

**THE 1986 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION**

The Art Treasures Case

IN THE INTERNATIONAL COURT OF JUSTICE

Republic of Misra,

Applicant

versus

Kingdom of Avon,

Respondent

MEMORIAL FOR THE APPLICANT

February 1986

Team 4-8

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JURISDICTION

The Republic of Mísra and the Kingdom of Avon submit their dispute to this court by special agreement pursuant to article 36(1) of the Statute of the International Court of Justice, which provides that the jurisdiction of the Court comprises all cases which the parties refer to it. Thus, the Court has jurisdiction in the present controversy and may resolve all legal questions submitted by the parties.

STATEMENT OF FACTS

I

The Republic of Misra is a poor country that harbors the remains of one of the world's oldest civilizations (C.1). Misra gained its independence in 1826 after a successful revolution against the Empire of Salamis, into which it had been forcibly incorporated during the seventeenth century (C.1). Throughout its history, Misra has been conquered and settled by invaders, who gradually and thoroughly replaced its earliest inhabitants (C.1).

As soon as it became independent, Misra demanded that the Kingdom of Avon return a collection of art treasures that belong to its national cultural patrimony (C.3). This collection had been taken from Misra prior to its independence (C.2), and was known as the Sloane Collection, named after Harrison Sloane, an Avonian consul to the Salamic Province of Misra (C.1).

Sloane, a classical scholar and collector of antiquities, had shipped some 200 crates of Misran cultural artifacts to the Kingdom of Avon, leaving only the shells of ancient Misran buildings, and causing severe architectural damage to several of Misra's most significant buildings (C.2). When Sloane began dismembering the ancient ruins in 1803, several leading Misrans had protested, lamenting their own powerlessness to back up their protests with force and the failure of Salamic authorities to come to their rescue (C.2).

Upon its independence, Misra also acted immediately to restore its precious architectural remains, seeking to recall the splendor of its ancient cultural heritage (C.4). Remains in Tannis, Misra's ancient capital, had been bombarded by Salamic invaders during the seventeenth century (C.1). Salamic troops had also converted these ruins into a fortress, destroyed ancient columns in target practice, burned marble statues

for whitewash, and converted Misra's principal temple into an ammunition storage area (C.1).

The Kingdom of Avon is a wealthy country that colonized much of Africa and Asia during past centuries (C.1). Avon appointed Sloane consul to the Salamic Province of Misra in 1802 (C.1). Upon his arrival in Tannis, Sloane sought and, after difficult negotiations, obtained permission from the provincial Bey to study the ancient ruins of the city (C.1). The Bey, however, explicitly restricted Sloane's activities to studying and reporting on the ruins, and denied Sloane's subsequent requests to undertake measures for "historic preservation" (C.12). Sloane, acting on his own, then applied to the Emir of Salamis, Sejam Fezgrina, to gain unrestricted access to the ancient city (C.2). The Emir issued a directive [the Fezgrina Directive], a French translation of which is the only remaining documentation (C.2).

The Fezgrina Directive allowed Sloane to remove "quelques pieces de pierre avec inscriptions and figures" [some pieces of stone with inscriptions and figures] (C.2). Without any authority other than a copy of this Directive, Sloane immediately took action, laboring continuously during the next year with 300 Salamic workers to remove statues, friezes, frescoes, and other artifacts of ancient Misra (C.2). Despite protests by leading Misrans, Salamic authorities did nothing to restrain Sloane or his workers (C.2). The Salamic government, however, protested Sloane's activities to the government of Avon (C.2).

Over 200 crates of Misran art treasures had arrived in Avon by 1806 (C.2). The "Sloane Collection" was placed in the Avon National Museum, a government institution, where it remains today (C.3). Sloane had offered to sell the collection to the government of Avon (C.2) after he encountered financial setbacks. Upon the recommendation of a commission appointed by the Avonian government, Sloane was paid a sum equivalent at that time to \$20,000 U.S. (C.3). The commission characterized

Sloane's act as "an absolutely necessary and virtuous act of salvage to preserve the priceless heritage of an ancient civilization" (C.2,3).

The Sloane Collection contributed to an upsurge of interest in ancient artifacts, and encouraged aggressive acquisition of Misran artifacts by private collectors, museums, and government officials in Avon and other European countries (C.3). Of greatest interest were preserved human remains in their elaborate caskets and Misran obelisks (C.3). The human remains were often taken for dissection to foreign laboratories or were destroyed in an effort to locate ancient documents and jewelry (C.3). By the time of Misran independence, most of its ancient obelisks stood in Avon as well as in London, Paris, Rome, and Berlin, in all of which they became items of national pride (C.3). The treasures of Misra's cultural patrimony also contributed to public understanding of the value of ancient artifacts and a new school of Avonian painting (C.3).

Since Misra's demand in 1826 for reintegration of the Sloane Collection into its original site, subsequent governments of Misra have repeatedly made requests for the return of the Collection. All such requests have been denied by the government of Avon (C.3).

The government of Misra has consistently maintained that because the Sloane Collection is part of its national cultural heritage, it must be returned (C.5). In the government's view, neither Avon nor any of its nationals ever legally acquired title to works of art in the Collection; consequently, immediate restitution is appropriate (C.5). Avon maintains that its national museum legally acquired the art, and that it is part of the common heritage of mankind (C.5). Avon claims that its foremost objectives are to preserve and display the objects for widespread viewing (C.5). Avon contends that it alone can best accomplish these objectives (C.5). Avon relies upon the opinion of scientists that, given current high levels of pollution in and around Tannis, some objects in the Sloane Collection would be at risk of environmental destruction if they were displayed outdoors in Misra (C.5).

II

In 1908, Avon launched a military invasion against Misra (C.4). Noted art expert D. Van Dean accompanied Avonian troops, confiscating many artifacts along the way (C.4). The best of these objects were added to the Avon National Museum, while the remainder were sold to private collectors (C.4). Avon later claimed all of these artifacts as "war reparations" in a peace treaty ("The Peace Treaty") (C.4). The military invasion was designed to punish Misra for a wave of anti-western rioting that had resulted in the deaths of some Avonians, including diplomatic personnel (C.4).

The artifacts acquired by Avon during the military invasion in 1908 were among many pieces of Misran art that found their way out of the country despite Misra's adoption of strict regulations governing all excavations (C.4). The regulations, adopted in 1827, prohibit the removal of any object "of historical value or significance" without the government's consent (C.4).

In 1913, the Avon National Museum announced the excavation and acquisition of a unique marble bust of Theslon, an ancient Misran queen (C.4). This was the last and most important item of Misra's cultural heritage that Avon acquired for the Sloane Collection (C.4). Most art scholars and historians consider the bust to be among the world's greatest works of art (C.4). The Misran government immediately protested and demanded the return of the statue when it was first documented as inventory of the Museum (C.4). The Museum denied Misra's request (C.4).

Misra's investigation revealed that a customs official had been presented with a case filled with minor artifacts, among which, unbeknownst to him, was buried the statue of Queen Theslon (C.4,5). The customs official had not been presented with an itemization of the contents of the case (C.5). The investigation also revealed inconclusive evidence of bribery (C.5).

The Avon National Museum asserted that the bust of Theslon had been purchased legitimately from an anonymous finder, who had obtained Misran customs clearance to

export the object (C.4). The location of the find in Misra and the circumstances of the statue's acquisition have never been fully disclosed (C.5).

III

The Misra National Organization (MNO), a nationalist movement, has been gaining ground in the political arena (C.5). Two of its leaders hold portfolios in the coalition government of Misra (C.5). MNO, above all, stands for restoring cultural heritage and national pride (C.5). The organization's president is a lawyer, popularly known as Madame Z, who studied and taught in Avon for a few years (C.5). Later, she served as Misra's Ambassador to Avon. Currently, she is Misra's Ambassador to France (C.5).

In July, 1984, Madame Z stayed for three days in Avon, en route from Tannis to Paris (C.6). While in Avon, she gave a lecture and attended two concerts (C.6). Toward the end of her stay she and Erich Weiss, an Avonian art historian, visited the Sloane Collection at the Avon National Museum (C.6). Erich Weiss left Avon after his visit to the Avon National Museum with Madame Z, and he now resides in Misra (C.6). Weiss is regarded as a national hero (C.6).

Shortly after Madame Z's visit to Avon, it was discovered that the bust of Queen Theslon had vanished (C.6). Foreign reporters in Misra subsequently announced that Madame Z and Eric Weiss, her lover, had arranged the theft of the statue and its transfer to Misra in Madame Z's luggage (C.6). According to reports in the popular press, neither security nor customs officials searched her luggage at the airport when she left Avon (C.6). How Weiss got the piece out of the museum in Avon remains a mystery (C.6).

The government of Avon has charged Weiss and Madame Z with the theft of the bust of Theslon (C.6). Avon has demanded that Misra extradite them and return the statue to Avon under an extradition treaty between the two countries (C.6). Misra has refused without explanation (C.6).

The Misran Minister of Cultural Affairs held a press conference in Tannis three days after the bust of Theslon was discovered missing from Avon (C.6). He announced that "the bust of Queen Theslon, the country's pride and an integral part of its natural patrimony, has found its rightful place back in Misra" (C.6). He did not answer questions concerning the bust's appearance in Misra but declared that it would never be returned to Avon (C.6).

IV

Misra, Avon, and Salamis are all members of the United Nations and original parties to all global agreements on the law of armed conflict currently in force (C.9). In 1975, Misra signed and ratified the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (C.9). Avon signed the agreement in 1975, but has not yet ratified it; its ratification had been considered likely until the present dispute arose, but that prospect is now somewhat uncertain (C.9). Each of the two countries has adopted legislation consistent with Articles 6, 7, 8, and 13 of the UNESCO Convention, but in the case of Avon, formally independent of the Convention (C.9). Corresponding penalties in the laws of both countries include sentencing of offenders for up to two years for each offense (C.9). Similarly, the laws of both countries provide penalties for offenses listed in an Appendix to the bilateral extradition agreement that include sentencing of offenders for up to two years (C.9). Other features of national laws corresponding to the UNESCO provisions and the bilateral extradition agreement are irrelevant in seeking a peaceful resolution of this dispute (C.9). The government of Salamis has taken a keen interest in the dispute, but has not directly intervened (C.10).

Provisions of the extradition treaty between Misra and Avon that may be pertinent to the issues in this case are as follows:

The Governments of the Kingdom of Avon and the Republic of Misra:

Desiring to cooperate more closely in the fight against crime and, to this end, mutually to render better assistance in matters of extradition;

Have agreed as follows:

ARTICLE 1
Obligation to Extradite

The Contracting Parties agree to extradite, subject to the provisions of this Treaty, persons whom the authorities of the requesting Party have charged with an offense or have found guilty of committing an offense, or are wanted by said authorities to complete a judicially pronounced penalty of deprivation of liberty for an offense committed within the territory of the requesting Party.

ARTICLE 2
Extraditable Offenses

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

. . . .

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

. . . .

ARTICLE 8

Extradition shall be granted only if the evidence be found sufficient, according to the laws of the requested Party, either to justify the committal for trial of the person sought if the offense of which he has been accused had been committed in that place or to prove that he is the person convicted by the courts of the requesting Party.

. . . .

ARTICLE 12
Extradition of Nationals

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

. . . .

ARTICLE 22
Surrender of Property

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

The requested Party may condition the surrender of articles upon a satisfaction assurance from the requesting Party that the article will be returned to the requested Party as soon as possible.

APPENDIX

-
9. Robbery or burglary.
-
13. Receiving or transporting any money or other valuable securities, knowing the same to have been unlawfully obtained.
-
24. An offense against the laws relating to the importation, exportation, or international transit of merchandise.
- 25. Violations of customs laws.

SUBMISSIONS TO THE COURT

The Government of Misra asks the Court:

1. for a declaration that the Sloane Collection results from common theft and that it comprises part of Misra's national patrimony and cultural heritage; and for an order for immediate restitution of the collection to Misra;
2. for a declaration that it is under no duty to extradite either Erich Weiss or Madame Z, nor to return the statue of Queen Theslon to Avon.

The Government of Avon asks the Court:

1. for a declaration that the Sloane Collection forms part of the common cultural heritage of mankind and is reposing legally in Avon;
2. For an order that Misra comply with international law by extraditing Erich Weiss and Madame Z and returning the statue of Queen Theslon to Avon.

QUESTIONS PRESENTED

- I. Whether Misra is entitled to restitution of the Sloane Collection either because Avon's acquisition of the Collection was illegal or because customary international law recognizes each nation's inalienable right to possess its cultural patrimony?

- II. Whether Misra should extradite Madame Z, a political leader who serves as its Ambassador to France, and Erich Weiss, an honorary citizen of Misra, for trial in Avon on unspecified charges, based solely upon "evidence" consisting of reports by foreign journalists in Misra?

- III. Whether Misra has a duty to surrender the statue of its ancient Queen Theslon under any rule of customary or conventional international law?

SUMMARY OF ARGUMENT

I

In the seventeenth century, during Misra's occupation by the Empire of Salamis, international law began to protect cultural property from destruction and plunder in the course of war. By 1822, when Major Harrison Sloane was appointed as Avon's consul to the Salamic Province of Misra, international law recognized that a nation's cultural heritage could not be expropriated because it is designed to serve the permanent intellectual needs of the country. Despite these changes in international law, Major Sloane dismembered and removed the art treasures known as the Sloane Collection, without authority from the Salamic government. Avon is responsible for Sloane's actions. When Misra became independent in 1826, it became entitled to reclaim the treasures of its cultural heritage.

In 1908, Avon illegally plundered Misran cultural artifacts in the course of a military invasion of Misra. Avon is not entitled to keep the artifacts under a "Peace Treaty" between the two countries because the treaty was void when it was concluded under international law as it existed in 1908. The treaty is also invalid under contemporary international law because its provisions conflict with two peremptory norms contained in the U.N. Charter—the prohibition on the use of force, and the right to self determination.

Because Avon illegally acquired the Sloane Collection, Misra is entitled to full restitution. Misra has preserved its right to the Collection through timely and repeated protests, and Avon could not acquire any prescriptive rights to the Collection because it was acquired through illegal acts.

Misra is also entitled to restitution of the Sloane Collection, even if Avon's acquisition of the Collection is found to have been legal, because modern customary international law recognizes each nation's right to possess its national patrimony. Misra's

right to possess the Collection is consistent with the interests of mankind in promoting the accessibility and preservation of cultural property.

II

Misra has no duty to extradite Erich Weiss and Madame Z because Misran officials legitimately determined that Avon cannot prove the elements necessary to support its extradition request. Avon failed to charge Weiss or Madame Z with a specific offense. Therefore, its request violates both the specialty principle and basic minimum standards governing the rights of accused persons under international law. Avon has not shown, through reliable evidence, that Weiss and Madame Z can be connected with any crime. Misran officials could also legitimately reject Avon's extradition request on the ground that it was politically motivated, and because Madame Z and Weiss are its nationals within the meaning of the nationality clause of the extradition treaty Misra could also legitimately invoke diplomatic immunity on behalf of Madame Z as grounds for denying Avon's extradition request.

III

Misra has no duty under customary or conventional law to surrender the statue of its ancient Queen Theslon to Avon. The statue rightfully belongs in Misra because Avon illegally acquired it in 1913. Misra is also entitled to claim the statue as an integral part of her national cultural patrimony. No rule of customary international law requires Misra to surrender its own property to Avon. Avon cannot invoke the UNESCO Convention of 1970 to require Misra to return the statue because Avon is not a party to that Convention, and could not prove the validity of its claim even if it were. Misra has no duty to return the statue under the extradition treaty because it has no duty to grant extradition and because the express terms of the treaty permit Misra to exercise its lawful discretion to keep the statue in Misra.

ARGUMENT

I. MISRA IS ENTITLED TO RESTITUTION OF THE SLOANE COLLECTION BECAUSE AVON ILLEGALLY ACQUIRED THE COLLECTION AND CUSTOMARY INTERNATIONAL LAW RECOGNIZES MISRA'S INALIENABLE RIGHT TO POSSESS ITS NATIONAL CULTURAL HERITAGE.

Misra asks the Court to order restitution of the stolen art treasures comprising its national cultural heritage. Avon removed these treasures from Misra over the past two centuries to enrich its National Museum. The legal rights of the parties during this period must be determined under the doctrine of intertemporal law. This doctrine has two elements:

[F]irst . . . that acts should be judged in the light of the law contemporary with their creation, and [second,] that rights acquired in a valid manner according to the law contemporaneous with that creation may be lost if not maintained in accordance with the changes brought about by the development of international law.¹

Because Avon illegally acquired the art treasures contained in the Sloane Collection, in accordance with international law contemporaneous with each acquisition, the Collection rightfully belongs in Misra. Restitution is also appropriate, regardless of the legality of Avon's original acquisition of the Collection, under modern customary international norms that recognize each nation's inalienable right to possess the treasures comprising its national patrimony.

Misra's cultural heritage is unique and irreplaceable. Throughout its history, Misra's ancient architectural remains have shaped the cultural identity of a diverse blend of settlers who gradually replaced its earliest inhabitants. These ancient treasures belong to Misra's cultural patrimony:

[They are] the elements that distinguish one nation from another, . . . products of experiences lost over the centuries, of unique biological mixtures, as well as ways of life created under distinctive geographic, climatological, social, religious and political conditions Therefore, they belong to the people who created them and who now claim them as a right, no matter if they are more or less of interest to humanity as a whole.²

1. Elias, The Doctrine of Intertemporal Law, 74 Am. J. Int'l L. 285, 286 (1980). See also Island of Palmas Case (Neth. v. U.S.), 2 R. Int'l Arb. Awards 829, 845 (Perm. Ct. Arb. 1928).

2. Philippaki, Greece, in Return and Restitution of Cultural Property (special issue), 31 Museum 15 (No. 1, 1979).

A. Misra Retained The Right To Possess the Treasures Comprising Its National Cultural Heritage During The Period Of Forcible Occupation By Salamis.

The Empire of Salamis overran Misra in the seventeenth century. During the Salamic occupation, Avon made its first acquisition for the Sloane Collection through the efforts of Major Harrison Sloane, its consul to the Salamic Province of Misra. Sloane, who arrived in Misra in 1802, systematically dismembered and removed 200 crates of ancient statues, friezes, frescoes, and other artifacts from Misra.

During Misra's occupation by Salamis, new legal norms developed protecting cultural property from destruction, looting, and plunder in the course of war. In the seventeenth century, Grotius condemned the senseless waste of an enemy nation's artistic and cultural objects.³ Numerous treaties imposed a duty to return cultural artifacts belonging to the national cultural heritage of plundered states.⁴ In the next century, Vattel observed that "the wanton destruction of public monuments, temples, tombs, statues, paintings . . . is absolutely condemned, even by the voluntary law of nations, as never

3. See H. Grotius, The Rights of War and Peace 366-67 (Campbell trans. 1901):
There are some things of such a nature, as to contribute, no way, to the support and prolongation of war: things which reason itself requires to be spared even during the heat and continuance of war. Polybius calls it brutal rage and madness to destroy things, the destruction of which does not in the least tend to impair an enemy's strength, nor to increase that of the destroyer: Such are Porticos, Temples, statues and all other elegant works and monuments of art.

4. Rollet-Andriane, Precedents, in Return and Restitution of Cultural Property (special issue), 31 Museum 4, 6 n.7, (No. 1, 1979):

Obligations [to return cultural property to plundered states] appeared in a number of seventeenth-century treaties, such as the Treaty of Munster in 1648 between Spain and the Netherlands (art. LXIX); of the Isle des Faisans in 1659 between Spain and France (art. LIX), of Nimwegen in 1678 between Spain and France (art. XX); of Nimwegen, between Austria and France, in 1769 (art. XIX); of Lunden, between Denmark and Sweden, in 1769 (art. XII); of Ryswick, between the Netherlands and France, in 1697 (art. II and VI); of Utrecht, between the Netherlands and France, in 1713 (art. VI), and between France and Savoy (art. XII) Several of these treaties also provide for the return of archives removed from their place of origin or those relating to a ceded territory (cf. Treaty of Paris in 1783 between the United States and Great Britain, art. VII). Similarly, the Treaty of Oliva between Poland and Sweden (1660) provides for the restitution by Sweden of the Polish royal library; and the Treaty of Whitehall between Great Britain and the Netherlands in 1662 provides for the return of works of art belonging to the Stuart collection.

being conducive to the lawful object of war."⁵ States generally observed these norms.⁶ After Napoleon had plundered the museums of Europe, the victors of 1815 compelled France to effect one of the first large-scale restitutions recorded in history.⁷ Restitution was not limited to items that had been recently plundered, but included artistic treasures that had been looted as early as the seventeenth century.⁸ Viscount Castlereagh explained that "works of art have been invariably respected by modern conquerors as inseparable from the countries to which they respectively belonged"⁹ The idea behind these developments was not new, but "had already been foreshadowed by such enlightened thinkers as John Locke, George-Frederick Martens and Quartemere de Quincy According to this doctrine, scientific and artistic collections cannot be expatriated because they 'are destined to meet the permanent intellectual needs of the country.'"¹⁰

B. Avon Acquired The Sloane Collection Through An Act Of Common Theft.

Misra was robbed of its cultural patrimony by Major Harrison Sloane, an Avonian scholar and "collector of antiquities" who came to Tannis in 1802 as the newly-appointed consul to the Salamic Province of Misra. Although Sloane's crime is accurately described as an act of "common theft," it would be no exaggeration to speak of Sloane as a

5. E. de Vattel, The Law of Nations 370 (J. Chitty ed. 1855) (1st ed. 1758).

6. See Rollet-Andriane, supra note 4 (citing Muntz, Les Annexions de Collections d'Art ou de Bibliothèques, Revue d'Histoire Diplomatique (1895)):

Richelieu, Mazarin, Colbert and Louvois have also been given credit for "never having contemplated taking advantage of the victories of the French Armies to enrich the royal collections. During their wars, Louis XIII and Louis XIV, while they annexed provinces, scrupulously refrained from despoiling the vanquished of the monuments which were the memories of their nation's past, which embodied their scientific, literary or artistic achievements."

7. Id. (citing 1 H. Wheaton, Elements of International Law 15 (1852)).

8. See Rollet-Andriane, supra note 4, at 6 n.7:

[I]n some cases, those responsible for implementing the Allied decisions of 1815 did not stop at merely returning the transferred items to their last owner: some manuscripts which Napoleon's armies had seized in Rome were restored, not to the Pope, but to the Heidelberg Library whence they had been looted in 1622.

9. T. Twiss, The Law of Nations 130 (1875).

10. Rollet-Andriane, supra note 4, at 6 (citing Bluntschli, Droit International Codifié, art. 650, No. 4).

murderer, for "[t]he plunder of national art treasures has been called quite aptly the 'murder of man's history.'"¹¹

Regardless of what label applies to Sloane's crime, his actions cannot be tolerated under international law. When he finished, only the shells of ancient Misran buildings were left. Several of the most significant of these buildings suffered severe architectural damage. This devastation cannot be reconciled with a desire to "study" the ruins and take measures for their "historic preservation," the interests Sloane identified to Salamic authorities during his negotiations to gain access to the ancient city. Nor can Sloane's barbaric treatment of the ruins be characterized as "an absolutely necessary and virtuous act of salvage to preserve the priceless heritage of an ancient civilization"—the words that an Avonian study commission used to describe Sloane's acts in recommending that \$20,000 be paid for the purchase of the Collection by the Avon National Museum.

1. Sloane did not have permission to dismember and remove the treasures of Misra's past.

Sloane obtained permission to "study" the ruins only after difficult negotiations. The provincial Bey denied Sloane's subsequent requests to take measures for "historic preservation," and explicitly restricted his activities to studying and reporting on the ruins. Sloane then applied directly to Sejam Fezgrina, the Emir of Salamis, whose reply granted Sloane permission to study and move "quelque pieces de pierre avec inscriptions et figures." Without any authority other than the Emir's Directive, Sloane immediately began dismembering the ruins of ancient Tannis.

The Fezgrina Directive could not authorize Sloane to dismember the ruins of ancient Misra. Salamis and Sloane were both bound by international law, which obligated them to refrain from the wanton destruction and plunder of Misra's cultural patrimony.¹² Although this norm originally emerged from the idea that cultural property should be

11. Nafziger, Regulation by the International Council of Museums: An Example of the Role of Non-Governmental Organizations in the Transnational Legal Process, 2 Den. J. Int'l L. & Pol'y 231 (1972) (quoting Wall St. J., June 2, 1970, at 1, col. 1).

12. See supra text accompanying notes 5-10.

exempt from the ravages of war, it also governed the peacetime negotiations of Salamis and Sloane in 1802. The rationale underlying the rule—that cultural property is "destined to meet to the permanent intellectual needs of the country"¹³—is equally applicable in war or peace. Salamis could not permit Sloane to plunder Misra's ancient heritage when it had no authority to engage in plunder itself.

Furthermore, the circumstances surrounding Sloane's negotiations with Salamic authorities, and the language of the Directive itself show that Salamis did not consent to Sloane's acts. Although the Fezgrina Directive is not a treaty,¹⁴ principles of treaty interpretation are instructive in deciding what it means. The Directive, interpreted according to the "common use of [its] language,"¹⁵ merely gave Sloane permission to remove some fragments or bits of ruins that had already been dislodged, so that he could study them and report on his findings. The common meaning of "quelques" is "some, any (certain), a little, a few."¹⁶ "Pieces" means "pieces, bits, fragments."¹⁷ No good faith interpretation of "quelques pieces" can possibly stretch the meaning of the Directive to encompass over 200 crates of friezes, frescoes, and other artifacts of ancient Misra.¹⁸ Furthermore, nothing in the Directive can be construed to give Sloane authority to dismember and destroy the buildings of ancient Misra.

13. See supra note 10.

14. Treaties, at this time, could "only be made by the superior powers, by sovereigns, who contract in the name of the state," and treaties were "either for perpetuity or for a considerable period of time." E. de Vattel, supra note 5, at 192.

15. Id. at 248: "In the interpretation of treaties, compacts and promises, we ought not to deviate from the common use of the language unless we have very strong reasons for it."

16. M. Dubois, Larousse's Modern French-English Dictionary 583 (1960).

17. Id. at 537.

18. See K. Meyer, The Plundered Past 173 (1973), where the author discusses the meaning of the language contained in the firman, or permit, given to Lord Elgin, the British ambassador to Turkey who dismembered and removed a great deal of the Parthenon from the Acropolis. Lord Elgin's firman, or which the only surviving copy is an Italian translation, permitted the ambassador to remove "qualche pezzi di pietra con iscrizioni e figure," which corresponds exactly with the surviving French translation of the Fezgrina Directive. Harold Nicholson, a British author, is quoted as follows: "Even a most free and lavish translation of the Italian tongue cannot twist these words into meaning a whole shipload of sculptures, columns and caryatids."

The protest by Salamis to the Avonian government also supports a restrictive interpretation of the Directive. To suggest that Salamis permitted Sloane to dismember the ruins in light of its explicit protest of Sloane's activities is absurd.¹⁹ Furthermore, Salamic authorities were reluctant to give Sloane access to the ruins even for purposes of study. It is quite unlikely, therefore, that they would suddenly allow him to destroy and remove 200 crates of artifacts for shipment to Avon. Avon's acquisition of the Sloane Collection was not the product of Sloane's negotiations, but of common theft.

2. Avon is responsible for Sloane's theft, and could not legally acquire the Collection by purchasing it from him.

Avon is responsible for Sloane's common theft. As consul to the Salamic Province of Misra, Sloane acted as the agent of the Avonian government.²⁰ Under well-established principles of international law, a "state may be held responsible for the acts of any of its agents, if such acts violate international law to the detriment of a foreign state or citizen thereof."²¹ A state is accountable for the wrongful acts of its agents even if these actions are unauthorized.²² Because Avon commissioned Sloane as its agent in the Salamic Province of Misra, Avon must bear international responsibility for his act of common theft.

Furthermore, because Avon is responsible for Sloane's crime, it could not legitimately acquire the Collection by purchase from Sloane. This would be true even

19. See E. de Vattel, *supra* note 5, at 251: "Every interpretation that leads to absurdity ought to be rejected."

20. See 5 J. Moore, *A Digest of International Law* 33 (1906) (quoting T. Jefferson, Secretary for Foreign Affairs, Sept. 8, 1791, 4 Ms. Am. Let. 283) ("[C]onsuls are to be considered as distinguished foreigners, dignified by a commission from their sovereign, and specially recommended by him to the respect of the nation with whom they reside").

21. C. Eagleton, *The Responsibility of States in International Law* 73 (1928).

22. See *id.* at 57-58: "[E]ven though it be granted that the unauthorized act of the agent does not express the will of the state . . . [t]he assumption must be that, when a state has clothed an agent with its authority, his acts become its acts, even though wrongful ones."

if Avon's government had acted in good faith,²³ which is doubtful, given the relatively meager sum of \$20,000 it paid for a "priceless" Collection.

3. Sloane's theft has impeded the cultural development of Misra and of all mankind.

Sloane's crime inflicted a grave injury upon the people of Misra. Generations of Misrans have been deprived of their past, the opportunity to understand themselves and those who came before them.²⁴ The loss of their national cultural heritage has robbed them of unique moral and aesthetic experiences that could arise only through the civilizing influence of their art.²⁵ They have lost invaluable opportunities for scholarly enrichment²⁶ and creative achievement.²⁷

Even more tragic than the loss occasioned by Sloane's original theft from Misra is the great loss caused by plunderers who have followed his example. After the Sloane Collection was taken to Avon for the enrichment of Sloane and the Avon National Museum, other private collectors, museums, and government officials in Avon and other European countries aggressively plundered Misra to satisfy the demand for more of its ancient treasures. Preserved human remains in their elaborate Misran caskets were often taken to foreign laboratories for dissection or destroyed in an effort to find

23. Even if Avon had purchased the Collection in good faith, application of the bona fide purchaser doctrine would be inappropriate. See Note, The Protection of Art in Transnational Law, 7 Vand. J. Transn'l L. 689, 690 (1974).

24. Amadou-Mahtar M'Bow, then Director-General of UNESCO, observed: "The people who were victims of this plunder, sometimes for hundreds of years, have not only been despoiled of irreplaceable masterpieces but also robbed of a memory which would doubtless have helped them to greater self-knowledge and would certainly have enabled others to understand them better." M'Bow, A Plea for the Return of an Irreplaceable Cultural Heritage to Those Who Created It, in Return and Restitution of Cultural Property (special issue), 31 Museum 58 (No. 1, 1979).

25. See P. Bator, The International Trade in Art 29 (1982): "[T]he study and appreciation of art elevates and civilizes. . . . [T]he claim of a country that it be in a position to afford its citizens this experience is neither provincial nor selfish."

26. See id. at 29-39: "Art is an important object of aesthetic, historical, psychological, and philosophical studies, and is therefore one of the great stimulants of scholarship. Indeed, without art certain studies cannot go on at all"

27. See id. at 30: "Art also stimulates art. A country with a rich and visible artistic inheritance will be attractive to native and foreign artists; a continuing tradition of artistic creativity is obviously impossible if yesterday's art keeps vanishing" (emphasis in original).

ancient documents and jewelry.²⁸ Furthermore, Sloane's example has haunted not only Misra, but other nations rich with cultural traditions. Like Misra, these nations have seen their cultural patrimonies vanish at the hands of modern-day Sloanes, who plunder and exploit the past to satisfy the greedy demands of "collectors of antiquities." Sloane's crime has inflicted a grave injury upon the cultural development of all mankind.²⁹

C. Misra Reverted To Its Former Sovereignty Upon Its Independence And Immediately Became Entitled To Restitution Of The Sloane Collection From Avon.

When Misra achieved independence after a successful revolution against Salamis in 1826, it immediately reverted to the condition of sovereignty it had enjoyed prior to the Salamic occupation. Early writers recognized this concept as part of the ancient law of postliminium.³⁰ As Grotius observed:

Upon anyone's returning to his former condition by the law of postliminium, all his rights are restored as fully, as if he had never been in the hands and power of the enemy.

. . . .
What has been said of individuals applies to nations: so that a free people, who have been subjugated, upon being delivered from the yoke of the enemy by their allies, will recover their former condition.³¹

28. See 2 S. Rachel, The Law of Nations 186 (J. Bate trans. 1916) (1st ed. 1676) (neither religious nor sacred places were exempt from plunder by the enemy, "so long as the enemy did not offer violence and outrage to the bodies of the dead").

29. See K. Meyer, supra note 18, at 12:

As a result of both deliberate looting and the expansion of civilization, the material remains of the past are being churned up at an unprecedented rate. Sometimes the spoliation is rooted in greed; at other times its source is indifference. Either way, the consequences are the same—the wholesale devastation of the past.

30. See J. Crawford, The Creation of States in International Law 412-13 (1979): "The notion of postliminium was derived by the classical writers from Roman law, where it had involved reversion of persons or property to their status or ownership before capture by an enemy or alien nation."

31. H. Grotius, supra note 3, at 354. See also Alexandrowicz, New and Original States: The Issue of Reversion to Sovereignty, 45 Int. Aff. 465 (1969), where the author discusses Vattel's view of postliminium:

[W]hen a nation (state) has been entirely subdued, the question may arise whether a revolution can entitle it to the right of postliminium. If a conquered people (state) have not acquiesced in their new subjection, and have only ceased to resist from inability, such people are not subdued but defeated and oppressed.

The doctrine of reversion³² is now recognized by numerous modern writers³³ as a corollary to the principle of self-determination contained in the U.N. Charter.³⁴ Although the doctrine of reversion might be difficult to apply if a reverting state's property has been widely dispersed during the period of its occupation,³⁵ Misra asks simply for restitution of the Sloane Collection, an easily identifiable collection of its most precious artistic treasures.

Misra's independence immediately entitled it to restitution of the objects taken by Sloane during the Salamic occupation. Under the doctrine of reversion, all of the rights incident to the exercise of her former sovereignty were restored, as if the Salamic occupation had never occurred. Those rights include the right to reclaim the treasures of her ancient past. No longer under the disability imposed by the Salamic occupation,

(cont.)

If delivered from oppression, they doubtless return to their former situation.

Id. at 477 (emphasis in original).

32. This doctrine has been defined as follows: "There is a legal presumption that a State which lost its sovereignty but reverted to it (before the dust of history had settled), recovers a full and unencumbered sovereignty. The interpretation of rights and obligations connected with such sovereignty would therefore be in favor of the reverting State." Alexandrowicz, supra note 31, at 474.

33. Judge Mohammed Bedjaoui, recently appointed to this Court after his service as a Member of the International Law Commission, has recognized this principle, see Summary Records of the 20th Session, [1968] 1 Y.B. Int'l L. Comm'n 128, U.N. Doc. A/CN.4/204/1968, as did Judge Moreno Quintana, who eloquently expressed the nature of the doctrine in his opinion in the Right of Passage Case:

We must not forget that India, as the territorial successor, was not acquiring the territory for the first time, but was recovering an independence lost long since. Its legal position at once reverted to what it had been more than a hundred years before, as though the British occupation had made no difference

• • • •

To support the Portuguese claim in this case [to a right of passage over Indian territory, based in part upon the acquiescence of the British], which implies survival of the colonial system, without categorical and conclusive proof is to fly in the face of the United Nations Charter.

Right of Passage Case (Port. v. India), 1960 I.C.J. 6, 95 (Quintana, J., dissenting). See also I. Brownlie, Principles of Public International Law 672-73 (1979), where the doctrine of reversion is described as a situation in which "the successor state may be regarded as recovering a political and legal identity displaced by an intervening period of dismemberment or colonization." Id. at 672.

34. See U.N. Charter, art. 2.

35. See J. Crawford, supra note 30, at 415-16 n.83.

Misra is entitled to legal redress for the injury that Avon inflicted upon her at the hands of Sloane.

D. Avon Illegally Plundered The Artifacts It Claims As "War Reparations" In The Peace Treaty.

Avon violated international law governing the conduct of warfare when its armies confiscated Misran cultural artifacts during its military invasion of Misra in 1908. Avon and Misra are both original parties to the Hague Conventions of 1899 and 1907,³⁶ which codified the contemporary international law of land warfare.³⁷ The Convention of 1907 expressly prohibits the confiscation and pillage of a nation's cultural property, and provides that a belligerent state is responsible for "all acts committed by persons forming part of its armed forces."³⁸ Because Avon violated its international obligations to refrain from the confiscation of cultural property, Misra is entitled to complete restitution for the artifacts taken by Avonian troops.

Avon cannot justify its plunder of Misran cultural treasures as a valid act of reprisal, because customary international law in 1908 required that reprisals be proportionate to any injury suffered by the state engaging in them.³⁹ The confiscation of Misran art treasures bore no relationship whatsoever to the uprisings upon which Avon relied to excuse its invasion of Misra. Even if Avon could legitimately have sent troops to Misra to avenge the accidental deaths of its diplomatic agents, it cannot justify sending a noted art expert specifically for the purpose of plundering Misra of its art treasures. Additionally, reprisals were considered a prima facie act of war in 1908.⁴⁰ The prohibition on plunder contained in Article 56 of the Hague Conventions

36. Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 (1899), T.S. No. 403, 26 Martens Nouveau Recueil (2d) 949 [hereinafter cited as 1899 Hague Convention (II)]; Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 (1907), T.S. No. 539, 3 Martens Nouveau Recueil (3d) 461 [hereinafter cited as 1899 Hague Convention (IV)].

37. S. Toman, The Laws of Armed Conflict v (1981).

38. See 1899 Hague Convention (IV), supra note 36, art. 47.

39. W. Hall, A Treatise on International Law 368 (1890).

40. Id. at 365.

was therefore binding upon Avon's troops regardless of whether the invasion is labeled as an act of reprisal or full-scale war.

Avon cannot legitimize its confiscation of Misran artifacts by claiming them as "war reparations" in a "Peace Treaty." Similar treaty provisions were condemned long ago at the Congress of Vienna. After Napoleon's armies had plundered the art treasures of Italy, armistice treaties with the Pope and various princes purported to cede the confiscated art objects to France. In the restitution effort that followed Napoleon's defeat,

Both confiscated art and art acquired pursuant to treaty was ordered restored. To have required less would have been to invite legitimization of booty in the future by the imposition of sham treaties [T]he Allies decided that the treaties concluded by Napoleon as victor did not confer upon France valid title to the seized objects."⁴¹

Like France, Avon must return the objects confiscated by its troops despite its claim to those objects as "war reparations." Otherwise, rules prohibiting the plunder of cultural property could be rendered completely ineffective, for the stronger party would always have the power to legitimate the taking of booty by forcing the weaker party to cede the items in a treaty. Any modern treaty provision requiring the cession of unlawfully confiscated cultural artifacts would conflict with two peremptory norms contained in the U.N. Charter, the prohibition on the use of force, and the right of self-determination, which includes the right to cultural development. It is appropriate to apply these norms to the 1908 Peace Treaty, under the doctrine of intertemporal law, because rights created by treaties must be maintained in accordance with changes in the development of international law. Thus, even if the treaty was valid when it entered into force, it can no longer be enforced today because the rights it creates clash with contemporary norms of law that have attained the status of jus cogens.

41. Note, supra note 23, at 693.

E. Because Avon Illegally Acquired the Sloane Collection, Immediate Restitution Is Appropriate.

Misra has always resisted Avon's possession of its national art treasures. Even before winning independence from Salamis in 1826, Misran leaders vehemently protested the dismemberment and removal of their ancient ruins to the Salamic government. Upon its independence, Misra immediately demanded that Avon return the Sloane Collection for reintegration of the ancient artifacts into their original sites. Regardless of how long it has deprived Misra of the collection, Avon cannot acquire the right to claim it as its cultural heritage. A state may not acquire prescriptive rights out of situations brought about by illegal acts.⁴² Because Avon acquired the Collection illegally and because Misra has resisted Avon's possession by timely and repeated protests, the Collection must be restored to Misra regardless of how long Avon has withheld it.⁴³

International law requires that Avon restore the Sloane Collection to Misra as reparation for its illegal acquisition of the Collection. As Professor Brownlie has noted, "In imposing obligations on aggressor states to make reparation for the results of illegal occupation, the victims may be justified in requiring restitution of 'objects of artistic, historical, or archaeological value belonging to the cultural heritage of the [retro] ceded territory."⁴⁴ Restitution is also appropriate under the principles of reparation expressed by this Court's predecessor in the Chorzow Factory case.⁴⁵ These principles require the immediate return of the objects taken by Sloane and Avonian troops for reintegration

42. I. Brownlie, supra note 33, at 162.

43. Id.

44. Id. at 462.

45. The essential principle contained in the notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law. Factory at Chorzow(Ger. v. Pol.), 1927 P.C.I.J. ser. A, No. 17, at 47.

into their original sites. In addition, full restitution should include "a sum corresponding to the value which a restitution in kind would bear"⁴⁶ in order to compensate for any objects sold to private collectors by Avon. Complete restitution is not only appropriate, but necessary in order to "wipe out all the consequences of [Avon's] illegal act[s] . . . and re-establish the situation which would . . . have existed if [those] act[s] had not been committed."⁴⁷

F. Customary International Law Recognizes The Inalienable Right Of Each Nation To Possess Its National Cultural Heritage.

Customary international law now upholds the right of formerly colonized or occupied states to demand restitution of the treasures comprising their national cultural heritages even where those treasures were legally acquired by a third state. Some writers have urged that this right is rapidly attaining the status of jus cogens:⁴⁸

The reassembly of dispersed heritage[s] through restitution or return of objects which are of major importance for the cultural identity and history of countries having been deprived thereof, is now considered to be an ethical principle recognized and affirmed by the major international organizations. This principle will soon become an element of jus cogens of international relations.⁴⁹

Regardless of whether it has yet attained the status of jus cogens,⁵⁰ restitution

46. Id.

47. Id.

48. Professor Brownlie has explained the legal significance of attributing the status of jus cogens to customary norms as follows: "The major distinguishing feature of such rules is their relative indelibility. They are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect." I. Brownlie, supra note 33, at 513. Among the norms which may be said to have achieved this status are "the prohibition of aggressive war, the law of genocide, the principle of racial nondiscrimination, crimes against humanity, . . . rules prohibiting trade in slaves and piracy, . . . the principle of permanent sovereignty over natural resources, and the principle of self-determination." Id.

49. Study on the Principles, Conditions and Means for the Restitution or Return of Cultural Property in View of Reconstituting Dispersed Heritages, in Return and Restitution of Cultural Property (special issue), 31 Museum 62, 66 (No. 1, 1979) [hereinafter cited as Restitution].

50. See Nafziger, The New International Legal Framework for the Return, Restitution or Forfeiture of Cultural Property, 15 N.Y.U. J. Int'l L. & Pol. 789, 805-06 (1983), where the author expresses doubt as to whether a nation's right to restitution of its cultural patrimony can be considered an element of jus cogens "[at] this stage of development," while conceding that the principle of self-determination is such an element.

of cultural property to countries of its origin is now firmly established as a norm of customary international law. The right of formerly occupied nations to possess the treasures comprising their cultural patrimonies is supported by numerous human rights documents,⁵¹ and U.N. General Assembly Resolutions,⁵² as well as state practice.⁵³ In some cases, restitution has been implemented through bilateral treaty arrangements.⁵⁴ Restitution has also been achieved through less formal means.⁵⁵ The cumulative result of this restitution effort has been the formation of a rule of customary international law which recognizes each nation's right to reclaim the lost treasures of its past.

The Sloane Collection belongs in Misra as an integral element of its national cultural patrimony, the priceless legacy of its ancient inhabitants. Misra does not demand every item that has been taken from it during the centuries of its existence—its obelisks, its preserved human remains, its elaborate caskets, and other ancient artifacts—but simply the most important treasures that are essential to the cultural identity of its people. Misra's right to restitution of these treasures is supported not

51. See, e.g., International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 A (XXI), U.N. GAOR Supp. 16, at 49, U.N. Doc. A/62 (1966) (all people have a right to freely pursue their social and cultural development; all persons have an equal right to enjoyment of social and cultural rights, and to participate in cultural life); Universal Declaration on Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/71, at 70 (1948) (every person has a right to own property and may not be arbitrarily deprived thereof; every person has a right to freely participate in the cultural life of the community and to enjoy the arts).

52. See Return or Restitution of Cultural Property to the Countries of Origin, U.N. Doc. A/36/L. 22/Rev. 1 and Rev. 1/Add. 1 (1981), for a list of these resolutions.

53. See Specht, Geluwe, Pott, Sutaarga, Auboyer & Monreal, Arrangements Concluded or Being Concluded, in Restitution and Return of Cultural Property (special issue), 31 Museum 28, 32, 38, 43, 49 (No. 1, 1979), for a description of some of the arrangements for restitution that are already concluded or in progress.

54. See, e.g., Agreement on the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, Sept. 15, 1981, U.S.-Peru, T.I.A.S. No. 10136; Treaty of Cooperation Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, July 17, 1970, U.S.-Mex., 22.1 U.S.T. 494, T.I.A.S. No. 7088.

55. See de Silva, Sri Lanka, in Restitution and Return of Cultural Property (special issue), 31 Museum 23 (No. 1, 1979): "Through an act of voluntary restitution, a British private citizen, Josephine Whitelaw of Scotland, recently returned to the National Museum, Colombo, an antique Kandyan Kastane sword (eighteenth century) which was acquired by her husband about 1930"

only by customary international law, but by fundamental considerations of international friendship and cooperation.⁵⁶ As stated by the Secretary General of UNESCO:

The return of a work of art or record to the country which created it enables a people to recover part of its memory and identity, and proves that the long dialogue between civilizations which shapes the history of the world is still continuing in an atmosphere of mutual respect between nations.⁵⁷

G. The Sloane Collection Is Not The Common Heritage Of Mankind.

Avon refuses to acknowledge Misra's right to possess the treasures of its ancient past because of its unilateral determination that these treasures belong to the "common heritage of mankind." Avon's claim cannot be reconciled with international law. The "common heritage of mankind" is a concept that describes the legal status of outer space, deep sea bed resources beyond national jurisdiction, and the environment.⁵⁸ Nations have recognized the need for mutual sharing and protection of resources in these areas, where the interests concern property that belongs to no one, res nullius, or everyone, res communis.⁵⁹ Cultural property is different because it is created, and derives its significance from the efforts of the people in particular nations.⁶⁰ The Sloane Collection belonged to Misra long before it attracted the interest of Avon and other nations, who collectively comprise the entity known as mankind.

Avon's view that Misra's cultural patrimony belongs to the "common heritage of mankind" is also not supported by the behavior of states: "It is doubtful whether states

56. See Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States, G.A. Res. 2625, 25 G.A.O.R. Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970) ("States should co-operate in . . . cultural fields . . . and for the promotion of international cultural and educational progress").

57. M'Bow, supra note 24, at 58.

58. See S. Williams, The Protection of Movable Cultural Property 57 (1977).

59. See id.

60. See id.:

The notion of the common heritage as regards cultural property differs enormously from its application in other areas, as it does not concern a res nullius or res communis. That is to say it does not concern property that either belongs to no-one or belongs to the whole world. As the cultural property concerned is situated within the territorial sovereignty of particular states, it is hard to visualize a true adoption of communal control over its utilization for exhibition purposes and protection.

would cede their authority over cultural property situated in their territory to the status of being the property of mankind."⁶¹ Although international conventions refer to cultural property as the common heritage of mankind, they "are concerned with the protection of cultural property from destruction or theft. They are not directly concerned with ensuring the right of all mankind to the property."⁶²

Avon is also unjustified in asserting that "mankind" will suffer if the Collection is returned to Misra. Visitors to Misra will be able to appreciate the Collection just as visitors to Avon's National Museum have done in the past. Nor do environmental conditions in Tannis support Avon's refusal to restore the Collection to Misra. The Collection can be protected from the environment in an indoor museum in Misra, and need not be exposed to pollution in Tannis. "Certain arguments against a restitution, such as bad conditions prevailing in the museums of the demanding countries, can easily be rejected. Museums can be built . . . and equipped in conformity with international standards [Funding]—if not available from international organizations—[could] be allocated from . . . 'development aid funds.'"⁶³ Because international law recognizes that Misra's right to its cultural patrimony is consistent with the interests of mankind, Avon must restore the Collection to Misra.

II. MISRA HAS NO DUTY TO EXTRADITE MADAME Z OR ERICH WEISS TO AVON FOR TRIAL ON UNSPECIFIED CHARGES BASED SOLELY UPON EVIDENCE CONSISTING OF REPORTS BY FOREIGN JOURNALISTS IN MISRA.

A state has no duty to grant extradition in the absence of a treaty.⁶⁴⁶⁶ "[E]ven today the rule 'aut dedere aut punire' cannot be looked upon as a rule of positive

61. Id.

62. Id.

63. Ganslmayr, Federal Republic of Germany, in Return and Restitution of Cultural Property (special issue), 31 Museum 13 (No. 1, 1979).

64. Factor v. Laubenheimer, 290 U.S. 276, 287 (1933): "[T]he principles of international law recognize no right to extradition apart from treaty"; The State (Duggan) v. Tapley, 1951 Int'l L. Rep. 336-37 (No. 109, S. Ct. Ir.): "The negative doctrine that independent of special compact no state is bound to grant extradition seems now to be generally accepted."

international law."⁶⁵ Consequently, Avon may not invoke any right to extradite Madame Z or Erich Weiss that does not arise from the extradition treaty between Avon and Misra. Because Avon's extradition request fails to satisfy the requisite elements necessary to claim any right to extradition under the terms of the treaty, Misra has no duty to grant that request.

A. Avon Bears the Burden of Proving The Validity Of Its Extradition Request.

The terms of the extradition treaty itself expressly recognize that Avon must bear the burden of proving the validity of its claim to the satisfaction of Misra, in accordance with Misran law (C.8). Article 8 of the treaty specifies that extradition "shall be granted only if the evidence be found sufficient, according to the laws of the requested party . . . to justify the committal for trial of the person sought if the offense . . . had been committed in that place . . ." (C.8). Competent Misran authorities determined that Avon's request for extradition did not satisfy the requirements necessary for the extradition of Madame Z and Erich Weiss. Although the compromis does not disclose the specific grounds for denial of the request, or the specific provisions of Misran law at issue (C.6), the decision by Misran authorities cannot lightly be disregarded. This Court has often recognized that a lack of good faith cannot be presumed.⁶⁶ Appropriate deference must therefore be given to the decision by Misran authorities to deny Avon's extradition request.

65. 2 M. Bassiouni & V. Nanda, A Treatise on International Criminal Law 309-10 (1978). See also Prott, International Control of Illicit Movement of the Cultural Heritage: The 1970 UNESCO Convention and Some Possible Alternatives, 10 *Syr. J. Int'l L. & Com.* 333, 339 (1983), where the author notes that the drafters of the UNESCO Convention specifically rejected a provision "which would have required states to take penal action against persons who acquired goods which had been illegally exported from their country of origin."

66. See Aegean Sea Continental Shelf (Greece v. Turk.), 1976 I.C.J. at 13, para. 41 (Interim Protective Order of 9/11/1976). "[T]hese obligations are clearly imperative . . . and . . . it is not to be presumed that either State will fail to heed [its responsibilities]." See also Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U.S.), 1984 I.C.J. Opinion at 51, para. 101 (Jurisdiction and Admissibility of Application); Nuclear Tests Case (Austl. v. Fr.), 1974 I.C.J. at p. 272, para. 60; Nuclear Tests Case (N.Z. v. Fr.), 1974 I.C.J. at 477, para. 63 (Judgment); Factory at Chorzow (Ger. v. Pol.), 1927 P.C.I.J., ser. A, No. 17, at 63.

B. Avon Has Not Demonstrated The Validity Of Its Extradition Request.

1. Avon has failed to charge Madame Z or Erich Weiss with a specific offense.

Avon's extradition request fails to specify the crime with which Madame Z and Weiss are charged. The compromis reveals only that "[t]he government of Avon has charged Weiss and Madame Z with the theft" (C:6). No specific offense is denoted by the words "the theft"; rather, the words may refer to any number of offenses which relate to the disappearance of the statue of Queen Theslon from the Avon National Museum.

[E]xtradition is limited to the offense or offenses for which it has been granted. This is the meaning of the universally accepted principle of specialty, according to which the demanding state is allowed to prosecute or to punish the extradited criminal only for the offenses mentioned in the act of extradition and none others"67

Because Avon has failed to charge Weiss and Madame Z with a specific offense in its extradition request, the principle of specialty could not be enforced if extradition were granted. Avon's failure to specify the nature of the alleged offense is also inconsistent with international norms of basic minimum rights of accused persons.⁶⁸ Article 6(3)(A) of the European Human Rights Convention⁶⁹ entitles an accused person "to be informed promptly, in a language which he understands and in detail, of the nature and cause of

67. 2 M. Bassiouni & V. Nanda, supra note 64, at 321:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

68. See Orfield, What Constitutes Fair Criminal Procedure Under Municipal and International Law, 12 U. Pitt. L. Rev. 35, 43 (1950): "International decisions and outstanding writers on international law have asserted that an alien criminal defendant has the following rights as a matter of international law He is entitled to be informed of all the charges against him."

69. European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (1955). The Convention is an attempt to implement the rights stated in the Universal Declaration on Human Rights, G.A. Res. 217(III), U.N. Doc. A/71, at 70 (1948). See generally Buergenthal, Comparative Study of Certain Due Process Requirements of the European Human Rights Commission, 16 Buffalo L. Rev. 18 (1966-67).

the accusation against him."⁷⁰ The European Human Rights Commission has held that this provision requires that an accused "has the right to be informed not only of the grounds for the accusation, that is, not only the acts with which he is charged and on which his indictment is based, but also of the nature of the accusation; namely, the legal classification of the acts in question."⁷¹ Avon's attempt to charge Weiss and Madame Z with "the theft" of the statute of Queen Theslon in no way informs them of the legal classification of their acts under Avonian law. Because extradition of Weiss and Madame Z would violate the specialty principle, and would offend basic norms governing the rights of accused persons under the standards of international law, Misra was justified in denying Avon's request.

Furthermore, if "theft" were the offense upon which Avon claims a right to extradition, provisions of the extradition treaty elaborating the principle of double-criminality would preclude the granting of extradition. Under the principle of double-criminality, "which is almost universally recognized, extradition is to be granted only if the act the fugitive is sought for is an extraditable crime according to the law of the demanding state as well as that of the requested state."⁷² Theft is not listed as an extraditable crime in the Appendix to the extradition treaty. Offenses which are not listed in the Appendix are extraditable offenses only if they are "punishable, in accordance with the laws of both Contracting Parties, by deprivation of liberty the maximum of which shall not be less than one year."⁷³ Avon provides the Court with no evidence concerning the penalties for the offense of theft under either Misran or Avonian law. Because theft is not shown to be an extraditable offense under the laws of either country, extradition could not be granted for that offense.

70. European Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 69, art. 6(3)(A).

71. Buergenthal, supra note 69, at 31 (quoting App. Nos. 542/59 & 617/59, *Ofner & Hopfinger v. Aus.* (Merits), Report of the Commission of 23 November 1962, Council of Europe, Doc. A. 78.827, at 31 (1963) (italics in original)).

72. 2 M. Bassiouni & V. Nanda, supra note 64, at 313.

2. The evidence offered by Avon is insufficient to connect either Madame Z or Weiss with any crime.

International law recognizes an accused person's right to be presumed innocent until proven guilty.⁷⁴ Yet, Avon fails to support its demand for extradition with any reliable evidence connecting Weiss and Madame Z with any crime. Avon relies entirely upon "investigative reporting by foreign journalists in Misra" to support its contention that Weiss and Madame Z were responsible for the removal of the statue of Queen Theslon from the Avon National Museum. To grant extradition based solely upon this evidence would violate basic rights of Weiss and Madame Z, by depriving them of the opportunity to examine witnesses against them.⁷⁵ Avon completely fails to produce any evidence as to how the mysterious "theft" was arranged—incredible for a nation that has appointed itself the guardian of the "common cultural heritage of mankind," a task which would presumably require Museum security measures. Avon can show only that Madame Z and Weiss visited the Museum shortly before the "theft" occurred, and that the statue turned up in Misra some three days later. Because this evidence in no way connects Weiss and Madame Z with the commission of any crime, and because Misran authorities could legitimately disregard the unreliable accounts of foreign reporters in evaluating the evidence according to their own law, Avon's extradition request was properly denied.

73. Extradition Treaty Between the Republic of Misra and the Kingdom of Avon, art. 2.

74. See European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 69, art. 6(2) ("everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law").

75. See *id.*, art. 6(3)(d) (an accused has the right "to examine or have examined witnesses against him").

3. Misra has no duty to extradite Madame Z or Weiss for a political offense.

Misran authorities could legitimately determine that any offense with which Weiss and Madame Z were charged was a political offense. "Though extradition was exercised in earlier times in order to get hold of the enemies of a state, . . . for quite some time now, extradition is usually refused for political offenses."⁷⁶ One recent expression of the political offense doctrine is contained in the European Convention on Extradition, which permits a state to refuse extradition

if the requested party has substantial grounds for believing that a request for extradition for an ordinary criminal offense has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, or political opinion, or that person's position may be prejudiced for any of these reasons.⁷⁷

Misra had substantial grounds for believing that Madame Z and Weiss could be punished—or at least prejudiced—by Madame Z's prominent political status in the Misran National Organization (MNO), an organization which strongly supported the restoration of Misra's cultural heritage and national pride. Although Weiss, an Avonian art historian, was not himself a member of the MNO, the possibility of prejudice to him was also great. Avonians could easily have perceived Weiss (now an honorary citizen of Misra) as a "turncoat," who had deserted Avon and espoused the cause of Misran nationalism for the sake of his lover, Madame Z. Because Misran authorities had substantial grounds for determining that the charges against Weiss and Madame Z were politically motivated, Misra had no duty to extradite them.

76. 2 M. Bassiouni & V. Nanda, supra note 64, at 314.

77. European Convention on Extradition, art. 3a 1.2, 315 U.N.T.S. 139 (1957) (quoted in 2 M. Bassiouni & V. Nanda, supra note 64, at 316).

4. Misra has discretion to deny extradition of Madame Z or Weiss under the nationality clause of the extradition treaty.

The extradition treaty between Misra and Avon permits either party to deny extradition of its own nationals "if in its discretion, it be deemed proper to do so."⁷⁸ Misra could exercise this discretion to deny extradition in good faith. Its reluctance to extradite Madame Z is entirely understandable in light of her status as ambassador to France, and her political status in Misra. Furthermore, extradition of Erich Weiss, a permanent resident of Misra, could also be refused under the nationality clause. "Some states refuse extradition of persons living permanently in their country as well."⁷⁹ Avon's claim for the extradition of Weiss and Madame Z was properly denied because Avon had no duty to extradite its own nationals under the express terms of its treaty with Avon.

C. Madame Z Cannot Be Extradited For A Supposed Offense That Was Committed While She Enjoyed The Protection Of Diplomatic Immunity.

Madame Z's diplomatic immunity justifies Misra's refusal to extradite her. As Misra's Ambassador to France, Madame Z was en route from Misra to France, with a three-day layover in Avon, at the time that the supposed "theft" occurred. Misra's right to invoke diplomatic immunity in her behalf is supported by Article 40 of the Vienna Convention on Diplomatic Relations,⁸⁰ which provides: "If a diplomatic agent passes through or is in the territory of a third state, . . . while proceeding to take up or return to his post, . . . the third state shall accord him inviolability and such other immunities as may be required to ensure his transit or return."⁸¹ Misran officials could determine, in accordance with their own law as provided by terms of the extradition treaty, whether Avon had met its burden to show that Madame Z's activity in Avon was outside the scope of Article 40. The judgment of Misran officials must be accorded

78. Extradition Treaty Between the Republic of Misra and the Kingdom of Avon, art. 12.

79. 2 M. Bassiouni & V. Nanda, supra note 64, at 319.

80. Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95 (signed Apr. 16, 1961, entered into force Apr. 24, 1964).

81. Id. at art. 40.

due respect. No rule of international law requires a state to waive diplomatic immunity for purposes of granting an extradition request. Thus, Avon's request was properly denied.

III. MISRA HAS NO DUTY TO RETURN THE STATUE OF ITS ANCIENT QUEEN THESLON UNDER ANY RULE OF CUSTOMARY OR CONVENTIONAL INTERNATIONAL LAW.

A. The Statue Rightfully Belongs To Misra.

The marble bust of Misra's ancient Queen Theslon was wrongfully taken from Misra in 1913. Misra's regulations prohibited the removal of any object of "historical value or significance" without the consent of the government. Because the statute was the public property of the Misran government, it was absolutely immune from seizure by Avon.⁸² Furthermore, Avon bears international responsibility for the wrongful removal of the statue from Misra even if, as it asserts, the statue fell into its hands through the handiwork of an "anonymous finder." A state must "exercise due diligence to prevent internationally injurious acts."⁸³ Avon's National Museum was bound to inquire into the circumstances surrounding the removal of the statue from Misra. Given the importance of the statue, which is widely conceded to be one of the world's greatest works of art, the Museum's "purchase of the statue from an "anonymous finder" was an act of bad faith that utterly fails to satisfy the requirements of due diligence. Additionally, even if the Museum had been innocent of any wrongdoing, the statue would rightfully belong in Misra under modern international norms because it is of fundamental importance to Misra's national cultural heritage.

82. See S. Williams, supra note 58, at 65.

83. Id. at 64.

B. Neither Customary Nor Conventional International Law Supports Avon's Demand For The Surrender Of The Statue.

No rule of customary international law requires the surrender of property that rightfully belongs to a state. Nor can Avon legitimately invoke the UNESCO Convention of 1970⁸⁴ as a basis for the return of the statue. Avon is not a party to that convention, and non-party states cannot acquire rights under international conventions except in exceptional circumstances which do not exist here.⁸⁵ Furthermore, Avon could not force Misra to surrender the statue under the Convention because it cannot furnish "the documentation and other evidence necessary to establish its claim" that the statue legally belongs to the Museum.⁸⁶ Because Avon's original acquisition of the statue was tainted with bad faith, the UNESCO Convention of 1970 furnishes no legal basis for its return.

C. The Extradition Treaty Does Not Require Misra To Surrender The Statue.

Avon may not invoke the extradition treaty to support its demand for the statue because the treaty requires the surrender of property only "upon the granting of the extradition."⁸⁷ Because Misran authorities had legitimate cause to refuse Avon's extradition request, the treaty imposes no obligation upon Misra to deliver the statue to Avon. Furthermore, the treaty requires surrender of property only "to the extent permitted under the law of the requested Party."⁸⁸ Misra's regulations forbid the removal of the statue without the government's consent. Misra's government could,

84. UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted Nov. 14, 1970, 823 U.N.T.S. 231, reprinted in 10 I.L.M. 289 (1971).

85. See Vienna Convention on the Law of Treaties, art. 36, U.N. Doc. A/Conf. 39/27 (1969):

A right arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third state, or to a group of states to which it belongs, or to all states, and the third state assents thereto

86. UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property, supra note 84, at art. 7(b)(ii).

87. Extradition Treaty Between the Republic of Misra and the Kingdom of Avon, art. 22.

88. Id., art. 8.

therefore, legitimately refuse to surrender the statue because Avon has ignored repeated requests for the return of items belonging to its cultural patrimony since 1826. Because Misra's government legitimately exercised its discretion to forbid the removal of the statue from Misra, no duty to surrender the statue exists under the express terms of the extradition treaty.

CONCLUSION

For the foregoing reasons, the Applicant state of Misra respectfully requests that this Honorable Court find, adjudge and declare as follows:

1. That Avon illegally acquired the Sloane Collection under international law;
2. That the Collection forms part of Misra's national patrimony and cultural heritage;
3. That Misra is entitled to complete restitution of the art treasures contained in the Collection;
4. That Misra has no duty to extradite Madame Z or Eric Weiss to Avon; and
5. That Misra has no duty to surrender the statue of its ancient Queen Theslon to Avon.

Respectfully submitted,

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