NO.

IN THE

INTERNATIONAL COURT OF JUSTICE

THE HAGUE, NETHERLANDS

APRIL TERM, 1986

THE KINGDOM OF AVON APPLICANT

V

THE REPUBLIC OF MISRA RESPONDENT

MEMORIAL FOR THE KINGDOM OF AVON

ERRATA (AVON)

1. Pages 1-2, para. 1,2 & 3 : whereever " salomis" occurs, substitute " Salamis "
2. Page 1, para. 1, line 2 : delete " Bay "; insert " Bey "
3. Page 1, para. 2, line 1: delete "old" ; insert "art".
4. Page 1, para. 3, line ; delete "treaty" ; insert "directive".
5. Page 2, para. 1, line 1 : delete " misraj" ; insert " misra ".
6. Page 3, para . penultimate, line 5 : delete " pacta sont servondA" ; insert " pacta sunt servandA ".
7. Page 4, first sentence : delete "our" and "of"; insert " art and "as" respectively.
8. Page 5, para.1 : insert full stop between "known" and "unless"
9. Page 6, para. 2, line 3 : delete "compiled" ; insert "complied"
10. Page 6,para.1 , line 4 : delete "notified" insert "ratified ".
11. Page 7, para.5, sentence 1 : delete "notified" ; insert "ratified"
12. Page 9, line 12, substitute "Weiss" for "kleiss"
13. Page 11, line 23 : substitute number "27" for number "26".
14. Page 11, line 21 : insert "the" between the words "allow" and "contradiction".
15. Page 11, line 30 : substitute "as" for "at".
16. Page 12, line26 : insert "facts" between "the" and "the".
17. Page 15, line 24 ; substitute "parker" for "parties".
18. Page 15, line 17 : substitute "Jayanti " for " Joyonti ".
19. Page 16, line 26 : substitute " business " for "visit".
20. Page 16, line 29 : substitute "accordance" for "being"
21. Page 17, line 4 : insert numeral 3 before sentence starting " Article 8 " and begin new paragraph.
22. Page 17, line 29 : substitute " Orfield" for "Garfield".

23. Page 18, line 1 : Paragraph starting " The strict rules" should be indented

24. Page 18, line 9 : substitute " Avon " for " Misra "

25. Page 18, line 22 : insert numeral "4" in margin.

****

TABLE OF CONTENTS

BOOKS / TREATIES

1. Bassiouni and Nanda, A Treatise on International Criminal Law. (1983.)
2. Brownlie I. International Law and the Use of Force by States.
3. Deak, 19 American International Law cases.
4. Denza E., Diplomatic Law Commentary on the Vienna Convention on Diplomatic Relations . (1970).
5. Harris, Cases and Material on International Law. (3rd Ed. 1983)
6. 10 International Legal Materials 289
7. Phipson, Phipson on Evidence. (12th Edn. 1982).
8. Schultz H., The Classic Law of Extradition and Contemporary Needs in International Criminal Law.
9. Shearer I.A., Extradition in International Law . (1971).
10. Ulassic Ed., Explorations in Aerospace Law. (1968).
11. Oppenheim, International Law (8th Edn. 1955).
12. Great Britain - Israel Treaty of 4th April, 1960. T.S.No. 77 (1960) Cmnl. 1223.
13. Hague Peace Conferences 1899 and 1907 ; done at the Hague 29th July 1899 and October 1907 respectively.
14. Hague Convention on certain questions relating to the conflict of Nationality Laws 179 LNTS 89.
15. Vienna Convention on the Law of Treaties , May 23rd, 1969.

PERIODICALS

1. Deere, Political Offences in the Law and Practice of Extradition 27 AJIL 247.

2. Lauterpacht E, 23 British Yearbook of International Law 218 (1946).

3. Smith, 23 British Yearbook of International Law 226 (1946).

4. Lauterpacht E, 30 British Yearbook of International Law.

5. Wright 26 American Journal of International Law. 26 (1946).

STATUES

1. Statue of the International Court of Justice.

2. Lietchenstein, Law of Jan, 4th, 1934.

ADDITIONAL PERIODICAL

Whiteman M, Whiteman's Digest of International Law (1968).

1. Bergman v. re Sieves 191 Federal Supplemental 334 (1946).

2. British Guiana v. Venezuela Boundary Arbitration 92 B.F.S.P 160 (1899-1900).

3. The Charmanski's Case Periodques Belges Vol.24 (1911) no.854.

4. Charmezal Arbitration Case 5 A.J.I.L. 782 (1911).

5. Chorzow Factory Case P.C.I.J. Rep. Series A, No.17.

6. Menzel v. Liszt 49 Misc. 2d 300, 267 N.Y.S. 2d 804.

7. Nottebohm Case 1955 I.C.J Rep 4.

8. R. v. Governor of Pentonville ex parte Teja /1971/ 2 All ER 9.

9. R. v. Guildhall Magistrates Courts ex parte Jarrett Thorpe The Times , Oct.5,1977 (Q.B.D.)

10. R. v. Governor of Brixton Prison ex parte Kolcizynki /1955/ 1 Q.B.D 540.

11. R. v. McDonald ex parte Strutt /1901/ Q.L.J. 85.

12. re Galway /1896/ 1 Q.B.D. 230.

13. Right of Passage Case I.C.J. Rep. 1960 ; page 6.

14. S. v. Pirzenthal /1969/ 2 S.A. 224 (T).

15. United States v. Rosenberg etal (1946) 6 F.R.D. 69.

16. United States v. WilliamRauscher 119 U.S. 407 (1866).

JURISDICTION

Litigation is commenced in accordance with:

1. The Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, done at Paris on the fourteenth day of November 1970.

2. The Hague Peace Conferences, done at the Hague on the eighteenth day of October, 1907 and the twenty-ninth day of July, 1899.

3. The Vienna Convention on the Law of Treaties, done at Vienna on the twenty-third day of May, 1969.

4. The Extradition Treaty between the Governments of the Kingdom of Avon and the Republic of Misra.

5. The provisions of Article 38 (1) of the Statute of the International Court of Justice.

STATEMENT OF FACTS

The Republic of Misra was a poor country colonized by the Empire of Salamis during which time Major Harrison Sloane was appointed as the Kingdom's consul there in 1802.

Sloane, an art collector, was denied permission from the Provincial Bey to undertake measures for the historic preservation of Misra's ancient capital of Tannis. He successfully appealed to the Emir of Salamis. Under the " Fezgrina Directive " issued to him, he was authorized to remove " quelques pieces de pierre avec inscriptions et figures " , over 200 crates of remains were shipped to Avon.

The art treasures were sold by Sloane to his government after a study commission appointed by it approved the circumstances under which they were acquired. They were placed in the government-owned Avon National Museum, and inspired worldwide interest in ancient Misran art, including humans remains containing jewellery, and documents.

Misra achieved independence on July 4,1826 and its immediate and subsequently consistent requests to Avon for the return of the Sloane Collection were refused with equally consistency. Anti-Avonian sentiment in Misra resulted in the violent deaths to several Avonian citizens including diplomats. Avon therefore launched a punitive expedition against Misra. An art expert, D. Van Dean, accompanied the Avonian troops and acquired many Misran artifacts which were ceded to Avon as " war reparation " under the peace treaty concluded between the two countries "

In 1913, a marble bust of the Ancient Misran queen Theslon was excavated and exported from Misra. No evidence of compliance with Misran 1827 regulations prohibiting such acts without governmental consent was shown. Inconclusive evidence of bribery and deception existed, but the entire circumstances of its excavation and export were never conclusively established. The best were added to the Sloane Collection.

Misra's requests for the bust and the Sloane collection were all denied . Avon claimed ownership on the basis that the collection was part of the common cultural heritage of mankind , and that it was subject to damage on outdoor display in Misra. Misra claimed the collection on the basis of it being illegally acquired by Avon and it being Misra's cultural patrimony.

On July 1984, the marble bust of Theslon was removed from the Avon National Museum and returned to Misra in undisclosed circumstances. Investigative journalisn revealed that it was removed by Madame Z, the Misran ambassador to France who was on a 3 days stopover in Avon en route from Tannis to Paris and Ehrich Weiss, the lover of Madame Z. Both persons were visitors at the Musuem immediately before the bust was missed. Erich Weiss was accorded Misran honorary citizenship and permanent residence, and was treated as a national hero in Misra. Without explanation, Misra has denied Avon's request for the extradition of Madame Z and Ehrich Weiss to face charges of theft , and for the return of the marble bust.

Both countries are original parties to all global agreements on the law of armed conflict and signatories to the UNESCO Convention on the Means of Pronibiting and Preventing the Illicit Import,Export and Transfer of Ownership of Cultural Property done in 1970.

Both signed it in 1975, but only Misra has ratified it and Avon is not now likely to do so. They are also parties to bilateral treaty on extradition which contains the following provisions:

ARTICLE 2
Extraditable Offences

1. Extradition shall take place, subject to this Treaty, for wilful acts which fall within any of the clauses of the Appendix and are punishable in accordance with the laws of both Contracting Parties, by a deprivation of liberty, the maximum of which shall not be less than one year.

.....

3. Extradition shall also be granted for wilful acts, which, although not being included in the Appendix, are punishable, in accordance with the laws of both Contracting Parties, by deprivation of liberty the maximum of which shall not be less than one year.

.....

ARTICLE 8

Extradition shall be granted only if the evidence be found sufficient, according to the laws of the requested Party, either to justify the committal for

trial of the person sought if the offense of which he has been accused had committed in that place or to prove that he is the person convicted by the courts of the requesting Party.

.....

ARTICLE 12

Extradition of Nationals

Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall cooperate in good faith in delivering them up if, in its discretion, it be deemed proper to do so.

.....

ARTICLE 22

Surrender of Property

To the extent permitted under the law of the requested Party and subject to the rights of third parties,which shall be duly respected , all articles, instruments, objects of value or documents relating to the offense, whether or not used for its execution, or which in any other manner may be material evidence for the prosecution , shall be surrendered upon the granting of the extradition even when extradition cannot be effected due to the death, disappearance, or escape of the accused.

The requested Party may condition the surrender of

articles upon a satisfactory assurance from the requesting Party that the articles will be returned to the requested Party as soon as possible.

APPENDIX

..... 9. Robbery or burglary.

13. Receiving or transporting any money or other valuable securities, knowing the same to have been unlawfully obtained.

24. An offense against the laws relating to the importation, exportation or international transit of merchandise.

25. Violations of customs laws.

****

QUESTIONS PRESENTED

I. Whether the Government of Misra must comply with the Extradition Treaty made with the Government of Avon and return the Bust of Queen Theslon and Madame Z and Earl Weiss to Avon.

II. Whether the Government of Avon is under an obligation to return the Sloane Collection to Misra, according to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of ownership of Cultural Property.

III. Whether the Sloane Collection was lawfully taken from Misra by Major Sloane and under "the peace Treaty" of 1908.

IV. Whether the Marble Bust of Theslon was lawfully removed from Misra in 1913, or from Avon in July 1984.

Avon

Summary of Arguments

1. The Sloane Collection was lawfully taken from Misra because:

   (i) The Fezgrina Directive was lawfully issued and obeyed

   (ii) The peace treaty of 1908 validated the acquisition of all war booty taken during the Expedition and

   (iii) There is no evidence to show that the Marble Bust of Theslon was illegally exported to Avon from Misra.

2. The Sloane Collection is the common cultural heritage of mankind, over which ownership can be lawfully exercised by Avon.

3. The Marble Bust of Queen Theslon was unlawfully removed or stolen from Avon and should therefore be returned pursuant to the rules of International law and the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit, Import, Export and Transfer of Ownership of Cultural Property.

4. Madame Z was not covered by diplomatic immunity during her stop-over in Avon and is therefore extraditable pursuant to the bilateral treaty of Extradition made between Avon and Misra.

5. Under the rules of International Law, Earl Weiss is still a national of Avon and cannot be shielded from extradition by a shown endowment of citizenship from Misra.

6. The crimes committed by Madame Z and Earl Weiss were common Acts of theft and breaches of customs laws, and are not protectable as political offences.

I. THE SLOANE COLLECTION WAS LEGALLY TAKEN FROM MISRA.

(i) THE FEZGRINA DIRECTIVE

It cannot be seriously contended that the Emir of Salomis could not lawfully issue the Fezgrina Directive and thereby overrule the Provincial Bay. Authority to take such decisions rest in the Emir of Solomis as the Head of State of the Salomic Province of Misra. In almost every hierarchical governmental structure, and especially in a Colonial one, superiors can and sometimes should, overrule their subordinates. A denial of this truism would wreak chaos and gross uncertainty in the affairs of governments.

Since Major Sloane acted within the boundaries of his authority, the old objects and other artifacts he took were all legitimately acquired. The French translation, which is the only remaining evidence of the terms of the orginal directive, contains no limitation on the amount of artifacts that Major Sloane could remove. Neither was there any limitation on the period of time over which the objects could be removed.

The facts do not establish that Major Sloane removed the human remains in their caskets, which were not included within the literal terms of the treaty. Assuming, but in no way conceding, that it was he who did remove them, their removal can still be justified on the principle of necessity.

These caskets containing human remains also contained jewellery and the things in which Sloane would have been interested. Nothing is known of the type of jewellery involved, and they may well have been within the description laid down in the Fezgrina Directive. Such jewellery were accessible only if their depository, the caskets and preserved bodies, were removed and explored. Removal of these objects was therefore an act that was reasonably incidental to the powers granted by the Directive.

However repugnant Major Sloane's act was to the citizens of Misraj there seem to be no basis on which a public outcry could render unlawful an act that was undoubtedly lawful from the start. This must have been recognized by the Government of Salomis which refused to revoke Sloane's authority or to restrain him in any way. Instead, an attempt was made to put pressure on the Major to operate on a smaller scale, by approaching his government in Avon and lodging a protest.

If the Government of Salomis thought that Sloane's acts were illegal, as distinct from repugnant, it is reasonable to assume that it would have revoked the authority and even expelled him from Misra. Under customary international law[1] and the practice of states[2], Salomis was empowered to take expulsive action.

Major Sloane was well within the law in seeking and obtaining for himself the privileges he exercised. A consul may claim for himself rights and privileges sanctioned by local laws.[3] The preservation of historic objects is a most benevolent act that any sincere art collector would seek to achieve, and the desirability of such steps was codified in the Hague Peace conferences of 1907 and 1899.[4]

(ii) THE EXPEDITION AND THE ACTS THEREIN WERE LEGALLY JUSTIFIABLE UNDER THEN EXISTING RULES OF INTERNATIONAL LAW.

International law recognises the right of one state to take action against another for injuries received by the one. Moore[5] states that "retortion is the appropriate answer to acts which it is within the strict light of a state to do ... but which are evidence of unfriendliness... It consists of treating the subjects of the State giving provocation in an identical or closely amalogous manner with that in which the subjects of the state using retortion are used". State practice suggests that Avon's despatch of a punitive expedition for the atrocious crimes

committeed on Avonian nationals in Misra was justifiable.

Japanese refusal in 1852 to protect nationals of the United States visiting there resulted in the despatch of an imposing naval force.[6]

A squadron was despatched to the Mediterranean in 1858 by the United States government, with instructions to "inflict upon the criminals the punishment they so richly deserve" for massacaring several United States citizens at Gaffa.[7]

The intervention of an international force in China in 1900; the bolckade of Venezuela by Germany, Great Britain and Italy in 1902 and the Pershing Expedition into Mexico in 1916[8] are all examples of state practice in these matters.

Alternatively, Avon's action was a lawful act of reprisal against Misra. Moore[9] distinguishes retortion and reprisal by the fact that "retorsion" is retaliation in kind, while "reprisal" is seizing or arresting the goods or trade of subjects of such state as set-off for injuries received. Not only were Misran properties seized, but they were retained with Misran consent.

(iii) THE PEACE TREATY WAS A FREE EXPRESSION OF MISRA'S AGREEMENT TO MAKE REPARATIONS.

Pursuant to its right which existed at International Law, Avon seized Misran property to endow the seizure with legality, the peace treaty was executed. This was done only because of Avon's desire to act as far as possible in accordance with law. Misra must abide by the doctrine whereby all treaties must be honoured: pacta sont servando. This doctrine forms the basis of the performance of all international obligations.

The general principle of estoppel, whereby a party will not be allowed to revoke an obligation made in return for a benefit, should be applied by this court as directed by Article 38 (1)(c) of the statute which sets it up.

(iv) THE HAGUE REGULATIONS FOR THE OPERATION OF WAR WERE INAPPLICABLE.

The Hague Peace conferences of 1899 and 1907 protects our property from confiscation of war booty. This proscription, however, did not apply to the Avonion troops because they did not fit the description of "army of occupation", to which the prohibitions are directed. Article 42 of the 1899 convention defines territory as being occupied "when it is actually placed under the authority of the hostile army" and explains that "the occupation applies only to the territory where such authority is established and in a position to assert itself." Avon did not intend to occupy Misra, and did not do so.[10] There is no evidence to show that Misra came under Avonian authority. This condition, not being satisfied, results in the inapplicability of the Hague Regulations to the Avonian expedition.

Thus Avon's act in launching aginst Misra a punitive expedition, during which a member of its armed forces lawfully took Misram property, cannot be used as the basis of any alleged wrongdoings on Avon's part.

(v) THE MARBLE BUST OF QUEEN THESLON WAS LEGALLY ACQUIRED BY THE AVONIAN NATIONAL MUSEUM.

There is no evidence whatsoever to prove that the marble bust of Theslon was excavated contrary to the 1827 Misram regulations. The location and circumstances of the find were never fully disclosed. The possibility exists, therefore, that the bust was legally excavated. Ignorance of a fact is no reason to charge that the circumstances were illegal.

So also is there no evidence that the bust was exported without government consent. The permission of the customs official represents that of the government. The bust was not hidden in a clandestine manner. Any concealment could have, and it is submitted, was indeed purely accidental. That it was not seen was due to the carelessness, negligence or laziness of the customs

official.

Not only is the change of bribery based on inconclusive evidence, in addition, the purpose of the bribery and the person bribed is not known unless Misra can produce more facts and cogent evidence to substantiate their claim that the bust was illegally exported, the benefit of any doubt must lie in Avon's favour.

(vi) AVON HAS ACQUIRED A PRESCRIPTIVE RIGHT TO THE SLOANE COLLECTION

The Sloane Collection consists of items taken from Misra in 1806, 1827 and 1913. Avon has been in possession of the collection nearly one hundred years now. It is a principle of general law and of international law that undisturbed possession over a long period of time will validate title in the hands of the possessor.

This doctrine of prescriptive rights was applied in British Guiana v Venezuela Boundary Arbitration.[12] It was stipulated in that case that adverse holding of prescription during a period of 50 years shall make a good title. Other cases in which the doctrine was considered include the Chumizal Arbitration case between the United States and Mexico (1911)[13] and the Right of Passage Case between Portugal and India in 1960.[14]

The basis on which the doctrine is founded is that long held rights cannot be disturbed whimsically, or because of some ancient claim. Peace and goodwill are best served by leaving such long held title where they lie. This doctrine is based in sound sense and good law, and exists in private as well as public law. It is applicable in this dispute and must operate to confer indisputably rights of ownership in the Sloane collection to the Kingdom of Avon.

II. AVON HAS NO OBLIGATION IN INTERNATIONAL LAW TO RETURN THE SLOANE COLLECTION.

Avon is not bound to return cultural property taken from Misra. The relevant principles and authorities in international law do not demand such action. The UNESCO Convention on the Illicit Movement of Art Treasures 1970[14] was never notified by, and so is not binding on, Avon.[15] Avonian legislation pursuant to the Convention's provisions has been made independently of the Convention itself. Even if the Convention was binding on Avon, it would not be applicable since the provisions therein are aimed at property illicitly exported after the Convention's entry into force.[16] This cannot be said of the Sloane collection.

Avon has refused to act in accordance with its municipal laws in full knowledge of the provisions of Article 18 of the Vienna Convention on the Law of treaties 1969.[17] This article has been compiled with however because Avon's intention not to become a party to the treaty has been notified to the Government of Misra.

In addition, no general prin ciple of restitution can apply in Misra's favour. This principle, as established in the Chorzow Factory Case[18] only applies where an unlwful act was committed.

The collection reposes legally in Avon as a part of the world's cultural heritage.

The fact that the Slaone collection is a part of the world's cultural heritage is beyond doubt. It has provided tremendous knowledge on the early inhabitants and civilization of Misra. The concept of a cultural heritage of mankind is not unknown in international law. It has been articulated in relation to the High Seas; outer space; the moon and other celestial bodies; and cultural property itself.

"The Declaration of principles governing the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction 1970"[19] stated that the sea-bed, inter alia, "are the common heritage of mankind".

The "Treaty on Principles governing the activities of States in the exploration and use of Outer Space, including the moon and other celestial bodies 1967"[20] declares that space and its bodies "shall be the province of all mankind."

The "Intergovernmental Conference on the Protection of Cultural Property in the event of Armed Conflict 1954"[21] declares that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind ..."

The risk of damage to the Sloane collection if it is returned to Misra cannot be taken. Avon has a duty to protect it as the cultural heritage of mankind.

AVON IS ENTITLED TO THE RETURN OF THE BUST OF THESION PURSANT TO THE 1970 UNESCO CONVENTION.

Misra has notified the 1970 UNESCO Convention after it entered into force, the Marble bust of Queen Theslon was illicitly exported or stolen from Avon into Misra. The 1970 UNESCO Convention, the provisions of which have been implemented in Misra's laws, demand the return of the bust to Avon. Misra is under a duty to comply with Article 7 of the Convention and prevent its museum from acquiring the bust.

It is also bound by Article 8 to penalize Madame Z and her Avonian lover for their responsibility in stealing or illicitly exporting the bust.

I. The government of Avon seeks to estalish that Ehrich Weiss and Madame Z are extradictable from Misra for their theft of the statute of Queen Thelson from the Avonian National Museum. To establish this we will seek to prove four points:

(i) That Ehrich Weiss is still a national of Avon according to International Law and cannot be regarded as a citizen of Misra.

(ii) That Madame Z is not covered by diplomatic immunity and is extraditable for crimes committed in Avon.

(iii) That a prima facie case is proven against these parties as required by Article 8 of the Extradition Treaty between Avon and Misra.

(iv) That the statute of Queen Theslon should be permanent returned to Avon even if extradition of Weiss and Madame Z are not granted.

1. In customary international law extradition is a discretionary measure. States jealously guarded their rights to grant asylum to those sought by the law enforcement agencies of other states. It was because of the exercise of these rights that the extradition treaties were formed to govern the rights of extradition between states. Modern extradition treaties still leave a measure of discretion in the hands of the executive as to whether or not to surrender a fugitive.

Such discretion is widest in the area of nationals of the requested country. Many treaties expressly forbid the surrender of such nationals while others make it discretionary whether such nationals are surrendered. The reasoning behind this is the idea that a state owes a certain level of protection to its nationals and should therefore not be bound to abrogate that duty as against any other state. The nationality of the fugitive is therefore crucial to the question of extradition.

The Extradition Treaty between the Kingdom of Avon and the Republic of Misra states in Article 12 that -

> Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall cooperate in good faith in delivering them up if, in its discretion, it be deemed proper to do so.

This article codifies a norm of international extradition law that a state shall not be bound to surrender its own national under any such treaties, as mentioned above.

It is questionable, however, what is the effective nationality of Ehrich Weiss. The facts show that soon after the disappearance of Queen Theslon's statue from the Avonian National Museum Weiss turned up in Misra. He now resides in Misra and the Misran government has made him a 'honorary citizen' and granted him permanent residency status. It has not been made clear to the Avonian government the legal effect of Kleiss' 'honorary' citizenship according to Misran law. It will be assumed that the honorary citizenship is of legal effect and is recognized as equivalent to the acquisition of citizenship by birth or naturalisation.

It is an accepted principle of international law that the question as to whether a person is a national of a particular country, in the eyes of that country's laws, should be decided solely by the law of that country. This principle is enunciated in the case of The Nationality Decrees in Tunis and Moraco,[22] in addition to being codified by Article 1 of the Hague Convention on the Conflict of Nationality (1930). The Convention states:

> It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international customs and principles of law generally recognized with regard to nationality.

The limitation on the international recognition of nationality is a very important one. While the law of nations gives a country the right to confer nationality it does not allow any one nation to impose its grant against another state unless its done in a manner consistent with the recognized customs, conventions and principles of international law.

The requirements of international law in respect to the recognition of nationality conferred by another state was dealt within the famous Nottebohm Case.[23] Frederich Nottebohm was a German national who resided in Guatemala since 1905, although retaining not only his German nationality but also family and business connections in Germany. He carried out a business in Guatemala and traveled frequently to Europe because of this business or on holiday to see his family. Soon after the outbreak of World War II in 1939, Nottebohm went to Liechtenstein where he applied for nationality by naturalization under Liechtenstein law.[24] The relevant law requires that a person seeking naturalization needed to prove (a) that his acceptance into one of Liechtenstein's Home Corporations (Heimatverband) has been promised provided he acquired nationality; (b) that he will lose his former nationality upon naturalization; (c) that he has resided in Leichtenstein for a minimum of three years. The law also provided for a naturalization fee which amounted to one half of the fee payable by the applicant to the Heimatverband of the Leichtenstein commune to which he would be accepted.[25]

Nottebohm applied for and received acceptance into the Commune of Mauren. He also paid his fee and made provision to pay taxes to the government of Leichtenstein. In fact he paid a sum of 25,000 Swiss francs to Mauren and 12,500 Swiss francs to the State itself. He made arrangements with the Leichtenstein Government to pay an annual tax of 10,000 Swiss francs and made a deposit of 30,000 Swiss francs towards paying this tax. It is not surprising therefore, that Nottebohm's application for a waiver of the residency requirement - a request which was permittable by law[26] - was granted by the Leichtenstein Government. Nationality was conferred on Nottebohm as permitted by Leichtenstein law of January 4th 1934. The salient point, however, is that Nottebohm received nationality from Leichtenstein in a manner that was legally valid according to Leichtenstein law.

After receiving this grant of nationality Nottebohm returned to Guatemala where he continued his business. In 1943 after Guatemala entered World War II, Nottebohm was arrested as an enemy alien and deported to the United States where he was interred for the duration of the war. In 1946 after his release he returned to Leichtenstein. The Leichtenstein government on Nottebohm's behalf instituted a claim against the government of Guatemala for property belonging to Nottebohm which was seized during the war. Guatemala refused the claim on the grounds of the nationality of Nottebohm. Both parties decided to submit the conflict to the International Court of Justice.

The 'World Court' saw the question as one of whether Nottebohm could invoke the naturalization received by him against Guatemala. The court stated that two States separately may enforce its nationality on an individual according to their own law and still remain "within the limits of its domestic jurisdiction". However, when this situation had to be decided on international level or by a third state.

> If the arbitrators or the courts of such a State should confine themselves to the view that nationality is exclusively within the domestic jurisdiction of that State, it would be necessary for them to find that they were confronted by two contradictory assertions made by two sovereign States, assertions which they would consequently have to regard as of equal weight which would oblige them to allow contradiction to subsist and thus fail to resolve the conflict submitted to them.[26]

These tribunals therefore, in an attempt to resolve the question before them use the "international criteria" of "real and effective nationality". The definitive statement to describe this criteria for recognizing a naturalization is on page 23 of the majority judgement.

> According to the practice of States, to arbitral and judicial decision and to the opinion of writers, nationality is a legal bond, having at its basis a social attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the judicial expression of the fact that the

> individual upon whom it is conferred either directly by law or as a result of an act of the authorities, is in fact more losely connected with the population of the State conferring nationality than with any other State. Conferred by a State it only entitles that Stste to exercise its protection vis-a-vis another State, if it constitutes a translation into judicial terms of the individual's connection with the State which made him its national.[28]

This passage is close to the limitations in Article 1 of the Convention on the Conflict of Nationality cited above.

Weiss' claim of Misran nationality is ever more tenuous than that of Nottebohm. Nottebohm followed a prescribed legal formulation in becoming a Leichtenstein citizen. Weiss' acquisition does not seem to have been by any prescribed legal methodology. However, even if the Misran government was in the habit of granting honorary citizenships they have failed to proved the 'legal bond' necessary to create 'real and effective nationality' out of the 'honorary citizenship' granted to Weiss.

The facts show that Weiss is not only an Avonian national but has spent considerable time studying Avonian art. His reputation as one of our country's leading art historians, in addition to his family ties in Avon show a real 'social attachment' to Avon. The International Court held that Nottebohm had no social attachment because he had 'no settled abode', permanent residence in Liechtenstein and no intention of staying there. Weiss seems to have an intention to stay in Avon, but he was in no better a position than Nottebohm when he acquired nationality. In fact, where Nottebohm scrupulously adhered to the required procedures for naturalization, Weiss did not. According to the the earliest date he could have gained permanent residence status was at the time of his grant of honorary citizenship. Therefore at the time of this endowment by the Misran government he was entirely an Avonian citizen without any attachment to Misra. Misra's legal act cannot be internationally valid without such an attachment.

Weiss' only attachments to Misra are his affair with Madame Z and whatever sympathy he may have with the Misran political cause. In the first instance, the relation, not being a legal one such as marriage, cannot be found to give Weiss the sort of attachment which can be legally recognized. Neither can his political sympathies for the Misran cause be legally recognisable in such a way.

Even if the Misran 'nationality' of Weiss could subsist in International Law, Misra could not enforce it against Avon according to Article 24 of The Convention on the Conflict of Nationality Laws[29] which states:

> A State may not afford diplomatic protection toone of its nationals against a State whose nationality that person also possess.

Weiss, if found to possess Misran nationality, is of dual nationality possessing both Misran and Avonian nationality. Misra cannot therefore afford him protection as a national under the Extradition Treaty between Misra and Avon.

The grant of nationality to Weiss was not a judicial expression of the fact that Weiss was more closely connected to Misra than Avon. It was merely an expression of the fact that Weiss had rendered a service to Misra. In light of this we urge the court to consider Weiss an Avonian national and thus extraditable.

2. Madame Z is Misra's Ambassador to France so the question is whether she is protected by diplomatic immunity from criminal jurisdiction. Such immunity would not put her above the criminal law although it would serve to preserve her from the actual liability to the jurisdiction of the courts of a country where her diplomatic immunity is subsisting. However, since Madame Z is not the Ambassador to Avon, the issue is one of diplomatic immunity in a third country, that is one other than the sending or receiving state.

Article 40 of the vienna Convention on Diplomatic Relations deals with immunities in third countries. Paragraph (1) states:

> If the diplomatic agent passes through or is in the territory of a third State, which has granted him a passport visa, is such a visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of members of his family.

Eileen Denza in her book Diplomatic Law[30] illustrates the development of diplomatic immunities in third countries, from the early days when diplomats would request safe passage from the relevant soveriegn, to more recent days when 'a right of innocent passage' was tacitly recognized by customary international law. There was a consistent thread that ran throughout the development of these imminities. It is that the safe passage or innocent passage should be as expeditious as possible. The diplomat should not delay in his journey and "[i]f they did delay for personal reasons it was agreed that they lost their entitlement to diplomatic immunity."

Lauterpacht - Oppenheim in International Law Vol. I[30A] at para 398 put it this way -

> If an envoy travels through the country of a third State incognito or for his pleasure only there is no doubt that he cannot claim any special privileges ... There ought to be no doubt that such third State must grant the right of innocent passage (transituo inoxis) to the envoy. But other privileges especially those of inviolability and extra-territoriality, need not be granted to the envoy. Moreover, the right to innocent passage does not include the right to

Denza concludes that Article 40 is in accordance to the modern international law. The immunities which a diplomat enjoys in a third state are limited to those 'required to ensure his transit and return'.

This question of the intransit diplomat has not been dealt with by international tribunals but various municipal courts have decided on this issue before and after the passing of the Vienna Convention.

In Bergman v Re Sieyes[31] the Bolivian Ambassador to France was served

with a summons in New York whilst in transit to take up his position in Paris. The court held that an Ambassadoe en route to take up his post had the same immunities that he would have had he been accredited to third State itself. Notice however, that there was no question of delay in this case as the diplomat had not spent any unnecessary time in New York.

In The United States v Rosal,[32] Mauricio Rosal was a Guatemalan diplomat accredited to Belgium and the Netherlands. He visited New York where he carried out transactions in narcotics. The court held that 'under the common law of nations' diplomats traveling to or from their diplomatic post to their own state had the same degree of immunity in the third State as in the receiving State. In short it folowed the principle of Bergman v De Sieyes. The court saw itself as having to decide only 'a narrow question of fact' viz. whether at the time of his arrest Rosal was on his way to or from his diplomatic post. The evidence showed that he was not, therefore he was convicted.

The Vienna Convention on Diplomatic and Consular Relations was incorporated in British law by the Diplomatic Privileges Act 1964. In 1970 Joyonti Dharma Teja was detained for extradition to India. He traveled on a Costa Rican diplomatic passport as he had been appointed economic advisor to the Costa Rican embassy in El Salvador. Costa Rica had given Teja asylum in that country, after he fled India inter alia to escape charges of fraud. The court was asked to decide in a ciase cited as R v Governor of Pentonville ex parte Teja,[33] whether Teja was protected by diplomatic immunity as provided by Art. 40 of the Convention. Lord Parties, the Chief Justice stated that Teja could not be entitled to immunity since he was not on his way to or from his diplomatic post therefore he could not be covered by the immunity.

Article 40 was also interpreted by another British case in 1977 - R v

Guildhall Magistrates Court ex parte Jarrett-Thorpe[34]

> The applicant was the husband of the counsellor to the Sierra Leone Embassy in Rome. His wife travelled to London to buy furnishing for the Rome Embassy. It was intended that the applicant would join her later for the purpose of travelling back to Rome and to help with her baggage. It was not intended that he should enter the United Kingdom for any other purpose. When he arrived in the United Kingdom the applicant received a message to the effect that his wife had already left for Rome. While he was waiting for a flight to Rome [he] was arrested by police at heathrow in connection with criminal proceedings pending against him in London.[35]

It was held that the applicant was entitled to immunity and that the protection extended by Article 40 did not refer only to diplomats in transit between sending and receiving States.

The important point in this case is that the diplomat had to be on official business and not a frolic of his own to be protected. Although ex-parte Jarrett - Thorpe seems to give a wide orbit of protection, it seems to underscore the point that the diplomat had to be on official business to be protected. Mr. Jarret-Thorpe although not on in transit between a receiving state and a sending state was on official business. Mauricio Rosal was neither on official business or in transit. Madame Z's delay in Avon was of such a nature as to negate the claim that she was in transit. Her stay there became entirely personal, a frolic of her own. The lecture she had given and her attendance at the concerts are in no way official Misran visit, nor are her travels with Erich Weiss.

The Avonian government notes that under Art. 12 of the Extradition Treaty between Misra and Avon, neither party is bound to surrender its own national. This provision is in being with international law but the treaty also makes provision for the executive to surrender such a person on its discretion. This means that there is no total prohibition against surrendering a national. Avon has jurisdiction over the crime committed as it was committed in Avon. It is in the interest of all nations to have persons who commit such serious

crimes brought to trial, especially those who abuse the diplomatic privileges which all nations need and respect.

We submit that Madame Z is liable for crimes committed in Avon during her frolic and seek that this court order her return to Avon for trial. Article 8 of the Extradition Treaty allows extradition to be granted only if evidence sufficient to 'justify the committal for trial of the person sought' can be found. There is a difficulty here because investigations have not determined all the facts of the theft of statue, since the alleged perpetrators who could assist with the investigations left Avon very quickly. It is the view of the Government of Avon that the proper interpretation of this part of the treaty is that there needs to be proof of a reasonable ground to bring the person to trial.

Ivan A. Shearer, as quoted by Hans Shultz[36] explains this rule -

> Its aim is not to ask for a prima facie case against the requested person made before the judge ... but to exclude the lengthy procedure of extradition with all its risks and burdens if there is no occasionable ground to hold the fugitive guilty[37] ...

Schultz suggests that if that view is correct then International Law could adapt the proposition -

> ... that, as a rule, the requested state should be satisfied with an examination of the documents supporting the demand of extradition... If the fugitive is not yet convicted he shall have the right to give any evidence possible that proves that the accusation is not well founded.[38]

We then see that the standard necessary is one that establishes a reasonable ground for belief that the accused committed the crime.

Most of the evidence available is hearsay evidence. Normal rules of evidence stage that hearsay evidence is admissible in a trial. However, according to Lester Garfield in Criminal Procedure from Arrest to Appeal,[39] hearsay evidence can be accepted in a Preliminary Examination.

The strict rules of evidence applied in the trial of a criminal case are not applied to the preliminary hearing ... In practice hearsay evidence is considered.[40]

The facts show that the investigations of foreign journalists have pinpointed Madame Z and Erich Weiss as having arranged the theft of the Statute. Such evidence can be considered admissible.

In respect to the charge of theft, it has been noted that no such charge under the Extradition Treaty. Let it be noted that theft can be accomodated under Sections 13 of the Appendix in the view of the government of Misra theft is a crime which is included in the Extradition Treaty.

The crime which has been alleged does not fit any of the definitions of a political crime. It was not a crime committed to favour the aim of one of two factions seeking to impose their rule, or a crime committed in furtherance of a political disturbance. Also it must be noted that political crimes are of an internal nature, that is, there needs to be some turmoil within the country that the crime is committed. No evidence has been brought to evidence turmoil in Avon. A terrotist cannot leave his country to attack another country's interest on behalf of a faction in his own country, then contend that it is a political crime.

Avon asks this court to declare that there is evidence enough to commit Madame Z and Erich Weiss to trial.

Concerning the bust of Queen Theslon Avon asserts that the bust belongs to our government, as it is a "general principle of law" that other claims of ownership are extinguished by prolonged possession by one party. We note that Article 22 of the Extradition Treaty allows the requested party to 'condition the surrender' of stolen items on assurance of return of such items by the requesting party. Misra could use the provision to ask for return of the bust after the

trial of Madame Z and Erich Weiss.

The UNESCO Convention on the Illicit Movement of Art Treasures states in respect to 'cultural property stolen from a museum ... after entry into force of this Convention' that

> Art 7(b)(ii) at the request of the State Party of origin to take appropriate steps to recover and return any such cultural property imported after entry in force of the Convention in both States concerned provided however that the requesting State shall pay just compensation to an innocent purchaser or to a person who has a valid title to property...

Two problems arise from this. First it may be agreed that Avon is not a State Party to the treaty because it has signed but not ratified it. Secondly, because of the first point the Convention is not in force in Avon, as described by Article 21 of the Convention.

While the government of Avon admits this it points out that it has enacted legislation akin to Articles 6, 7, 8 and 13 of the Convention, as has Misra. Avon asks the court to look upon Art. 7 as a commonly held principle of international law between Misra and Avon. Misra cannot sign this Convention then encourage acts contrary to the Convention and have such acts upheld before an International Tribunal. In fact, the similar legislation in both countries estimate a bilateral jus cogens which Misra has violated.

Further note is taken that there are no bona fide third party rights to protect which is a prime motive behind the demand for compensation in Art. 7(ii)(b) of the Convention and probably behind Art. 22 of the Extradition Treaty.

Avon therefore request the return of the bust even if the parties are not extraditable.

RELIEF SOUGHT

In light if the above arguments, the Government of Avon asks the Court for a declaration that the Sloane Collection forms part of the commom cultural heritage of mankind andis reposing legally in Avon.

Further, the Government of Avon asks the Court for an order that Misra shall comply with international law by extraditing Erich Weiss and Madame Z. and return the bust of Queen Theslon to Avon.

NOTES

1. V Moore, A Digest of International Law § 700 P.19 (1906). A consul is liable to expulsive action at the option of the offended government.

2. Id. P.25 (Expulsion of U.S. consul from Paraguay in 1873).

3. Id. P.33 quoting the 1896 Consular Negotiations of the United States.

4. Done at the Hague, 18th October 1907, and 29th July 1899 respectively. The regulations respecting the laws and customs of war on land, annex to the Convention of 1899, Art.56 prohibits distinction of such property even in a war. Art. 27 of the 1907 Convention imposes positive measures for protection of such property even during a war.

5. VII Moore, A Digest of International Law § 1090 at 105 (1906).

6. Id. at P.108.

7. Id. P.108.

8. See Ian Brownlie, International Law and the Use of force by States, 30 et. seq. (1963).

9. VII Moore, A Digest of International Law §1090 at 106 (1906).

10. Brownlie op.cit. 40.

11. Accord: Hague Peace Conferences 1899 and 1907 Articles 3.

12. 92 B.F.S.P. 160. (1899-1900). See also D.J. Harris, International Law Cases and Materials 169. (3rd Edn. 1983).

13. International Boundary Commission. See Harris op.cit. at p.167.

14. None at Paris, November 14, 1970. Hereinafter called the 1970 UNESCO Convention.

15. Accord. Art 21.

16. UNESCO 1970 Convention, Art.7.

17. Done at Vienna. May 23rd, 1969.

18. P.C.I.J. Series A. No. 17. P.29.

19. G.A. Resn. 2749 (xxv) Desn. 17, 1970. 10 I.L.M. 230 (1970).

20. U.K.T.S. 10 (1968) Cmmd. 3519; 610 U.N.T.S. 205.

21. Done at the Hague. May 14th, 1954.

22. 1 Hudson World Court Reports 143 (1943).

23. 1955 I.C.J. Rep. 4.

24. Liechtenstein Law of January 4th, 1934.

25. 1955 I.C.J. Rep. 4 at p.13, 14.

26. Ibid p.14.

27. Ibid p.21.

28. Ibid p.23.

29. 5 Hudson, International Legislation 359 (1936).

30. Eileen Denza,. Diplomatic Law Commentary on the Vienna Convention on Diplomatic Relations. 1976 Oceana Publications, New York.

30A. L. Oppenheim, International Law, Vol. I. Eighth Edition, 1955 London.

31. 71 Federal Supplement 334 (1946). See also Holbrook Henderson (N.Y. 1839) 4 Sandf. 619.

32. 191 Federal Supplement 663 (1960).

33. 1971 2 All E.R. 11.

34. The Times, October 5 1977 (Q.B. Div. Court).

35. Harris, D.J. Cases and Materials on International Law, 1983. Sweet & Maxwell, London at p. 271.

36. Schultz Hans. The Classic Law of Extradition and Contemporary Needs in International Criminal Law. Volume II Jurisdiction and Cooperation.

37. Schultz at p.323.

38. Ibid.

39. Copyright 1947. Reprinted 1972, Greenwood Press, Connecticut.

40. Orfield at p.88.

All respectfully submitted by

LEIGHTON PUSEY
DONALD GITTENS
CHRISTOPHER HONEYWELL
ROSEMARIE ANTOINE