



# Association of Student International Law Societies

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THE 1986 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

THE ART TREASURES CASE

REPUBLIC OF MISRA

v.

KINGDOM OF AVON

MEMORANDUM FOR JUDGES\*

THE CONTENTS OF THIS BRIEF MAY NOT BE SHOWN TO, READ BY, OR IN  
ANY OTHER WAY MADE AVAILABLE TO STUDENT PARTICIPANTS IN THE  
1986 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

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BENCH BRIEF FOR THE 1986  
PHILIP C. JESSUP INTERNATIONAL  
LAW MOOT COURT COMPETITION

This bench brief provides an overview of the facts, arguments and law in the 1986 Jessup competition. It is designed for judges with or without a background in international law. Coverage of the Problem is not exhaustive. The bench brief therefore does not purport to substitute for the legal literature.

FACTS

It is essential that every judge read the 1986 Jessup Problem carefully before consulting this bench brief. Most judges in the Jessup competition prefer to read the problem at least twice: a first time for general content and a second time for a more detailed understanding of the issues and arguments.

SOURCES OF LAW

Misra and Avon have submitted their dispute to the International Court of Justice (I.C.J.) in the form of a compromis under Article 36 of the Statute of the I.C.J. The Court will review the arguments under Article 39 (1) of the Statute, which provides a basic list of legal sources, as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59 [which establishes that the Court's decisions are binding only on the parties and in respect of the particular case], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[Paragraph 2, which refers to the Court's power to decide a case ex aequo et bono, is irrelevant in this case.]

Jessup participants may be, and often are, questioned in-depth about the source of any law they may invoke. If they cite decisions of the I.C.J., they may be reminded that Article 59 of the Statute of the Court specifically avoids stare decisis. Thus, a decision of the Court is binding only between the parties and in respect of the particular case. On the other hand, I.C.J. opinions offer useful formulations of principles and rules that may be, and often are, reapplied in subsequent cases. Thus, the Court's decisions, although not controlling as precedent, often influence later opinions.

Principles of equity will play an important role in this case, as will persuasive arguments that certain originally non-binding state practices have become custom. Generally speaking, to become binding custom, a practice must be widespread, sufficiently established over time, and thought to be required by law (opinio juris).

## OVERVIEW OF THE CASE

The 1986 Problem involves issues of the Court's jurisdiction, involving the rights of a third-party state; state succession; cultural property law: the intertemporal problem of changed law; treaty law: humanitarian law of armed conflict: and extradition. The focus of the Problem is on a claim for the return, restitution, or forfeiture of cultural property, and the extraditability of alleged offenders under treaty law and international custom. The Problem extends beyond contemporary issues of theft and illegal trafficking in art and archaeological treasures to consider the "cutting edge" question of whether a sovereign has an obligation to return property obtained long ago as a result of practices that are now condemned. The dispute, with its allusions to such real-world controversies as the validity of Greece's claim to the Elgin Marbles in the British Museum, concerns the equitable sharing and reallocation of the common cultural heritage of mankind between an economically poor but art-rich source state (Misra) and an economically rich but art-poor collecting state (Avon).

International means are essential to effect the return, restitution or forfeiture of cultural property relocated to its territory by a former colonial or occupying power such as Avon. Because of the reluctance of former colonial governments to return such property to "countries of origin", however, inter-governmental cooperation is essential, as is the implementing work of non-governmental organizations such as museums. The past 15 years have witnessed a series of resolutions and recommendations

by international governmental and non-governmental organizations concerning the restitution, return or forfeiture of cultural property. These have evolved from rather crude, unconditional appeals to more cooperative, realistic instruments. The organizations which adopted these instruments--the United Nations General Assembly, the United Nations Educational, Scientific, and Cultural Organization (UNESCO), and the non-governmental International Council of Museums (ICOM)--together provide a potentially effective, if sometimes controversial, basis for an effective regime to implement their resolutions and recommendations. In order to build on these constructive rudiments, bilateral and multilateral agreements are crucial. In interpreting these agreements and international custom, the 1986 Problem requires Jessup participants to be concise and efficient in articulating and balancing a variety of artistic, cultural, legal and political values and principles.

## ISSUES

### Jurisdiction

Unlike past Jessup problems, this one raises a preliminary question: whether Salamis is a necessary third party on the issue of Misra's claim to the pre-independence portions of the Sloane collection. Salamis has not yet attempted to intervene in the dispute under either Article 62 or 63 of the Statute of the I.C.J. although it has taken a "keen interest" in the dispute. Thus, several past I.C.J. decisions that have addressed petitions to intervene are largely irrelevant, including El Salvador's

attempt in the case between Nicaragua and the United States. It is well-established that the potentiality of third-party intervention does not in itself preclude dismissal of an action on the basis of the third party's absence. On the other hand, the recently decided Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta) (1985) framed its decision so as to leave the claims of a third party, Italy, "unaffected."

It is possible that neither party, having agreed to the compromis, will wish to disturb the jurisdiction of the Court in any way. Avon, however, should be credited with raising the argument (and Misra for responding) that Salamis is a necessary party. Presumably, Avon's argument would encourage intervention by Salamis, which, if it occurred, would quite likely weaken Misra's equitable arguments. Tactically, just raising the argument that Salamis is a necessary party may serve to shed some doubt on the strength of the Misran claim. The Court itself may raise the issue sua sponte, just as it alone may determine its own jurisdiction (Art. 36 of the Statute of the Court).

The key authorities concerning the issue of necessary parties include the above-cited case between Libya and Malta, the current Case Concerning Military and Paramilitary Activities In and Against Nicaragua, and, most importantly, the Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question). There, the Court dismissed an action between Italy and the United Kingdom on the basis that Albania was a necessary, absent party. The Court held that when a vital issue affects the legal interests of a third State and forms the very subject matter of a decision, it could not give a decision without the consent of that third

State. Although Italy (like Avon) had agreed to bring the action, it thereupon attacked the jurisdiction of the I.C.J., just as Avon might in this case. In the Nicaragua case, the Court rejected an "indispensable parties" argument, on the basis that other states could intervene or institute separate proceedings, but had not indicated any intention to intervene. The Court added that "[t]he circumstances of the Monetary Gold case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction; and none of the States referred to can be regarded as in the same position as Albania in that case, so as to be truly indispensable to the pursuance of the proceedings."

In the instant case, Avon may argue that, if the determination of rights to the Sloane acquisition is at issue, only Salamis, the then sovereign of Tannis, has standing to raise it and that, because a decision might adversely affect the legal rights of Salamis to claim the pre-independence horde, the Court should dismiss the action. Avon will also argue that, unlike the decision in the Libya/Malta case, to frame a decision in this case would be difficult, if not impossible, so as not to "affect" potential Salamis interests or legal rights. Misra will argue, however, that Salamis, as an illegal conquerer, never had a valid claim to the property, that on independence Misra succeeded to any claim Salamis might have had, and that the Fezgrina Directive of Salamis, far from refuting the Misran claim of national patrimony over the disputed objects, offered Sloane an illegal license to steal. Salamis therefore explicitly forfeited any claim it might have had to the property. Moreover, its belligerent treatment of Tannis evidences, as a matter of equity, that

it would not have clean hands to intervene as a competing claimant. Even if Salamis were allowed to intervene, it has thus far only taken a "keen interest" in the case. Citing the Libva/Malta case, Misra may argue that a decision in Misra's favor could be explicitly framed so as to be limited to the instant, two-party dispute and so as not to prejudice a later claim by Salamis against Misra. In any event, a decision in this case would not be binding on Salamis (Art. 5<sup>o</sup> of the Statute of the Court).

#### Pre-Independence Acquisitions

Assuming that the Court may adjudicate this dispute in the absence of Salamis, Misra will argue that its historical patrimony over the pre-independence acquisitions was interrupted only by an illegal occupation by Salamic troops. Thus, only the provincial Bey, who denied Major Sloane's requests, could have authorized the acquisitions, and he, in effect, refused to do so. The Fezgrina Directive is therefore invalid. Avon will argue, however, that Salamis clearly had sovereign control over Misran territory as a sovereign state under the then current constitutive theory of Statehood. Alternatively, the formality of Salamic sovereignty over Misra is irrelevant since it was clearly in control of Misran territory. Either way, Salamis was entitled to act on its powers. Therefore, the Directive gave Sloane the authority to remove (in English translation) "some stone pieces with inscriptions and figures." Sloane and the government of Avon then conveyed valid title to the Avon National Museum.

Even if the Directive is deemed to be valid and binding, Misra will argue that it did not represent a license to steal

at will, but only a qualified, cooperative authorization to take "some" stone "pieces." The qualified language of the Directive, Misra will argue, must be interpreted reasonably to foreclose a plunder of Tannis by removing most of its cultural heritage, including whole statues, friezes, frescoes, and other artifacts. Misra will cite the protest by Salamis of Sloane's activities as evidence that the Fezzrina Directive (by the Emir of Salamis) did not contemplate systematic removal of the treasures.

Misra will argue that from this period to the present, Avonian actions have amounted to a form of common theft, or at least to an actionable tort under international law. They are reprehensible acts of pillage: Avon's acceptance and retention of the disputed cultural objects has been tantamount to an illegal seizure of property. Since all legal systems condemn theft and most provide for restitution of stolen property, Misra is entitled to relief. Misra may cite a smattering of municipal judicial decisions that have defined theft or stolen property under municipal law by reference to the antiquities laws of countries of origin. Avon will argue, however, that common theft is not an international crime: it is a territorial crime which, though it may be condemned by municipal law, does not give rise to standing under international law.

Avon will argue that Sloane's actions conformed with both the letter and the spirit of the broad language in the Fezzrina Directive, and that it was a bona fide purchaser, thereby protecting its claim according to the state practice (that is, laws) of the majority of (civil law) legal systems, though not necessarily of the common-law systems.

Avon will also assert that it rescued the treasures from oblivion ("an absolutely necessary and virtuous act of salvage") and that the great public benefits of the Sloane Collection and Avon's superior competence to preserve and display cultural objects have vindicated the acquisition. The Sloane Collection has contributed importantly to public interest in and understanding of Misran civilization and the development of a new school of Avonian painting. Misran artifacts have become items of national pride not only in Avon, but in London, Paris, Rome and Berlin. Thus, the objects in the Collection are not just within Misran's national patrimony, but a part of the world's cultural heritage.

Misra will argue that these considerations are not juridically relevant and that, even if they were, the resulting harm outweighs any possible benefits. Specifically, Misra will cite the serious depletion of its priceless cultural heritage that resulted from the Sloane acquisitions, the loss of a portion of its national identity, the encouragement the acquisitions have given to aggressive collectors, and the desecration of human remains. Misra will emphasize the importance of the artifacts to its national development and consciousness. Moreover, Misra will argue that restrictions on the export of artifacts were justified in the nineteenth century just as they are today under principles of sovereignty over cultural resources, unjust enrichment, and self-determination of a national patrimony.

Misra will argue that human rights law establishes a principle or right of self-determination that encompasses full sovereignty over cultural resources. National patrimony over cultural resources flows directly from the principle of self-determination.

Avon will make counter-arguments based on what it regards as a general principle: the cultural heritage of mankind. Thus, even if Misra's justifications have merit in theory, they may be better served by sharing rather than by clinging to, the national patrimony. Avon will argue that nationalism is a fragile foundation in some cases for claiming an identification between modern cultural-political systems (Misra) and those of ages past (ancient Tannis). Also, one result of rampant nationalism has been to stimulate a flourishing black market in artifacts and to foster hurried, clandestine, pilfering and destruction of artifacts. These acts are concealed from authorities by stealth, and evidence a lack of concern for careful, scientific removal. Avon will argue that nationalism has encouraged disrespect for laws that are overly restrictive, contributes to international tensions, and generates a cottage industry in forgeries. Worst of all, a reactionary form of nationalism has eroded a foundation for human understanding by limiting the access of archeologists and the global public to foreign archeological sites.

Misra will respond that even if 'common cultural heritage of mankind' is the appropriate legal principle, this would support return of the property to Misra. In this regard it may cite Article 149 of the 1982 Law of the Sea Convention which gives preferential treatment to the country of origin of cultural property, when such property is found in the Area beyond national jurisdiction.

The quality of this portion of the argument should be judged on the basis of the Jessup participants' skills in balancing competing values effectively. These values include:

- (1) preservation of archeological evidence at its original site;
- (2) association of art with its geographical-historical milieu;
- (3) preservation of the national patrimony for reasons of awakening the national conscience, fostering community pride, socializing youth, enhancing local scholarship, and elevating national civilization;
- (4) preservation of both individual objets d'art and, when significant, sets and collections of them;
- (5) enhancement of an exporting or loaning state's foreign policy and the financial resources of its museums;
- (6) enrichment of the importing state's civilization;
- (7) promotion of international understanding through diffusion of art;
- (8) respect for cultural diversity, acknowledgment of a global patrimony, and a shared heritage of significant art, as well as the elimination of parochialism;
- (9) widest possible visibility and accessibility of significant objects;
- (10) protection of significant objects, under the best possible circumstances, in both countries of origin and other countries;
- (11) encouragement of respect for the law and the mutual development of shared controls;

- (12) enrichment of aesthetic and intellectual interests of individual collectors, museums, and museum viewers; and
- (13) discouragement of forgeries.

Finally, Misra will argue that, ever since independence, it has preserved its claim against Avon by repeatedly demanding that the latter return the items. Avon will argue that Misra failed to support these protests with concrete action (for example, by proposing negotiations) and that Misra is prevented by the equitable doctrine of laches from sitting on whatever rights it might have had and by not bringing a legal claim in a timely fashion. Avon will also argue that Misra's protests were juridically moot once the controverted items were properly found in Avon and that, even if Misra had once been the country of origin of the objects in dispute, Avon has long since displaced Misra as their appropriate national patrimony, under the doctrine of historical prescription. Specifically, Avon will argue that Major Sloane's original acquisition took place 17<sup>th</sup> years ago and the latest acquisition (the bust of Queen Theston) took place 72 years ago--sufficient periods of time to establish the Museum's title to the Collection by historical prescription. Generally, these same arguments are applicable to the issues related to objects obtained by the Sloane Collection after Misra's independence.

#### State Succession

Misra already argued that, despite the period of occupation by Salamis, it was always a nation entitled to control its own

patrimony. It will next argue, alternatively, that even if its sovereignty is derived by state succession from Salamis, it nevertheless is entitled to claim the property that left its territory before independence. Specifically, Misra will argue that, according to the laws of state succession, it is free of any estoppel arguments based on the Fezgrina Directive that might have burdened Salamis. It has, however, succeeded to all the rights of Salamis to reclaim the items even if, as a colony, it enjoyed no pre-independence sovereign rights of cultural patrimony. Avon will argue, however, that ancient Tannis and modern Misra are not identical; therefore the Tannis treasures are not part of Misra's patrimony. Also, Misra's independence terminated all claims (which only Salamis could raise) to property already removed from its territory, and that, even if Misra had succeeded to the rights to which Salamis was entitled, its successor state claims are subject to the Fezgrina Directive. The law of state succession is unclear, but would appear to give Misra the qualified rights of Salamis.

The question of the patrimony today of an object removed long ago into a colonial power's possession is difficult to answer. Misra will emphasize, perhaps repeatedly, that it is "the country of origin" of the disputed objects, whereas Avon will argue that, even if it was the country of origin (as opposed to Salamis), it no longer is the patrimonial sovereign.

Two questions arise: Which of several modern states is the "country of origin" entitled to reclaim artifacts, where one of them (Salamis) had been an imperial power over the territory of the other (Misra)? Also, can the national patrimony of an object

change from one state (Misra) to another (Avon) under a theory of historical prescription? Jessup participants may mention, for example, the cases of the Elgin Marbles, the Temple of Preah Vihear, Aztec objects in the Vienna museums, or the acquisition by United States museums of the "pillage par droit d'argent" of medieval French and other European material. Today, Israeli excavations in Old Jerusalem expose conflicting claims by the international community, Jordan, and Palestinian citizens.

#### Intertemporal Problem

Throughout the Problem Misra will cite contemporary custom and practices. Avon will argue that these do not apply in regard to nineteenth-century events. Misra will contend that international law is dynamic and that its application to the consequences of past events--that is, the continued existence as opposed to the creation of rights--depends on rules of law acceptable today rather than to the nineteenth-century colonialist world. Avon will argue the general rule that a claim is to be examined according to conditions and rules in existence at the time of the facts or events immediately related to which the claim is based (Island of Palmas Case). Misra's argument, on the other hand, is essentially an important refinement of "intertemporal law", as formulated in the Island of Palmas Case itself: While the creation of particular rights is dependent upon the international law of the time, the continued existence of such rights depends upon their conformity with the evolving conditions of the international legal system. In the words of the Permanent Court of Arbitration in the Island of Palmas Case:

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.

According to Misra. the continued retention of the Sloane Collection by Avon must be considered in the light of contemporary, not nineteenth or early twentieth century, international law.

#### Post-independence Acquisitions

Misra's strict regulations, enacted in 1927, bear on the status of subsequently-acquired objects. Misra will argue that Avon must return any objects "of historical value or significance" taken without Misra's permission from its territory, but Avon will reiterate its argument that it, not Misra, is now the national patrimony of the objects, under the doctrine of historical prescription. Avon will also argue that the record fails to disclose that the miscellaneous items were of genuine "historical value or significance."

Avon's acquisition of artifacts as a result of the 1908 punitive expedition will be controversial. Avon will argue that the expedition represented a legitimate reprisal--Jessup participants on both sides may cite the Maulilaa test--in retaliation against Misra's failure to protect Avonian nationals. The Peace Treaty was thus the freely negotiated outcome of a legitimate reprisal action and therefore ratified the 1908 acquisitions by Van Dean. They were legitimate war reparations. According to the doctrine of uti possidetis, a party to armed combat may by treaty retain whatever it has lawfully claimed during combat.

On these points, Misra will counter-argue that The Peace Treaty was void ab initio because it was the product of coercion, and the required reparations were nothing more than illegal booty. The presumption that legitimate use of force confers a right to assert the validity of a treaty obtained under duress does not apply when flagrant injustice is perpetrated by the use of force. Avon's use of force to seize Misran artifacts constituted either an illegal reprisal under customary international law or a war crime under Article 56 of the 1907 Convention Respecting the Law and Customs of War on Land (and its Regulations). Thus, Avon's seizure as a war crime or illegal reprisal was a flagrant injustice. Misra will also present an argument under the 1907 Convention's "Martens Clause," which is recognized as international custom. The Martens Clause establishes that, in the absence of specific treaty regulations, the law of war is informed by custom, "the laws of humanity and . . . the dictates of the public conscience." In further support of this position, Misra might invoke traditional principles of decency and justice that were later formulated by the Judgment of the Nuremberg Tribunal as follows:

The law of war is to be found not only in treaties, but in customs and practices of states, which gradually obtained universal recognition, and from the general principles of justice applied by jurists . . . . The law is not static, but by continued adoption follows the needs of a changing world . . . .

Of course, an examination of the "general practice of states" in the nineteenth century might well strengthen Avon's case.

Misra may also argue that the 1908 seizure represented a violation of customary constraints later formulated in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Both the text of the 1954 Convention

of War on Land and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Otherwise, there was only a hodgepodge of municipal legislation and judicial decisions to serve the progressive development of the law. Much of the litigation was sui generis, especially that related to Nazi confiscations and Allied occupation seizures during the Second World War.

Briefly, the UNESCO Convention of 1970 creates multilateral control of the movement of cultural property while seeking to promote the legitimate exchange of cultural property and international cooperation in preparing national inventories. The Convention's most important features are: a system of export certification, an emergency measure permitting signatories to call upon one another to help control the flow of jeopardized property of special significance, a requirement that parties return property within their jurisdiction stolen from museums, monuments, and other institutions, a requirement that, "consistent with national legislation," parties prevent museums and similar institutions from acquiring property illegally exported from other countries, a requirement that parties will impose penalties or other administrative sanctions for stipulated infringements (Article 8), and international cooperation in identifying cultural property and developing national inventories. Contraband items are recoverable on demand by the country of origin, so long as it pays just compensation to innocent purchasers. This document strikes a compromise between the interests of art-importing and art-exporting countries. The scheme allocates the burden of control between them, imposing primary responsibility on exporting countries while requiring the importing country's cooperation in

the recovery and retrieval of illicitly exported property. The Convention is not retroactive.

Avon will emphasize, first and foremost, that the 1978 Convention has no retroactive force. Second, because Avon is not a party to the treaty, it is not bound by it (Art. 34 of the Vienna Convention on the Law of Treaties). Misra will argue, however, that as a signatory, Avon must at least "refrain from acts which would defeat the object and purpose of a treaty" (Art. 18, Vienna Convention on the Law of Treaties). It is controversial whether the Vienna Convention on the Law of Treaties articulates custom or, put another way, serves as the best evidence of customary law, although most of the Convention's provisions are generally accepted as custom. Misra's argument is that Avon's refusals to cooperate in a mutually fair program of return and restitution violate the objects and purposes of the UNESCO treaty and therefore violate her legal obligations.

Even if Avon is not bound by the UNESCO Convention as such, Misra will argue that Avon has a customary obligation, as articulated in Article 7, to return property that has been inventoried in Misra and stolen from her public institution (stolen property is customarily returned from one country to another). Misra will further argue that Avon's own municipal laws, which the record discloses are "consistent with Article 13 of the Convention," therefore require it:

- (b) to ensure that their competent services cooperate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner;
- (c) to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners;

- (d) to recognize the indefensible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported.

Avon will argue that these duties are only admonitory or aspirational and that, in any event, they are binding on the Avonian government and enforceable against it only domestically, not internationally, and that Article 13 qualifies any obligation by imposing it only to the extent "consistent with the laws of each State."

In interpreting the UNESCO Convention, Avon will also argue that the preamble to the UNESCO Convention does not speak in terms of national patrimonies. Rather, it speaks in terms of cultural property of international interest, whose proper protection and use demands international cooperation. The first, if not foremost, provision of that preamble establishes "that the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations." Moreover, the later UNESCO Convention for the Protection of the World Cultural and Natural Heritage, itself arguably evidencing custom, speaks even more explicitly and extensively in terms of "the world heritage of mankind," the "importance, for all the peoples of the world" of protective safeguards, and the cultural "heritage of outstanding universal value." A related UNESCO Recommendation reiterates this language and reminds States of the need, as a matter of regional development and national planning,

for a protective policy "thought out and formulated in common" and "likely to bring about a continuing interaction among Member States."

Leaving aside the UNESCO Conventions, Misra will describe a trend of state practice and international organizational efforts in favor of its arguments. State practice discloses a number of peace-time agreements providing for restitution or return of cultural property (for example from Belgium to Zaire, from the Netherlands to Indonesia, from the United States to Peru, and from the United States to Mexico). Restitution has specifically included European paintings, Pre-Columbian artifacts, Asian treasures, and such African cultural property as the Afo-A-Kom.

This trend is rooted in general principles of international cooperation, sovereignty over national resources, self-determination over a cultural heritage, and unjust enrichment. For example, In 1978 the General Conference of UNESCO established an Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriations. The Committee is entrusted with the task of promoting bilateral agreements for the return or restitution of cultural property, particularly that resulting from colonization and military occupation, to countries of origin. Also, the United Nations General Assembly has adopted a series of resolutions since 1973. Although they have differed in wording, the essential provisions of each resolution have been the following: to confirm a duty of international cooperation in the restitution of cultural property to countries of origin; to invite states to take adequate

measures to prohibit and prevent illicit trafficking in obiets d'art; to invite states to prepare national inventories; to invite states to become parties to the UNESCO Convention; to strengthen museum infra-structures; and to marshal professional expertise, the media and public opinion in favor of programs of restitution.

Avon will argue that General Assembly Resolutions are not binding in themselves. Misra will respond, however, that these particular Resolutions were adopted by such huge margins (the 1981 resolution by a vote of 109-0), and long enough in the past, that they may be safely presumed to represent the best evidence of customary law.

On the substance of the resolutions, the trend is rather clearly toward accommodating the interests of art-collecting states. For example, the 1975 version affirmed the need for prompt restitution of cultural property, without charge, as just reparation for damage, whereas none of the italicized wording appears in the 1981 version. The 1975 resolution called upon "those States concerned which have not already done so to proceed to the restitution of" cultural property, whereas the 1981 version merely invites states to deter illegal trafficking. Even so, Misra will point out that the 1981 Resolution appeals to museums and public and private collectors to return totally or partially, or make available to the countries of origin, items kept in the storehouses of such museums and to help the countries of origin, with the cooperation of UNESCO, in their efforts to prepare inventories of these collections.

Jessup participants may also argue the significance and applicability to their case of the International Council of Museums' rather ambitious, even extravagant study on the "Principles, conditions and means for the restitution or return of cultural property in view of reconstituting dispersed heritages." Also, the participants may note The Draft European Convention on Offenses relating to Cultural Property. Although this document is not law, it nevertheless represents a significant development. It seeks to define and prevent offenses against the common cultural heritage of Europe. The core of the Draft Convention provides legal rules for international cooperation in the discovery and restitution of cultural property that has been unlawfully removed from a national patrimony.

Finally, Misra may argue that even if it is not entitled to the return of all objects in the Sloane Collection, it is entitled to the return of some of them. A scheme of triage might classify items of cultural property as follows: (1) those whose long-term retention by the country of origin is imperative; (2) those whose retention for medium-range research needs is important; (3) those whose short-term retention is necessary for documentation or temporary display; and (4) those which are expendable. At the very least, Misra would appear to be entitled to items in the last two of these four categories, according to principles of equity and good faith, international cooperation, and unjust enrichment.

#### Acquisition by Avon of the Bust of Queen Theston

This argument will center on the suspect provenance of the bust, the violation of Misran regulations, and the nature of the

offense as an act of common theft. The possibility of bribery, although unclear, further diminishes the strength of Avon's case for retaining the item, given the above-mentioned practice today of restitution and return to countries of origin. Misra will argue that the removal of the bust from Misra amounted to common theft of a national treasure and hence a violation of international law. Because the "anonymous finder" had no title to give, Avon could take no title. Avon has failed in carrying its burden to disclose facts that would justify the acquisition of the stolen property. Avon will argue that Misra impliedly consented to the export of the bust when it granted customs clearance to the finder of the bust.

#### Reacquisition and Retention by Misra of Queen Theston

Avon will argue that Misra's reacquisition of the bust is the product of common theft, a crime by the general practice of states. The Court should therefore order Misra to return the bust to it under Article 7 (a and b)--especially Article 7(b)(ii)--of the UNESCO Convention, and less persuasively, under Article 8 (cum 6). Although Avon has not itself ratified the UNESCO Convention, it and Misra, as signatories, must "refrain from acts which would defeat the object and purpose of a treaty" (Art. 18, Vienna Convention on the Law of Treaties).

Under Article 7 of the Convention, Avon will argue that Misra has failed, as required, "to take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has

been illegally exported" (it is unclear from the record, however, whether the bust has been acquired by a museum or similar institution, within the language of Article 7). Nor, it will be argued, has Misra prohibited "the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention" nor has Misra satisfied its treaty obligations "at the request of the State Party of origin to take appropriate steps to recover and return any such cultural property imported" (Avon will argue that it has been the State Party of Theslon's origin, for a period of over 70 years.)

Misra will argue, as a matter of reciprocity, that it may shield itself against use by Avon (as yet a non-party) of the UNESCO Convention. Misra will argue also that its retention of the bust is sanctioned by the General Assembly Resolutions, UNESCO Recommendations, and principles of equity. A serious issue, however, is whether an "art-rich" country may use these resolutions as a basis for refusing to return property stolen from another country but originally belonging to the national patrimony of the first country. A contemporary instance was Mexico's retention of a rare Aztec codex which had been pilfered somehow from the French National Library by a Mexican national. Such self-help measures, even if endorsed by governments on the basis of United Nations resolutions, may pose a serious threat to the future of international cooperation in managing the flow of cultural property.

## Extradition

Avon will argue that Misra has a duty to extradite Madame Z and Erich Weiss under the Treaty between the two countries. Misra cannot deny the extradition of Weiss on the ground that he is a Misran national. "Honorary citizenship" is no defense. The Court's decision in the Nottebohm Case established the principle that recognition of nationality under international law requires a "genuine link" between a person and a state. Also, Misra has abused its discretion by refusing extradition for an improper purpose, namely, to protect Weiss and Madame Z from prosecution for art theft. Avon will argue that Misra may also not invoke a "political offense exception" to refuse extradition because there is no political offense exception in the Treaty. There is also no widely-accepted definition of "political offense" that the Court could apply. Moreover, the political offense exception should not apply to cases concerning serious international crimes such as the theft of cultural property, as defined by the UNESCO Convention. Madame Z enjoys no diplomatic immunity because her activities in Avon were unrelated to her diplomatic status of transit through Avon.

Misra will reply that Madame Z and Erich Weiss committed no crime in returning the bust to Misra because it has always been Misran property and its return was necessary to protect vital Misran interests. Misra need not extradite Madame Z nor Erich Weiss because they are Misran nationals who are exempted from extradition by Article 12 of the bilateral treaty. Honorary citizenship established Weiss's new nationality. Also, Misra need not extradite Madame Z because, as an Ambassador in transit

to her post, she has diplomatic immunity from arrest and prosecution. Moreover, Misra need not extradite Madame Z nor Erich Weiss because their conduct was predominantly political in nature and therefore exempts them from extradition under customary international law even in the absence of a "political offense" exception in the bilateral treaty. Finally, under Article 22 of the treaty, Misra has no duty permanently or unconditionally to return the Theslon bust to Avon, as the latter has requested in this case.

This brief discussion about extradition covers all of the issues, but the participant's argument should devote proportionately more attention to these issues than does this bench memo.