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ES CLAIMS TRIBUNAL

دیوان داوری دعادی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

Case No. 10514

Date of filing: 3. Jun 1988

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\*\* AWARD - Type of Award \_\_\_\_\_  
- Date of Award \_\_\_\_\_  
\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* DECISION - Date of Decision \_\_\_\_\_  
\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* CONCURRING OPINION of \_\_\_\_\_  
- Date \_\_\_\_\_  
\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* SEPARATE OPINION of \_\_\_\_\_  
- Date \_\_\_\_\_  
\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* DISSENTING OPINION of \_\_\_\_\_  
- Date \_\_\_\_\_  
\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* OTHER; Nature of document: Concurring & Dissenting opinion of  
Mr Noori

- Date 3. Jun 88  
46 pages in English \_\_\_\_\_ pages in Farsi

In the Name of God

DUPLICATE  
ORIGINAL

نسخه اصلی

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CASE NO. 10514

CHAMBER ONE

AWARD NO. 360-10514-1

LEONARD and MAVIS DALEY,  
 a claim of less than \$250,000  
 presented by THE UNITED STATES OF AMERICA  
 in protection of its national,

Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,

Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه دادگاهی دعوی ایران امان - ایالات متحده
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## CONCURRING/DISSENTING OPINION OF ASSADOLLAH NOORI

## I. INTRODUCTION

- 1 - In order to provide a better and fuller understanding of why I concur in a part of the Tribunal's findings in the Award in the instant Case, and why I dissent to other parts thereof, I feel I must begin by commenting upon the facts and events involved in the claims under this Case. I firmly believe that once I have provided these comments, which are based on the existing evidence filed with the Tribunal and upon witness testimony during the Hearing conference, my esteemed readers will well understand the reasons for my concurrence in, and dissent to, this Award.

I shall set forth these comments, which relate to the facts and events involving Mr. Daley's claims, under the heading of "the issue of credibility and reliability." This is because examining this issue will help considerably to ascertain the credibility or noncredibility of Mr. Daley's contentions, especially since where it finds in favor of Mr. Daley the Award is based, to an unprecedented degree, upon premises so flimsy that they ought to pale into insignificance, in the face of the uncertainty engendered by the noncredibility of Daley's contentions throughout the examination of the Case.

2 - However, before addressing this issue, and taking up in general the reasons for my concurrence/dissent to the Award, I must make a few brief general comments by way of introduction:

2-1 As differentiated by the Algiers Accords, the claims in the present Case fall in the category of claims of less than \$250,000 which, pursuant to Article III, paragraph 3 of the Claims Settlement Declaration, must be brought and pursued before the Tribunal by one of the two Governments -- viz, that Government of which the individual alleging to have a claim is a national<sup>1</sup>. Therefore, apart from the fact that all of the claims within this Tribunal's jurisdiction are espoused claims -- where, to expedite matters, permission has been granted in those cases wherein the remedy sought is greater, for those individuals claiming entitlements or injury to bring and pursue their claims under the

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<sup>1</sup>Article III, paragraph 3 of the Claims Settlement Declaration provides that

"Claims of nationals of the United States and Iran that are within the scope of this agreement shall be presented to the tribunal..., in the case of claims of less than \$250,000 U.S. Dollars by the Government of such national."

supervision and protection of their Government<sup>2</sup> -- in connection with those claims where the remedy sought is less than \$250,000, even the classical form of protection has been fully preserved in respect of the claims. Therefore, using phrases such as "presented by the United States of America," as was done in the caption to the Award, does not make a difference in the meaning; and I have added the words "in protection of its national" to the same caption solely in order to make this fact clear. Otherwise, there is no dispute over the fact that the pleadings in these claims have -- in accordance with the provisions of the Claims Settlement Declaration -- from the beginning been prepared by the United States (Office of International Claims and Investment Disputes) and filed with the Tribunal under the signature of the Agent of the United States, and pursued before the Tribunal by attorneys of the United States Government right up to the stage of oral proceedings.

- 2-2 Since the caption of the Case and the Award has been chosen in a way which might give rise to the misunderstanding that seemingly, both Mr. and Mrs. Daley have requested that this Case be presented by the United States, I deem it necessary to remove this misapprehension and state that no evidence, whether written or oral, has been presented at any stage of the proceedings, to indicate that Mrs. Daley has ever made such a request of the United States. No evidentiary document from Mrs. Daley has been submitted, and she did not take part in the oral Hearing, which precludes the possibility that her presence, or any document from her, could in any way

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<sup>2</sup>For further discussion, see: Dissenting Opinion of Iranian Arbitrators in Case No. A/18, reprinted in 5 Iran-U.S. C.T.R. 275; and Separate Opinion of Judge Sayed Khalil Khalilian to Award No. 346-10973-2.

indicate that she confirmed Mr. Daley's statements and allegations as set forth in his pleadings<sup>3</sup>.

<sup>3</sup>Besides its ramifications on the evidence in support of the claim, this issue also poses the question as to whether or not the United States of America can bring a claim before this Tribunal in protection of a national who has made no such request of it. Certainly, if the United States intends to regard these claims as not being espoused, then it should indubitably have obtained authorization to bring the claim on behalf of the Claimant, since a claim cannot be brought without the claimant's authorization or deputation. Yet, this Tribunal's situation is different, because notwithstanding the inconsistent and contradictory positions taken by the United States in this arbitration, on page 1 of the Statement of Claim in the Sample Case (The Government of the United States of America On Behalf and for the Benefit of Certain of Its Nationals, vs. The Islamic Republic of Iran, Case No. 86), the United States Government has stated that the claims brought therein are in the nature of espoused claims, and the statements of claim are:

"...presented to the Iran-United States Claims Tribunal by the Government of the United States of America against Iran pursuant to the Declaration...in continuance of the exercise of diplomatic protection of its nationals, acting as parens patriae, trustee, guardian and representative, and on their behalf."

In the 64th Session of the [Full] Tribunal held on 5 November 1982, the Agent of the Government of the United States stated that owing to the nature of these claims as espoused claims, in bringing those claims in this arbitration "no instructions were being sought or received from individual claimants." In international law, however, the issue is not disposed of so easily, and there is a division of opinion between those for and against this position. In its decision in the Melczer Mining Company Case (1929), the United States-Mexican Claims Commission accepted -- based on the approach taken by the Anglo-American Claims Commission in the Cayuga Indians Case (Nielsen's Report, p.272) -- that bringing an espoused claim arises, not from the claimant or his representatives, but from a principle of international law. On the other hand, a contrary position was taken by the Italian-Mexican Claims Commission in its decision in Emilia Marta Viuda de Giovanni Mantellero (A.H. Feller, The Mexican Claims Commissions (1923-45), p.90).

This issue has repeatedly been considered from another  
(Footnote Continued)

2-3 As will be seen, my objection to the Award relates to the basis of the decision reached in the two parts which found in favor of the Claimant. I am not concerned here with the amount of the Award, because in comparison with other awards by this Tribunal, the amount awarded in the instant Case can be regarded as rather insignificant. Rather, my objections are to the weakness of the premises on whose basis the Tribunal finds that those monies are to be awarded to the Claimant; whereas the Claimant's lack of credibility in describing the facts and events, and his unreliability as a result of these statements, could in themselves constitute justifiable reason for rejecting them.

## II. THE ISSUE OF CREDIBILITY AND RELIABILITY

3 - Regrettably, it must be said that Mr. Daley has not been truthful in any of his assertions relating to those facts and events occurring before, during or after the alleged

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(Footnote Continued)

perspective in those decisions confronted with the Calvo Clause issue, because in those cases, the espousing state asserts that its right to espouse overshadows the Calvo Clause (clause waiving the right of recourse to diplomatic protection). Nonetheless, there are numerous international decisions and legal opinions which have not accepted that a state is entitled to bring an espoused claim, notwithstanding the Calvo Clause. (See, eg., the Decisions of the United States-Mexican Special Claims Commission, in the North American Dredging Company Case (Annual Digest 1925-26), Case 218); and Mexican Union Railway, Decision and Opinions of the Commissioners (1931), p.137. See also: Max Sorensen, Manual of Public International Law, at 591-592;

"Normally, the presentation of a claim is made only at the request of an individual or corporation complaining of injury. It is difficult to admit that such protection will or may be exercised in the face of a freely concluded agreement that no such request will be made to the state of nationality."

events which gave rise to the claims. The facts divulged, stage by stage, during filing of pleadings up to the time of the Hearing conference, have shown that Mr. Daley's statements and assertions can be neither relied upon nor said to enjoy the slightest credibility. In order that this rather unpleasant fact may be better appreciated, I must set forth Mr. Daley's statements (or those of the United States, speaking for him) in connection with his residence and occupation in Iran, and relating to the alleged events leading to the claims at issue in the Case. Then, relying upon solid evidence, I shall demonstrate that those assertions are untrue.

Assertions relating to residence and occupation in Iran

- 4 - Mr. Daley (or the United States, speaking for him) asserts (on page 15 of the Supplemental Statement of Claim, and in paragraph 4 of the "Daley Affidavit") that he came to Iran with his wife and their two children in July 1972, and that in Iran, they resided in Apartment No.22, on the second floor of a building located at Khiyaban-e Boostan No.6, until they left Iran towards the end of June 1979<sup>4</sup>.

He also alleges that on 8 July 1972, he was hired by Iran Aircraft Industries as its Manager of Plans and Programs, and that he continued working there until June 1978. As proof of this allegation, Mr. Daley relies upon a document annexed to the Supplemental Statement of Claim as Exhibit 3 thereof. This Exhibit is ostensibly a letter signed and sent on 28 May 1978 by a certain Mr. D. Jonson, serving as President of Iran Aircraft Industries, wherein it is

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<sup>4</sup>Mr. Daley alleges that although his two children, Lynette and Brian, left Iran in February 1979, he and his wife remained in Iran until 25 June 1979, without having previously left Iran during that year.

attested that "Mr. Leonard Daley was employed under contract to Iran Aircraft Industries from 8 July, 1972 to the present date."<sup>5</sup>

Mr. Daley alleges that in July 1978, he was hired as Director of Program Planning by Hover Naft Construction Company, which was under contract to build a town, with low-cost housing utilizing prefabricated components, for the Ministry of Housing, and that he continued in the employment of that company until he left Iran (25 June 1979). As support for this assertion, a letter dated 24 June 1979, signed by a certain Mr. David Renshaw (Managing Director of Hover Naft) was filed as Exhibit 5 to the Supplemental Statement of Claim, wherein it was broadly and vaguely written that "Mr. L. Daley has been employed by this Company for the past year as our Project Planning & Operations Manager."<sup>6</sup>

- 5 - Throughout the proceedings, the Respondent not only denied these claims, but held, on the basis of solid evidence, that they were invalid and false. According to evidence filed by it with this Tribunal, the Respondent even proved that some of the documents relied on by the Claimant had been forged. As against this evidence (which was in part repeated in witness testimony before the Tribunal and in the presence of Mr. Daley), the Claimant neither attempted to deny it nor submitted to the Tribunal any evidence in rebuttal thereof.

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<sup>5</sup>The original of this letter is in English and there was no Persian version. The passage cited in the Persian text of this Opinion has been quoted from the Persian translation filed by the United States.

<sup>6</sup>This letter does not offer even prima facie support for the Claimant's assertion that he was employed by Hover Naft until 25 June 1979, because it merely mentions "the past year."

6 - First of all, based on written and oral testimony by Mr. Salehi Nasab and his wife (Mrs. Bassirian), both of whom gave testimony under oath at the Hearing, the Respondent established that Mr. and Mrs. Daley resided in Apartment No.22, on the second floor of the building located at Boostan No.6, from 22 May 1977 until 22 February 1979, and that a certain Mr. Clark had rented the building before them beginning in late 1976, when construction of the building was finished. Based on official certificates from the Municipality, and on the lead-sealed title deed, the Respondent proved that the permit for construction of both floors of the building located at Boostan No.6 was issued in September of 1975, and that the construction work was completed in September 1976. Mr. Salehi Nasab and his wife testified, both in writing and orally (orally, at the Hearing conference and in Mr. Daley's presence), that they had joined Mr. and Mrs. Daley in the afternoon of 22 February 1979 for a farewell dinner at a restaurant located a few hundred meters from Apartment No.22, Boostan No.6, in the presence of a friend of the Daley family (serving as translator), and that they had not met since that night, with the sole exception of one occasion thereafter, when Mr. Daley went to the above-mentioned address for the purpose of offering a burglar alarm device in lieu of his back rent (which had still not been paid as of the date of the Hearing conference).

Both the Respondent, and Mr. Salehi Nasab and his wife, established -- the latter by their written and oral testimony, and the former by presenting written depositions from residents of the area where the Daley family had lived -- that the Daley family had sold off their household furnishings before leaving No.22, Boostan No.6. The Respondent also submitted two affidavits from two of the people who had come to the apartment to purchase furnishings. One of them stated that he had bought some

electric appliances from the Daley family, and the other testified that when he went to see them, there was nothing in the apartment left to buy, except for a pair of hung curtains, which were apparently supposed to be left there<sup>7</sup>. Mr. and Mrs. Salehi Nasab also testified that Mr. Daley had left only some cartons, probably containing papers and books, behind in the apartment's basement, and that on their own advice, these had later been turned over to an Iranian friend of the Daley family, who had come to pick them up and take them elsewhere (presumably, Hover Naft Company).

- 7 - Secondly, based on documents which it had obtained from the files of Iran Aircraft Industries and filed with the Tribunal, the Respondent established that Mr. Daley had been employed by that company only up to 18 May 1974, that his employment was severed as of that date pursuant to a letter signed by A. L. Charipar (Managing Director), accounts for his services up to that date had been settled, and that he had even been paid his expenses for airplane tickets and airport exit fees for himself, his wife and his children, as well as his expenses for shipping his household effects abroad. On 20 May 1974, Mr. Daley certified that he had received those reimbursements.

The Respondent also filed with the Tribunal a circular from Iran Aircraft Industries, stating that Mr. Derek Jonson resigned as General Manager of the Company on 15 March 1974, and was succeeded in that position by Mr. A. L. Charipar. In addition, the Respondent filed with the Tribunal evidence revealing that Mr. Jonson's accounts were settled as of 15 March 1974. Finally, the Respondent filed a number of

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<sup>7</sup> Mrs. Salehi Nasab (Bassirian) brought this pair of curtains with her to The Hague, and showed them to the Tribunal and Mr. Daley at the Hearing. Mr. Daley confirmed that these were the curtains that had been hanging in the apartment.

documents with the Tribunal, demonstrating that the signature on the letter relied on by Mr. Daley (Exhibit 3 to the Supplemental Statement of Claim) had been forged and did not in any respect conform to Mr. Jonson's actual signature. At no stage did Mr. Daley rebut this evidence, either orally or in writing.

- 8 - Thirdly, the Respondent has invoked evidence relied on by the Claimant himself, in order to show that his assertions as to the date on which he was hired by Hover Naft, and that he worked there until 25 June 1979 and, finally, that during 1979 at least, he did not leave Iran prior to 25 June, are totally incorrect and contrary to fact. The Respondent pointed out that the first time a request for a work permit for employment with Hover Naft was made for Mr. and Mrs. Daley, was on 8 April 1979. In this connection, it relies on Exhibit 4 to the Supplemental Statement of Claim, wherein both of their names appear on a work permit application list.

The Respondent also draws attention to some further evidence. First of all is the affidavit of Mr. Renshaw, which the Claimant has used as evidence in support of his claims (Annex to Claimant's Reply to Iran's Statement of Defence), in paragraph 3 of which Mr. Renshaw states that he flew to the United States in March of 1979, "to meet with Mr. and Mrs. Leonard Daley to discuss their willingness and availability to return with me to Iran..." Mr. Renshaw goes on to say that "It was agreed that initially Mr. Leonard Daley would return with me to Iran to assess the current territorial conditions and to apply for the necessary work permits... We returned to Iran in late March 1979

accompanied by Miss E. Wachli, a Swiss national and my personal assistant and interpreter"<sup>8</sup>. This affidavit shows, as do those of Mr. Daley himself, that no work permit was ever issued for Mr. and Mrs. Daley or Miss Wachli, and that they eventually left Iran without obtaining the permits.

The second of these evidentiary documents is an incomplete photocopy of certain pages of the passport of Mr. Daley himself. Relying on page 8 of Mr. Daley's passport, the Respondent has established that in addition to his departure in February, a fact acknowledged at the Hearing by the Deputy Agent of the United States<sup>9</sup>, Mr. Daley entered and departed Iran on other occasions as well. This page reveals that Mr. Daley entered Iran on 9.1.1358 [29 March 1979], and again on 31.2.1358 [21 May 1979]<sup>10</sup>.

<sup>8</sup> Unfortunately, only certain pages of Mr. and Mrs. Daley's passports have been photocopied and filed with the Tribunal, and despite my request, the Claimant and his representatives refused to produce the passports of these two persons. From those incomplete pages, it can be clearly seen that Mrs. Daley did not return to Iran in late March with Mr. Daley and Mr. Renshaw, although it might be presumed that she entered Iran sometime in May and left Iran later, with her husband. The last entry stamp on page nine of Mrs. Daley's passport indicates that she entered Mehrabad Airport on 31.2.58 [21 May 1979].

<sup>9</sup> In his affidavit, Mr. Renshaw attests to the departure of Mr. and Mrs. Daley from Iran in February 1979:

"...In February 1979...I returned to the U.K. via Switzerland, and Leonard and Mavis Daley returned to the U.S.A. via London."

<sup>10</sup> Unfortunately, as stated above, the Tribunal was never provided with copies of all the pages of the passport; nor, despite my request, was the actual passport itself made available to the Tribunal. The stamps on the copies of pages 8 and 9 are also mostly either illegible or superimposed on one another. These three dates have  
 (Footnote Continued)

Therefore, it is certain that in the first half of 1979, and prior to his alleged departure on 25 June 1979, Mr. Daley made at least one departure from Iran in February, a re-entry on 29 March 1979, another departure at some unknown date but probably during April, and then another re-entry on 21 May 1979.

Finally, the Respondent relies on Mr. Renshaw's letter dated 24 June 1979 (Exhibit 5 to Claimant's Supplemental Statement of Claim), wherein Mr. Renshaw testifies that "Mr. L. Daley has been employed by this Company [Hover Naft] for the past year [ie., 1978]..."<sup>11</sup>

The Respondent also relies on the testimony of witnesses (Mr. and Mrs. Salehi Nasab), who stated under oath that the dinner on 22 February was a farewell dinner for Mr. and Mrs. Daley on their departure from Iran.

Contentions relating to facts and events between 17 March and the end of May, 1979

- 9 - In his statement filed with the Tribunal as an Affidavit and annexed to the Supplemental Statement of Claim, Mr. Daley has portrayed the events in the period from 17 March to the

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(Footnote Continued)

been derived from the fully legible stamps on the passport, and there can be no doubt that they are correct. The last entry stamp on Mr. Daley's passport conforms to that in his wife's passport, but no departure stamp conforming to 25 June 1979 is to be found in either passport.

<sup>11</sup>It must be noted that even Mr. Daley's previous employment with Hover Naft is open to doubt, because the Claimant has not established how and why, if Mr. Daley had worked for Hover Naft in 1978, he lost his work permit, whereby a request for issuance of a new work permit was made on his behalf in April 1979, without any mention being made of his prior employment with Hover Naft, or any reference to his having previously had a work permit?!

end of May 1979 as follows: soon after the victory of the Revolution, Revolutionary Guards raided and searched his home on three occasions, on the pretext that they were looking for incriminating evidence that his landlord had been a collaborator of the Shah's regime. He alleges that:

"The first time was March 17, 1979, and the reason I recall the date so well is that it was St. Patrick's Day. At approximately 1 a.m., we awoke to the sounds of gunfire... About five minutes later, four Revolutionary Guards... came to our front door... the Guards walked through the rooms opening drawers and doors, pushing furniture around... all in an attempt to provoke us and thereby substantiate the use of their weapons or physical force against us... Similar searches occurred on two other occasions in the beginning of April 1979 and the last week of April 1979." (Paragraph 8 of the Affidavit)

The Claimant then alleges that "Because our home was subject to nearly constant invasion, our landlord, whose health was quickly deteriorating, advised us to seek safer quarters in another part of the city". (Paragraph 9 of the Affidavit)<sup>12</sup>. Daley then alleges that on 7 May 1979, in response to his landlord's advice and his own concern for his wife's safety, he moved to a friend's house in Shemiran, but since cars were being searched everywhere, apart from a few bags and some clothes he was unable to take along his personal belongings, including two hand-woven Kashan

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<sup>12</sup>At the Hearing (before Mr. and Mrs. Salehi Nasab testified), Mr. Daley alleged that Mr. Salehi Nasab was put out of work towards the end of 1978 or early in 1979 because he had held a high administrative position and had links to the Shah's regime, and that he went to see Mr. Daley on several occasions at Hover Naft looking for work, as he was in difficult financial straits. It was on one of these visits, that he showed Mr. Salehi Nasab a burglar alarm  
(Footnote Continued)

carpets, from the apartment at No.22 Boostan No.6, to his friend's house.

Finally, Mr. Daley alleges that on 30 May 1979, an Iranian friend who had apparently come by to visit them at Boostan No. 6 informed them that he had witnessed Revolutionary Guards removing the contents of their residence. He further alleges that he went there himself on the following day and found the front door of the building broken and saw that all of the furniture had been removed, including even the drapes, and that slogans supporting the Leader of Iran's Islamic Revolution had been written on the doors and walls. Mr. Daley concluded by alleging that he had complained to the Minister of Housing, who advised him to lodge a complaint with a clergyman named Rajahany, who was in charge of the local Revolutionary Committee.

- 10- On the basis of the documentary evidence, the Respondent proved that all of these allegations were untrue and did not conform to any of the physical and unimpeachable facts.
- 11- As noted above, the Respondent proved on the basis of evidence -- even evidence relied on by the Claimant himself -- that Mr. and Mrs. Daley cleaned out the apartment at Boostan No. 6 on 22 February 1979, and left Iran sometime later that same month<sup>13</sup>. The Respondent has proved,

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(Footnote Continued)

device, so that the latter might be able to make some money by becoming a sales representative for the device.

<sup>13</sup>As we saw above in paragraphs 6 and 8, and in footnotes 8 to 10, it has been established -- even on the basis of the Claimant's own evidence -- that Mr. and Mrs. Daley left Iran in late February. In his affidavit, Mr. Renshaw expressly mentions that Mr. Daley returned (alone) in late March, and the stamp on his passport also indicates that Mr. Daley entered Iran on 29 March 1979 (ie., considerably after 17 March, a date which he himself "recalled so well"). Moreover, the entry stamp for the

(Footnote Continued)

based on witness testimony and written depositions from the neighbors, that prior to vacating their residence Mr. and Mrs. Daley sold all their furniture and household effects, except the drapes, contrary to what was alleged in the Affidavit; they left the drapes as they were for the landlord, and his wife brought them to the Hearing with her. At the Hearing, Mrs. Bassirian (Salehi Nasab) and Mr. Salehi Nasab, Mr. Daley's landlords, reiterated in detail the scenario of the farewell dinner, how the apartment was vacated on 22 February 1979, and how the Daleys sold their belongings before vacating the premises, without being countered by any evidence in rebuttal. Mrs. Bassirian testified both orally and in writing, that her brother had purchased some of the goods sold by the Claimant.

Both in their written testimony, and orally at the Hearing and in Mr. Daley's presence, Mr. and Mrs. Salehi Nasab denied under oath Daley's allegation that their house had ever been raided by anyone, whether the police or Guards, under any pretext, whether that of links with the Shah's regime or otherwise. Emphasizing once more that the Daley family did not reside in their apartment at Boostan No. 6 at any of the alleged dates in the months of March and April 1979, and relying on depositions from witnesses in the neighborhood who testified that they never saw or even heard of any such events in that area<sup>14</sup>, Mr. Salehi Nasab noted, producing his retirement papers, (first) that he had been

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(Footnote Continued)

month of May attests to the fact that he left Iran again sometime between 29 March and 21 May 1979, and that he was not in Iran for a part of this period.

<sup>14</sup> The deposition thus submitted has been signed by eight residents of Boostan No. 6 (with the exception of Mr. Salehi Nasab and Mrs. Bassirian, who gave separate testimony). In this deposition, the witnesses declared that they did not observe any remarkable event or disturbance, whether with respect to foreigners or

(Footnote Continued)

an employee with the Ministry of Finance, and not a high-ranking official connected with the Shah; (second) that he continued working at the Ministry of Finance for over a year following the alleged events; and (third) that he subsequently retired at his own request, and had been receiving a pension ever since his retirement.

Denying Mr. Daley's assertions, Mr. Salehi Nasab pointed out in his presence that his only meeting with Mr. Daley was several months after the apartment was vacated, when Mr. Daley came to see them. During that very brief visit in the downstairs kitchen (where the Salehi Nasab family lived), Mr. Daley proposed giving him a burglar alarm device in satisfaction of his outstanding debt for the last rental payments, promising to give Mr. Salehi Nasab the device after first showing it to some people so that he could find a market for the device. Mr. Salehi Nasab emphasized that he never saw Mr. Daley after that date, and that Mr. Daley neither paid his back rent nor gave him the burglar alarm.

- 12- The Respondent has submitted an affidavit from Engineer Mostafa Kateraie, former Minister for Housing and Urban Development of the Provisional Islamic Revolutionary Government, wherein he testifies that:

"...I did not know Mr. Daley [and had] no acquaintance with him. Therefore I deny all his statements in respect of having contact with me.

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(Footnote Continued)

in connection with Mr. Salehi Nasab, during the relevant period. Some also attested that they had tenants who were foreigners, but that neither they nor their tenants had been harassed. According to the testimony of Mr. Abdol - Azim Kavoosian, one of the signatories to the deposition, at the same time as the event alleged by Mr. Daley, his house at 31 [Boostan No.6] was being rented by an American colonel named John Server (holder of passport No.71513079), who lived at Boostan No.6 without any trouble until the end of his stay in Iran.

As to... the alleged attack, harassment, destruction and taking the properties out of [Mr. Daley's] house and that this incident was reported to me and that I advised him to lodge a complaint with a clergyman, named Rajahany... nothing was reported to me in these respects and I did not talk with Mr. Daley or any other person in these connections. Furthermore, I do not know essentially [sic] a person in the name of Mr. Rajahany and strongly deny Mr. Daley's statements in these respects."

Contentions relating to the seizure of the Peykan automobile

- 13- Mr. Daley alleges that he had a meeting with an Iran Aircraft Industries adviser, named Uwe Koch, at the Hilton Hotel on 19 February 1979. In answer to the Respondent's objection and to a query by the Tribunal, he alleged that the reason for holding the meeting with Mr. Koch at the Hilton Hotel, even though he knew that it had come under control of the Revolutionary Guards, was that "the Hilton Hotel was being used as an assembly area for United States nationals wishing to leave the country," and Mr. Koch had moved to the Hotel.

Following upon these prefatory remarks, the Claimant alleges that when he reached the entrance to the Hotel grounds, some Guards jumped from the back of a truck and made him get out of his car, and one of them took the vehicle registration papers from him, jumped into the car, and drove off.

The Claimant's only evidence in support of these assertions consists of the plaintiff's (Mr. Daley's) own affidavit and another affidavit, allegedly signed by Mr. Koch. Only this written affidavit has been filed with the Tribunal by Mr. Koch. He did not attend the Hearing, and the arbitrators were thus unable to question him.

Mr. Daley has also made a number of other allegations, in support of which he has presented no evidence or other documentation:

First of all, he alleges that after this incident, he entered the Hotel and complained to a clergyman who was there. The clergyman responded that "the whole infrastructure (police, government, etc.) was now in the hands of the revolutionaries." Mr. Koch, however, does not mention any such matter in his affidavit.

Secondly, he alleges that he reported the incident to the Ministry of Housing, and that he was given assurances that when things returned to normal he would be compensated for his loss.

Thirdly, he alleges that he reported the incident to the United States Embassy, but no evidence in substantiation of this allegation has been filed with the Tribunal.

- 14- As against this claim the Respondent noted, by way of preliminary, that at the time in question no group or faction known as the "Revolutionary Guard Corps" yet existed; second, the Guards did not have uniforms until long after the victory of the Islamic Revolution; and third, the Guards never had any trucks at their disposal, and in particular, they did not go around in trucks during the first and second year (or even longer) after they were established.

In addition to these background remarks, the Respondent has relied on various other evidence in order to demonstrate that the statements of the Claimant and Mr. Daley are untrue:

- 15- The Respondent points out that whereas the Claimant represents that he had to go to the Hilton Hotel to meet Mr. Koch, because the latter had moved there in order to be evacuated from Iran, in his affidavit Mr. Koch states that following the theft of the automobile, "Mr. Daley and I... returned to our respective homes by way of taxi."

- 16- Mr. and Mrs. Salehi Nasab attested in their affidavits, and also gave oral testimony before the Tribunal and in Mr. Daley's presence, that on the occasion of the farewell dinner which took place two or three days after the alleged theft of the Peykan automobile, Mr. and Mrs. Daley did not make the slightest reference to any such incident. On the contrary, they pointed out, Lynette, Mr. Daley's daughter, had previously told their own daughter that her father had sold their Peykan automobile<sup>15</sup>.
- 17- The then Minister of Housing and Urban Development has attested that :

"... the statements of Mr. Daley concerning the way his Paykan car was confiscated... and that the Ministry of Housing assured him that when situation [sic] returned to normal he would be compensated for his loss, are entirely untrue. Mr. Daley never talked to me about his car and I strongly deny any conversation with him."

Contentions relating to the horse, "Brown Sugar"

- 18- In connection with this horse, which he allegedly bought for his daughter Lynette, Mr. Daley alleges that after hearing from some German friends that "no one was allowed to remove their horses from the stables", and being told that these friends intended to ship their own horses and Brown Sugar out of Iran on 1st March 1979,

"My wife and I visited the stables to see what was happening... On arrival at the stables we were confronted by Revolutionary Guards... for a period of ten days, we were prevented from entering to care for

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<sup>15</sup>Mr. Daley, who was afraid that the Respondent might have obtained the sales receipt for the automobile from the buyer, abruptly alleged at the Hearing -- in order to prevent the issue from being raised -- that he had prepared a receipt indicating that he had sold the Peykan to a customer, and had given his wife the receipt, but the buyer never went to see him or his wife in order to pay for and receive the car.

our horse... The last time we went down, we were accosted by Guards who threw stones at us forcing us to flee for our safety... Although we have not seen the horse since the spring of 1979, a friend of ours, who recently returned from Iran, notified us that when he left Tehran in March 1984, our horse was the property of the Iranian Army and was still at the stables."

On the basis of solid and incontrovertible evidence, the Respondent has established that none of these allegations is true.

19- Based on numerous affidavits, Iran has proved that no horse owner was ever, at any stage, prevented from visiting and caring for his horse. Aside from all this, however, based on numerous affidavits and evidentiary documents, inter alia the horse's identity certificate, the Respondent has established that:

- 1 - On 23 June 1979, ownership of the horse was transferred to Mr. Renshaw, pursuant to a sales document signed by Mr. Daley, and the particulars of this transfer were registered on 3.4.58 [24 June 1979], on the page relating to "transfer of ownership."
- 2 - The membership card for the Nowroozabad Riding Club (the stable where the horse was kept) in connection with Brown Sugar, which had formerly been in Lynette's name, was reissued on 7.4.58 [28 June 1979] in Mr. Renshaw's name, with Miss Wachli being named as co-user, and both of the latter regularly visited and rode the horse.
- 3 - From the month of Mordad 1358 (June 1979) on, the Club membership fees and stabling charges for the horse were paid by Mr. Renshaw.
- 4 - Mr. Renshaw and Miss Wachli authorized Mrs. Ellen Schmitt and Mr. Peter Sturberg to use, ride and

care for the horse while they were out of Iran on holiday (from 13 August 1979).

- 20- The affidavit of Mr. Renshaw, and the attachments thereto<sup>16</sup> -- which the Claimant has filed with the Tribunal as ostensibly confirming Mr. Daley's allegations -- indicate that Mr. Renshaw regarded himself as the owner of the horse throughout this time, and that he encountered no obstacle, other than that of finding a truck which could, at the height of the war and the Iraqi attacks, travel to Iran and ship the horse out of the country.

In one of these communications attached to Mr. Renshaw's affidavit, at the top of which appears the date 17th November 1980 (ie., about two months after the war began), Mr. Renshaw says:

"Anyway as I was saying, reference my request for a broadcast on 'Truckers Hour' to locate some of the old drivers on the Iran run... Well I have a house full of furniture[!] out there to bring back if anybody is interested in a return load. But more important than that... I have a beautiful horse called 'Brown Sugar' in Teheran which I would like to get to my place in Switzerland or back here to the U.K.... So if you find any willing truckers I'll supply all the written authorities and the stables to collect it from. I know the horse is O.K., as I had word about it only three weeks ago, notwithstanding the war that's going on out there."<sup>17</sup>  
 (emphasis in the original)

<sup>16</sup> Attached to this affidavit are letters which Mr. Renshaw allegedly exchanged with an announcer for BBC-Radio 2, whom he wanted to make a radio announcement so that he could find a trucker [willing to go and] bring out Brown Sugar with him from Iran.

<sup>17</sup> In contrast to the extensive efforts made abroad by Mr. Renshaw to have Brown Sugar shipped out, Mr. Daley has not produced any evidence which would indicate that he was concerned in the slightest over any property left behind in Iran, that he was thinking about taking it out of Iran,  
 (Footnote Continued)

- 21- Contrary to Mr. Daley's allegation to the effect that as of March 1984 the horse was the property of the Army, a certificate from the Organization for Physical Education and the specialist veterinarian of riding sports, filed by the Respondent, demonstrates that the horse died on 17 Deymah 1361 (7 January 1983) of "volvulus of large colon," apparently a prevalent disease among livestock. This fact is also confirmed by separate documentary evidence attached to Mr. Renshaw's affidavit, and shows that Mr. Renshaw was aware of the matter as well. The letter of 14 July 1983 from the BBC announcer to Mr. Renshaw states:

"...Sorry to hear about Brown Sugar, and I'm only sorry we never managed to find anyone brave enough to bring him back. Just recently I've spoken to a couple of drivers down at Dover who have been on their way to Teheran!" (emphasis in the original)

Contentions relating to events at the airport

- 22 - Mr. Daley, who asserted in the Statement of Claim filed on 19 January 1981 only that the sum of U.S.\$15,000 was confiscated from him at the airport, alleged in the Supplemental Statement of Claim filed on 22 October 1984, that on 25 June 1979, when he and his wife arrived at Mehrabad Airport intending to take a British Airways flight, they had with them \$15,000 in cash (in fifteen \$1000 bills), 49 Pahlavi gold coins worth \$14,100, and some jewelry worth \$4,500 belonging to his wife, including two rings set with jewels and a diamond solitaire.

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(Footnote Continued)

or even that he had asked Mr. Renshaw about the condition and fate of the horse.

Mr. Daley goes on to say that he had heard prior to arriving at the airport that the "Revolutionary Guards would take jewelry and cash in excess of \$250 from Americans" (paragraph 14 of Mr. Daley's Affidavit). In paragraph 13 of his Supplemental Affidavit he completes the account, stating, apparently for this reason, that "I had carefully placed my money in various places on myself and in my baggage, but the Guards were extremely thorough and managed to find everything of value." Mr. Daley also alleges that the Guards ushered his wife "into another corner, went through her purse and confiscated all of her jewelry." Mr. Daley alleges that his watch worth \$800 was confiscated, along with other items.

At the Hearing, in response to a question by the Tribunal as to where he had kept these valuables -- as well as the cash which he had allegedly gradually converted from rials into dollars in the bazaar -- when he left Iran in February 1979, Mr. Daley alleged that he had hidden them in the central heating duct above the kitchen door of his apartment at 22 Boostan No. 6.

- 23- The expectation that the Respondent disprove Mr. Daley's allegations, which were based on absolutely nothing more than his own Affidavit, is perhaps one of the most inappropriate expectations which can be had of a respondent. For in such cases, the respondent cannot possibly prove a negation -- ie., that the Claimant did not have the money and jewelry, or that the allegation that they were confiscated by the authorities is untrue. Notwithstanding this difficulty, however, the Respondent has proved that :

- First, as confirmed by the Department of Notes Issue and Treasury of Bank Markazi Iran,

"according to the International Police Book (Interpol) the United States Government has printed a small number of US\$1000 notes, but has

issued only a very small number of them. So far, no record has been traced in this department showing that US\$1000 notes were available for sale or purchase in Iran."

- Second, Mr. and Mrs. Daley obtained only two travellers' cheques, for \$1000 dollars each, from Bank Saderat, whereas Mr. Daley alleges that they had 15 \$1000 bills and makes no mention of these two travellers' cheques.
- Third, Mr. Daley's account of the events shows that he has not told the truth, because the Revolutionary Guards are not involved at the stage where suitcases are inspected (when, Daley alleges, the authorities found and confiscated the items and bank notes hidden in the suitcases); suitcases are inspected in the Customs room by the Customs officials, prior to being brought to the airplane. The Guards' role, coming at the last stage before the traveller boards the airplane, is to make a body search and to inspect the hand baggage.
- Fourth, Mr. and Mrs. Daley left Iran via Mehrabad Airport on at least one other occasion (towards the end of February 1979), and Mr. Daley departed on still another occasion (in April or May 1979). (See paragraph 8 and footnotes 8 to 10 above). Therefore, the assertion that he suddenly experienced this sort of alleged harassment during his journey on 25 June 1979 cannot possibly be justified.
- Fifth, Mr. and Mrs. Salehi Nasab testified to the contrary, stating that Mr. Daley visited the apartment at Boostan No. 6 only once after leaving it, and on that occasion he only talked with them briefly in the kitchen of Mr. Salehi Nasab's home, in connection with his back rent and the burglar alarm. Mr. Salehi Nasab pointed out that the heating for the apartment was

provided by radiators installed in the room floors, and not by putting central heating ducts under the ceiling. Mr. Salehi Nasab emphatically denied that Mr. Daley visited the apartment on the second floor, after vacating it on 22 February 1979.

- Finally, the Respondent points out that even Daley's wife was not willing to prepare a separate affidavit of her own in confirmation of his allegations. The Respondent also requested that in reaching its decision, the Tribunal take into account Mr. Daley's character and the impression it had formed of him during the proceedings and in connection with his other allegations and portrayal of events.

### III. REASONS FOR MY CONCURRING/DISSENTING OPINION WITH RESPECT TO THE AWARD

- 24- My detailed discussion under Section II above, made with the aid of the available evidence in this Case, will help clarify the reasons for my concurrence/dissent to the Award.

#### A. Jurisdictional issues

- (a) The issue of Mr. and Mrs. Daley's United States nationality

- 25- In this Case, the Claimant has submitted photocopies of only the first pages, and pages 8 and 9, of Mr. and Mrs. Daley's passports.

While the passports could perhaps constitute, if accompanied by other evidence, corroboration of the assertion that Mr. and Mrs. Daley were United States nationals in 1978 or 1979 (when the claim arose) -- but no such evidence has come to light -- the United States has nonetheless failed to

establish, in the face of the doubts created by Mr. and Mrs. Daley's previous (or dual) British nationality, that such United States nationality was held continuously, at least to the date when the claim was filed or the Algiers Declarations came into effect<sup>18</sup>. These doubts are

<sup>18</sup>I do not find it relevant, for the purposes of the present Opinion, to take up here the issue of how long nationality must, according to international law, have been held continuously, starting from the time the claim arose. Therefore, to acquaint the reader with certain opinions and approaches in international law, I shall merely draw attention to the following sources, as well as to the sources cited therein:

- Hurst, Nationality of Claims, BYIL, 1926, p.162.
- Borchard, The Protection of Citizens Abroad and Change of Original Nationality, YLJ (1934) p.359 at 372.
- Lauterpacht, International Law Reports vol. 20, pp.233-234; vol. 21, pp. 157-162; vol. 15, p.191.
- Ian Brownlie, Principles of Public International Law, 3rd ed., p.663.

At any event, however, it is necessary to draw attention to Article VII, paragraph 2 of the Claims Settlement Declaration, which provides that:

"Claims of nationals' of Iran or the United States as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this agreement enters into force, by nationals of that state..."

Furthermore, even where a passport has been visaed by the government against which the claim is brought, the passport does not constitute sufficient proof of nationality in order to give rise to a right to diplomatic protection, as has been ruled by the International Court of Justice in the Nottebohm case:

"When Nottebohm... presented himself before the Guatemalan authorities, the latter had before them a private individual; there did not thus come into being any relationship between governments. There was nothing in all this to show that Guatemala then recognized that the naturalization conferred upon Nottebohm gave Liechtenstein any title to the exercise of protection." (ICJ Rep. 1955, p.4, at p.18; Diplock, (Footnote Continued)

particularly reinforced if we note that the Claimant and Mr. Daley refused to submit the passport of the latter individual, even though a request to examine it was made at the final Hearing.

Therefore, I do not understand how the majority can be satisfied that the Claimants "are United States nationals as defined in Article VII, paragraph 1 of the Claims Settlement Declaration, and that they have been so at all times since the claim arose."

- 26- In confronting the sensitive and important issue of Mr. and Mrs. Daley's dual British/United States nationality, the Tribunal did not look into the matter in order to determine their dominant nationality; instead, it simply relied on Mr. Daley's own second Affidavit, wherein it is alleged that after acquiring United States nationality, they immediately returned their British passports to the place of issue in London. And yet, the Claimant did not even bother to substantiate this assertion by submitting some certification from the relevant British authorities which might confirm his allegation.
  
- 27- In view of these shortcomings, doubts and uncertainties, and in the absence of compelling and acceptable evidence in proof of Mr. and Mrs. Daley's United States nationality, the Tribunal should not have been so ready to regard their United States nationality as proved.
  
- (b) The issue of the right to bring claim in protection of Mrs. and Miss Daley

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(Footnote Continued)

Passports and Protection in International Law, 32 Grotius Society (1946) p.42; Guy S. Goodwin-Gill, International Law and the Movement of Persons Between States [1978] pp.46-47).

- 28- As was stated above in paragraph 2-2 and in footnote 3 to this Opinion, if the Tribunal were to sustain the United States' position that the claims brought before this Tribunal are not in the nature of espoused claims, then the claims relating to Brown Sugar (because the horse was owned by Lynette Daley, who is an adult), and also the other claims wholly or partially belonging to Mrs. Daley (indubitably including those for the gems, jewelry and diamond solitaire) should have been dismissed, merely by virtue of the fact that the United States lacks the capacity to represent them or to act as their locum tenens, and has not submitted the least shred of evidence indicating that those persons have authorized the United States Government to bring such claims on their behalf<sup>19</sup>.
- 29- At any event, even in espoused claims, and regardless of which of the theories mentioned in footnote 3, supra, we support and adhere to<sup>20</sup>, it was definitely necessary, in the

<sup>19</sup> See also the Decision by the Italian-Mexican Commission in Emilia Marta Viuda de Giovanni Mantellero (footnote 3, supra).

<sup>20</sup> In allowing the claims of private persons against states to be brought pursuant to a treaty or inter-state accord, it is not the private individual owner of the claim that is elevated to the status of a subject of public international law. Rather, it is the national's private claim that is elevated to the level of an international claim, by virtue of having been taken up and espoused by the state of which he is a national. (See: Mavrommatis Palestine Concessions, PCIJ, Series A, No. 2 at 12; and Edwin M. Borchard, Diplomatic Protection of Citizens Abroad (1927), pp.356-9). For according to established doctrine, only states make up the community of international law (Oppenheim, International Law Section 1556 (8th ed. 1955)); and Hyde, International Law p.93 [2nd ed., 1945]. In a situation where the state espouses the claim of a national, the rule of good faith plays an essential role, because that foreign state which is a party to the claim can, in reliance on the good faith of

(Footnote Continued)

special circumstances of this Case, to obtain the permission of Mrs. and Miss Daley:

"The requirement of securing the consent of the injured individual is a wise limitation on the presentation of unfounded claims." (A. H. Feller, The Mexican Claims Commissions (1923-1934), p. 91).

B. The merits of the claim

(a) The Peykan automobile

- 30- Although the Tribunal has made a correct beginning in its Award with respect to this claim by providing in paragraph 17 thereof that, in order to succeed in his claim, the Claimant must carry the burden of proving (a) that he owned the automobile at the time of the alleged events, and (b) that persons whose acts were attributable to the Government of Iran (c) had confiscated that automobile, it has nevertheless failed to consider any of these factors in reaching its decision.
- 31- Not only is there no convincing evidence showing that Mr. Daley still owned the Peykan automobile as of 19 February 1979 (that is, the burden of proof of the claim has not been successfully met), but the documentary and circumstantial evidence leads to the opposite conclusion:
  - 31-1 The presumption and possibility that Mr. Daley owned and possessed the automobile as at 19 February 1979 becomes quite unconvincing when countered by the

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(Footnote Continued)

the espousing state, assume that the latter has fully examined and studied the claim. Therefore, if at any stage it becomes known that the claim is not an honest one, it is the duty of the espousing state to pursue the matter, and even if payment has been made thereon, to make restitution of that payment to the foreign state concerned (Edwin M. Borchard, ibid, at 358-59).

following premises and probabilities: that Mr. Daley put up for sale, and sold, his property in or prior to February (as noted by the Tribunal in paragraph 28 of the Award), that he sent his two children back to the United States in February 1979, that on 22 February 1979 he vacated his apartment and terminated the rental agreement with his landlord, and finally that he and his wife left Iran in late February (paragraphs 6, 8 and 11 of this Concurring/Dissenting Opinion)<sup>21</sup>.

In this sort of situation, where someone sells all his furniture, vacates his apartment, tells his friends goodbye, and a few days later leaves the country, it is very far-fetched and highly improbable that he would have failed to make a disposition of his automobile (which was one of his most valuable possessions). And in such a case, where :

"...one of the Parties allege[s] the existence of facts which imply a departure from the normal state of affairs or a violation of international law,"

The practice has been, to apply the rule of onus probandi in an especially strict and stringent manner<sup>22</sup>.

31-2 The written and oral testimony of Mr. Salehi Nasab, who testified that his daughter told him that she had heard from Lynette Daley that her father (Mr. Daley) had sold the Peykan automobile at some time prior to the alleged

<sup>21</sup>Mr. Renshaw's statements in paragraphs 2 and 3 of his affidavit show clearly that Mr. and Mrs. Daley left Iran permanently in February 1979 (cf. p.8 and footnote no.9 of this Concurring/Dissenting Opinion).

<sup>22</sup>George Schwarzenberger, International Law (London, 1949), 2nd ed., vol.1, p.439.

events of 19 February 1979, is considered in the Award to constitute insufficient proof that Mr. Daley no longer owned the automobile<sup>23</sup>.

In the first place, the Tribunal fails to make clear why it does not regard this testimony as constituting sufficient secondary evidence that the car had been sold, when taken together with the abundant further secondary evidence, inter alia the comments of Mr. Daley himself, who alleged that he signed and gave his wife a sales receipt for the car so that she could hand it over to the buyer when he came<sup>24</sup>. In the second place, it is not clear why the Tribunal has made the Respondent bear the burden of proving that Mr. Daley did not own the automobile as at that particular date. The Tribunal has apparently forgotten that several lines above, it agreed (especially in the face of all this secondary rebuttal evidence) that it was the Claimant who bore the burden of proof that he had the car. Mr. Salehi Nasab's inability to tell the Tribunal the buyer's name or the precise date of sale of the car should not have been made a reason for completely releasing the Claimant from his obligation to produce evidence<sup>25</sup>.

<sup>23</sup> In response to a question put by one of the arbitrators, Mr. Salehi Nasab stated that he had brought along his daughter's diary for that period and was prepared to show it to the Tribunal if it so desired, so that it could note the time and nature of the conversation between his daughter and Lynette.

<sup>24</sup> In view of the consequences of registered transactions and of the problems involved in ordinary transactions, in Iran all sales and purchases of automobiles are carried out before a notary public, and a formal instrument reflecting the transaction is prepared.

<sup>25</sup> Even if it were true that the Respondent did not submit sufficient evidence, it is the Claimant's claim that  
(Footnote Continued)

31-3 Although the Respondent was under no obligation to prove that the automobile had been sold, from the very outset of exchange of briefings it requested through the Tribunal that the Claimant provide it with information concerning the automobile, so that it could prove when, and to whom, it had been sold. The Respondent stated on a number of occasions that if it were provided with any of the information relating to the automobile's plate number, the name of the person who sold this second-hand automobile to Mr. Daley, and the number of the notary public (or address of the notary public's office) where this transaction took place, it would be able to inform the Tribunal of what happened to the automobile, and of its ownership as of 19 February 1979. This effort on the part of the Respondent, which clearly demonstrates its veracity and good will, was made even though everyone was aware that international proceedings are not so flexible as to permit shifting the burden of proof from the Claimant, on whom it belongs<sup>26</sup>. The burden of proof is shifted to the respondent only where it is entirely certain that he has at his disposal evidence which he refuses

(Footnote Continued)

must be rejected, in the absence of convincing evidence on his part. (V.S. Mani, International Adjudication (1980), p.205). In the words of Lord Phillimore:

"Another principle... is that by which the plaintiff must prove his contention under penalty of having his case refused." PCIJ, Procès verbaux of the proceedings of the Committee, June 16-July 24, 1920 at 316 (1920).

<sup>26</sup> See:the Decision of Edwin B. Parker, the arbitrator for the Lusitania Claims Mixed Claims Commission: U.S. and Germany: Administrative Decisions and Opinions of a General Nature and Opinions in Individual Lusitania Claims and Other Cases: to June 30, 1925 (Washington, D.C. 1925) p.470.

to produce even though it would be of considerable help to the decision in, and disposition, of, the claim<sup>27</sup>.

- 32- Based on the foregoing, and on what has been set forth in Section II of this Concurring/Dissenting Opinion (the Issue of Credibility and Reliability), it is my opinion that the claim relating to the Peykan automobile should have been dismissed right at that stage in the proceedings.
  
- 33- In connection with the allegation that the automobile was expropriated by the Revolutionary Guards<sup>28</sup>, the Tribunal has apparently given great weight to Mr. Koch's affidavit (paragraphs 19-20 of the Award), because in view of the noncredibility and unreliability which attach to Mr. Daley's comments, without Mr. Koch's affidavit he could not possibly have gained even the semblance of an entitlement in respect of this claim, let alone succeed in obtaining an award in his favor. In reaching this decision, the Tribunal has relied upon the similarity between the statements of Mr. Koch and Mr. Daley. However, a brief consideration of these two affidavits makes it clear that this conclusion is not particularly justifiable.
  
- 33-1 Firstly, the Tribunal has forgotten that in contrast to the Respondent's action in making its principal witnesses (Mr. and Mrs. Salehi Nasab) available to the Tribunal for questioning at the oral Hearing, Mr. Koch

<sup>27</sup> See: Arthur and Margaret Levis claim, in the Decision of the Arbitral Commission on Property and Interests in Germany (The Arbitral Commission, Koblenz, 1958-67), vol.2, p.210.

<sup>28</sup> The Tribunal has not paid the slightest attention to the fact that this Corps had not yet been organized as of that date, and that no revolutionary forces had uniforms and army trucks at their disposal in those days following so immediately after the victory of the Revolution.

did not attend the Hearing, and the Tribunal was thus given no opportunity to determine whether his assertions were valid or invalid.

- 33-2 Secondly, nothing in Mr. Koch's affidavit bears out Mr. Daley's allegation that he was staying in the Hilton Hotel in order to be evacuated from Iran. On the contrary, Mr. Koch asserts that after the alleged occurrence of the events at approximately 1 p.m. on 19 February 1979, he and Mr. Daley "returned to [their] respective homes" (cf. paragraph 15 of the present Opinion). Therefore, we come back to the doubts and misgivings raised by the fact that it would have been highly unlikely for Mr. Daley to have arranged to meet Mr. Koch at the Hilton Hotel instead of at his or Mr. Koch's house or somewhere else, knowing as he did that the Hilton Hotel was at that time under the control of the Revolutionary Guards and had been selected as the evacuation point for Americans.
- 33-3 Thirdly, Mr. Daley alleges that he went and complained about the Revolutionary Guards' actions to a clergyman at the Hotel, whereas Mr. Koch's one-page affidavit makes no mention of such an encounter.
- 33-4 Finally, Mr. Daley has not submitted any evidence whatsoever (even in the form of an affidavit from an independent person) to indicate that he brought this incident to anyone's attention at that time (for example, to the attention of the United States Embassy in Tehran, as he alleges). It is surprising that the Tribunal has taken no notice of either this fact or the fact that he said nothing about the incident at the farewell dinner on 22 February 1979.

- 34- Not only has the Tribunal disregarded these two obstacles for no justifiable reason, but it has also facilely attributed the acts of individuals who allegedly stole Mr. Daley's automobile, to the Government of the Islamic Republic of Iran and thereby held that under international law, the Government has the responsibility to indemnify Mr. Daley for his loss.

Mr. Daley's own evidence and assertions bear witness to the fact that even if he was telling the truth in stating that he had an automobile and that it was confiscated in front of the Hilton Hotel, he could not attribute the acts of the individuals who allegedly stole his automobile to the Islamic Republic of Iran :

- 34-1 Mr. Daley himself alleges that when he complained to the clergyman present at the Hilton Hotel, he was told that the whole infrastructure was in the hands of the revolutionaries, and that the clergyman could do nothing. If there were any truth in Mr. Daley's and Mr. Koch's assertion that the automobile was confiscated by the Guards stationed at the Hotel, then such an answer would have been out of place, for the Guards would have had to listen to the clergyman who was at the Hotel.

As stated in paragraph 34 of the Award in Alfred L. W. Short (Award No.312-11135-3), even if the individuals who allegedly stole Mr. Daley's automobile were not thieves taking improper advantage of the special revolutionary situation, and were instead supporters of the Revolution, nonetheless:

"The acts of supporters of a revolution cannot be attributed to the government following the success of the revolution just as the acts of supporters of an existing government are not attributable to the government."

34-2 Snatching the automobile papers and absconding with the car is different from confiscation by a Government entity or organ whose acts can be regarded as giving rise to State responsibility. If the automobile had really been seized by the Guards, there would have been no point in fleeing in it<sup>29</sup>.

34-3 In reaching the incorrect conclusion at which it arrived by means of Mr. Daley's and Mr. Koch's version of the facts, the Tribunal has failed to answer the question of why the seizure of the automobile should give rise to responsibility on the part of the Government, if it was stolen by individuals whom neither the clergyman stationed at the Hotel nor the police could control, due to the special revolutionary

<sup>29</sup> At least since the beginning of the twentieth century, and with the work of D. Anzilotti in La Responsabilite Int'l des Etats a Raison des Dommages Soufferts par des Etrangers, no one has doubted that States are responsible only for their own acts, and are not responsible for the acts of ordinary persons, except by reason of denial of justice. This position was adopted in the draft proposal of Roberto Ago in the fourth Report on State Responsibility (Yearbook of the Int'l Law Commission), and no one has denied such a rule ever since it was published (there are numerous sources in this connection. Reference may be had, eg., to the following: M. Whiteman, Digest of International Law, vol.8, p.816; S. Hackworth, Digest of International Law, 471, 526; Ch. De Visscher, La Responsabilite des Etats, Bibliotheca Visseriana, II, p. 103; Ian Brownlie, System of the Law of Nations, State Responsibility, Part I (1983), pp.159 et seq; the Decision by Max Herber in British Properties in Spanish Morocco, (1925) R.I.A.A. vol. II, pp.696, 709; Gordon A. Christenson, The Doctrine of Attributio in State Responsibility, published in R. B. Lillich, International Law of State Responsibilities for Injuries to Aliens, 321 at 326-327). Moreover, even if in the course of carrying out his duties a government official, employee or soldier causes injury to a foreign national, this act does not, ipso facto, give rise to State responsibility from the viewpoint of international law. See: S. Hackworth, 563; Richard B. Lillich & Gordon A. Christenson, International Claims, pp.54-5; and Ian Brownlie, op cit, pp.145-150.

situation. Mr. Daley has submitted no evidence or documentation to show that even upon his second entry into Iran, which took place several months after the events and movements of the Revolution had reached their height, he took any action to recover his automobile or to make a complaint to the police or other authorities.

- 34-4 In connection with the events surrounding the [U.S.] Embassy in Tehran, which took place well after the culmination of the Revolution and during the time that the Provisional Revolutionary Government was in power and exercised a relative degree of control over the situation, the International Court of Justice did not accept the position that the acts of supporters of the Revolution should be attributed to the Government of the Islamic Republic of Iran. The International Court of Justice held that these acts:

"can be directly attributed to the Government of Iran only when it is established that in actuality, in the attack in question, the extremist groups have acted on behalf of the Government and were authorized to perform specific functions on behalf of a competent governmental agency of Iran." (Claim of the United States Diplomatic and Consular Staff in Tehran. 1980, ICJ 3, 29, para.58).

- 35- Relying upon the Award rendered in Kenneth P. Yeager and The Islamic Republic of Iran (Partial Award No. 324-10199-1) is out of place here, because the presumption that the Hilton Hotel was under the control of revolutionary forces (or as asserted by the majority in that Award, by the "Revolutionary Guards"), as found in that Award, does not ipso facto lead to the conclusion that the Guards stationed at the Hilton Hotel were the same persons who allegedly confiscated Mr. Daley's automobile in front of the entrance to the Hotel. Mr. Daley's own statements, as well as his narrative of his conversation with the clergyman who was at the Hotel, exactly confirms my opinion that the group which

allegedly stole the automobile was not made up of members of the group controlling the Hilton Hotel.

Consequently, in view of the failure to prove the necessary prerequisite that the persons who confiscated the automobile were revolutionaries authorized by the Government, there is no justification whatsoever for relying on the Award rendered in William L. Pereira Associates, Iran and Islamic Republic of Iran (Award No. 116-1-3) -- aside from the fact that that Award is totally different from the instant Award and cannot constitute a precedent for the latter. (See paragraphs 34-1 and 34-4, supra).

(b) The Rolex watch

36- With respect to the claims relating to the alleged incidents at Mehrabad Airport, to the effect that money, jewelry and a wrist watch had been confiscated, the Tribunal accepted the fact that the burden was on the Claimant to prove (1) his ownership of the property at the time of leaving via Mehrabad Airport, (2) its expropriation, as alleged, by individuals whose acts were attributable to the Government, and (3) the value of the alleged property. Once again, however, and in a manner which is unjustified and even more illogical than the way in which it treated the automobile claim, and based solely on assumptions and probabilities, the Tribunal has accepted that Mr. Daley owned and possessed a Rolex wristwatch<sup>30</sup>; and it has then assumed, on the basis of a presumptive continuation of his previous ownership of the watch -- which has never been ascertained -- that the watch was confiscated at Mehrabad Airport, by persons whose acts were attributable to the Government of Iran.

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<sup>30</sup> The Tribunal offers no reason as to why Mr. Daley must surely have worn a watch, and an \$800 Rolex at that.

37- In accepting the assertion that Mr. Daley owned and possessed a watch, the Tribunal has simply assumed that every office worker probably wears a watch -- and a Rolex at that. Going further yet, the Tribunal has regarded the mere probability of the Claimant's having had a watch, taken together with his own allegation, as evidence that the watch was, presumably, confiscated at the Airport; and it has then held that the possible confiscation of the watch at the Airport by Government officials constituted an act of expropriation. The Tribunal itself concedes that these allegations by Mr. Daley are unsupported by any other evidence; or rather, in accepting the Claimant's claim it has taken the difficulty of proving the claim into account (paragraph 33 of the Award)<sup>31</sup>.

Whereas the Tribunal has taken into account the difficulty of producing contemporaneous corroborative evidence in support of the claim, it has not taken into consideration another, much more basic, difficulty -- namely, first of all that it is far more difficult for the Respondent to produce contemporaneous evidence in support of its denial, in order to prove three negations: (1) that Mr. Daley did not have a Rolex watch at the time of his departure from Iran, (2) that it was not confiscated by persons at the Airport, and (3) in the event that it was confiscated as alleged, that the individuals who confiscated it were unrelated to the Islamic Republic of Iran, and that their actions were not attributable thereto. Secondly, the Tribunal has forgotten that where it is difficult to prove a claim or denial, it is the Claimant's claim that must be dismissed, rather than

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<sup>31</sup> Even the United States Foreign Claims Settlement Commissions have not operated in so facile a manner as has this Tribunal, in excusing the Claimant from meeting his burden of proof. (See: Richard B. Lillich & Gordon A. Christenson, International Claims [1962], pp.52-53).

awarding against the Respondent, which is an independent sovereign State, by reason of the difficulties faced by the Claimant in proving the claim (see: paragraphs 31-2 and 31-3, supra, and the footnotes thereto).

- 38- The practice of tribunals and other fora dealing with claims similar to this one has been, to place the burden of proof upon the claimant:

"Claims commissions have given clear expression to the principle that the burden of proof is upon the claimant." (Simpson & Fox, International Arbitration, p.97)

In all instances where international tribunals have proceeded on the basis of inferences and presumptions, they have done so in favor of the sovereign State (the respondent), rather than for the purpose of awarding against it<sup>32</sup>. International fora have held that in order to prove a claim against a State, it is necessary to have evidence which goes beyond prima facie evidence, and they have stated that the evidence must be convincing and of the highest and most conclusive character<sup>33</sup>:

"International Claims Commissions have always been

<sup>32</sup> See, eg., A. H. Feller, The Mexican Claims Commissions (1923-34), p.278; and Zaldivar Case (United States v. Spain) 1871, 16 Ms. Record No.127.

<sup>33</sup> See:

- U.S.A. (Walter J.N. McCurdy) v. United Mexican States, Opinions of Commissioners, 1929, p.137 at 141;
- U.S.A. (Daniel R. Archuleta) v. United Mexican States, Ibid, p.73 at 77;
- U.S.A. (Charles E. Tolerto) v. United Mexican States, Ibid 1927, p.402;
- Ralston, Law and Procedure of International Tribunals, pp.223-224;
- V.S. Mani, International Adjudication, (1980) pp.207-209;
- Simpson and Fox, International Arbitration, pp.197-199.

very careful when it is a matter of declaring that a Government has been negligent in the performance of its international obligations, and have never done so without requiring proof conclusive of that fact." (Mexico City Bombardment Claims, UN Reports, vol. V, p.89).

In the claim of Friedrich & Co., Ralston took three assumptions into account:

- (a) that a Government acts regularly and validly,
- (b) that public officers act regularly in performing their official duties, and
- (c) that there should be a presumption of good faith, in favor of public officers<sup>34</sup>.

39- In cases similar to Mr. Daley's claims, which involve the honor of a nation<sup>35</sup>, or where a particular exceptional and sensitive situation is concerned<sup>36</sup>, or else where a claim

<sup>34</sup> Report of French-Venezuelan Mixed Claims Commission of 1902, U.S. Senate Doc. No. 533 Cong. 59, Sess. 1, vol. 29 (Washington, D.C., 1906), p.31 at p.42. For similar presumptions, see the claim of Heirs of Jules Burn, Ibid, p.25; and D.V. Sandifer, Evidence Before International Tribunals (Revised Ed.), p.144.

<sup>35</sup> See the arbitral decision in Tacna-Arica, UN Report, vol. II, p.930:

"Undoubtedly, the required proof may be supplied by circumstantial evidence, but the onus probandi of such a charge should not be lighter where the honour of a private individual is concerned. A finding of the existence of bad faith should be supported not by disputable inference but by clear and convincing evidence which compels such a conclusion."

<sup>36</sup> "A charge of such exceptional gravity against a state would require a degree of certainty that has not been reached." (Corfu Channel Case, ICJ Reports, 1949, p.17.

relates to a departure from the normal state of affairs or to a violation of international law<sup>37</sup>, a State cannot be awarded against or held responsible merely on the basis of inferences and presumptions, and even on flimsy and unsubstantial evidence; rather, compelling and convincing evidence is necessary to prove the claims -- apart from the necessity of giving particular attention to the credibility and reliability of the claimant's statements, a matter which has already been discussed in detail above.

- 40- The reliance placed on the aforementioned Award in Kenneth P. Yeager and The Islamic Republic of Iran, constitutes one of the most irrelevant instances of reliance on precedent engaged in to date at this Tribunal. Regrettably, the majority in Chamber One apparently became ensnared in its own sophistry in seeking to render an Award in favor of someone like Daley, in its anxiety not to violate the precedent set by this very same majority in Yeager. Without going into the Award in Yeager and the objections thereto, since they are not germane to the instant Opinion<sup>38</sup>, I must note that the present Case bears no resemblance to the circumstances surrounding Yeager (except, presumably, that Mr. Daley and Mr. Yeager left via the same airport).

<sup>37</sup> See: Section 31-1 and footnote 22, supra.

<sup>38</sup> The Award in Yeager and the Award in the present Case, which was issued subsequently to the first, are inconsistent with this same Chamber's decision in Sea-Land Service, Inc., (Award No. 135-33-1). In that Award, it was provided that:

"...it is generally acknowledged that the state of administrative chaos which prevailed in Iran throughout the first few months of 1979 makes it unsafe to attribute any such ostensibly governmental acts to the revolutionary Government that subsequently came to power." (pages 23-24)

The Case taken as a precedent for the Award in Daley is an expulsion case. In that Case it was alleged -- and the Award was rendered on that basis -- that after Mr. and Mrs. Yeager were taken, supposedly against their will, to the Hilton Hotel, on 17 February 1979 (only about six days after the victory of the Revolution and at the height of the revolutionary turmoil), "they were taken to Mehrabad Airport in a convoy of buses." In this alleged situation, supposing of course that it existed as described, the Tribunal presumably held that the Guards or revolutionaries protecting Mr. and Mrs. Yeager incurred responsibility by virtue of having guarded them. No such situation, however, existed in Mr. and Mrs. Daley's case. Not only did the Tribunal not consider Mr. and Mrs. Daley as having been expelled, but it was not their first time to leave Iran during 1979. It is interesting that about 10 or 12 days after the incidents alleged by Mr. Yeager, Mr. and Mrs. Daley left Iran without experiencing any incidents of this sort. Mr. Daley returned to Iran in late March, left Iran sometime in April or May, and returned to Iran once more in late May, without reporting any incident.

Mr. and Mrs. Daley did not depart via the Airport under guard of any force or persons, either on 25 June 1979 or prior thereto. Therefore, there is no basis for holding the revolutionaries (or Revolutionary Guards) responsible for not preventing the alleged incidents (paragraph 35 of the Award) -- especially since Mr. Daley does not assert that he complained to any official or officials at the Airport, or that he ever informed any person or persons of the matter in writing following his departure. There is thus no reason whatsoever to expect the authorities to have prevented or remedied -- and to accuse them of dereliction of duty in failing to do so -- an incident which was not even reported to them.

Not only did Mr. and Mrs. Daley leave Iran without incident on several dates, inter alia on dates close to that of the events alleged by Mr. Yeager -- which they did not experience -- but their last departure took place during a period when relative calm had been re-established. There is thus no justification for inferring by analogy that a situation existed which was similar to that alleged by Mr. Yeager, unless such conclusion is based on convincing and conclusive evidence.

One point never considered by the majority in this section of the Award, is that no stamp showing that they departed via Mehrabad Airport on 25 June 1979 is to be seen on pages 8 and 9 of the photocopies of Mr. and Mrs. Daley's passports. Therefore, on principle it is not known on exactly what date, or how and with what passports, those two persons left Iran<sup>39</sup>.

- 41- Mr. Daley's mutually contradictory assertions (especially the contradiction between his statement in the Statement of Claim -- where he alleged only that \$15,000 in bank notes had been seized at the Airport -- and his subsequent statements) could have been a further justifiable reason for dismissing this portion of the claim. Unfortunately, in this connection the Tribunal has disregarded another precedent, one which has been repeatedly invoked against respondents. In Woodward-Clyde Consultants and The Government of the Islamic Republic of Iran and The Atomic Energy Organization of Iran (Award No. 73-67-3, page 16), the Tribunal considered it a "general rule of evidence that contradictory statements of an interested party should be

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<sup>39</sup> It is to be noted that Mr. and Mrs. Daley also held British nationality.

construed against that party."<sup>40</sup> Therefore, for the aforementioned reasons, I hold that awarding \$800 in favor of Mr. Daley is totally unjust because of lack of proof and because such a finding is devoid of any basis in law or logic, because of the unreliability and lack of credibility which attach to his statements and, furthermore, in reliance upon the international precedents and prior decisions of this Tribunal.

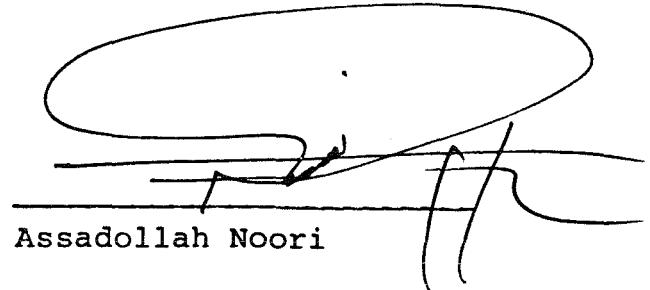
(c) The other claims

- 42- In view of the comments and factual account set forth in Section II of this Opinion, and particularly taking into account the fact that the Claimants were unable to prove, in turn, (1) that they owned the property, (2) that it was in their possession when the claim allegedly arose, (3) that acts culminating in the alleged confiscation or taking of the property actually occurred, and finally (4) that the alleged acts are attributable to the Government of the Islamic Republic of Iran, I concur in the Award's conclusions, where it dismisses the claims relating to the horse Brown Sugar, the household furnishings -- including the Kashan carpets -- and the alleged jewelry and cash. I also concur with the reasoning that the scope and nature of

<sup>40</sup> Moreover, in cases similar to Mr. Daley's refusal to produce his passport so as to prove his nationality, the number of times he left Iran, and the date of his last departure; and also his refusal to provide information and documents relating to the automobile, it has been the practice of international tribunals and claims settlement commissions to regard this as presumptive evidence against the claimant. (See: D.V. Sandifer, Evidence Before International Tribunals (Revised Edition) pp.147-154; and also the Decision of the United States Foreign Claims Settlement Commission in the claim of Nancy B. Simon, Claim No. PO-1437, Dec., No. PO-4,5 FCSC Semiann. Rep. 31 (July-Dec. 1961); and R. B. Lillich, Foreign Claims Settlement Commissions of the United States: Decisions and Annotations, p.564).

the alleged acts in connection with the horse, Brown Sugar (even if it had been ascertained that they ever took place) cannot be compared to the previous practice of this Tribunal with respect to "interference" and "expropriation", and that the awards cited in paragraph 23 of the instant Award cannot be regarded as constituting a precedent for similar acts in the present Case.

The Hague, 3 June 1988 / 13 Khordad 1367



A handwritten signature consisting of a stylized oval above a horizontal line, with the name "Assadollah Noori" written below it in a cursive script.

Assadollah Noori