4

Agents for Avon

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JURISDICTION

By agreement the Governments of the Republic of Misra and the Kingdom of Avon (the "Parties") submit the present dispute to this Court. The Parties expressly agree to accept the compulsory jurisdiction of the International Court of Justice. Under Article 36(1) of the Statute of the International Court of Justice, the Court has jurisdiction over all disputes which parties refer to it. In addition, under Article 36(2) of the Statute, the Court has jurisdiction to resolve legal disputes concerning any alleged breach of international law or other international obligation between States which have accepted the compulsory jurisdiction of the Court. Since the Parties have accepted this compulsory jurisdiction, the Court is empowered to resolve this dispute.

QUESTIONS PRESENTED

I.

Whether Avon's valid title to the artifacts in the Sloane Collection stems from the consent of the prior owners of such artifacts?

II.

Assuming arguendo that Avon did not originally possess valid title to the artifacts, whether the principles underlying acquisitive prescription compel the conclusion that title has since vested in Avon, where Avon possessed such property unchallenged for a century?

III.

Whether the UNESCO Convention does not vitiate Avon's ownership and right to possess the artifacts, where Avon has never ratified the Convention and the Convention does not apply retroactively?

IV.

Whether Avon has jurisdiction to try the persons accused of stealing the bust of Theslon from the Avon National Museum?

V.

Whether the Avon-Misra Extradition Treaty of 1950, by its terms compels the extradition of Madame Z and Erich Weiss, who are accused of stealing the bust of Theslon and are now present in Misra?

VI.

Whether the political offense exception excuses Misra's refusal to extradite Madame Z and Erich Weiss?

VII.

Whether Madame Z is immune from criminal jurisdiction due to her status as Ambassadoress to France under the doctrine of diplomatic privileges and immunities?

STATEMENT OF FACTS

The Sloane Collection, one of the world's finest displays of Misran antiquities, has for nearly two centuries been an item of Avonian national pride. Started in 1806, the Collection has over the years played a significant role in Avon's cultural heritage, fostering a brilliant new school of Avonian painting and contributing to an upsurge of interest in, and an understanding of, ancient artifacts. (Compromis at 2-3). The Collection is housed in the Avonian National Museum, a government institution, where the artifacts are carefully preserved and displayed for widespread viewing. (See Compromis at 3, 5).

The first items in the Collection were artifacts salvaged by Major Harrison Sloane when he was consul to the Salamic Province of Misra during the years 1802-1806 (the "Original Artifacts"). The Province had been formed when the Empire of Salamis conquered and incorporated all of Misra in the 17th century. (Compromis at 1). A well-known classical scholar and collector of antiquities, Major Sloane became interested in the historic preservation of the Misran artifacts in Tannis, the former ancient capital of Misra. (Id.)

Major Sloane applied to the Emir of Salamis, requesting unrestricted access to Tannis, and the Emir responded with a directive to the provincial Bey (the "Fezgrina Directive") which granted Major Sloane permission to study and remove "quelques pieces de pierre avec inscriptions et figures." This French translation is the only remaining documentation of the original directive. (Compromis at 2).

Operating under the Fezgrina Directive, Major Sloane mounted a concerted effort to salvage the artifacts of ancient Misra. In that year, some three hundred Salamic workers labored continuously to remove statues, friezes, frescoes, and other Misran antiquities; ultimately some two hundred crates were taken and shipped to Avon. (Id.). Although the Salamis Government protested Major Sloane's activities to the Government of Avon, Salamis never took any steps to restrain Major Sloane or his workers from their task. (Id.). Due to personal financial hardship, Major Sloane was forced to offer the artifacts, which had arrived in Avon by 1806, for sale to the Government of Avon. The Government purchased the entire collection and placed it in the Avon National Museum, where it remains today. (Compromis at 2-3).

Misra achieved independence from Salamis in 1826, and in 1827 enacted strict excavation regulations regarding the removal of Misran antiquities. (Compromis at 4). After it achieved independence, Misra also attempted to restore and preserve remaining archeological sites in Tannis and elsewhere. In addition, the Misran Government requested that the Government of Avon return the artifacts in the Sloane Collection to Misra. Avon has consistently denied such requests. (Compromis at 3).

The second set of artifacts in the Sloane Collection (the "Reparations") were acquired by Avon during an expedition against Misra in 1908 in reprisal for the killing of several Avonians, particularly Avonian diplomatic personnel. (Compromis at 4). The Reparations were later ceded by Misra to Avon

in a peace treaty (the "Peace Treaty"). The best of these artifacts were incorporated into the Sloane Collection; others were sold to private collectors in Avon. (Id.).

Finally, in 1913, the Avon National Museum acquired the bust of Theslon, a unique and valuable marble bust of an ancient Misran queen. The Museum had purchased the bust from an anonymous finder, who had obtained Misran customs clearance to export the artifact. (Compromis at 4). While the provenance of the bust has never been fully ascertained, a Misran investigation revealed that its customs official had not examined the contents of a case filled with Misran antiquities and which contained the bust of Theslon; nor did the official demand an itemization of the contents of the case. The investigation also revealed some inconclusive evidence of bribery.

The bust of Theslon remained carefully preserved and displayed in the Avon National Museum for seven decades when, in July of 1984, the bust was stolen from the museum. (Compromis at 6). The Government of Avon has charged two people, Erich Weiss, an Avonian art historian and his lover, Madame Z, Misra's Ambassador to France, with the crime. The two are also charged with violations of Avon's laws prohibiting the illicit export of cultural property. (Id.). The government of Avon and members of the international press corps suspect that the bust was smuggled out of Avon in Madame Z's diplomatic bags, thereby escaping customs inspection. (Id.).

Madame Z is president of the Misra National Organization ("MNO"), which is a nationalist organization seeking to restore cultural heritage and national pride to Misra. Among other members of the MNO are two individuals holding portfolios in the coalition government of Misra. (Compromis at 5).

While en route to her diplomatic post in France, Madame Z enjoyed a three day sojourn in Avon during which, among other activities, she visited the Avon National Museum with Erich Weiss. Shortly after that visit the bust of

Theslon disappeared, as did Erich Weiss. Three days following the theft, Mr. Weiss and the bust of Theslon resurfaced in Misra with no official explanation other than the unequivocal declaration by the Misran Minister of Cultural Affairs that the bust would never be returned to its place in the Avon National Museum. (Compromis at 6). Moreover, Misra has granted Mr. Weiss "honorary citizenship" as well as a grant of permanent residency. He is regarded as a national hero in Misra. (Id.).

The government of Avon has requested the extradition of Madame Z and Erich Weiss pursuant to the Avon-Misra Extradition Treaty of 1950. Without any explanation, Misra has refused extradition.

SUMMARY OF ARGUMENT

Avon's lawful ownership of all of the artifacts in the Sloane Collection derives from the consent of the prior owners of the artifacts. In the first instance, Salamis, the owner of the Original Artifacts, issued the Fezgrina Directive to Major Sloane authorizing the study and removal of Misran antiquities, and later neglected to take effective action to either rescind the directive or to stop Major Sloane's activities. Avon thus acquired good title to the Original Artifacts when Major Sloane sold them to Avon in 1806. Years later, Avon acquired title to the Reparations during a legitimate reprisal against Misra; Misra then formalized its consent to Avon's acquisition of these Reparations by ceding them to Avon in a peace treaty. Finally, a few years after this incident, Avon acquired title to the bust of Theslon when it purchased the bust, relying on the export authorization which a Misran official had provided to the seller.

Even assuming, however, that Avon's title to the artifacts was not originally valid, the principles underlying acquisitive prescription compel the conclusion that title has since vested in Avon. Moreover, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export

and Transfer of Ownership of Cultural Property (the "UNESCO Convention") does not vitiate Avon's ownership and right to possess the artifacts in the Sloane Collection because the Convention is inapplicable to the instant case. Even if the Convention is applicable, however, its explicit terms as well as the underlying policies call for this Court to confirm Avon's lawful ownership of the artifacts and to require Misra to return the bust of Theslon, which was recently stolen from Avon.

The theft of the bust of Theslon is a criminal offense over which Avon has territorial jurisdiction. In order to properly enforce its criminal laws, Avon requires the presence in its courts of Madame Z and Erich Weiss, who are accused of committing the theft. Therefore pursuant to the Avon-Misra Extradition Treaty of 1950 (the "Extradition Treaty"), Avon has requested the extradition of Madame Z and Erich Weiss.

The terms of the Extradition Treaty compel the extradition of Madame Z and Erich Weiss. The treaty explicitly covers the instant case: thieves have stolen artifacts from a public museum and escaped to another State in an attempt to avoid culpability for their crime. Thus, the Extradition Treaty and the norms of customary international law compel the extradition of Madame Z and Erich Weiss.

I. AVON'S VALID TITLE TO THE ARTIFACTS IN THE SLOANE COLLECTION STEMS FROM THE CONSENT OF THE PRIOR OWNERS OF SUCH ARTIFACTS.

The consent of sovereign States constitutes the fundamental law-making process in international law.¹ Consent, whether explicit or implicit, lies at the heart of the most binding sources of law codified in the Statute of the International Court of Justice.² In the instant case, Avon obtained valid title to all of the artifacts in question through the consent of the previous owners.

A. Avon's Lawful Ownership Of The Original Artifacts Derives From The Consent Of Salamis.

1. Under the international law regarding state succession in force at the time, title to the Original Artifacts vested in Salamis.

The identity of the valid owner of the Original Artifacts at the time of their acquisition by Major Sloane should be determined under the international law in force at that time. As Huber, Arbitrator, stated in the Island of Palmas arbitration, "[a] judicial fact must be appreciated in the light of the law contemporary with it."³ Both States⁴ and publicists⁵ recognize this proposition; plain common sense and equity renders it self-evident.

The classical international law in force at the time of Salamis' conquest of Misra held that state succession resulted from a definitive change in state

¹See Gross, The Peace of Westphalia: 1648-1948, 42 Am. J. Int'l. 20 (1948).

²Statute of the International Court of Justice, art. 38, para. 1, secs. (a) and (b); see also 1969 Vienna Convention on the Law of Treaties, art. 34, opened for signature May 23, 1969, U.N. Doc. A/CONF. 39/27 [hereinafter cited as 1969 Vienna Convention] and North Sea Continental Shelf (Den. v. W. Ger.; Neth. v. W. Ger.), 1969 I.C.J. 118.

³Island of Palmas (Neth. v. U.S.), 2 R. Int'l Arb. Awards 829, 845 (1928).

⁴E.g, id.

⁵E.g., Lindsey, Conquest: A Legal and Historical Analysis of the Root of United Kingdom Title in the Falkland Islands, 18 Tex. Int'l L. Rev. 11 (1983) [hereinafter cited as Lindsey, Conquest].

identity, such as that caused by acquisition of a State's territory by conquest.⁶ The facts show that Salamis became the successor State to Misra according to this view. Salamis both conquered and incorporated all of Misra.⁷ Indeed, Salamis' acquisition of Misra's territory was so complete that it can be viewed as debellatio, the ancient concept in international law applicable to situations involving a devolution of sovereignty.⁸

The fact that Avon, a principle world power during that time,⁹ had appointed Major Sloane as consul to the Salamic Province of Misra further supports the conclusion that Salamis was the successor State to Misra. While consuls were not then equivalent to diplomats, Avon's appointment of Major Sloane as consul nevertheless indicates recognition of Misra's status as a province of another State, rather than as a State in itself. All of the facts surrounding the history of Salamis' conquest of Misra thus compel the conclusion that Salamis became the successor State to Misra.

According to Brownlie, one of the consequences of state succession is the transfer of property to the acquiring State.¹⁰ State practice and publicists also recognize that among the public property which passes to the successor is the cultural property of the acquired State.¹¹ The conclusion is therefore inescapable that Salamis, as the successor State to Misra, became possessed of

⁶Kussbach, Conquest, 3 Encycl. of Pub. Int'l L. 119, 120 (R. Bernhardt ed. 1982) and Kunz, Identity of States Under International Law, 49 Am. J. Int'l L. 68, 72 (1955).

⁷Compromis of Art Treasures Case, signed 1985 (Misra v. Avon) at 1 [hereinafter cited as Compromis].

⁸Meyn, Debellatio, 3 Encycl. of Pub. Int'l L. 145, 146 (R. Bernhardt ed. 1982).

⁹See Compromis, supra note 7, at 1.

¹⁰I. Brownlie, Principles of Public International Law 655 (3d ed. 1979).

¹¹E.g., Cultural Agreement, Dec. 27, 1949, Indonesia-Netherlands, art. 9, 69 U.N.T.S. 258 and Fitzmaurice, The Juridical Clauses of the Peace Treaties, 73 Recueil Des Cours 259, 287-8 (1943, vol. II), cited in 2 M. Whiteman Digest of Int'l L. 909-10 (1963) (discussing Italian Peace Treaty of 1947); see also I D.P. O'Connell, International Law 450 (1965) [hereinafter cited as O'Connell].

all of Misra's property and thus owned the Original Artifacts when they were obtained by Major Sloane.

2. Avon's title to the Original Artifacts derives from Salamis' consent.

As the valid owner of the Original Artifacts, Salamis had the right and power to hold or dispose of such property as it saw fit. The Emir of Salamis, the head of that State's government, chose to consent to the study and removal of Misran antiquities by Major Sloane. Operating under the Fezgrina Directive, Major Sloane did study and remove the Misran artifacts.¹²

While Salamis later protested Major Sloane's actions, it is clear that such delayed protest did not vitiate Salamis' earlier consent. Major Sloane had conducted his activities on a grand scale, and in full public view for over a year.¹³ Not once during that period did Salamis take any action to either rescind its directive, or to stop Major Sloane's activities. This fact, together with the positive evidence of Salamis' consent provided by the Fezgrina Directive, more than counterbalances Salamis' ineffective protest. Consequently, Major Sloane acquired good title to the Original Artifacts.

Major Sloane subsequently conveyed that valid title to Avon, when in 1806 he sold the Original Artifacts to the Avon National Museum.¹⁴ Avon's lawful ownership of the Original Artifacts thus began in that year and continues to the present day.

B. Avon's Title To The Reparations Was Made Clear And Unequivocal When Misra Ceded The Reparations To Avon In The Peace Treaty.

1. The Reparations rightfully belong to Avon, in the first instance, as property acquired in a legitimate reprisal.

At the time Avon conducted its expedition against Misra the use of force was not proscribed by international law; this was explicitly recognized by

¹²Compromis, supra note 7, at 2.

¹³See id.

¹⁴Id. at 3.

publicists as late as 1912, four full years after the 1908 expedition.¹⁵ State practice¹⁶ and publicists¹⁷ agreed that reprisals were an entirely legitimate means of self-help, where they occurred in response to acts contrary to international law by the offending State, which were proportionate thereto, and had remained unredressed after a demand for amends. Avon's expedition against Misra was lawful because it met each of these conditions.

First, Avon's expedition against Misra was a proper response to, and was provoked by, the deaths of several Avonians, particularly diplomatic personnel, the official representatives of Avon's government. Such deaths were caused by a wave of anti-western rioting in Misra.¹⁸ Eminent publicists agree that general international law obligates States either to prevent acts injurious to other States from being committed in their territories, or to punish such acts and to force recompense to be paid.¹⁹ Regardless, then, of whether the Misran Government directly fomented the rioting, Misra nevertheless violated its duty under international law by allowing the rioting to occur. Accordingly, Avon's expedition against Misra was proper in reprisal against this delict.

In addition, Avon's actions in acquiring the Reparations was proportionate to Misra's delict. It is significant in this regard that the only action which the Compromis reveals occurred during this expedition was the taking of Misran artifacts.²⁰ There is no mention that any Misran blood was shed,

¹⁵P. Heilborn, Grundbegriffe des Völkenechts 23 (1912), cited in Randelzoffer, Use of Force, 4 Encycl. of Pub. Int'l L. 265, 266 (R. Bernhardt ed. 1982). But see Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

¹⁶E.g., Naulilaa Incident (Port. v. Ger.), 2 R. Int'l Arb. Awards 1012 (1928).

¹⁷See generally 12 M. Whiteman, Digest of Public Int'l Law 321-28 (1971) (quoting various publicists re the topic of reprisal).

¹⁸Compromis, supra note 7, at 4.

¹⁹E.g., H. Kelsen, Principles of International Law 126 (1959).

²⁰Compromis, supra note 7, at 4.

whether of military or civilian individuals. A reprisal taken against property is one of the more limited measures a State can take to redress its injuries, and reprisals historically consisted of such actions against property.²¹

Finally, because the *Compromis* is silent regarding whether Misra refused an Avonian demand for redress, this factor should remain neutral as to both parties since there is no way for this Court to ascertain whether this condition was met. Given, however, the fact that Avon's acquisition of the Reparations was otherwise entirely lawful, and that in any case the Reparations were ceded to Avon by Misra,²² this Court should find that the Reparations properly belong to Avon.

2. Title to the Reparations vested in Avon, independently of the reprisal, when Misra ceded the Reparations to Avon.

While it is clear that Avon was justified, in the first instance, to acquire the Reparations under its right of reprisal, Misra's decision to formally cede title in the Peace Treaty makes clear and unequivocal Avon's right to such artifacts. Under Article 38, paragraph 1, section (a) of the Statute of the International Court of Justice,²³ this Court is required to resolve the dispute between Misra and Avon by applying the Peace Treaty. Since the Peace Treaty evidences Misra's consent to Avon's ownership of the Reparations, this Court should find that the Reparations rightfully belong to Avon.

As McNair pointed out in the Law of Treaties, state practice has been consistent throughout history in recognizing the binding nature of peace treaties, regardless of the possibility of the threat of force:

Numerous decisions were given by the PCIJ upon the Treaty of Versailles of 1919 and other Peace Treaties entered into at the end of the First World War, and it is believed that in no case did any of

²¹Stone, Legal Controls of International Conflict 290 (2d imp. rev. 1959), cited in 12 M. Whiteman Digest of Int'l Law 154-55 (1971).

²²*Compromis*, supra note 7, at 4.

²³Statute of the International Court of Justice, art. 38, para. 1, sec. (a).

the defeated powers allege that an armistice agreement or a treaty was not binding upon it because its consent had been obtained by force or, the threat of force, namely the continuance or the renewal of war.²⁴

While it is true that in modern times, a treaty obtained without full freedom of consent would be invalid under Article 52 of the Vienna Convention on the Law of Treaties, that provision does not apply retroactively.²⁵ Thus, Misra's cession of the artifacts regardless of whether completely voluntary, conveyed to Avon full legal title to the Reparations.

C. Avon Acquired Title To The Bust Of Theslon When Avon Legitimately Purchased The Bust, Relying On Official Misran Export Authorization Evidencing Misra's Consent.

Under the doctrine of state responsibility a State is responsible for the wrongful acts of its public officials.²⁶ It is well-settled in arbitral jurisprudence that a customs officer is a state official and as such the State is responsible for his actions.²⁷ For instance, in one such arbitration a State was held responsible for the actions of its customs official who had seized the claimant's goods in "perfect accord with local legislation," but who had failed to perform a "reasonable inquiry" which would have disclosed the fact that the goods were not properly subject to seizure.²⁸

In the instant case, a Misran customs official granted official customs clearance to export the bust of Theslon.²⁹ Avon should not be penalized for relying on that official export authorization in its legitimate purchase of

²⁴A. McNair, The Law of Treaties 209 (1961) [hereinafter cited as McNair] (emphasis added).

²⁵II Yearbook of the International Law Commission 247 (1966), cited in 14 M. Whiteman Digest of Int'l Law 272 (1970).

²⁶E.g., 2 O'Connell, supra note 11, at 1043-44

²⁷E.g., Owners of the Jessie (Gr. Brit. v. U.S.), 6 R. Int'l Arb. Awards 57 (1921); Coquitlan (Gr. Brit. v. U.S.), 6 R. Int'l Arb. Awards 45 (1920).

²⁸Mannot Case (U.S. v. Venez.), 9 R. Int'l Arb. Awards 232, 233 (1903) (emphasis added).

²⁹Compromis, supra note 7, at 4.

the bust. Nor should Avon be held responsible for the actions of the seller of the bust. The seller presented valid customs clearance with the bust. That Avon was unaware of any problem in the way the seller acquired the clearance should not affect Avon's good title to the bust. Assuming Misra's investigation is correct, it was the Misran customs official who failed to perform a 'reasonable inquiry' which would have disclosed the presence of the bust, and who failed to demand an itemization of the contents of the case.³⁰ Notwithstanding the possibility of bribery, the customs official did not properly perform his office, particularly in view of Misra's strict excavation regulations. Avon obtained good title through its purchase of the bust of Theslon. Principles of equity and state responsibility support a finding that the bust rightfully belongs to Avon and should, therefore, be returned by Misra to Avon.

II. EVEN ASSUMING ARGUENDO THAT AVON DID NOT ORIGINALLY POSSESS VALID TITLE TO ANY OF THE ARTIFACTS IN THE SLOANE COLLECTION, THE PRINCIPLES UNDERLYING ACQUISITIVE PRESCRIPTION COMPEL THE CONCLUSION THAT TITLE HAS SINCE VESTED IN AVON.

The principles underlying acquisitive prescription provide that a State may obtain good title to property, even though such title may have been originally invalid.³¹ Both state practice³² and publicists³³ recognize this notion. It is regarded as "without any doubt a 'general principle' of law recognized by civilized nations."³⁴ Under acquisitive prescription, a State must exercise its "authority in a continuous, uninterrupted, and peaceful manner . . . for a

³⁰Id. at 4-5.

³¹Johnson, Acquisitive Prescription in International Law, 27 Brit. Y.B. Int'l L. 332 (1950) [hereinafter cited as Johnson, Acquisitive Prescription].

³²E.g., Island of Palmas (Neth. v. U.S.), 2 R. Int'l Arb. Awards 829, 867-912 (1928); see also Johnson, Acquisitive Prescription, supra note 31, at 340-42.

³³Johnson, Acquisitive Prescription, supra note 31, at 334-40.

³⁴Id. at 343 (citing Verykios, La Prescription au droit international public 40-55 (1934)).

sufficient period of time, provided that all other interested and affected states . . . [acquiesce] in this exercise of authority."³⁵ The facts surrounding Avon's possession of the artifacts in the Sloane Collection satisfy each of these requirements.

An extraordinary length of time has passed since the occurrences upon which Misra bases its claim. One hundred eighty-three, seventy-eight and seventy-three years have passed, respectively, since Avon acquired the Original Artifacts, the Reparations and the bust of Theslon.³⁶ During that time Avon has 'exercised its authority' over the artifacts by publicly displaying them in the Avon National Museum, a government institution.³⁷ Avon's possession of the artifacts during those years has been 'continuous, uninterrupted and peaceful.'

Perhaps most importantly, Misra's lack of effective protest over those years amounts to acquiescence on Avon's ownership. It is true that, prior to the establishment of an international tribunal, States were left to pursue their claims through diplomatic protests or war.³⁸ Ever since the establishment of the Permanent Court of International Justice ("PCIJ"), however, diplomatic protest has no longer been sufficient, on an indefinite basis, to establish a lack of acquiescence on the part of the protesting State.³⁹ Rather,

[t]he position now is that, if the matter is a proper one for determination by the Secretary Council or the International Court of Justice, failure to bring the matter before the Court must be presumed to amount to acquiescence, even if, for propaganda purposes,⁴⁰ or other reasons, 'paper protests' are still made from time to time.

³⁵Id. at 353.

³⁶See Compromis, supra note 7, at 2, 4.

³⁷Compromis, supra note 7, at 3.

³⁸Johnson, Acquisitive Prescription, supra note 31, at 341-42.

³⁹Id.

⁴⁰Id. at 342.

Misra's ineffectual protests to the Government of Avon thus do not preclude a finding of acquiescence. On the contrary, Misra's failure to follow up its protests with effective action bolsters the conclusion that Misra instead actually acquiesced in the situation. Even if one measures Misra's failure to take effective action from the date upon which Misra could bring its claim before an international tribunal, the passage of sixty-six years since that date still proves the point of acquiescence.

The Court's finding that title to the artifacts has vested in Avon should, moreover, not be affected by the fact that the instant case involves a question of title to chattel, rather than to territory. Although acquisitive prescription has been applied in the past to situations involving title to territory, the principles underlying acquisitive prescription apply with equal force to chattel. Acquisitive prescription and its municipal law counterpart 'adverse possession' both trace back to the Roman law notion of usucapio.⁴¹ Under usucapio, an originally defective title was considered cured by possession over a period of time.⁴² Courts⁴³ and publicists⁴⁴ agree that this theory applies with equal validity to chattel as to territory. The principle purpose of acquisitive prescription, to preserve international order and stability,⁴⁵ would clearly be defeated in the instant case were Misra allowed to take the artifacts from Avon. No State could be confident in the security of its title to land or to chattel if this Court were to hold today that a century's unchallenged possession of property is an insufficient period of time for title to

⁴¹ Id. at 334-35; Ames, The Disseisin of Chattels 3 Harv. L. Rev. 313, 318 (1890) [hereinafter cited as Ames, Chattels].

⁴² Johnson, Acquisitive Prescription, supra note 31, at 335.

⁴³ Ames, Chattels, supra note 41, at 321.

⁴⁴ E.g., Redmond v. New Jersey Historical Soc'y, 132 N.J. Eq 464, 473-76, 28 A.2d 189, 194 (1942).

⁴⁵ Johnson, Acquisitive Prescription, supra note 31, at 333.

vest in the possessor. As one authority has stated: "In the interests of the stability of society the law must draw a line somewhere and under reasonable conditions lend its sanctions to the state of affairs that already exist in fact."⁴⁶

III. THE UNESCO CONVENTION IN NO WAY VITIATES AVON'S OWNERSHIP AND RIGHT TO POSSESS THE ARTIFACTS.

A. The UNESCO Convention Is Inapplicable To The Instant Case.

1. Avon has never ratified the Convention.

Articles 1 and 9⁴⁷ of the UNESCO Convention provide that accession and ratification are the exclusive means by which a State may become bound by the Convention. Avon has signed but never ratified the Convention;⁴⁸ because the Convention is not self-executing, Avon's signature is not sufficient to render the Convention binding upon Avon. Avon's signature merely binds Avon to refrain from taking actions inconsistent with the purposes of the Convention,⁴⁹ a requirement with which Avon has complied.

Avon's decision to enact legislation consistent with Articles 6, 7, 8 and 13 of the Convention evidences its support of the spirit underlying the Convention. It must be remembered, however, that such action was entirely voluntary and was undertaken independently of the Convention.⁵⁰ The enactment of legislation in no way binds Avon to the Convention. As this Court itself pointed out in the North Sea Continental Shelf Case:

[W]hen a number of States, have drawn up a convention specifically providing for a particular method by which the intention to become bound by the regime of the convention is to be manifested [e.g.,

⁴⁶Id. at 335.

⁴⁷UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted, Nov. 14, 1970, arts. 1 & 9, 823 U.N.T.S. 231, 248 [hereinafter cited as UNESCO Convention].

⁴⁸Compromis, supra note 7, at 9.

⁴⁹1969 Vienna Convention, supra note 2, at art. 18.

⁵⁰Compromis, supra note 7, at 9.

ratification] . . . it is not lightly to be presumed that a State which has not carried out these formalities . . . has nevertheless somehow become bound in another way.⁵¹

The UNESCO Convention explicitly provides that ratification or accession are the exclusive means by which the Convention can enter into force with regard to a State. Because Avon never ratified or acceded to the Convention, it is not in force with regard to Avon and is consequently inapplicable to the settlement of the issues in the instant case.

2. The UNESCO Convention does not apply retroactively.

It is clear from the language of the Convention that it is a forward-looking document — its provisions will apply to a particular State only when the Convention enters into force with regard to that State.⁵² Thus the Convention is inapplicable to the instant case because Avon has never ratified the Convention, the condition precedent to the Convention's entering into force with respect to Avon.

B. Even If The Court Were To Apply The Convention To The Instant Case, Avon Would Not Be In Violation Of The Convention.

Article 3 of the Convention makes it illegal to import, export or transfer ownership of cultural property contrary to the provisions of the Convention.⁵³ None of the artifacts in the instant case was acquired in contravention of the Convention. Article 6 of the Convention obligates a State to ensure that official authorization accompany the export of any property; article 7 requires a State to control the acquisition by a museum of any property not so authorized.⁵⁴

⁵¹North Sea Continental Shelf (Den. v. W. Ger.; Neth. v. W. Ger.), 1969 I.C.J. 118

⁵²E.g., UNESCO Convention, supra note 47, at art. 7.

⁵³Id. at art. 3.

⁵⁴Id. at arts. 6 & 7.

Avon is not in violation of these provisions. First, Avon acquired the Original Artifacts long before any export laws were ever enacted.⁵⁵ Thus, they were not "illegally exported." Second, Avon acquired the Reparations in a legitimate reprisal action against Misra, and the artifacts were ceded to Avon by Misra.⁵⁶ Accordingly, their acquisition was not in violation of the Misra 1827 excavation laws. Finally, it was Misra itself which issued the certificate authorizing the export of the bust of Theslon.⁵⁷ The Avon National Museum was entitled to rely on such evidence of export authorization, and its acquisition of the bust was, therefore, entirely lawful.

C. The Values And Policies Of The Convention Would Be Promoted Best By Confirming Avon's Ownership And Right To Possess The Artifacts.

The spirit which underlies the Convention has at its heart the interest of the entire world community in the cultural property of mankind; this spirit is explicitly embodied in the Preamble to the Convention.⁵⁸ The Convention establishes a legal system which balances such lofty values as respect for cultural diversity and acknowledgement of a shared heritage in significant art⁵⁹ against the narrow national interest of a State in displaying cultural property within its own territory. The instant case presents a classic situation where this balance tilts overwhelmingly toward keeping the property in Avon, where the property best serves the interest of the world community. The artifacts at issue are not Misra's alone, but belong to the world community. As one eminent authority has stated: "It is not farfetched . . . to view cultural geography in the same light of lex ferenda as the high seas, Antarc-

⁵⁵ See Compromis, supra note 7, at 2.

⁵⁶ See Compromis, supra note 7, at 4.

⁵⁷ See Compromis, supra note 7, at 4-5.

⁵⁸ UNESCO Convention, supra note 47, at Preamble.

⁵⁹ Nafzinger, An Anthro-Apology for Managing the International Flow of Cultural Property, 4 Houston J. Int'l L. 189, 194-95 (1982).

tica, and outerspace."⁶⁰ Given that the artifacts have come, over the years, to play an important part in Avon's own national culture, and that their display in the Avon National Museum ensures their protection and presentation,⁶¹ as well as their accessibility to the world, this Court should emphatically affirm Avon's right to own, possess and display the artifacts. The natural corollary to the recognition of Avon's ownership of the Sloane Collection is the requirement that Misra return the bust of Theslon, which was wrongfully stolen from Avon.

IV. THE THEFT OF THE BUST OF THESLON, PROPERTY WHICH AVON LAWFULLY OWNS, JUSTIFIES AVON'S EXERCISE OF ITS TERRITORIAL JURISDICTION TO PRESCRIBE AND ENFORCE ITS CRIMINAL LAWS.

It is an unquestioned rule in international law that "the law of a State extends to all persons and to all acts committed within its territorial jurisdiction."⁶² A criminal offense is the most serious violation of a sovereign's authority to prescribe law because it directly threatens the peace and good order of the State. Therefore, the jurisdiction to enforce the law is the necessary correlative to the fundamental right to prescribe the law.

Accordingly, Avon has the sovereign right and the duty to preserve the integrity of its criminal code for the protection of Avonians and all other citizens of the world community present in Avon. Avon must enforce its criminal laws against those who violate them on Avonian soil. In order to properly enforce its criminal law, the presence of Madame Z and Erich Weiss, both accused of violating the law, is essential. Avon therefore requests extradition in accordance with the Avon-Misra Extradition Treaty of 1950 and customary international law.

⁶⁰Id. at 196.

⁶¹Compromis, supra note 7, at 3, 5.

⁶²R. Rafuse, The Extradition of Nationals (1939) [hereinafter cited as Rafuse].

V. THE EXTRADITION TREATY BETWEEN MISRA AND AVON BY ITS TERMS REQUIRES THAT MISRA EXTRADITE THE ACCUSED FOR TRIAL IN AVON.

Articles 1, 2 and 8 of the Extradition Treaty between Avon and Misra compel the extradition of Madame Z and Erich Weiss by Misra.⁶³

- A. Article 1 Of The Extradition Treaty Obligates Misra To Extradite Persons Charged With Committing An Offense Within The Territory Of The Requesting State.

Avon has territorial jurisdiction over the perpetrators of the crime because it was committed on Avonian soil.⁶⁴ The Kingdom of Avon has charged Mr. Erich Weiss and Madame Z with the theft of the Bust of Theslon and therefore they must be extradited under the Treaty.

- B. In Compliance With Article 8 Of The Extradition Treaty, Avon Has Established A Prima Facie Case Supporting The Charges It Has Brought Against The Accused.

Avon bases its charges against the accused on the following facts and inferences: 1) the bust of Theslon disappeared during Madame Z and Mr. Erich Weiss' visit to the museum; 2) Madame Z belongs to an organization that seeks to collect historical art for Misra; 3) Mr. Weiss, as Madame Z's lover, would be motivated to participate in the conspiracy to rob the Museum; 4) as an Avonian art historian, Mr. Weiss would be familiar with the Museum and could easily devise and implement a scheme to rob it; 5) Mr. Weiss disappeared and Madame Z left Avon at the same time the bust was discovered stolen; 6) Madame Z's luggage would have escaped customs inspection due to the trust and respect Avon extends to visiting diplomatic personnel; 7) the stolen property and Mr. Weiss both resurfaced in Misra without an official explanation; and 8) Erich Weiss has been treated as a national hero for his part in the theft and the illicit importing of the bust of Theslon in Misra.⁶⁵ From the foregoing, a reasonable inference that Mr. Weiss and Madame Z are involved in the

⁶³Compromis, supra note 7, at 7-9.

⁶⁴Compromis, supra note 7, at 4-6.

⁶⁵Compromis, supra note 7, at 5-7.

theft can clearly be drawn supporting the charges Avon has brought against them. Avon has established its prima facie case, thereby fulfilling Article 8 of the Extradition Treaty.⁶⁶

C. Avon Has Charged Madame Z and Erich Weiss With Extraditable Offenses Under Article 2 Of The Extradition Treaty.

1. Article 2, paragraph 1 of the Extradition Treaty is met.

- a) The offenses for which extradition is requested are contained in the Appendix.

Mr. Weiss and Madame Z robbed the Avon National Museum (Appendix No. 9), transported the stolen property out of Avon (Appendix No. 24), all in violation of Avon's customs laws (Appendix No. 25) and the general laws prohibiting the receipt of or transporting of stolen property (Appendix No. 13).⁶⁷

- b) Double criminality is present.

Article 31 of the Vienna Convention on the Law of Treaties states that treaties "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose."⁶⁸ The object and purpose of extradition treaties is the suppression of crime through international cooperation in the apprehension of criminals and suspected criminals.⁶⁹ The purpose of a double criminality provision is to prevent the situation where extradition is requested for an act which does not constitute a crime in the requested state.⁷⁰ The ordinary meaning of the double criminality provision of this extradition treaty therefore looks to whether or not the act, as perpetrated, on Avonian soil would also be criminal if perpetrated in Misra. It is beyond question

⁶⁶Compromis, supra note 7, at 8.

⁶⁷Compromis, supra note 7, at 9.

⁶⁸1969 Vienna Convention, supra note 2, at art. 31.

⁶⁹6 M. Whiteman, Digest of International Law 727 (1968).

⁷⁰Blakesley, Extradition Between France and the United States: An Exercise in Comparative and International Law, 13 Vand. J. Transnat'l L. 653 (1980).

that if two individuals were to enter a museum in Misra and rob it of artifacts the Misran government had put on display for the benefit of the world community and illegally transport them out of the country, a crime would have been committed under Misran law.

Furthermore, international law requires only that "the essential constituent elements" of the crime be the same in both countries in order for double criminality to be present.⁷¹ Because they are included in the Appendix, it can be assumed that the crimes of robbery, receiving valuable securities unlawfully obtained, customs violations and the illegal transit of merchandise are substantially similar in both countries.

Finally, the crimes with which Mr. Weiss and Madame Z have been charged are punishable by up to two years imprisonment by both Misra and Avon.⁷² This fact demonstrates the seriousness of the offenses charged and explains their inclusion in the Appendix listing extraditable offenses.

2. The offenses not listed in the Appendix for which extradition is requested are punishable by the laws of both States in conformity with Article 2, paragraph 3 of the Extradition Treaty.

Avon and Misra have both passed legislation consistent with Articles 6, 7, 8 and 13 of the UNESCO Convention.⁷³ It therefore serves as a relevant source of law, the violation of which constitutes an extraditable offense under Article 2, paragraph 3 of the Extradition Treaty. The bust of Theslon qualifies as cultural property under the UNESCO Convention as a product of 'archaeological excavation and artistic interest.'⁷⁴ Article 6 of the Convention requires an appropriate certificate for the export of cultural

⁷¹Extradition: Burglary Re Budlong and Kember QBD (Div Ct), November 30, 1979, 130 New L.J. 90 (1980); see also J. Verzijl, International Law in Historical Perspective (1972).

⁷²Compromis, supra note 7, at 9.

⁷³UNESCO Convention, supra note 47.

⁷⁴Id. at Article 1.

property.⁷⁵ It is obvious that one was not procured by either Mr. Weiss or Madame Z. Article 7(6) explicitly prohibits the importing of cultural property stolen from a museum.⁷⁶ Both Avon and Misra punish violations of these laws when committed within their jurisdictions under the Treaty.⁷⁷ Madame Z and Mr. Weiss are accused of violating these provision by stealing and smuggling the bust out of Avon.

In refusing to extradite Madame Z and Mr. Weiss for offenses under the UNESCO Convention, Misra has itself violated Article 13 of the UNESCO Convention, which Misra has ratified.⁷⁸ Misra has tolerated the importing of cultural property illegally exported from Avon and has refused to cooperate in either restoring the property or extraditing those charged with stealing it.⁷⁹ According to its own law Misra is obligated to extradite.

D. Article 12 Of The Extradition Treaty, Concerning Nationals, Does Not Bar Extradition.

1. Madame Z's status as a Misran national does not excuse her from the consequences of her criminal act.

Madame Z, through her status as a diplomat, clearly is a Misran national. The option not to extradite nationals has, according to customary international law, been coupled with an undertaking by the requested State to prosecute the accused for the offences charged.⁸⁰ The national is not given license to violate another State's laws. Instead, the goal is the fair prosecution for charges properly brought. It is not at all certain that Misra will prosecute Madame Z in exchange for the exercise of its option not to extradite her.

⁷⁵UNESCO Convention, supra note 47.

⁷⁶Id.

⁷⁷Compromis, supra note 7, at 7.

⁷⁸UNESCO Convention, supra note 47.

⁷⁹Compromis, supra note 7, at 6.

⁸⁰I. Shearer, Extradition in International Law 97 (1971).

Misra's failure to prosecute her will violate the universal principle that treaty obligations will be exercised in good faith (pacta sunt servanda) as articulated in Article 26 of the Vienna Convention on the Law of Treaties.⁸¹ By refusing to either extradite or prosecute its nationals accused of violating a foreign State's criminal laws, Misra will be condoning and encouraging such behavior in direct contradiction of its duty under the Extradition Treaty. Misra's unequivocal refusal to explain the appearance of stolen property on its soil presents a strong indication of its unwillingness to meet its Extradition Treaty obligations.

2. Erich Weiss is an Avonian national and therefore extradition is appropriate under Article 12 of the Treaty.
 - a) "Honorary citizens" are not recognized as nationals under the Extradition Treaty.

According to the Vienna Convention on the Law of Treaties, a special meaning will be given to a term only if it is established that the parties so intended.⁸² The maxim, 'that which is not included in a treaty is expressly excluded' (expressio unius est exclusio alterius) is well-established in international law.⁸³ In the arbitration between the United States and Germany arising out of the sinking of the Lusitania, the Umpire unequivocally stated that "expressio unius est exclusio alterius is a rule of both law and logic and applicable to the construction of treaties."⁸⁴ The exclusion of the definition of the term "national" from the Extradition Treaty only can be interpreted to mean that the parties intended it to have its historic and customary meaning.

Customary international law recognizes nationals according to three

⁸¹1969 Vienna Convention, supra note 2, at Article 26.

⁸²Id. at Article 31(4).

⁸³McNair, supra note 24, at 399.

⁸⁴Arbitration between the United States and Germany arising out of the sinking of the Lusitania, 19 A.F. (1924) 593-609; A.D. 1923-24, No. 197, cited in McNair, supra note 24, at 402.

methods, jus soli, jus sanguinis and naturalization.⁸⁵ Clearly Mr. Weiss lacks jus soli or jus sanguinis; the remaining question is whether he can be said to have been naturalized. "Naturalization must be based on an explicit voluntary out of the individual."⁸⁶ Mr. Weiss has not evidenced an intention to renounce his Avonian citizenship nor has he resided in Misra for any period of time. Furthermore, Misra has deliberately stopped short of naturalizing Mr. Weiss by merely granting him "honorary citizenship."⁸⁷ This is evidenced by Misra's concurrent grant of "permanent residency" in Misra. Nationals possess the inherent right to reside in their home State and would not need a special concurrent grant of permanent residency.⁸⁸ As far as international law is concerned, Mr. Weiss is at best an Avonian national residing in Misra.

- b) Misra's grant of honorary citizenship to Mr. Weiss is not effective as a matter of customary international law.

Misra, in attempting to treat Mr. Weiss as a national for purposes of an international treaty, has taken the issue out of the realm of municipal law and placed it in the realm of international law. Misra is not the first nation to attempt to confer ex post facto citizenship on foreign nationals. Historically, international law has rejected such actions in cases where the conferral of citizenship has international significance. "In a matter, which like that of nationality is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by its obligations which it may have undertaken towards other states."⁸⁹

The 1965 Resolution of the Institute of International Law restated the

⁸⁵ I. Brownlie, Principles of Public International Law 386 (3rd ed. 1979).

⁸⁶ Id. at 391.

⁸⁷ Compromis, supra note 7, at 6.

⁸⁸ See Cavers, Habitual Residence: A Useful Concept?, 21 Am. U.L. Rev. 475 (1972).

⁸⁹ Nationality Decrees in Tunis and Morocco (Tunis v. Morocco), 1923 P.C.I.J., Ser. B, No. 4.

limits on when such action may be effective:

From the practice as determined by an examination of international tribunals, three rules seem discernable: 1) the link of nationality must exist at the date when the injury giving rise to the claim occurred; 2) the link of nationality must exist at the time the claim is presented; and 3) the link of nationality must exist continuously⁹⁰ from the date of injury up to the time of presentation of the claim.

Mr. Weiss cannot be considered a Misran under these rules because he was an Avonian at the time of the theft which gave rise to a claim of extradition under the Extradition Treaty.⁹¹ While these rules formally apply in the context of diplomatic protection, there is a direct parallel with the extradition context present in this case. In both situations a State is attempting to evade international law through the use of its power to grant citizenship. This subversion of international law has not been tolerated throughout history, nor should it be now.⁹²

The Mergè Case (U.S. v. Italy) is directly on point because it dealt with the dual national.⁹³ The question involved in that case was whether a woman with Italian and American citizenship could use her newly acquired American citizenship against Italy through the device of diplomatic protection. The Commission answered that question in the negative, relying on the principle of effective and dominant nationality.⁹⁴ Similarly, Mr. Weiss' recent grant of honorary citizenship is not effective against Avon.

In the Nottebohm Case (Liechtenstein v. Guatemala) this Court held that in order for a grant of citizenship to have international significance against a foreign State there must be a "genuine link" between the granting State and

⁹⁰Cuthbert, Nationality and Diplomatic Protection 24 (1969) [hereinafter cited as Cuthbert].

⁹¹Compromis, supra note 7, at 6.

⁹²Cuthbert, supra note 90.

⁹³Mergè Case (U.S. v. Italy), 14 R. Int'l. Arb. Awards 236 (1955).

⁹⁴Id.

the individual.⁹⁵ A determination of genuine link is to be made with reference to the "factual ties" between the individual and the State whose nationality he is claiming.⁹⁶

Mr. Weiss' factual ties are to Avon, not Misra. It appears that Mr. Weiss has been an Avonian citizen all of his life and, most importantly, at the time he is accused of having violated Avon's criminal law. Undoubtedly Mr. Weiss has friends, family and colleagues still residing in Avon with which his brief tenure as a Misran "honorary citizen" cannot compare. As did Mr. Nottebohm, Mr. Weiss lacks any prolonged residence in Misra. His professional ties are to Avonian art history; in fact he lacks any link with Misran patrimony. The only connection of any substance is his romance with a Misran woman.

The lack of 'genuine links' between Mr. Weiss and Misra is not the only foundation on which to base extradition. Extradition is requested for a crime which Mr. Weiss is accused of committing on Avonian soil while unquestionably an Avonian citizen. Moreover, Mr. Weiss was charged under the very same criminal code which protected him throughout his lifetime as an Avonian. Finally, the policies which historically favored the refusal to extradite nationals are inapplicable to the case of Mr. Weiss. As an Avonian national he will be tried according to his native law by his own nationals in his native tongue. Thus, there can be no principle of international law which would bar Mr. Weiss' extradition.

VI. THE POLITICAL OFFENSE EXCEPTION OF CUSTOMARY INTERNATIONAL LAW DOES NOT BAR TO EXTRADITION.

The majority of States' generally hold that the political offense excep-

⁹⁵Nottebohm Case (Liechtenstein v. Guatemala), 1955 I.C.J. 4.

⁹⁶Id.

tion is only applicable in the context of a disturbance or violent uprising.⁹⁷ Unlike the typical case in which the political offense exception might apply, this case deals with a purely criminal act of robbery. No political uprising or disturbance existed in Avon which might justify the crime perpetrated by Madame Z and Mr. Weiss. If a political movement can be said to exist it is within Misra, not Avon. The political offense exception, however, is not intended to excuse acts of robbery committed in a separate foreign State. Instead, it is meant to grant asylum to those peoples so oppressed by their own governments that violence and other illegal acts are the only recourse available.⁹⁸ To say otherwise would be to grant to any organization which disagrees with a foreign State's policy, license to use illegal means to achieve its purpose so long the means are orchestrated according to some political purpose. This would directly contravene Article 33 of the Charter of the United Nations⁹⁹ which requires that in disputes between nations peaceful means must be employed for their resolution.

VII. EXTRADITION OF MADAME Z IS CONSISTENT WITH THE CUSTOMARY INTERNATIONAL LAW REGARDING DIPLOMATIC PRIVILEGES AND IMMUNITIES.

A. According To The Vienna Convention On Diplomatic Relations, Madame Z Is Not Immune From Avon's Criminal Jurisdiction.

Article 40 of the Vienna Convention on Diplomatic Relations specifically addresses the situation where a diplomat accredited to one State travels through a third State en route to the diplomatic post.¹⁰⁰ If that diplomat is

⁹⁷ See generally Eain v. Wilkes, 641 F.2d 504, 518 (7th Cir. 1981); Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962); In Re Castioni, [1891] 1 Q.B. 149 (1890).

⁹⁸ Banoff & Pyle, "To Surrender Political Offenders": The Political Offense Exception to Extradition in United States Law, 16 N.Y.U.J. Int'l L. & Pol. 169 (1984).

⁹⁹ U.N. Charter art. 33, para. 1.

¹⁰⁰ Vienna Convention on Diplomatic Relations opened for signature April 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter cited as 1961 Vienna Convention].

proceeding directly to the accredited State or from the accredited State to the home State, a third State is obligated only to provide such immunity as is necessary for transit.¹⁰¹

Oppenheim stated that customary international law requires only that the diplomat receive immunity for innocent passage.¹⁰² Madame Z is not entitled to immunity from criminal jurisdiction because she was accredited to France not Avon and she did not limit her presence in Avon to innocent passage.

Innocent passage, according to customary international law, must be continuous and expeditious.¹⁰³ Madame Z's three day sojourn does not qualify as passage; therefore, she may not claim the immunities Article 40 bestows on diplomats passing through third States.

In addition, Madame Z's complicity in the robbery of the Avon National Museum removes her from the class of "innocent travelers" intended to receive immunity under Article 40. "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the . . . State."¹⁰⁴ In violating Avon's criminal law, Madame Z has acted so as to threaten the good order of Avon and therefore her stay in Avon was neither a passage nor was it innocent.

Finally, if the diplomat accredited to another State travels in a third State for purposes of conducting personal business, the Article 40 immunity is automatically lost.¹⁰⁵ Madame Z spent her time in Avon attending concerts,

¹⁰¹E. Satow, A Guide To Diplomatic Practice 242-53 (1979).

¹⁰²L. Oppenheim, International Law (H. Lauterpacht 8th ed. 1955).

¹⁰³Draft Convention on the Law of the Sea, U.N. 3rd Conf. on Law of the Sea, art. 18, A/Conf. 62/WP. 10/Rev. 3, Sept. 22, 1980. See also Convention on the Territorial Sea and the Contiguous Zone of April 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205.

¹⁰⁴Id.

¹⁰⁵E. Denza, Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations (1976).

giving a lecture and visiting the Avon National Museum.¹⁰⁶ She was not officially proceeding directly to her diplomatic post so, by its very language, Article 40 does not apply to her. That this is a correct reading of Article 40 is corroborated by the practice of other states.¹⁰⁷

Even if Madame Z could qualify for the Article 40 immunity for innocent passage, she would not be immune from criminal jurisdiction because Article 40 does not provide the type of blanket immunity a receiving State customarily accords its accredited diplomats.¹⁰⁸ The immunity a third State is obligated to provide is limited to what is necessary for the diplomat's unimpeded transit. That immunity was freely granted Madame Z by Avon in allowing her to travel unhindered by customs inspections.¹⁰⁹

Even if Article 40 were to include immunity from criminal jurisdiction and Madame Z could somehow qualify for it, her abuse of the immunity of innocent passage violates Article 41 of the Vienna Convention on Diplomatic Relations¹¹⁰ and compels a waiver of the immunity from criminal jurisdiction pursuant to Article 32.¹¹¹ Diplomats, as a condition of their immunity, are expected to respect the law of the State in which they are present.¹¹² For her violation of the trust Avon extended to her as Ambassador from Misra,

¹⁰⁶Compromis, supra note 7, at 6.

¹⁰⁷U.S. v. Rosal, 191 F. Supp. 663 (S.D.N.Y. 1960) (The court held that an ambassador to another State passing through the United States to the home State on personal business without continuing directly on to the home State was not entitled to immunity from U.S. criminal jurisdiction.).

¹⁰⁸D. Grieg, International Law (1970).

¹⁰⁹Compromis, supra note 7, at 6.

¹¹⁰1961 Vienna Convention, supra note 100, at art. 41 (Article 41 provides that "it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State.").

¹¹¹Id. at Article 32 (Article 32 provides that "the immunity from jurisdiction of diplomatic agents . . . may be waived by the sending State.").

¹¹²C. Hurst, International Law (1950).

Misra should waive her diplomatic immunity so that she may stand trial for the criminal offense she has been charged with by Avon.

B. Diplomatic Immunity Only Extends To Official Acts.

Even if Madame Z was granted immunity from criminal jurisdiction, the de lege ferenda in this area has paralleled that in the area of sovereign immunity such that the immunity does not extend to cover private acts under the restrictive theory.¹¹³ Madame Z's alleged theft from an Avonian museum for her own private purposes unrelated to her nation's mission in France should not receive the immunity that is reserved for diplomats requiring immunity for their proper function.¹¹⁴

CONCLUSION

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

1. Declare that Avon lawfully owns the Original Artifacts, the Reparations, the bust of Theslon and all other artifacts in the Sloane Collection.
2. Order that Misra return the bust of Theslon to Avon.
3. Order the extradition of Madame Z and Erich Weiss so that they may stand trial in Avon for the offenses with which they are charged.

All of which is respectfully submitted

Team 6-4
Agents for Avon

¹¹³See Société Anonyme de Chemins de Fer Liegeois Luxembourgeois v. The Netherlands, [1903] Pasicrisie I, 294; Dame Marigo Kildani v. The Ministry of Finance of Greece, 24 Bulletin de Legislation et Jurisprudence Egyptiennes 330 (1911-1912); Letter from the Acting Legal Advisor of the Department of State to the Department of Justice, May 19, 1952, 26 U.S. Dept. St. Bull. 984 (1952).

¹¹⁴R. Higgins, The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience, 79 Am. J. Int'l L. 641 (1985).