

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

REPUBLIC OF MISRA,
Applicant

KINGDOM OF AVON,
Respondent

February, 1986

On Submission to the
International Court of Justice

MEMORIAL FOR THE RESPONDENT

Team No. 11 - 11

John W. Borkowski
John H. Ehrlich
Carl D. Flaningam
John A. Franczyk
Darsee R. Staley

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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

The Sloane Collection consists of ancient artifacts acquired by the government of Avon during the early nineteenth and twentieth centuries. (Compromis at 3.) The Collection, publicly displayed in the Avon National Museum, comprises statues, friezes, and frescoes produced by an ancient civilization which once existed in Misran territory. (Id.)

This territory had been ruled by a succession of conquerors and invaders, who thoroughly replaced the original inhabitants. (Id. at 1.) The Empire of Salamis overran and forcibly incorporated the Misran region in the seventeenth century. (Id.) A temple which had been built in the city of Tannis by the ancient civilization suffered severe destruction during the period of Salamic rule. (Id.) The Salamic government had converted the temple into an ammunitions storage depot for its military forces. (Id.)

In 1802, Major Harrison Sloane, a classical scholar and Avonian consul in the Salamic Province of Misra, sought and received permission from the ruling Emir of Salamis to study and remove statues and carved stones from Tannis. ("The Fezgrina Directive," id. at 2.) To that end, Major Sloane removed and shipped approximately two hundred crates of remains to Avon. (Id.) The Salamic government did nothing to prevent Major Sloane from removing these ruins. (Id.)

The Kingdom of Avon subsequently purchased these artifacts from Major Sloane for a sum then equal to \$20,000 (U.S.). (Id. at 3.) The Government purchased this portion of the collection only after determining that removal of the artifacts from Misran territory was necessary for their preservation. (Id. at 2.) Since that time, the collection and subsequent additions have been displayed in the Avon National Museum.

The Republic of Misra gained its status as an independent State in 1826, following a revolution against the Empire of Salamis. (Id. at 3.) Prior to 1826, there was no regulation of excavations and archeological digs within the territory. (Id. at 4.) Newly promulgated regulations restricted the removal of major artifacts from Misra by requiring government approval. (Id.)

In 1908, Avon responded to Misran rioting, in which several Avonian nationals and diplomats were killed, by launching a punitive expedition against Misra. (Id.) D. Van Dean, an Avonian art expert, accompanied this expedition and acquired numerous additional artifacts for the Sloane Collection. (Id.) Misra ceded all of the artifacts collected by Van Dean to Avon in the 1908 Peace Treaty. (Id.)

The Avon National Museum acquired the last addition to the Sloane Collection in 1913, when it purchased a marble bust of Queen Theslon from an anonymous collector. (Id.) The collector exported the bust from Misra along with other artifacts. (Id. at 4-5.) How the collector acquired the statue is not known.

After achieving its independence, Misra sought the return of the Sloane Collection, claiming it as part of Misra's national cultural heritage. (Id. at 5.) The Misra National Organization (MNO), a nationalist movement, has gained prominence in Misran politics with a platform which calls for such restoration. (Id.) In July 1984, the president of the MNO, a former Misran diplomat to Avon known as Madame Z, and her lover, the Avonian art historian Erich Weiss, visited the Avon National Museum and viewed the Sloane Collection. (Id. at 6.) Immediately thereafter, Erich Weiss and the bust of Queen Theslon vanished from Avon. (Id.) Three days later, the Misran Minister of Cultural Affairs defiantly announced the presence of the bust in Misra and unequivocally declared that it would never be returned. (Id.)

Foreign journalists who investigated the matter determined that Madame Z and Weiss perpetrated the theft and smuggled the bust out of Avon in Madame Z's luggage. (Id.) Misra subsequently awarded Weiss residency and honorary citizenship. (Id.) Avon has charged Madame Z and Weiss with the theft of the bust and has requested their extradition and restitution of the bust according to a valid bilateral treaty, signed and ratified by both States. ("Extradition Treaty," Id.) Misra has ignored Avon's request. (Id.)

Both Avon and Misra are members of the United Nations, and are parties to the currently effective multilateral agreements on the laws of armed conflict. (Id. at 9.) In addition, both states have signed the UNESCO Convention on the Means of Prohibiting and

Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property; both have enacted internal legislation consistent with certain provisions of this Convention. (id.) The parties have agreed to submit this dispute by special agreement to the International Court of Justice.

QUESTIONS PRESENTED

- I. Has a nation legally acquired artifacts where such artifacts were obtained from a state possessing valid legal title to them, through a peace treaty signed by sovereign states, and from a private parties who had legally exported them?

- II. Should artifacts which form part of mankind's common cultural heritage remain where they have had the greatest cultural impact and can be properly preserved and displayed?

- III. Is a nation obligated to surrender persons under an Extradition Treaty where all provisions of the treaty have been satisfied and no international standards prevent operation of the treaty?

- IV. Is a nation obligated to surrender an art object which is material evidence for prosecution of a common crime in another state, when surrendering the object is required under a valid bilateral treaty?

SUMMARY OF ARGUMENT

Avon legally acquired all the objects contained in the Sloane collection. In 1802, Major Sloane was authorized by the Salamic government to remove these artifacts from their original location. At the time, Salamis had legal title to all public movable property. Later, Avon recognized that Sloane's acquisitions had not only been legal, but had been necessary for the preservation of the objects. Avon purchased the Sloane Collection in good faith.

Avon twice expanded the collection through legal means. In 1908, Avon conducted a punitive expedition against Misra as a legitimate reprisal for the death of Avonian citizens residing in Misra. Subsequently, Misra transferred a group of artifacts to Avon pursuant to a valid bilateral Peace Treaty. In 1913, Avon purchased the bust of Queen Theslon from an anonymous finder. The property passed legally through Misran customs. The purchase was made in good faith and was valid under Avonian law.

Avon has continuously protected the Sloane Collection as part of mankind's common cultural heritage. This great treasure must be accessible for the benefit of all mankind, both now and in future generations. The Avon National Museum has for over 170 years fulfilled this mission and it remains the best place to preserve and display the collection.

If the Sloane Collection were subject to national ownership it would belong to Avon. For more than a century it has had a profound influence on Avonian art and culture. Misra's only claim to the Collection is that the present-day Misran state occupies the territory where, centuries ago, another people created these treasures.

Misra's obligations under the 1970 UNESCO Convention require that the bust of Queen Theslon be returned. Regardless of who removed it, Misra is forbidden from allowing its importation because it was taken from a museum.

Madame Z and Erich Weiss, however, have been implicated in the theft of the bust. They should both be surrendered under the Extradition Treaty. The evidence of their involvement, establishes a prima facie case against them. Furthermore, while the Extradition Treaty provides for the discretionary surrender of nationals, Misra has no valid justification for refusing to deliver Madame Z or Erich Weiss. Furthermore, Erich Weiss should not be considered a Misran national for purposes of extradition.

Madame Z is not entitled to diplomatic immunity. She was neither performing official duties in Avon nor enroute to another post. Thus, accepted theories of diplomatic immunity allow her to be subject to Avon's criminal jurisdiction.

Finally, the political offense exception should not be applied in defense of Madame Z or Erich Weiss. First, the Extradition Treaty does not provide for any such exception. Second, the crime committed does not fit under any accepted theory of political offenses and the justifications for excepting those who commit political offenses do not apply in this case.

ARGUMENT

I. AVON LEGALLY ACQUIRED ALL ARTIFACTS COMPRISING THE SLOANE COLLECTION IN COMPLIANCE WITH INTERNATIONAL LAW.

A. Major Sloane acquired valid legal title from the Salamic Empire to all artifacts in the original collection.

1. The Salamic Empire possessed valid legal title to all movable property within its territory.

Throughout the seventeenth and eighteenth centuries, the capture of territory during warfare gave to the victor valid title to all property of the vanquished state.¹ The forcible incorporation of Misra² was an act of subjugation³ resulting in the Salamic Empire becoming the state successor to Misra.⁴ As the successor state, Salamis acquired all of Misra's rights under international law.⁵ The sovereignty of the territory had been effectively transferred to a "newly organized and effective legal order, valid for a certain territory and population...."⁶ Salamic state practice further evidenced this transfer of sovereignty as the Empire reorganized the Misran territory, placing it under the provincial administration of the Bey.⁷

The consensus of contemporary publicists is that, with the transfer of sovereignty through state succession, the inhabitants of the territory "lose the nationality of the predecessor state and become ipso facto nationals of the successor."⁸ Notwithstanding the absence of a peace treaty ending hostilities, the transfer of sovereignty to Salamis is recognized under the international legal principle of debellatio.⁹ Under this standard a formal devolution of power need not be evident to effectuate the transfer of sovereignty.¹⁰ Consequently, the forcible incorporation of Misra ended a period of belligerency, extinguished the Misran state, and transferred full territorial sovereignty to the Salamic Empire.

2. The Salamic Empire possessed valid legal title to all public movable property, even if a technical state of war existed.

The sovereignty of an occupying power is equivalent to that of the previous

government.¹¹ Following Roman law, the occupying state is not subject to the vanquished government's constitutional restrictions.¹² Consequently, the occupant possesses valid title to public movable property and is endowed with the power of alienation.¹³

Even if Salamis did not possess title to the artifacts, international law permits an occupying state to appropriate public property for military purposes, whether it is movable or immovable.¹⁴ The temple of Tannis lay in ruins by the time Salamic forces occupied the city.¹⁵ They converted the remains of the building into an ammunition storage area. The Hague Conventions of 1899 and 1907 formally recognized such practice.¹⁶

The valid rights of the Salamic Empire extended to all former Misran movable and immovable property. The Compromis does not indicate that any artifacts were attached to immovable property in situs. Even if the objects could be classified as immovable at one time, their subsequent transferral to Avon revealed the artificial distinction between movable and immovable property.¹⁷ Early-nineteenth century state practice resulted in the transfer of many objects previously classified as immovable.¹⁸

3. The Salamic Empire's inaction validated Major Sloane's acquisitions pursuant to the Fezgrina Directive.

The Fezgrina Directive explicitly granted Major Sloane authority to remove former Misran artifacts.¹⁹ While the provincial Bey limited Major Sloane's activities to studying and reporting on the objects, Sejam Fezgrina, the Emir of Salamis, permitted their removal.²⁰ Only at a later time did Salamis protest Sloane's activity to Avon. Nonetheless the Empire did not follow up with additional protests or take any effective action to restrain Major Sloane.²¹ The protests of former Misran inhabitants do not evidence state practice as they were not agents of the Salamic Empire. Moreover, the former Misrans could not prevent Major Sloane's activity, thereby indicating their lack of state authority.²²

B. The Peace Treaty of 1908 granted Avon legal title to additional artifacts in the Sloane Collection.

By the end of the nineteenth century, customary international law supported a limited

right of forcible self help to protect human rights.²³ State practice of the time illustrates that Avon acted within its sovereign rights by initiating a punitive expedition to protect its nationals endangered by a wave of anti-western rioting in Misra.²⁴ Avon sought to provide the protection to its diplomatic personnel normally provided by the host country under international law.²⁵

Following the expedition, Misra exercised its sovereign state powers and entered into the 1908 Peace Treaty with Avon.²⁶ The Peace Treaty is valid and binding based upon recognized criteria of equality and reciprocity in international law.²⁷ There is no indication that Avon coerced Misra into entering the accord, activity which might vitiate the treaty.²⁸ Even if coercion did exist, international law prior to the League of Nation's Charter disregarded its effect in invalidating treaties.²⁹

Additionally, Avon and Misra entered into the Peace Treaty as equal powers. The treaty did not provide Avon with unilateral rights and impose on Misra obligations in violation of customary international law.³⁰ Even if Misra was not an equal party, international law would presume the treaty to be valid. Failure to recognize the legality of peace treaties increases the burdens of reaching a settlement and perpetuates the state of war.³¹

C. The principle of intertemporal law supports the validity of Avon's ownership of the entire Sloane Collection.

The general principle of intertemporal law holds that rules of international law must be evaluated and applied only with regard to the circumstances existing at the time of the activity in dispute.³² The most recent definitive commentary on the principle declared that "any norm of public international law shall be determined in accordance with the general principle of law by which any fact, action or situation must be assessed in the light of the rules of law that are contemporaneous with it."³³ Consequently international law absolutely prohibits the retroactive application of twentieth-century treaties recognizing the common cultural heritage of mankind to justify the return of the Sloane Collection.

D. Avon legally acquired the bust of Queen Theslon.

The Avon National Museum legally acquired the bust of Queen Theslon in 1913 from an anonymous finder who had obtained Misran customs clearance to export the object.³⁴ The clearance granted by a customs official, an agent of the Misran government, sanctioned the legal export of the bust by Misra.³⁵

Even if the bust had been removed illegally from Misra, such activity would not invalidate the Avon National Museum's legal title. In a persuasive decision written by Lord Denning, a court held that an exporter of cultural property, even that which is exported illegally, does not forfeit title unless the government of the exporting nation seizes the goods.³⁶ Citing numerous Anglo-American precedents, the court determined that the failure to detect and prevent the illegal export of cultural property effectively bars a state from claiming title.³⁷ Consequently, goods illegally exported from one state may be legally imported into a second state.

The Avon National Museum also possesses valid legal title to the bust under the lex situs principle of private international law. Under this standard, personal property disposed according to the laws of the state in which the object is located is binding everywhere.³⁸ The museum purchased the bust from a collector who possessed valid title.³⁹ Therefore any challenge to the museum's legal title must be made under Avonian law.

II. THE SLOANE COLLECTION FORMS PART OF THE COMMON CULTURAL HERITAGE OF MANKIND AND BELONGS IN AVON.

A. The Sloane Collection is part of mankind's common cultural heritage.

The Sloane Collection is a significant part of mankind's cultural heritage. These artifacts record the achievements of one of the world's first great civilizations.⁴⁰ They stand as a tribute to mankind's creative genius and artistic nature. The Sloane Collection is universal in its appeal to the human spirit and it cannot be regarded as belonging exclusively to any one nation.⁴¹ The earliest inhabitants of the city of Tannis influenced all of Western

culture.⁴² Avon acknowledges this cultural inheritance by openly displaying the Sloane Collection for all the world.

International law requires that the Sloane Collection, as part of mankind's common heritage, be managed for the benefit of all people.⁴³ Both the importance and scarcity of cultural property suggest "it is not farfetched . . . to view . . . [it] in the same light of lex feranda as the high sea, Antarctica and outer-space."⁴⁴ The foundations of an international legal order recognizing the common cultural heritage of mankind have already been laid. The UNESCO Convention of 1970 is the cornerstone of a regime of international cooperation to protect the world's artistic treasures.⁴⁵ A 1972 UNESCO convention expanded the principle that cultural property is part of the world heritage of mankind as a whole.⁴⁶ International law protects the cultural heritage of the world by demanding the cooperation of all peoples.⁴⁷

B. Avon has an international obligation to preserve and display the Sloane Collection.

The opposing claims to the Sloane Collection of Avon and Misra reflect the ambivalence of the international community toward the proper disposition of cultural property. The conflict here is between internationalism and nationalism.⁴⁸ Misra claims the Collection, on the basis of national right, as its sole national patrimony. Avon, however, is required by international law to preserve and display the Sloane Collection for the benefit of all.⁴⁹ Avon cannot send the Collection to Misra because Avon cannot abrogate these responsibilities.

According to international law, Avon's obligation to preserve the Sloane Collection entails preservation under the "best possible circumstances."⁵⁰ Scientists are in agreement that transport of the Sloane Collection to the polluted city of Tannis is a great risk.⁵¹ The risk of damage during transport is one concern. More important, however, are the risks of air pollution that would jeopardize the artifacts once they reached Tannis.⁵² The best interests of the Sloane Collection, and of the world community which shares its heritage, clearly lie in Avon's continued possession of the artifacts. In Avon they will be safe and accessible.

Avon's second duty to the international community is to give the Sloane Collection the widest possible visibility.⁵³ This duty has not been undertaken lightly. The Avon National Museum display exhibit has fostered great public interest and understanding of these ancient artifacts.⁵⁴ Misra has indicated that it would reintegrate the Sloane Collection into the Temple at Tannis, but has neither demonstrated the ability to protect the Collection nor manifested the intention to keep the display within reach of the world community.

C. If cultural property is to be considered national patrimony, the Sloane Collection belongs to Avon.

Avon legally acquired the Sloane Collection "with the consent of competent authorities" in 1802 and 1908 and purchased legally the Theslon bust in 1913.⁵⁵ The bulk of the collection was acquired to preserve the artifacts from destruction.⁵⁶ These special circumstances of acquisition preclude return.⁵⁷

Since the collection is more important to Avonian than Misran culture, it should remain in Avon.⁵⁸ The Sloane Collection has contributed substantially to the growth of culture in Avon and Europe. A brilliant new school of Avonian painting⁵⁹ was inspired by these artistic treasures at a time when in Tannis they were used for whitewash and target practice.⁶⁰ The obelisks transported to the great cultural centers of Europe also became sources of national pride for these countries.⁶¹ In contrast, the only Misrans with direct ties to the Sloane Collection have been gradually and thoroughly replaced.⁶² The modern Misrans have no direct ancestral ties to the ancient civilization which created these works; they rely exclusively on an ambiguous notion of country of origin for their claim.⁶³

The Sloane Collection is an integrated exhibit displayed by professionals in a manner that fosters understanding and appreciation of its great beauty and historical significance. The return of cultural property to its country of origin should not significantly dismantle collections.⁶⁴ The paramount aesthetic and historical value the bust of Queen Theslon requires that it be returned to Avon and reintegrated into the Sloane Collection.

D. International law requires Misra to return the bust of Queen Theslon.

Whether Avon is considered the custodian or the owner of the Sloane Collection, Misra as a party to the 1970 UNESCO Convention⁶⁵ violated its obligations by allowing the "import of cultural property stolen from a museum."⁶⁶ The bust of Theslon therefore should be recoverable on demand by Avon.⁶⁷

Misra has no right under international law to keep the bust of Theslon. Return and restitution of cultural property do not constitute a generally accepted norm of international law.⁶⁸ Self-help measures, whether employed by states or individuals, pose a serious threat to the future of international cooperation in protecting the common cultural heritage of mankind.⁶⁹ Misra's refusal to return the bust and tacit endorsement of its theft, whether rationalized by reference to United Nations General Assembly resolutions,⁷⁰ or otherwise, amount to blatant nationalism and disrespect for law and culture, which should not be tolerated by the international community.⁷¹

III. INTERNATIONAL LAW OBLIGATES MISRA TO EXTRADITE MADAME Z AND ERICH WEISS AND TO RETURN THE BUST OF QUEEN THESLON TO AVON.

A. The evidence implicating Erich Weiss and Madame Z is sufficient to satisfy the requirements of the Extradition Treaty.

1. International and internal state evidentiary standards allow consideration of indirect, circumstantial evidence.

International arbitral tribunals have applied broad standards in their overall consideration of evidence.⁷² When examining evidence to evaluate the validity of a claim, international tribunals further relax these already liberal evidentiary standards where one state has exclusive control over vital evidence.⁷³ Under these norms, Avon, the claimant state, need only establish a prima facie case of theft against Weiss and Madame Z.⁷⁴ To substantiate its case, Avon may present and rely on inference of fact and circumstantial evidence.⁷⁵

Internal state procedure is interpreted in a like manner before international tribunals.

In the Corfu Channel Case,⁷⁶ this Court acknowledged that "indirect evidence is admitted in all systems of law, and its use is recognized by international decisions."⁷⁷ The function of this Court is to "decide in accordance with international law such disputes as are submitted to it."⁷⁸ In pursuance of this function, international law recognizes that municipal evidentiary technicalities which would restrict evidence should be avoided.⁷⁹ Thus, rather than apply evidentiary standards which would thwart the function of this tribunal, this Court should consider all circumstantial and inferential evidence, as allowed under all applicable systems of law to resolve the evidentiary question of the Extradition Treaty.⁸⁰

2. The evidence against Madame Z and Weiss meets the Article 8 requirements of the Extradition Treaty.

The evidence against both parties is sufficient to justify consideration of extradition under either international or internal standards. Madame Z's presidency of an organization dedicated to restoring Misra's cultural heritage,⁸¹ her presence with Weiss in the Museum prior to the theft,⁸² and Weiss's simultaneous disappearance from Avon with the bust⁸³ provide potent circumstantial evidence of their complicity in the crime. It is also unlikely that Misra would grant citizenship to Weiss so readily other than as a reward for the crime. Further, because "there are no rules in international judicial procedure against the admission of hearsay evidence,"⁸⁴ the journalists' account of the crime is also admissible as evidence. Avon has thus presented evidence, as the general standard in extradition hearings requires,⁸⁵ to constitute a prima facie case against Madame Z and Weiss. Misra has failed to explain its refusal to grant Avon's request, and is obligated to extradite both individuals.

B. Misra must grant Avon's request to extradite Madame Z under the force of the Extradition Treaty.

1. Madame Z is not entitled to diplomatic immunity from Avon's criminal jurisdiction.
 - a. Multilateral treaties provide only that safe passage be given a diplomat who passes through a state enroute to his post.

The Vienna Convention on Diplomatic Relations,⁸⁶ an embodiment of customary

international law, does not immunize diplomatic personnel from all criminal charges.⁸⁷ As applied to Madame Z, it only would have allowed her to request passage to France, her assigned state.⁸⁸ The Convention further required her to respect Avonian laws and regulations while in Avon.⁸⁹ Her failure to respect those laws, as indicated by the evidence which implicates her with the theft of the statue, was a blatant violation of international law.

General state practice and customary law⁹⁰ indicate that Madame Z's previous status as a diplomat to Avon terminated shortly after her recall from Avon. This precludes any broader claim to diplomatic immunity which she might assert as a diplomat to Avon. Thus there are no provisions for immunity which would prohibit extradition of Madame Z to Avon.

- b. Subjecting Madame Z to Avon's criminal jurisdiction is consistent with accepted theories of diplomatic immunity.

A primary justification for granting diplomatic immunity is to protect the sending state's diplomatic function.⁹¹ Functional necessity is not without limits, however, as a diplomat may not invoke immunity to circumvent local laws.⁹² Further limitations, supported by general state practice, withdraw immunity with respect to purely private transactions⁹³ and actions outside of a diplomat's official functions.⁹⁴ Art theft is a common crime, not encompassed in the function of a diplomatic mission. Madame Z's participation in the crime was ultra vires, and private and personal in character. She is thus subject to the full criminal jurisdiction of the Avonian courts.

2. Madame Z must be extradited under Article 12 of the Extradition Treaty.

Article 12 of the Treaty states that, while neither party shall be bound to extradite its nationals, such persons can be delivered up if the requested party deems it proper to do so.⁹⁵ The prevalent form of extradition treaty contains language stating that neither party shall be required to extradite its nationals. This has been interpreted to mean that requested parties cannot deliver up their own citizens.⁹⁶ Misra, however, signed a treaty

under which the surrender of nationals was optional on the part of the requested nation, and has assumed the burden of establishing that the extradition of Madame Z would be improper. Misra cannot justify such a determination and is thus obligated to extradite her under the Treaty.

States which have the right to extradite their nationals under discretionary treaties have generally justified their actions on the basis of protecting their own citizens against inadequate judicial safeguards in other countries.⁹⁷ Requested nations have claimed vast disparities in the quality of justice between their courts and those of the requesting parties.⁹⁸ Avon would afford Madame Z all the procedural protections provided other criminal defendants. Absent a showing by Misra that Avon is incapable of providing Madame Z with a fair trial, no basis for deeming extradition improper has been established.

Furthermore, under the doctrine of noninquiry, Misra should be prevented from basing its extradition determinations on the quality of Avonian justice. Under Article 8 of the Extradition Treaty,⁹⁹ the extradition hearing is merely to determine if there is sufficient cause for the subject to be bound over for trial. State practice has been to interpret such language to exclude considerations of defense claims that the accused would not receive a fair trial or would be subject to dangerous conditions if imprisoned.¹⁰⁰

The Vienna Convention on the Law of Treaties¹⁰¹ obligates Misra to perform its duty under the Extradition Treaty in good faith,¹⁰² and "to refrain from acts which would defeat the object and purpose of a treaty."¹⁰³ Consonant with these widely-accepted rules, Misra must agree to extradite Madame Z, a Misran national, under Article 12 of the Extradition Treaty.¹⁰⁴ Any unsupported refusal to do so is a bad faith attempt to thwart the stated purpose of the Treaty, and is a violation of international law.

C. Misra is obligated under the extradition treaty to surrender Erich Weiss.

1. Erich Weiss is not entitled to protection as a national of Misra.

At the time at which he committed crimes in Avon, Erich Weiss was a citizen of Avon.

Later, he was declared an honorary citizen and given permanent residence by Misra.¹⁰⁵ Weiss has not renounced his Avonian citizenship. Weiss's honorary citizenship does not insulate him from Avon's extradition request. Weiss fled Avon in order to evade prosecution: his citizenship status in Misra should be considered tainted. State practice has been to consider the acquisition of nationality under such circumstances as "merely a device to defeat extradition" and to ask the requesting nation to ignore the subject's acquired citizenship in granting extradition.¹⁰⁶

Misra should not be permitted to base its refusal to extradite Weiss on his acquired nationality because of its interest in his actions. Weiss was made an honorary citizen only after he helped steal the statue of Queen Theslon.¹⁰⁷ Misra's actions amount to a quid pro quo for Weiss' crimes. Permitting Misra to use the national status it has granted Weiss in refusing his extradition is to ignore Misra's interest in his criminal activities.

2. If Erich Weiss is determined to be a national of Misra, Misra is still obligated to extradite him under the Treaty.

The good faith cooperation obligation in Article 12 of the Treaty¹⁰⁸ should similarly cause Misra to refuse to consider the possible treatment of Weiss in Avon in making its extradition determination.

D. The political offense exception should not be applied in defense of Madame Z or Weiss.

1. The Extradition Treaty does not exempt political offenses.

Article 2 of the Extradition Treaty specifies that extradition shall take place for acts specified in the Appendix.¹⁰⁹ No exception for political offenses is included in the Treaty. While the grant of asylum (and the protection of nationals) has been considered absolute, unless excepted by treaty,¹¹⁰ this principle generally has been regarded as applicable only to pure political offenses.¹¹¹ Hence, an exception for relative political offenses must have been included expressly in the Treaty to have formed a basis for refusing extradition. States have commonly included such exemptions in extradition treaties, if this exception were to be given effect.¹¹²

Misra did not contract to create an exception for political offenses. However, it did contract to limit its otherwise absolute right to protect its own nationals under Article 12 of the Extradition Treaty.¹¹³ Madame Z and Weiss' crimes were not pure political offenses. Even if the subjects' crimes were relative political offenses, extradition cannot be refused on such grounds absent a provision for doing so under the Extradition Treaty.

2. Madame Z and Weiss' crimes were not political in nature.

Madame Z and Weiss' crimes do not fit under any accepted theory of political offenses. As a result, they should be extradited as common criminals.

Pure political offenses have traditionally been limited to treason and similar crimes.¹¹⁴ Pure political offenses are limited to acts directed against the state which do not injure private persons, property, or interests and which are not accompanied by the commission of common crimes.¹¹⁵ Madame Z and Weiss' theft of the statue injured private persons by depriving them of the opportunity to view this art treasure.¹¹⁶ In addition, the subjects' acts were accompanied by the commission of the common crime of robbery.

Madame Z and Weiss' crimes also do not meet any accepted test for relative political offenses, under which otherwise common crimes are deemed political. Their acts fail the Anglo-American political incidence test because these crimes were not committed during the course of a political uprising, nor were they incidental to a political uprising.¹¹⁷ The theft of the statue did not occur during the course of any rebellion in Avon, and consequently was not incidental to any political disturbance.

The subjects' acts also fail the French political objective test, in part because their extradition has not been requested for political ends.¹¹⁸ To justify refusal of extradition under this theory requires a showing that Avon would violate the doctrine of specialty and would try Madame Z and Weiss for political crimes rather than common crimes.¹¹⁹ It is a rebuttable presumption that requesting nations will obey the doctrine of specialty.¹²⁰ In addition, criminals are considered to have a political objective only if they intended to

attack the political organization of the state.¹²¹ The theft of the statue, while injuring private persons as mentioned above, cannot be said to have been intended to effect political change in Avon.

Finally, these crimes fail the Swiss political motivation test. There is no nexus between these crimes and a political struggle.¹²² Swiss courts have deviated from this requirement only where the extradition subjects were from totalitarian states in which the opportunities for political opposition were minimal.¹²³ Most important, the political motivation test requires that the defendants' acts constitute an efficient means to reach the political objectives sought.¹²⁴ To meet this test, the theft of the statue must be viewed as an efficient means to the MNO's goal of "restoring cultural heritage and national pride."¹²⁵ Under these circumstances this Court should not condone use of criminal acts as an efficient means to attain political goals.

3. The justifications for the political offense exception are inapplicable to this case.

None of the justifications for the political offense exception apply to this case. Three justifications have been given for this exemption: (1) humanitarian protection of subjects against unfair and retaliatory trials; (2) noninvolvement of the requested state in the internal politics of the requesting state; and (3) lack of necessity for extraditing persons who do not pose a danger to world public order.¹²⁶

The humanitarian protection justification has been raised where political refugees would have faced certain persecution on their return.¹²⁷ If Weiss is considered a national of Misra, neither Weiss nor Madame Z can be viewed as having taken refuge from Avon. Rather than protecting political fugitives, Misra is aiding citizens who have committed common crimes.¹²⁸

The humanitarian justification also assumes that Madame Z or Weiss would be subject to persecution on return to Avon. Avon has requested extradition for criminal offenses and it should be presumed in the absence of conflicting evidence that Avon will obey the

doctrine of specialty. The humanitarian justification has been applied where subjects would have been prosecuted on the basis of their status (e.g., race, nationality, political opinions).¹²⁹ Madame Z and Weiss would instead be prosecuted on the basis of their acts alone.

Noninvolvement in the internal politics of the requesting state is clearly inapplicable to this case. This case involves the internal politics of the requested state, not the requesting state. The connection between the MNO and the government of Misra and the actions taken by the government establish existing involvement in the internal political issues presented by this case. Denial of extradition by Misra would not avoid further involvement of the government.

The last justification, lack of threat of political offenders to world public order, is inapplicable as well. Madame Z and Weiss' actions have created a dispute between Misra and Avon. Bassiouni has commented that refusal to extradite politically important fugitives allows such persons to "pit one state against the other."¹³⁰ This is precisely the case here.

E. Prosecution by Misra would be an inadequate remedy.

Under the principle aut dedere aut judicare nations which have declined extradition have instead prosecuted requested persons in their own courts.¹³¹ This would be an inadequate remedy in this case for three reasons. First, it is not clear that the Misran courts possess jurisdiction to try Madame Z or Weiss for their crimes. Several states, including Great Britain and the United States, do not usually prosecute persons for offenses committed abroad.¹³²

Second, the principle of territoriality, which states that the country in which the offense took place, takes precedence over other principles of jurisdiction.¹³³ This is superior to the principle of personality, under which Misra might assert a right to try its own citizens.

Finally, trial of Madame Z and Weiss in Misra would impair the quality of justice in

this case. This is not a claim as to the competence of the Misran courts. Trial in Misra would lower the quality of justice because it would cause difficulties in the presentation of evidence. Physical evidence and witnesses in Avon would either have to be transported to Misra or the trial would have to rely solely on written depositions. In addition, the publicity surrounding this case, as well as the climate of political opinion in Misra,¹³⁴ would be likely to prejudice the outcome of the trial. Trial in Avon, however, would not be subject to these factors.

F. Article 22 of the Extradition Treaty obligates Misra to return the bust of Queen Theslon to Avon.

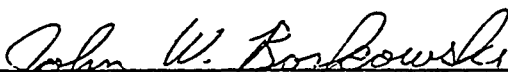
The Preamble to the Extradition Treaty clearly states that both Avon and Misra "desir[e] to cooperate more closely in the fight against crime and to this end, mutually to render better assistance in matters of extradition."¹³⁵ This goal is reflected in Article 22, which specifically requires that tangible evidence of the crime for which extradition is sought must be returned to the party requesting extradition. Good faith interpretation of these provisions¹³⁶ and implementation of the parties' intentions,¹³⁷ support the view that the bust must be returned under Article 22. Misra's refusal to return the bust thus violates the Extradition Treaty and is contrary to international law.

CONCLUSION

The Kingdom of Avon respectfully requests that this Court:

1. declare that the Sloane Collection forms part of the common cultural heritage of mankind and is reposing legally in Avon;
2. order Misra to extradite Erich Weiss and Madame Z and to return the statue of Queen Theslon to Avon.

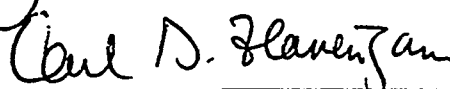
Respectfully submitted,



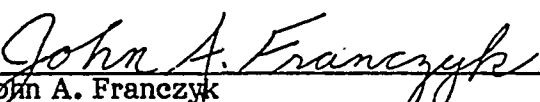
John W. Borkowski




John H. Ehrlich



Carl D. Flaningam



John A. Franczyk



Darsee R. Staley

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- 1 D. O'Connell, International Law 432 (2d ed. 1970); 2 Halleck's International Law 77 (Baker 4th ed. 1908).
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- 9 D. O'Connell, supra note 1, at 441.
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- 14 Hague Convention, July 29, 1899, art. 23(g), 32 Stat. 1803, T.S. No. 403; Hague Convention, Oct. 18, 1907, art. 23(g), 36 Stat. 2277, T.S. No. 539; I. Vasarhelyi, Restitution in International Law 51 (1964); Oppenheim supra note 3, at 339.
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- 53 Nafziger, supra note 50, at 807.
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- 128 Compromis at 3.
- 129 C. Van den Wijngaert, supra note 109, at 3; see European Convention on Extradition, Dec. 13, 1957, art. 3, 359 U.N. .S. 273, Europ. T.S. No. 24.
- 130 Bassiouni, Ideologically Motivated Offenses and the Political Offense Exception in Extradition: A Proposed Juridical Standard for an Unruly Problem, 19 De Paul L. Rev. 217, 237 (1969).
- 131 C. van den Wijngaert, supra note 109, at 161.
- 132 Oehler, Recognition of Foreign Penal Judgments and their Enforcement, in 2 M. Bassiouni and V. Nanda, supra note 97, at 266.
- 133 Id. at 267-68.
- 134 Compromis at 5-6.
- 135 Compromis at 7.
- 136 See supra note 101.
- 137 A. Schechter, Interpretation of Ambiguous Documents by International Administrative Tribunals 124 (1964).