

IN THE  
INTERNATIONAL COURT OF JUSTICE AT THE PEACE PALACE  
THE HAGUE, NETHERLANDS

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REPUBLIC OF MISRA,

Applicant

KINGDOM OF AVON,

Respondent.

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February, 1986

On Submission to the  
International Court of Justice

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MEMORIAL FOR THE APPLICANT

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## TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES.....	iv
JURISDICTION.....	x
STATEMENT OF FACTS.....	xi
QUESTIONS PRESENTED.....	xiv
SUMMARY OF ARGUMENT.....	xv
<b>ARGUMENT</b>	
I. <u>AVON ILLEGALLY ACQUIRED THE ARTIFACTS WHICH CONSTITUTE THE SLOANE COLLECTION.</u>	1
A. <u>Major Sloane illegally acquired Misran artifacts.</u>	1
1. Salamis never acquired sovereignty over Misra.	1
2. As an occupying power, Salamis cannot transfer title to the property of Misra, the occupied state.	1
B. <u>The artifacts obtained in the 1908 punitive expedition were acquired illegally.</u>	2
1. Avon's punitive expedition was an illegitimate reprisal.	2
2. Van Dean's confiscation of Misran artifacts violated international law.	3
3. The use of cultural property as war reparations violates international law.	3
C. <u>Avon's acquisition of the statue of Queen Theslon violated general principles of international law.</u>	3
II. <u>AVON IS REQUIRED TO RESTITUTE MISRA'S NATIONAL PATRIMONY AND CULTURAL HERITAGE.</u>	4
A. <u>Restitution of cultural property is a generally accepted principle of customary international law.</u>	4
1. The return of cultural property is a long recognized practice of states.	4
2. The customary practice of retroactive restitution requires Avon to return Misra's cultural property.	5

	<u>Page</u>
3. Avon does not possess valid title to the Sloane Collection as against Misra, the original owner.	5
B. <u>The laws of war as recognized by state practice have established customary principles protecting Misra's cultural patrimony.</u>	6
1. As public property, Misran cultural heritage is exempt from confiscation and pillage by an occupying power.	6
2. Even if the Sloane Collection constituted private property at the time of the takings, the property is exempt from any disposition.	7
3. Avon is required to restitute the Sloane Collection to Misra under the laws of war.	7
C. <u>According to customary international law, the Sloane Collection should be returned to Misra, its country of origin.</u>	7
D. <u>Avon must return the Sloane Collection because it forms a significant part of Misra's national patrimony and cultural heritage.</u>	8
1. Misra's compelling national interests in the Sloane Collection are recognized by international law.	8
2. Even if the Sloane Collection is part of mankind's common cultural heritage, it must be returned to Misra.	9
III. <u>MISRA IS NOT OBLIGATED TO EXTRADITE EITHER MADAME Z OR ERICH WEISS, NOR TO RETURN THE BUST OF QUEEN THESLON TO AVON.</u>	9
A. <u>There is no direct evidence connecting Madame and Erich Weiss with an offense under the Extradition Treaty.</u>	9
1. International law mandates the application of Misran standards to determine the admissibility of evidence.	9
2. Evidence, the value of which is impossible to assess, is inadmissible under general principles of law.	10
3. Failure to satisfy the Article 8 standards prevents extradition under the Treaty.	11

	<u>Page</u>
B. <u>Misra is not obligated to extradite Madame Z under the Extradition Treaty, nor under any other provisions of international law.</u>	11
1. Misra has legitimately retained the discretion to refuse extradition of its own nationals, and is legitimately exercising that discretion with respect to Madame Z.	11
2. Madame Z is immune from Avon's criminal jurisdiction as a Misran diplomat.	11
3. The political nature of the charges against Madame Z exempts her from extradition to Avon.	12
C. <u>Misra is under no obligation to extradite Erich Weiss.</u>	13
1. Erich Weiss is entitled to protection as a national of Misra.	13
2. Erich Weiss' actions should be considered political offenses.	14
D. <u>Misra would be the proper forum for a trial of Madame Z and Erich Weiss, if a trial were in fact warranted.</u>	14
E. <u>Misra is under no obligation to return the statue of Queen Theslon to Avon.</u>	15
 <u>CONCLUSION</u>	 16

## INDEX OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<u>The Alabama Claims</u> , 61 B.F.S.P. 40 (1872)	10
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	<u>Page</u>
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	<u>Page</u>
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	<u>Page</u>
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	<u>Page</u>
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	<u>Page</u>
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## JURISDICTION

The parties have agreed to the jurisdiction of the International Court of Justice pursuant to special agreement.

## STATEMENT OF FACTS

Misra and Avon are members of the United Nations and have consented to be bound by numerous treaties in their mutual interest. Both states are signatories to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. [Compromis at 9.] Misra has also ratified the Convention. [Id.] Parties to this treaty recognize their moral obligations to respect the cultural heritage of all nations. Both states have enacted legislation consistent with the provisions of the Convention. [Id.]

Misra and Avon are also original parties to all global agreements on the laws of armed conflict, including the Hague Conventions of 1899, 1907, and 1954. [Id.] Consequently, the two states have recognized the cultural heritage of all mankind. Misra and Avon have executed a bilateral Extradition Treaty acknowledging the discretionary power of each state to extradite its own nationals. [Extradition Treaty, *id.* at 7-9.]

Despite the similar interests of the two countries as evidenced by multilateral and bilateral agreements, the mutual relations between Misra and Avon have not been amicable. Unlike Avon, Misra is a poor country which throughout its history has been the pawn of belligerent neighbors in territorial conquests. [Id. at 1.] One such aggrandizement occurred in the seventeenth century when the Salamic Empire overran and forcibly occupied Misra. [Id.] During the battle many significant objects of Misran cultural heritage sustained heavy damage, including the Temple at Tannis. [Id.]

This dispute arises from a decision in 1802 by the Emir of Salamis to permit the Avonian consul to Misra, Major Harrison Sloane, to study and remove "quelques pieces de pierre avec inscriptions et figures." [Fezgrina Directive, *id.* at 2.] The Salamic Provincial Bey previously restricted Sloane's activity to studying and reporting on the ruins. [Id. at 1-2.] Nonetheless, Sloane proceeded to remove obelisks, statues, friezes, frescoes, and human remains. [Id. at 2-3.] Several leading Misrans denounced the extensive removals and the Emir lodged a formal protest with the Kingdom of Avon. [Id. at 2.]

Sloane employed three hundred laborers who worked continuously to fill two hundred crates with Misran cultural heritage. [Id.] Sloane's wholesale removal resulted in significant architectural damage and left only the shells of historic Misran structures. [Id.] Sloane subsequently shipped all the artifacts to Avon. [Id.] Only after suffering personal financial misfortunes, Sloane sold Misra's national patrimony to the Avon government for the equivalent of \$20,000 (U.S.). [Id. at 2-3.] The collection is now housed in the Avon National Museum. [Id. at 3.]

In 1826 the Misran people rose up against the Salamic Empire and achieved their independence. [Id.] The government immediately demanded that Avon return the Sloane Collection to its rightful place in Misra. [Id.] Avon refused this and all subsequent requests. [Id.] To protect its remaining treasures, Misra promptly enacted strict regulations prohibiting the removal of any object of "historical value or significance" from archaeological excavations without the express consent of the government. [Id. at 4.]

A second major taking of Misran cultural heritage occurred in 1908 when Avon invaded Misra in response to domestic political unrest. [Id.] During its punitive expedition, Avon permitted one of its nationals D. Van Dean, to remove additional pieces of Misran cultural property. [Id.] Avon later claimed these objects of national patrimony as war reparations. [Peace Treaty, id.] Avon subsequently added these objects to the Sloane Collection at the Avon National Museum.

Five years later the museum announced another acquisition of Misran heritage, the bust of Queen Theslon. [Id. at 4.] The marble statue is generally considered to be one of the world's greatest works of art. [Id.] Misra immediately protested and demanded the return of the bust. [Id.] Once again Avon refused to comply with Misra's request. [Id.] Subsequent Misran investigation discovered that the bust had been illegally exported in violation of Misran regulations and that the guilty party may have bribed a Misran customs official. [Id. at 4-5.]

A second issue in this dispute concerns the successful return of the bust to Misra in July 1984. [Id. at 6] Avon claims that Madame Z, Misra's ambassador to France, and Mr. Erich Weiss, an Avonian art historian, are responsible for the theft of the bust. [Id.] Earlier that month, Madame Z travelled to Avon enroute to France and gave a lecture. [Id.] While in Avon she attended two concerts and viewed the Sloane Collection at the Avon National Museum with Mr. Weiss. [Id.] Avon has not been able to present any direct evidence of the participation of Madame Z or Mr. Weiss in any scheme to reclaim the bust.

Avon has sought the extradition of Madame Z and Mr. Weiss and the return of the bust under provisions of the Extradition Treaty. [Id. at 7-9.] Misra has not complied with this request and has sought adjudication by this Court on these claims.

## QUESTIONS PRESENTED

- I. Did Avon acquire Misran artifacts illegally if Avon obtained them from a private person who exceeded the authority granted to him by a military occupant, as war reparations, or through a purchase from an anonymous person?
  
- II. Is resitution the proper remedy where cultural property forming a significant part of Misra's national patrimony has been removed from its place of origin?
  
- III. Does the discretionary Extradition Treaty require Misra to extradite two of its nationals, one of whom is a diplomat, if there is no direct evidence that the two were involved in acts which can be construed as political offenses?

## SUMMARY OF ARGUMENT

Avon's purchase of Misran artifacts from Major Sloane did not vest Avon with valid title because Sloane did not have valid title to convey. Sloane acquired the artifacts illegally because the Empire of Salamis, as a military occupant of Misran territory, was powerless to convey title to property during its occupation. The proper interpretation of the Fezgrina Directive did not authorize Sloane to export two hundred crates of Misran art.

Avon's second acquisition in 1908 was also illegal because it occurred in conjunction with a punitive military expedition. Van Dean's acquisitions during the punitive expedition directly contradicted prohibitions on the pillage of art and historical objects. The relinquishment of the objects acquired by Van Dean to Avon in the Peace Treaty violated international legal prohibitions against the use of cultural patrimony as war reparations.

The bust of Queen Theslon was transferred to Avon illegally in 1913. The anonymous finder of the bust did not acquire valid title because Misra had strictly regulated the excavation of significant historical objects. The finder also failed to meet the strict regulations Misra had instituted on the exportation of such objects. Consequently the anonymous seller of the bust did not have legal title to convey.

Restitution of the Sloane Collection is the only proper remedy. Customary international and well-developed state practice indicate that retroactive restitution is the correct remedy for the misappropriation of cultural artifacts. Regardless of the public or private character of the artifacts taken, their acquisition by Avon was illegal because it occurred during belligerent occupation or wartime.

Modern state practice also supports the principle that restitution is the proper remedy in this case. It is generally recognized that cultural property belongs in its country of origin without regard to the circumstances surrounding subsequent claims

of ownership. Regional and bilateral agreements and the UNESCO Convention of 1970 recognize the compelling interest of states to have the possession of their cultural patrimony.

Misra is capable of displaying and preserving the objects currently comprising the Sloane Collection. It is not necessary for the objects to remain in Avon in order for them to be properly preserved. Moreover, only Misra can properly display the Sloane Collection in its geocultural milieu.

Misra is under no obligation to extradite Madame Z or Erich Weiss. Only Misran standards of evidence are applicable to this case. There is no direct evidence linking Madame Z or Erich Weiss to the theft of the bust of Queen Theslon. Thus, Avon has failed to establish a prima facie case that would justify extradition. This failure to satisfy Article 8 of the Extradition Treaty releases Misra from any obligation to extradite.

Madame Z is immune from compulsory extradition by virtue of her status as a Misran diplomat. State practice upholds the well-recognized practice of complete immunity from criminal jurisdiction for diplomatic personnel.

The political nature of the charges against Madame Z and Erich Weiss support Misra's right to exempt them from extradition. Whether the allegations against Madame Z and Erich Weiss are purely or relatively political, Misra is justified in providing for their safety by refusing to extradite.

Erich Weiss should be considered a national of Misra for the purposes of the extradition request. His nationality at the time of the extradition request is controlling. Therefore, his extradition is discretionary on Misra's part under the Extradition Treaty.

Misra is not obligated to return the bust of Queen Theslon in the absence of an obligation to extradite Madame Z or Erich Weiss. The bust is not material evidence needed for prosecution in Avon. Article 22 conditions surrender of property upon

satisfactory assurances that it will be returned following trial. Avon's past statements justify Misra's conclusion that the assurances offered are unsatisfactory.

## ARGUMENT

### I. AVON ILLEGALLY ACQUIRED THE ARTIFACTS WHICH CONSTITUTE THE SLOANE COLLECTION.

#### A. Major Sloane illegally acquired Misran artifacts.

##### 1. Salmis never acquired sovereignty over Misra.

The Salamic Empire's belligerent occupation of Misra did not strip Misra of its sovereignty. Military occupation of another state's territory suspends rather than extinguishes sovereignty.<sup>1</sup> The ultimate success of Misra's independence movement in the early-nineteenth century, ending the period of Salamic occupation shows that force was the only basis of Salamic authority. Salmis forcibly incorporated Misra, subjecting it to the military government of the Provincial Bey.<sup>2</sup>

##### 2. As an occupying power, Salmis cannot transfer title to the property of Misra, the occupied state.

Military occupation by itself does not confer title or extinguish a nation.<sup>3</sup> While the sovereignty of Misra was suspended during the years of occupation, the Salmis had only a temporary right of administration.<sup>4</sup> The occupying power enjoys certain rights, but these "cannot be coextensive with those of sovereignty. They are due to the military exigencies of the invader, and consequently are only provisional."<sup>5</sup> International law restricts occupying states to the use of property and then only for military purposes.<sup>6</sup> Only through the conclusion of a formal treaty of peace could title to Misran lands and property vest in the hostile occupant.<sup>7</sup> The International Law Conference of 1943 confirmed the principle that occupying powers have no right to transfer title.<sup>8</sup>

Absent recognized legal authority to transfer title, the Salamic Empire could neither sell the artifacts from the Temple of Tannis to Major Sloane, nor transfer them by gift. The Fezgrina Directive must be interpreted in this light. Sejam Fezgrina, the Emir of Salmis, directed the Provincial Bey to allow Sloane to study the ruins of Tannis and remove "some pieces of stone."<sup>9</sup> The Bey had restricted Sloane to studying and reporting on the ruins.<sup>10</sup>

While displacement of some pieces might have facilitated Sloane's examination, removal from the site and wholesale exportation from the country are not equivalent. The protestations of the Salamic government<sup>11</sup> confirm the fact that Sloane violated the spirit of the Directive. Without valid title, Sloane had no authority to transfer title to the government of Avon.

B. The artifacts obtained in the 1908 punitive expedition were acquired illegally.

1. Avon's punitive expedition was an illegitimate reprisal.

Avon's 1908 punitive expedition against Misra was not a legitimate reprisal in retaliation for the deaths of Avonian citizens residing in Misra. Legitimate retaliatory acts are appropriate "as responses to the prior illegalities of another state, the original lawbreaker having refused to give satisfaction for its wrongs...."<sup>12</sup> The rioting which resulted in the deaths of Avonian citizens was not an act of the state, nor of its agents. Therefore, Misra is not guilty of prior illegalities that would justify Avon's reprisal. Avon did not seek redress of its grievance prior to the reprisal, thus Misra did not refuse to give satisfaction for the injury. Finally, Avon's hostile invasion of Misra was not an appropriate response.

The principle of sovereign equality between states mandates that return to the status quo ante be the objective of acts of retaliation.<sup>13</sup> Countermeasures, such as reprisal, are legitimate only when used simply to restore equality.<sup>14</sup> The Naulilaa Incident Arbitration of 1928 and Professor von Glahn support this concept of proportionality.<sup>15</sup>

While incidents of excessive armed reprisal during peacetime have been common,<sup>16</sup> they are nonetheless illegitimate. Characteristically, peacetime reprisals in the modern period have been exclusively a weapon of the larger powers against smaller and weaker nations.<sup>17</sup> Although the Covenant of the League of Nations did not prohibit armed reprisals, Article 2(4) of the United Nations Charter made "resort to armed reprisals legally impossible."<sup>18</sup>

2. Van Dean's confiscation of Misran artifacts violated international law.

Even in the context of legitimate reprisal the offended nation's aim is merely to coerce the offending state into satisfying its claim. For this reason property seized during a reprisal is to be "sequestered rather than confiscated [and] returned when the offending state yield[s]." <sup>19</sup> The actions of Van Dean were pillage and hence contrary to modern practice which "tacitly forbids indulgence in the cultural looting of one nation by another." <sup>20</sup>

Van Dean's role in the punitive expedition is analogous to the role of the infamous Alfred Rosenberg. Rosenberg's depredations on behalf of the Einsatzstab were characterized as "looting and pillaging," <sup>21</sup> and condemned as criminal by the world community at the Nuremberg trials. <sup>22</sup>

3. The use of cultural property as war reparations violates international law.

The Peace Treaty between Avon and Misra exacted a price which was contrary to the laws of war. Avon is a party to all agreements on the laws of armed conflict, including the Hague Conventions of 1899, 1907, and 1954. <sup>23</sup> Avon was bound by the letter as well as the object and purpose of international law to protect and respect Misra's cultural heritage. <sup>24</sup> As a High Contracting Party, Avon agrees to recognize the force of the Convention in times of war <sup>25</sup> and to prevent the exportation of cultural property from occupied territory. <sup>26</sup> Avon has violated its pledge never to take cultural property as war reparations. <sup>27</sup> Moreover, the taking of cultural property as war reparations clearly violates the customary international law forbidding such war-time practices. <sup>28</sup>

C. Avon's acquisition of the statue of Queen Theslon violated general principles of international law.

Avon's purchase of the plundered statue of Queen Theslon violated state practice as represented by the Anglo-American legal tradition. In common law countries a purchaser cannot acquire good title from a seller who does not have legal possession. <sup>29</sup> The

"anonymous finder" of the statue could not have obtained good title without the consent of the Misran government, due to its strict regulation of excavation.<sup>30</sup> The statue clearly meets the criterion of the regulations as an object of historical value or significance.

The conditions under which the bust of Queen Theslon was exported were of dubious legality. Misra strictly regulates the export of cultural property and evidence suggests that the exporter bribed a customs agent. Current state practice enforces bans on the importation of art which has been illegally exported.<sup>31</sup> The Organization of American States supports a complete ban on the importation of illegally exported cultural property.<sup>32</sup> Article 7 of the UNESCO Convention of 1970, to which both Avon and Misra are signatories, provides a framework for states to use in implementing legislation banning the import of illegally exported cultural property.<sup>33</sup>

Avon ignored its state responsibility to respect the laws of Misra which seek to protect the cultural heritage of the country. The history of Misran art in Avon belies the notion that the Avon National Museum was ignorant of the value or origin of the Theslon bust when it was purchased. Avon's acquisition of the bust of Queen Theslon is but one example of the "one-sided commercial and cultural transactions" between art-importing and art-exporting nations.<sup>34</sup> The United States experience with repatriating artistic treasures is particularly illustrative of the spirit of mutual accommodation that is necessary to solve the problem of illegal trafficking in cultural property.<sup>35</sup>

## II. AVON IS REQUIRED TO RESTITUTE MISRA'S NATIONAL PATRIMONY AND CULTURAL HERITAGE.

### A. Restitution of cultural property is a generally accepted principle of customary international law.

#### 1. The return of cultural property is a long recognized practice of states.

The restitution of cultural property to its country of origin had become common state practice long before Avon's illegal plundering of Misran cultural patrimony in the nineteenth century. The recognition of the territorial connection between cultural property and its

place of origin can be traced throughout history.<sup>36</sup> As early as the Third Punic War, Scipion returned to Sicily statues and artistic treasures located in Carthage.<sup>37</sup> In the ninth century Charlemagne refused to transfer the artistic riches of Italy to the Franco-Germanic possessions.<sup>38</sup> During their territorial conquests neither Louis XIII nor Louis XIV removed literary and artistic treasures from occupied powers.<sup>39</sup>

By the time of the Salamic occupation of Misra in the seventeenth century, the restoration of cultural property by belligerent states had become recognized state practice. Following the 1648 Treaty of Westphalia,<sup>40</sup> at least eleven treaties entered into by European states prior to Sloane's 1806 taking provided for the restitution of cultural property.<sup>41</sup> Of particular importance are the Treaty of Oliva in which Sweden returned the Royal Polish Library and the Treaty of Whitehall in which the Netherlands restored art works owned by the House of Stuart.<sup>42</sup> Consequently, the illegal takings of Misran cultural heritage occurred in contravention of well-recognized state practice.

2. The customary practice of retroactive restitution requires Avon to return Misra's cultural property.

Well-developed and consistent state practice requires Avon to provide Misra with the retroactive restitution of its national patrimony and cultural heritage. Restitution of cultural artifacts to their legal owner is not limited to immediate past takings.<sup>43</sup> By the time of the Congress of Vienna in 1815 all conquering states respected the inseparability of a state and the objects comprising its cultural heritage.<sup>44</sup> Consequently, the Allies required France to return objects plundered as early as 1622.<sup>45</sup> Consistent state practice continued into the twentieth century with victorious powers restoring objects seized up to seventy years earlier.<sup>46</sup> In 1921, the Treaty of Riga required the return of all cultural property illegally removed from Poland after 1772.<sup>47</sup>

3. Avon does not possess valid title to the Sloane Collection as against Misra, the original owner.

Customary international law and opinio juris do not recognize the right of subsequent

parties who hold cultural property illegally taken from its original owner. The Congress of Vienna, for example, required France to return unique manuscripts not to the Vatican, but to the Library at Heidelberg where they were first plundered in 1622.<sup>48</sup> Following World War I the Allies required Germany to return the original Koran to the King of Hedjaz in Medina rather than to Constantinople.<sup>49</sup> Moreover, courts have upheld claims by original owners -- both individuals and states -- over subsequent parties which purchased stolen cultural heritage without knowledge of invalid title.<sup>50</sup>

As the rights of belligerent occupancy are not coextensive with rights of sovereignty,<sup>51</sup> the Salamic Empire held no valid title to Misran cultural property. Therefore, only Misra holds valid title to the Sloane Collection which customary international law and opinio juris require Avon to restitute to Misra.

B. The laws of war as recognized by state practice have established customary principles protecting Misra's cultural patrimony.

The codification of the laws of war in the nineteenth century included the established principle that state-owned cultural property is exempt from seizure. The 1863 Lieber Code required that "in no case shall [works of art] be sold or given away...nor shall they ever be privately appropriated, or wantonly destroyed or injured."<sup>52</sup> The Brussels Declaration of 1874 echoed this tenet by recognizing that cultural heritage is irreplaceable and that its value extends to all nations of the world.<sup>53</sup>

1. As public property, Misran cultural heritage is exempt from confiscation and pillage by an occupying power.

The Hague Conventions of 1899 and 1907 embody rules which have been officially adopted by most nations.<sup>54</sup> The annexa to both Conventions recognize that artistic and religious property, even that owned by the State, is exempt from seizure.<sup>55</sup> Moreover, the seizure, destruction, or damage to such property by a belligerent state is a violation of international law subject to legal proceedings.<sup>56</sup> Having received overwhelming international recognition, the Conventions provide that Salamis had no right to dispose of

Misran cultural property.

2. Even if the Sloane Collection constituted private property at the time of the takings, the property is exempt from any disposition.

Both the Hague Conventions of 1899 and 1907 exempt private property from confiscation by belligerents and prohibit acts of pillage.<sup>57</sup> This principle received additional support in the King of Italy in which the court held that a sovereign state has the authority to dispose of state property only, and that a private citizen may dispose of personal property independently.<sup>58</sup> Consequently, even if the Sloane Collection constituted private property, only its owner could legally dispose of it.

3. Avon is required to reconstitute the Sloane Collection to Misra under the laws of war.

Avon is a party to all agreements on the laws of armed conflict,<sup>59</sup> including the Hague Conventions of 1899, 1907, and 1954.<sup>60</sup> Consequently, Avon has agreed to recognize the force of the Convention in times of war and nonbelligerent military occupation<sup>61</sup> and to prevent the exportation of cultural property from occupied territory.<sup>62</sup> If such removals occur, Avon must act solely in a custodial capacity and return the property at the cessation of hostilities.<sup>63</sup>

- C. According to customary international law, the Sloane Collection should be returned to Misra, its country of origin.

Modern state practice, in multinational, regional, and bilateral agreements supports the historical principle of restitution where cultural property has been removed illicitly from its country of origin.<sup>64</sup> UNESCO has established a committee to promote negotiation for restitution.<sup>65</sup> Regional agreements also recognize restitution as the appropriate remedy for the illicit transfer of cultural property.<sup>66</sup> The UNESCO Convention of 1970 explicitly encourages bilateral agreements regarding restitution.<sup>67</sup> Finally, nations from every inhabited continent have participated in either informal negotiations<sup>68</sup> or formal treaties<sup>69</sup> providing for the return of cultural property. Avon has consistently refused to recognize its

duty under such well-recognized state practice, to return the Sloane Collection.<sup>70</sup>

Whether acquired legally or illegally, the Sloane Collection should be returned to its country of origin. Bilateral negotiations for the return of cultural property need not involve a claim of illicit acquisition.<sup>71</sup> Becher concludes that "the obligation to return such cultural property is an obligation under international law and it exists independently of ownership."<sup>72</sup> This generally accepted principle of international law<sup>73</sup> makes all of Avon's claims regarding legal acquisition and state succession<sup>74</sup> irrelevant to the issue. Cultural property attaches to its territory of origin and should be returned, whatever the reason for its removal,<sup>75</sup> regardless of subsequent claims of ownership.<sup>76</sup> The United Nations General Assembly has recognized that countries like Avon "had access to such valuable objects only as a result of colonial or foreign occupation" and therefore prompt restitution is only just as "reparation for damage done."<sup>77</sup> The Sloane Collection belongs in Misra regardless of Avonian claims or pretexts.<sup>75</sup>

D. Avon must return the Sloane Collection because it forms a significant part of Misra's national patrimony and cultural heritage.

1. Misra's compelling national interests in the Sloane Collection are recognized by international law.

Misra seeks to protect the integrity of its cultural heritage, as do most nations.<sup>79</sup> The Sloane Collection returned to Misra would be "a source of pride and identity, stimulating a sense of both continuity with the past generations and of community with the present one."<sup>80</sup> The laws of many states recognize that art can exist for the inspiration and unification of the people.<sup>81</sup> This is particularly true of newer states, which like Misra are developing a national culture to achieve moral and political balance.<sup>82</sup>

The individual's right to participate in cultural life is intimately tied to the right of every people to its national and cultural identity and its artistic, historical, and cultural wealth.<sup>83</sup> The Universal Declaration of Human Rights affirms every person's right "to participate in the cultural life of the community and to enjoy the arts."<sup>84</sup> Culture, a group

attribute, depends on the community. Culture is "the privilege a group enjoys vis-a-vis others to maintain its style and strategy of living;"<sup>85</sup> therefore there can be no single world culture. The groups which have a legally protected right to culture are nations.<sup>86</sup> Consequently, the Sloane Collection belongs to the Republic of Misra.

2. Even if the Sloane Collection is part of mankind's common cultural heritage, it must be returned to Misra.

Whether the words "common cultural heritage of mankind" attach to the Sloane Collection is irrelevant to the restitution issue. The common heritage of mankind is a political concept<sup>87</sup> not useful in the context of cultural property.<sup>88</sup> Avon is misusing this concept which was developed to protect nations like Misra from the power of wealthier nations to monopolize the world's unappropriated resources.<sup>89</sup> The precedent which would be established by permitting Avon to retain the Sloane Collection would ultimately have the opposite result; a few wealthy nations possessing art, and the rest of the world culturally impoverished.<sup>90</sup> The common heritage principle requires that nations jointly manage common assets in a trust for the benefit of all.<sup>91</sup> Avon has kept exclusive control of the Sloane Collection throughout its history and now invokes the common heritage notion only to maintain its control.<sup>92</sup>

Countries such as Misra are quite capable of preserving ancient artifacts.<sup>93</sup> All mankind would benefit from the display of the Sloane Collection within its geocultural milieu.<sup>94</sup> Since Avon has ignored its clear obligation under customary international law to return the Sloane Collection to Misra,<sup>95</sup> it must be required to do so.

### III. MISRA IS NOT OBLIGATED TO EXTRADITE EITHER MADAME Z OR ERICH WEISS, NOR TO RETURN THE BUST OF QUEEN THESLON TO AVON.

#### A. There is no direct evidence connecting Madame Z and Erich Weiss with an offense under the Extradition Treaty.

1. International law mandates the application of Misran standards to determine the admissibility of evidence.

There are no strict rules of evidence in international law.<sup>96</sup> The logical presumption

is, therefore, that states would specify the body of evidentiary law to be applied in event of a dispute. To this end, both Misra and Avon have agreed that an individual, accused of violating the requesting state's substantive law will be extradited only if the evidence is sufficient "according to the law of the requested party" to justify committing that individual to trial.<sup>97</sup>

State practice supports the notion that a protocol between two states may determine the character of the evidence to be discovered or received in resolving international disputes.<sup>98</sup> The 1903 Venezuelan Arbitrations, for example, were governed by protocol articles which established standards for acceptable documentation.<sup>99</sup> Similarly, in the Shufeldt claim, evidence was discoverable only as previously agreed by the parties.<sup>100</sup> Misra and Avon were thus justified in specifying the evidentiary law to be applied under the Extradition Treaty.

The recent repatriation of the Aztec Codice of Tonalmatil Aubin to Mexico<sup>101</sup> demonstrates the common state practice of applying internal evidentiary laws in international disputes. Basing his decision upon standards embodied in multilateral and bilateral treaties, the Mexican Attorney General declared that there was insufficient direct evidence to justify the charges against a Mexican national whom France had accused of taking the treasured codice from their national library.<sup>102</sup>

International tribunals are not empowered to apply automatically international law.<sup>103</sup> They are empowered to apply the law of one state accepted by all parties prior to the dispute.<sup>104</sup> Therefore, this Court must respect Avon and Misra's prior choice of evidentiary law.

2. Evidence, the value of which is impossible to assess, is inadmissible under general principles of law.

Both Anglo-American<sup>105</sup> and civil law<sup>106</sup> courts exclude unverifiable evidence from consideration. In the United States Nationals in Morocco case, this Court also refused to consider documents containing reports of conversations, because there was no way to

determine the value of the reports.<sup>107</sup> Questions concerning evidence generally are directed to value;<sup>108</sup> when that value is based on conjecture, the evidence is not considered. Misra's courts would, therefore, legitimately exclude unsubstantiated evidence from consideration.

3. Failure to satisfy the Article 8 standards prevents extradition under the Treaty.

The foreign journalists' reports concerning the removal of the bust cannot be substantiated and thus must be excluded from consideration. Avon's claim against Erich Weiss and Madame Z is based only on his reception in Misra and her membership in the MNO. These circumstances fail to establish a prima facie case, and Avon's entire extradition request fails under Article 8 of the Treaty.<sup>109</sup> Absent direct evidence connecting Erich Weiss and Madame Z with the relocation of the bust, Misra's refusal to extradite is in compliance with the Treaty.

B. Misra is not obligated to extradite Madame Z under the Extradition Treaty, nor under any other provisions of international law

1. Misra has legitimately retained the discretion to refuse extradition of its own nationals, and is legitimately exercising that discretion with respect to Madame Z.

State practice has long supported a nation's reservation of the discretionary right to extradite its own nationals.<sup>110</sup> That numerous bilateral treaties contain discretionary clauses is evidence of this common practice.<sup>111</sup> Misra and Avon have both legitimately reserved this right, as indicated by Article 12 of their Extradition Treaty.<sup>112</sup>

By refusing to extradite Madame Z, Misra is acting in good faith, as further prescribed by Article 12,<sup>113</sup> and is complying with the object and purpose of the Treaty, as required by international law.<sup>114</sup> Misra's good faith reasons for denying Avon's request include Misra's need to have Madame Z continue her diplomatic work in France and Misra's fear that Madame Z will not receive a fair trial in Avon.<sup>115</sup> By complying with the specific requirements of the Treaty, Misra is complying with the Treaty's spirit.

2. Madame Z is immune from Avon's criminal jurisdiction as a Misran diplomat.

Diplomats have long been granted immunity from a foreign state's criminal jurisdiction as a means of ensuring each nation's right to develop international relationships.<sup>116</sup> Both conventions<sup>117</sup> and customary law<sup>118</sup> have historically supported absolute criminal immunity for diplomats. State practice also confirms the notion that a diplomat's criminal immunity is rarely, if ever, waived by the sending state.<sup>119</sup>

Immunity extends to a diplomat who passes through a third state enroute to his post, guaranteeing his innocent passage.<sup>120</sup> To ascertain that a diplomat is allowed to perform the functions of his mission, both the Harvard Draft Convention on Diplomatic Privileges and Immunities of 1932<sup>121</sup> and at least one Anglo-American court<sup>122</sup> have stated that a diplomat is entitled to the same immunity from jurisdiction of a third nation's courts that he would have if he were a resident therein.

3. The political nature of the charges against Madame Z exempts her from extradition to Avon.

The alleged offenses in this dispute were directed exclusively against the government of Avon. The Avon National Museum is a government institution. Avon claims the art object in question as government property.<sup>123</sup> Removal of the statue therefore fulfills the two requirements commonly used to determine whether an offense is purely political: (1) the act must be exclusively directed against the state, without injuring private persons, property, or interests; and (2) the act must not be accompanied by the commission of common crimes.<sup>124</sup> This act clearly met the first test because of the Avonian government's claim of ownership. There was no removal of a privately-owned piece of art from a commercial art gallery, and no risk of injury to private persons, property, or interests.

The alleged offense was not accompanied by the commission of common crimes. Removal of the statue was in itself a political act. This act was unaccompanied by the commission of common crimes, such as stealing an automobile or shooting a museum guard.

In the case In re Castioni,<sup>125</sup> the defendant shot and killed a person during a political uprising. Participation in the rebellion itself by the defendant was a pure political offense,<sup>126</sup> but his extradition was requested for the killing, a common crime incidental to and accompanying the political offense.<sup>127</sup>

Because the crimes claimed by Avon constitute pure political offenses, extradition is unwarranted. State practice is to refuse extradition of persons charged with pure political offenses.<sup>128</sup> In addition, treason and other purely political crimes are not enumerated as extraditable crimes by the Treaty.<sup>129</sup> In addition, political crimes do not meet the double criminality requirement expressed in Article 2 of the Treaty.<sup>130</sup> The alleged offenses injured only Avon; Misra is not obligated to protect the security interests of Avon under the Treaty.<sup>131</sup>

Alternatively, extradition can be refused because the alleged offenses can be considered relative political offenses. Political motivation and the political element of these offenses predominated over their common criminal element.<sup>132</sup> Repatriation of the statue is within the context of the MNO's efforts to restore the cultural heritage and national pride of Misra.<sup>133</sup> Relocation of the bust was therefore directly connected to a political struggle, making it a politically motivated and relative political offense.<sup>134</sup>

Removal of the statue was also a relative political offense because the removal meets the test of proportionality. This act was committed without threat or risk of physical violence, no private property was taken or damaged, and no acts of gratuitous violence unnecessary to the MNO's objectives were committed.<sup>135</sup>

C. Misra is under no obligation to extradite Erich Weiss.

1. Erich Weiss is entitled to protection as a national of Misra.

Erich Weiss should be considered a national of Misra; as a result, his extradition is optional at the requested nation's discretion under the terms of Article 12 of the Treaty.<sup>136</sup> That Mr. Weiss was made an honorary citizen of Misra after he allegedly committed crimes

in Avon<sup>137</sup> does not affect his status as a national as regards extradition. The material moment for the determination of nationality is the extradition hearing itself, not the time of the alleged flight or offense.<sup>138</sup> Courts of several nations have held that, unless excepted by the law of the asylum country, nationality acquired after the offense brings the accused within the nationality exemption.<sup>139</sup> Extradition has been refused on grounds of nationality where subjects have acquired nationality after they have committed offenses in nations requesting their extradition and the delivery of its nationals by the requested nation was discretionary.<sup>140</sup>

2. Erich Weiss' actions should be considered political offenses.

For the reasons indicated above,<sup>141</sup> Mr. Weiss' alleged acts should be considered political offenses. In addition, Mr. Weiss was an Avonian citizen at the time of the incident. Avon could consider his act treasonous as a crime against the state.

D. Misra would be the proper forum for a trial of Madame Z and Erich Weiss, if a trial were in fact warranted.

Under the principle of aut dedere aut judicare, nations which have denied extradition requests, especially regarding their nationals, have instead prosecuted those persons.<sup>142</sup> If Avon had met the evidentiary standards of Article 8 of the Extradition Treaty,<sup>143</sup> Madame Z and Erich Weiss could therefore have been tried in Misra. Misran courts possess competent jurisdiction over the extraterritorial acts of its citizens under the jurisdictional principle of nationality.<sup>144</sup> Both Madame Z and Erich Weiss are Misran nationals<sup>145</sup> and therefore, are subject to Misra's civil and criminal jurisdiction. Avon's assertion of jurisdiction over Madame Z and Erich Weiss under the principle of territoriality<sup>146</sup> does not deny the competence of Misran courts to try Misran citizens.

State practice has been to deny extradition where trials would be "colored by political passion."<sup>147</sup> If a trial were justified, Misra would be its proper location.

E. Misra is under no obligation to return the statue of Queen Theslon to Avon.

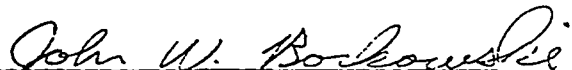
Misra is not required to return the bust of Queen Theslon to Avon for at least three reasons. First, Article 22 of the Treaty conditions surrender of property on its materiality as evidence in the prosecution of persons extradited under the Treaty.<sup>148</sup> Because Misra is not obligated to extradite either Madame Z or Erich Weiss, it has no reason to surrender the statue. Second, even if Misra were to extradite either subject, the statue does not constitute material evidence required for prosecution by the Avonian courts. Those courts need not have physical possession of the statue to try Madame Z or Mr. Weiss. Lastly, Article 22 conditions surrender of articles upon a "satisfactory assurance from the requesting party" that the articles will be returned.<sup>149</sup> Avon's position, that it owns the Sloane Collection, and that it is the appropriate site for the display of Misran objects,<sup>150</sup> create a risk that Avon will not return the statue, justifying a denial of Avon's demand.


CONCLUSION

The Republic of Misra respectfully requests that this Court:

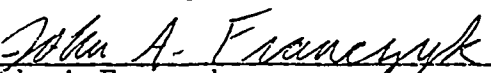
1. declare that the Sloane Collection results from common theft;
2. declare that the Sloane Collection comprises part of Misra's national patrimony and cultural heritage;
3. order Avon to restitute immediately the Collection to Misra;
4. declare that Misra is under no duty to extradite either Erich Weiss or Madame Z, nor to return the statue of Queen Theslon to Avon.

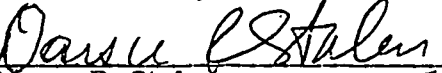
Respectfully submitted,

  
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John W. Borkowski

  
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John A. Franczyk

  
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Darsee R. Staley

## NOTES

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