

**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 RESPONDENT

February 1986

Team 4-8

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JURISDICTION

The Republic of Misra 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 Kingdom of Avon is a wealthy country that sponsors the Avon National Museum ("the Museum"), a government institution that preserves a significant part of the world's cultural heritage (C.1,3). Cultural artifacts representing mankind's earliest and greatest artistic achievements are displayed at the Museum for widespread viewing. Since 1806, the Museum has housed the Sloane Collection, a collection of remains of one of the world's oldest civilizations (C.2). The Republic of Misra, a poor country that gained its independence in 1826, now governs the territory that once was the home of this ancient civilization (C.1,3).

In July, 1984, a unique marble bust of Theslon, an ancient Misran queen, vanished from the Museum (C.6). The bust was the last and most important item that Avon acquired for the Sloane Collection, and most art scholars and historians consider it to be among the world's greatest works of art (C.4). The bust's disappearance occurred immediately after a visit to the Museum by Madame Z, a Misran political figure, and her lover, Erich Weiss, an Avonian art historian (C.6).

Three days after the bust of Theslon was stolen from the Museum, the Misran Minister of Cultural Affairs held a press conference in Tannis, the site of Misra's ancient capital (C.6). The Minister cheerfully 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 refused to answer questions on the circumstances surrounding the object's removal from Avon, and declared unequivocally that it would never be returned there (C.6).

Subsequent investigative reporting by foreign journalists in Misra disclosed that Madame Z, with the help of Erich Weiss, had arranged the theft of the statue and its transfer to Misra in Madame Z's luggage (C.6). How Weiss took the piece out of the

Museum remains a mystery (C.6). Having fled Avon, he now resides in Misra where he is regarded as a national hero (C.6). He has been made an honorary citizen of Misra and given permanent residence there (C.6).

Madame Z is a lawyer who studied and taught in Avon for a few years. She is the president of the Misra National Organization (MNO), a nationalist movement that has been gaining ground in the Misran political arena (C.5). MNO, above all, stands for restoring cultural heritage and national pride (C.5). Two of its leaders now hold portfolios in the coalition government of Misra (C.5). Madame Z is also a former Misran Ambassador to Avon, and is currently Misra's ambassador to France (C.5). According to reports in the popular press, neither security nor customs officials searched her luggage at the airport when she left Avon with Weiss and the bust of Theslon (C.6).

Prior to the theft, Madame Z visited Avon for three days while en route from Tannis to Paris (C.6). During her visit she gave a lecture and attended two concerts (C.6). Toward the end of her stay in Avon Madame Z visited the Sloane Collection at the Avon National Museum with Weiss (C.6). Immediately afterward, it was discovered that both the bust of Queen Theslon and Weiss had vanished from Avon (C.6).

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

II

The original collection of ancient artifacts known as the Sloane Collection was acquired by the Museum in the early nineteenth century when Misra was a Province in the Salamic Empire (C.1,2,3) Throughout its history, Misra had been conquered and settled by invaders, who gradually and thoroughly replaced its ancient inhabitants (C.1). Salamic forces overran and forcibly incorporated Misra in the seventeenth century (C.1).

During the battles to acquire Misra, the Salamis bombarded and then occupied Misra's ancient capital of Tannis (C.1). The ruins were converted into a fortress whose ammunition storage area had been the principal temple of the city (C.1). Salamic troops destroyed ancient columns in target practice and burned many marble statues to create lime whitewash (C.1).

The ruined fortifications of Tannis remained substantially untouched until 1802, when the Kingdom of Avon appointed Major Harrison Sloane as consul in the Salamic Province of Misra (C.1). Major Sloane was a well known classical scholar and collector of antiquities (C.1). Upon his arrival in Tannis he sought and, after difficult negotiations, obtained permission from the provincial Bey to study the ancient ruins of the city (C.1). The Bey, however, denied Major Sloane's subsequent requests to undertake measures for historic preservation (C.1). Instead, the Bey explicitly restricted the activities of Major Sloane to studying and reporting on the ruins (C.1).

Acting on his own, Major Sloane then applied directly to Sejam Fezgrina, the Emir of Salamis, to gain unrestricted access to the ancient city (C.2). The Emir replied with a Directive to the Bey ("The Fezgrina Directive"), which, in its French translation, granted Sloane permission to study and remove "quelques pieces de pierre avec inscriptions et figures" (C.2). This French translation is the only remaining documentation of the original directive (C.2).

When Sloane received his copy of the Fezgrina directive, he took immediate action to preserve the ruins of Tannis (C.2). During the following year some three hundred Salamic workers aided Sloane in removing statues, friezes, frescoes, and other artifacts of ancient Misra (C.2). By 1806, two hundred crates of remains had been preserved and shipped to Avon (C.2). The Salamic government did nothing to restrain Sloane and the workers (C.2). Leading Misrans lamented their inability to use force to back up their protests of the removal of the objects, and the failure of the Salamic government to

come to the rescue (C.2). The Salamic government protested Sloane's activities to the government of Avon (C.2).

The government of Avon appointed a study commission to evaluate Sloane's activities after personal financial hardships forced Sloane to offer the collection for sale (C.2). The commission found that Sloane's effort was "an absolutely necessary and virtuous act of salvage to preserve the priceless heritage of an ancient civilization" (C.2,3). Upon the commission's recommendation, the government purchased the entire collection from Sloane for a sum equivalent at that time to \$20,000 U.S. and placed it in the Avon National Museum, where it remains today (C.3).

The Sloane Collection contributed to an upsurge of interest in ancient artifacts, a public understanding of them, and a brilliant new school of Avonian painting (C.3). In Avon and all throughout Europe, the new interest in Misran art also seemed to encourage acquisition of Misran art by private collectors, museums, and government officials (C.3). Misran obelisks and preserved human remains in their elaborate caskets were of greatest interest (C.3). By the time of Misran independence, most of its ancient obelisks stood in London, Paris, Rome, and Berlin, as well as Avon, in all of which they became items of national pride (C.3).

The renaissance of ancient Misran culture and its contribution to the world's cultural development was not without cost. Major Sloane and the Salamic workers left the shells of buildings standing, and some of the buildings suffered architectural damage (C.2). Later, collectors took some of the preserved human remains for dissection to foreign laboratories or destroyed them in an effort to locate ancient documents and jewelry (C.3). Scientists concur, however, that valuable objects in the Sloane Collection would be at risk of environmental destruction from current high levels of pollution surrounding Tannis if they were returned today for outdoor display in Misra (C.5).

Misra fought a successful revolution and ousted the Salamis from power on July 4, 1826 (C.3). Misra's new government then demanded that Avon return the Sloane

Collection for reintegration of the artifacts into their original sites (C.3). Avon denied Misra's request, and since then has always denied repeated requests by subsequent governments of Misra (C.3). Avon has maintained that its national museum legally acquired the art, and that it is part of the world's rather than any nation's cultural heritage (C.5). Avon observes that the foremost objectives are to preserve and display the artifacts properly for widespread viewing (C.5). Given the high levels of pollution in and around Tannis, Avon notes that it alone, not Misra, can best accomplish these objectives (C.5). The government of Misra, however, has consistently complained that because the Sloane Collection is part of its national cultural heritage, it must be returned (C.5). Misra asserts that neither Avon nor any of its nationals ever legally acquired title to works of art in the Collection. Consequently, Misra claims that immediate restitution is appropriate (C.5).

III

Misra enacted strict regulations to govern all excavations in 1827 (C.4). These regulations prohibited removal without the government's consent of any object "of historical value or significance" (C.4). In spite of these regulations, Misra was unable to prevent major pieces of Misran art from finding their way out of the country (C.4).

In 1908, a wave of anti-Western rioting in Misra resulted in the deaths of several Avonians, including diplomatic personnel (C.4). Avon sent an expedition of troops into Misra. Noted art expert D. Van Dean accompanied Avonian troops, preserving many artifacts along the way (C.4). These were later enumerated in a peace treaty between Avon and Misra ("The Peace Treaty"), in which Misra ceded them to Avon as "war reparations" (C.4). The best of these objects were added to the Avon National Museum, and the remainder were sold to private collectors in Avon (C.4).

In 1913, the Avon National Museum announced the acquisition of the marble bust of Theslon and documented the statue as inventory of the Museum (C.4). The Museum

that the bust had been purchased legitimately from an anonymous finder, who had obtained Misran customs clearance to export the object (C.4). The Misran government immediately demanded its return and protested (C.4). Misra conducted an investigation which revealed that a customs official had been presented with a case of artifacts which, unbeknownst to him, included the bust of Theslon (C.4). There was some inconclusive evidence of bribery, and the customs official had not been presented with an itemization of the contents of the case (C.5). Despite Misra's investigation, the location of the find in Misra and the circumstances of the statue's acquisition have never been fully disclosed (C.5).

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.

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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.

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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.

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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.

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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 effect due to the death, disappearance, or escape of the accused.

The requested Party may condition the surrender of articles upon a satisfactory 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 the Sloane Collection, as part of the common cultural heritage of mankind, legally reposes in the Avon National Museum, which has preserved and displayed it for widespread viewing for nearly two centuries as the common cultural heritage of mankind?

- II. Whether Misra may disclaim the terms of a Peace Treaty negotiated with Avon in 1908, by which it voluntarily ceded certain cultural artifacts to Avon as reparations for the deaths of Avonian diplomats killed in Misra by anti-Western militants?

- III. Whether Misra must comply with its good faith obligations under international law by extraditing Madame Z and Erich Weiss for the theft of the bust of Queen Theslon from the Avon National Museum?

- IV. Whether Misra must comply with its good faith obligations under international law by returning the bust of Queen Theslon to the Avon National Museum?

SUMMARY OF ARGUMENT

I

The Avon National Museum legally acquired the Sloane Collection from Major Harrison Sloane, its consul to the Salamic Province of Misra. Major Sloane salvaged the Collection from the ruined fortifications of Tannis, Misra's ancient capital, and Salamic authorities fully acquiesced in Sloane's effort. Sloane's preservation of the ruins was entirely consistent with emerging principles of international law in the nineteenth century, which began to afford protection to cultural property as the common cultural heritage of mankind. Misra acquired no right to possess the Collection upon its independence from Salamis in 1926, because it was bound by the lawful acts of its predecessor state.

Today, international law regards cultural property as the common heritage of mankind. Accessibility and preservation are values that form the cornerstone of the modern legal framework for the protection of cultural property. Misra cannot deprive the world of its cultural heritage solely to fulfill its demands for national pride. Because Avon has preserved the Sloane Collection for nearly two centuries, and Misra cannot assure its continued accessibility and preservation, the Collection rightfully belongs in the Avon National Museum. No rule of customary international law requires museums to surrender art treasures to the countries from which they came. Even if such a rule had attained the status of customary international law, Misra is unable to fulfill the conditions necessary to invoke the rule. The Sloane Collection, therefore, legally reposes in the Avon National Museum.

II

Avon legally acquired the artifacts gathered by its troops during an expedition to quell anti-Western riots in Misra in 1908. Avon's expedition was a legitimate act of

reprisal for Misra's failure to protect Avonian diplomatic officers, who were killed in the riots. Under principles of international law that existed in 1908, Avon's actions were entirely permissible because reprisals were then lawful. The Hague Conventions of 1899 and 1907 do not apply to the actions of Avonian troops, because a state of war did not exist. Even if the Conventions did apply, however, the acquisition of the artifacts was lawful as an act of military necessity designed to preserve them from destruction during the violence in Misra.

Regardless of the legality of Avon's original acquisition of these artifacts, Misra is bound by the peace treaty by which it ceded them to Avon as reparations for the deaths of the Avonian diplomats. The treaty was valid when it was concluded, and modern rules governing the invalidity of treaties cannot be applied retroactively to cancel the effect of treaty provisions that have already been performed. Additionally, Misra has failed to object to Avon's possession of the artifacts since the treaty was first concluded. Misra is barred from raising the issue now because of its acquiescence in Avon's possession of the artifacts.

III

Misra must comply in good faith with its obligations under the extradition treaty with Avon. Misra has a duty to extradite Madame Z on the basis of this treaty and on the basis of other international conventions. Misra has assumed an obligation to cooperate with other states to assure that offenses against cultural property will not go unpunished. Misra has made it obvious that Madame Z and Erich Weiss will not be punished in Misra for the theft of the statue of Theslon from the Avon National Museum, and Misra's refusal to grant extradition is a breach of its international obligations. Misra cannot in good faith justify its refusal to grant extradition by invoking diplomatic immunity on behalf of Madame Z. Nor can Misra deny extradition under the pretense that the theft of the statue was a political offense. Misra cannot

deny extradition on the basis of the nationality clause of the extradition treaty because to do so would be an act of bad faith that is expressly prohibited under the terms of the treaty. Misra must extradite Weiss and Madame Z to comply in good faith with its obligations under international law.

IV

Misra is responsible for the theft of the statue of Theslon, and must return it under principles of customary international law relating to state responsibility. Misra also has a duty to return the statue under the UNESCO Convention of 1970 because Article 13(b) of the convention creates rights in favor of all states, including Avon. The extradition treaty between Avon and Misra requires that Misra immediately surrender the statue to Avon. Misra must return the statue to comply in good faith with its international obligations.

ARGUMENT

L. THE SLOANE COLLECTION, AS PART OF THE COMMON CULTURAL HERITAGE OF MANKIND, LEGALLY REPOSES IN THE AVON NATIONAL MUSEUM WHICH HAS PRESERVED AND DISPLAYED IT FOR WIDESPREAD VIEWING FOR NEARLY TWO CENTURIES.

The Avon National Museum acquired the Sloane Collection during the early nineteenth century from Major Harrison Sloane, a well known Avonian scholar and collector of antiquities. Until 1802, when Major Sloane salvaged the Collection from the ruins of ancient Misra, neither the Empire of Salamis nor the Misran people had made any effort to preserve these ancient remains for future generations (C.1). Avon, through the efforts of Sloane and its National Museum, has now preserved and displayed the Collection for the universal enjoyment of people of all nations for nearly two centuries. Because Avon legally acquired the Collection and has protected and preserved it as the common cultural heritage of mankind, it asks this Court to deny Misra's claim for "restitution," and to declare that the collection is legally reposing in Avon.

The legal rights of the parties must be determined in accordance with the doctrine of intertemporal law. Thus, the Court must evaluate Avon's original acquisition of the Collection according to the principle that "acts should be judged in the light of the law contemporary with their creation."¹ In addition, the legality of Avon's continued display of the Collection must be tested under the second aspect of this doctrine, which requires that rights must be "maintained in accordance with the changes brought about by the development of international law."²

Avon's original acquisition of the Sloane Collection was legal under prevailing norms of international law during the early nineteenth century. The Empire of Salamis occupied Misra at the time Sloane began preserving the ruins. Although Salamic authorities were initially reluctant to give Sloane access to the ruined fortifications of Tannis, subsequent events show that Salamis fully acquiesced in Major Sloane's work

1. Elias, The Doctrine of Intertemporal Law, 74 Am. J. Int'l L. 285, 286 (1980).

2. Id.

(C.2). Changes in international law since Avon first acquired the Collection not only permit, but require, continued preservation and open display of the Collection in the Avon National Museum as part of the common cultural heritage of mankind:

This heritage is a compendium of the sufferings and the genius of mankind. It must be well-preserved to ensure that future generations can see and marvel at the accomplishments of their own epoch and those that came before.

It is in this sense that cultural property is universal in character. It demonstrates mankind's diversity and artistic nature. Such achievements of creation by man cannot be regarded as "belonging" exclusively to any one nation. Cultural property is a medium through which the peoples of the world may gain intellectual exchange and thus they have a right to claim access to it.³

A. The Avon National Museum Legally Obtained the Artifacts Salvaged By Major Sloane.

- 1. Sloane's salvage of the Misran ruins was consistent with contemporaneous norms of international law which recognized the need for preservation and protection of cultural property.**

The Empire of Salamis overran and forcibly occupied Misra during the seventeenth century (C.1). At this time, Salamis had exclusive authority over the site of the ancient ruins.⁴ Unfortunately, Salamis treated the ruins with barbaric contempt. In its battles to acquire Misra, Salamis bombarded Tannis, the site of its ancient capital, and converted it into a fortress.⁵ Salamic troops used the principal temple of the city to store ammunition, destroyed ancient columns for target practice, and burned many marble statues to make lime whitewash (C.1).

After the conquest of Misra, the ancient ruins remained substantially untouched until 1802, when Major Sloane arrived in Tannis (C.1). International law, in the meantime, had developed new rules for the protection of cultural property. In the

3. S. Williams, Protection of Movable Cultural Property 52 (1977).

4. H. Grotius, The Rights of War and Peace 335 (A. Campbell trans. 1901) (1st ed. 1625): [A]ccording to the law of nations, not only the person, who makes war on just grounds, but any one whatever, engaged in regular and formal war, becomes absolute proprietor of everything which he takes from the enemy: so that all nations respect his title, and the title of all, who derive through him their claim to such possessions.

5. The actions of Salamic troops were apparently not unusual. Grotius noted that "land will be considered as completely conquered, when it is inclosed or secured by permanent fortifications, so that no other state or sovereign can have free access to it, without first making themselves masters of these fortifications." Id. at 337.

eighteenth century, Vattel wrote that "the wanton destruction of public monuments, temples, tombs, statues, paintings . . . is absolutely condemned, even by the voluntary law of nations, as never being conducive to the lawful object of war."⁶

By the early nineteenth century, when Major Sloane set foot in Tannis, the concept that cultural property belongs to the common heritage of mankind began to be recognized as the rationale for these new rules:

[T]he arts and sciences are admitted amongst all civilized Nations to form an exception to the several rights of war, and to be entitled to favour and protection. They are considered not as the peculium of this or that Nation, but as the property of mankind at large, and as belonging to the common interests of the whole species⁷

States refrained from the destruction of cultural property during this period, but not its seizure.⁸ After Napoleon had deposited art treasures from all of Europe in the Louvre, however, the victorious Allies forced France to return them in 1815.⁹ The measures taken by the Allies against proud, nationalistic France were an affirmation of the emerging principle that cultural property cannot "belong" to one nation, but must be shared among all.

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

7. T. Twiss, The Law of Nations 132 (1875) (citing The Marquis de Somerueles, Stewart's Vice-Admiralty Reports 482 (1813)). See also H. Wheaton, Elements of International Law 401 (1846), where the author condemns the destruction of the Capitol, and other public buildings in Washington, D.C., by British forces in August, 1814, observing that cultural objects of this kind "contribute nothing to the means of hostility, but are consecrated to purposes of peace, and minister to the common and perpetual interest of all human society."

8. S. Williams, supra note 3, at 6: "It was contended in the eighteenth century that although no state would be justified in destroying such works, except in accidental circumstances, or by the necessity of unavoidable combat operations, it was allowable to seize and appropriate such movable property."

9. Id. at 8.

2. Competent Salamic authorities granted Sloane access to the site of the ruins and acquiesced in Sloane's efforts at salvage and preservation.

The Salamic government acquiesced in Major Sloane's efforts to salvage the ruins of ancient Misra. At first, the provincial Bey denied Major Sloane's requests to preserve the ruined fortifications of the ancient city (C.1). Acting on his own, Sloane appealed to the Emir of Salamis, Sejam Fezgrina, who issued a Directive to the Bey ("The Fezgrina Directive"), which gave Sloane authority to study and remove "quelques pieces de pierre avec inscriptions et figures." Sloane began salvaging the ruins immediately after he received his copy of the Emir's Directive (C.2,3).

The Fezgrina Directive, or what remains of it, does not provide conclusive evidence of the attitude of Salamic authorities toward Major Sloane's preservation efforts. Only eight words, translated into French, remain from the text of the original Directive. Although the language of this fragment clearly establishes Major Sloane's authority to remove "any pieces of stone with inscriptions and figures,"¹⁰ it is silent concerning the excavation of the ruins.¹¹

The actions of Salamic rulers, however, reveal that they completely acquiesced in Major Sloane's preservation efforts. Three hundred Salamic workers labored under Major

10. See W. St. Clair, Lord Elgin and the Marbles 90 (1967), where the author discusses the firman, or permit, given to Lord Elgin, the British ambassador to Turkey who preserved the ancient ruins of the Parthenon during the early nineteenth century. The only surviving documentary evidence of Lord Elgin's authority to excavate and remove the marbles is an Italian translation of the firman which allowed him to remove "qualche pezzi di pietra con iscrizioni," which corresponds exactly to the French language fragment of the Fezgrina directive. The English rendering of this language appears as "any pieces of stone with inscriptions and figures."

11. Lord Elgin's firman was also silent as to his authority to excavate prior to removing any of the stones from the Parthenon. One writer has concluded, however, that such authority was implicit within the authority to remove the "stones." See id. at 91, "The interesting thing about the firman, if one reads the last part closely, is its clear indication that the Turks, if they considered the point at all, only intended to grant permission to excavate and remove." This interpretation is also confirmed in a letter from Lord Elgin's wife, Lady Elgin, to her parents, written at the time the firman was granted: "It allows all our artists to go into the citadel to copy and model everything in it, to erect scaffolds all round the Temple, to dig and discover all the ancient foundations, and to bring away any marbles that may be deemed curious by their having inscriptions on them" Id. (citing The Letters of Mary Nisbet, Countess of Elgin 116 (1926)).

Sloane's direction for a period of at least a year to complete the salvage of the ruins (C.2). Given the number of Salamic workers involved, and the length of time required to complete the project, it is impossible that Salamic authorities were deceived as to the nature or the scope of Major Sloane's effort. The provincial Bey had already demonstrated his ability to restrict Major Sloane's access to the ruins before the preservation effort was begun (C.1). If Sloane had exceeded his authority, the Bey could easily have halted his work. Yet, Salamis did nothing effective to restrain Major Sloane or the three hundred Salamic workers under his direction.

Major Sloane's work did not become illegal after Salamis protested his "activities" to the Avonian government. "A protest which does not clearly indicate the act against which it is directed is without significance and may be rejected."¹² This "protest"¹³ was, at best, ambiguous in light of the complete acquiescence by Salamis in Major Sloane's effort to excavate, remove, and preserve the ancient ruins. Apparently, Salamis protested to appease Misran dissenters, who lamented their inability to back up their own "protests" with force. These protests by individual Misrans did not have legal significance under international law because they were not made "by or on behalf of a state."¹⁴ Salamis continued to acquiesce in Avon's possession of the Sloane Collection after 1806. Salamis did not protest at all during the next twenty years, and Avon's

12. MacGibbon, Some Observations on the Part of Protest in International Law, 30 Brit. Y.B. Int'l L. 293, 296 n.1 (1953).

13. See id.; Proceedings of the Alaskan Boundary Tribunal, S. Doc. No. 162, 58th Cong., 2nd Sess., vol. 5, at 183 (1904) (one of the alleged British protests is described as "so artfully veiled as to make it entirely undiscernible, and consequently of no notice to the Government of the United States").

14. MacGibbon, supra note 12, at 294.

right to possess the Sloane Collection could not be challenged by 1826.¹⁵

B. Misra Has No Right To Demand Restitution Of The Sloane Collection.

1. Misra acquired no right to the Sloane Collection upon its independence.

The state of Misra did not legally exist until it became independent from the Empire of Salamis in 1826.¹⁶ Upon its independence, Misra's new government could not retroactively acquire any right to the artifacts in the Sloane Collection, because it was bound by the acts of Salamis, its predecessor. "[T]he division of an empire creates no forfeiture of previously vested rights of property; and this principle is equally consonant with the common sense of mankind, and the maxims of external justice."¹⁷

2. Restitution is inappropriate because Avon acted lawfully.

Misra cannot demonstrate that Avon has committed any wrongful act. "[R]estitution is based on the rectification of an international delinquency, and property which has been legally taken away cannot be subject to this treatment."¹⁸ Because Avon's acquisition of the Sloane Collection was lawful, restitution is inappropriate.

15. See Anglo-Norwegian Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 130. See also H. Wheaton, supra note 3, at 208-09:

[T]he constant and approved practice of nations shows that, by whatever name it be called, the uninterrupted possession of territory or other property, for a certain length of time, by one state, excludes the claim of every other This rule is founded upon the supposition, confirmed by constant experience, that every person will naturally seek to enjoy that which belongs to him, and the inference fairly to be drawn by his silence and neglect, of the original defect of his title, or his intention to relinquish it.

16. See H. Wheaton, supra note 7, at 61-62: "Until the independence of the new State has been acknowledged, either by the foreign State where its sovereignty is drawn into question, or by the government of the country of which it was before a province, courts of justice and private individuals are bound to consider the ancient state of things as being unaltered."

17. H. Halleck, International Law 78 (1861). See also D. O'Connell, The Law of State Succession 227 (1956): "The predecessor state is competent up to the moment of change of sovereignty to alienate the public domain or any portion of it, and the property so alienated cannot be appropriated ipso facto by its successor."

18. S. Williams, supra note 3, at 12.

3. Even if Major Sloane acted unlawfully, Avon is not responsible to Misra for any injury that resulted.

Major Sloane acted individually, and not as a representative of the Avonian government. In negotiating with Salamis to achieve the preservation of the ruins, Major Sloane acted "on his own" (C.1,2). Consequently, responsibility for any injury that resulted from Sloane's activities belonged to Sloane individually, and not to Avon. "[I]t is impossible for the best regulated state, or for the most vigilant and absolute sovereign to model . . . all the actions of his subjects, and . . . it would be unjust to impute to the nation, or to the sovereign, all the faults of the citizens."¹⁹ If any wrong had occurred, Salamis, and not Avon, is chargeable with neglect for its failure to bring it to the attention of the Avonian government. Avon, having no knowledge of any illegal act by Major Sloane, is not responsible for any act that it neither authorized or ratified.

4. The state of Misra suffered no legally recognizable injury.

Assuming that any injury had occurred through Avon's acquisition of the Sloane Collection, Misra cannot complain of that injury. As Judge Fitzmaurice observed:

[S]ince the Applicant state did not exist as such at the date of these acts or events, these could not have constituted, in relation to it, an international wrong, nor have caused it an international injury. An act which did not, in relation to the party complaining of it, constitute a wrong at the time it took place, obviously cannot ex post facto become one.²⁰

C. The Sloane Collection Belongs to the Common Cultural Heritage of Mankind.

1. Modern international law regards cultural property as the common heritage of mankind.

The concept of cultural property as the common heritage of mankind had its genesis during the mid-eighteenth century when new rules for the protection of cultural property from the ravages of war began to emerge. Today, cultural property is "considered . . . as being merely in the hands of a state, which is acting as a custodian for mankind

19. Id. at 274 (citing E. de Vattel, Droit des Gens, Book II, ch. VI, §§ 71, 72).

20. Case Concerning the Northern Cameroons (Cam. v. U.K.), 1963 I.C.J. 4, 129 (Fitzmaurice, J., separate opinion).

at large. Traditional property concepts cannot apply."²¹ Above all, the common heritage of mankind concept promotes widespread access to cultural property and its preservation for future generations.

In 1939, the International Council of Museums conducted a study in which it concluded that "states that are rich artistically are only depositories of such works for the general benefit of mankind."²² Later, the United Nations Educational, Scientific and Cultural Organization (UNESCO) was constituted to "see to the conservation and protection of the universal heritage of books, works of art and other monuments of historical or scientific interest."²³ In 1954, the common cultural heritage concept received another boost with the signing of the Hague Convention for the Protection of Cultural Property In The Event of Armed Conflict.²⁴ This Convention, to which both Avon and Misra became original parties, recognized "that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind."²⁵ The concept was again reaffirmed in the UNESCO Convention of 1970,²⁶ also signed by Avon and Misra, which recognizes that the "interchange of cultural property among nations . . . increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations."²⁷

In part, the common cultural heritage of mankind concept has emerged to counter "rampant nationalism" in some countries that threatens to destroy prospects for

21. S. Williams, supra note 3, at 64.

22. Id. at 53 (citing Trintigan, La protection internationale des biens culturels en temps de paix 157 (1974)).

23. Id. (citing Act Constituting UNESCO, 1946, s. 2-C, 61 Stat. 2495, T.I.A.S. 1580, 4 U.N.T.S. 275).

24. 249 U.N.T.S. 215 (signed May 14, 1954, entered into force, Aug. 7, 1956).

25. Id., preamble.

26. 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).

27. Id., preamble.

widespread access to cultural development.²⁸ One of the unfortunate consequences of this nationalist undercurrent has been an increasing political demand for cultural property in poorly developed countries without a corresponding outlay of resources to ensure its widespread availability and continued preservation. Thus, "[i]n Mexico, . . . politicians volubly celebrate the national patrimony while at the same time keeping the National Institute of Anthropology and History on a starvation budget"²⁹ Another consequence has been theft. In 1982, a dispute arose between Mexico and France when a Mexican national stole "a fifteenth century tonalamatl" from the French National Library. The thief turned the item over to authorities in Mexico, claiming that he had merely recovered property belonging to the national patrimony of Mexico. Mexican authorities refused to return the object despite evidence that France had possessed it since the nineteenth century as the result of a legitimate series of transactions.³⁰

Misra's demand for the Sloane Collection, like Mexico's claim to its "tonalamatl," cannot be reconciled with modern principles of international law which recognize the duty of each nation to respect the common cultural heritage of all.³¹ The Sloane Collection has inspired visitors to the Avon National Museum for nearly two centuries. Those visitors have emerged with a new understanding of their ancient past and a

28. Nafziger, An Anthro-Apology for Managing the International Flow of Cultural Property, 4 Hous. J. Int'l L. 189, 193 (1982):

The result of this rampant nationalism has been to stimulate a flourishing black market in artifacts and to foster hurried, clandestine, pilfering and other destruction Nationalism has encouraged disrespect for laws that are overly restrictive and contribute[d] to international tensions, Nationalism has also generated a cottage industry in forgeries Worst of all, nationalism has eroded a foundation for human understanding by limiting the access of archeologists and the global public to foreign patrimonies, [threatening] the shared values of cultural diffusion and the advancement of scientific knowledge

29. K. Meyer, The Plundered Past 185 (1973).

30. See Nafziger, supra note 28, at 193.

31. S. Williams, supra note 3, at 64: "States are responsible . . . to the international community . . . for the preservation of cultural property and they have a duty to take the appropriate steps to ensure protection and to render it accessible to all."

renewed sensitivity to the cultural ties that bind all nations to the core of their common traditions.

Misra cannot deprive the world of its cultural heritage solely to fulfill a short-sighted demand for national pride. Scientists concur that, given current high levels of pollution in Tannis, artifacts in the Sloane Collection would face the risk of environmental destruction if returned to Misra for reintegration into their original sites. Misra's demand for "immediate restitution" and its refusal to cooperate in resolving the theft of the Theslon statue show a total disregard for the values of accessibility and preservation, values that are the cornerstone of the modern legal framework for the protection of cultural property. Because the Collection belongs to the common cultural heritage of all mankind, and because only Avon can assure its continued accessibility and safety, international law demands that the Collection remain in the Avon National Museum.

2. Customary international law does not recognize Misra's demand for restitution of the Sloane Collection.

No rule of customary international law requires the world's museums to surrender works of art to the territories from which they originated. Although "restitution" of cultural artifacts to the countries of their origin has attracted some interest among developing countries, the realities of state practice support the view that, at best, this principle is merely an ethical principle.³² UNESCO efforts to promote the return of cultural property to the countries where it originated have achieved but little success, and "have aroused . . . strong reactions and misunderstandings. Pathetic requests have sometimes been met with timid hesitations, certain accusations with irritability."³³ By no stretch of the imagination can the results of these UNESCO pleas for "restitution" be considered a "very widespread and representative participation of states" necessary

32. 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, 804-06 (1983).

33. Fradier, Editorial, in Restitution and Return of Cultural Property (special issue), 31 Museum 2 (No. 1, 1979).

to create a customary norm of international law.³⁴ Nor do the few examples where cultural artifacts have been returned show that the "[s]tates concerned must therefore feel that they are conforming to what amounts to a legal obligation."³⁵ Where such "restitution" has occurred, it has been "motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."³⁶ Although this type of cultural co-operation is desirable, in appropriate circumstances, to promote the rights of all peoples to enjoy the common cultural heritage of mankind, this does not mean that a customary norm exists requiring the return of cultural property to countries of its origin. Indeed, "[i]t is preposterous to argue that all objects should remain in their countries of origin, let alone that they should be restored or returned to them."³⁷

General Assembly resolutions³⁸ and bilateral treaty arrangements³⁹ concerning the return of cultural artifacts to the countries of their origin recognize the need for co-operation on a practical level to allow all peoples the right to share in their common cultural heritage. They do not provide evidence of an inflexible rule of law requiring the surrender of cultural property to any nation who claims it as its "patrimony." Such a rule would be absurd because it would, inevitably result in the disappearance or destruction of much of the world's cultural heritage. "[A]ny effective policy for restitution or return should never lose sight of the threefold requisite of protection, accessibility to the public and transmission of the objects."⁴⁰ These goals can be achieved only through painstaking efforts at negotiation and compromise, tempered with

34. North Sea Continental Shelf Cases (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 43.

35. *Id.* at 45.

36. *Id.*

37. Nafziger, *supra* note 28, at 197.

38. A list of these resolutions is contained in 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).

39. A number of these arrangements are described in Restitution and Return of Cultural Property (special issue), 31 *Museum* 28 (No. 1, 1979).

40. Study on the Principles, Conditions and Means for the Restitution of Cultural Property in View of Reconstituting Dispersed Heritages, in Restitution and Return of Cultural Property (special issue), 31 *Museum* 62, 64 (No. 1, 1979) [hereinafter cited as Restitution].

the recognition that the return of cultural artifacts to the places where they were found is often not appropriate. Customary international law supports the protection and preservation of cultural property as the common heritage of mankind, not its disappearance and destruction for the sake of a small minority of nationalists.

3. **Even if customary international law recognized the right of states to possess a "national patrimony," the Sloane Collection would rightfully belong in the Avon National Museum.**

Even if a principle supporting the "restitution" of national patrimonies to their countries of origin had attained the status of customary international law, Misra could not legitimately invoke such a principle to support its demand for the Sloane Collection. Misra is not the "country of origin" of the Sloane Collection. "[T]he notion . . . of country of origin is often ambiguous. It can in fact indicate the country in which the work was created, the country of which its author is a national or the last country to hold the object prior to its removal."⁴¹ The country in which the Sloane Collection was created was ancient Misra, one of the world's oldest civilizations which simply happened to occupy the territory now occupied by Misra. The "authors" of the works displayed in the Sloane Collection are not the people of present day Misra, nor their ancestors; they are the ancient inhabitants of Misra's territory who were thoroughly replaced by invaders. Nor was Misra the last country to hold the objects prior to their removal. When Major Sloane salvaged the ruins of ancient Tannis, the Empire of Salamis controlled the site of the ancient ruins. Misra's claim that it is the "country of origin" of the artifacts displayed in the Sloane Collection is ironic; prior to Sloane's preservation of the artifacts, neither Salamis, nor the people of Misra had attributed the slightest cultural significance to them, as the ruins had remained substantially untouched since the seventeenth century (C.1).

Furthermore, Misra's demand for "restitution" of the Sloane Collection as part of its "national patrimony" overlooks the importance of the Collection to the national

41. Id. at 63.

culture of Avon. If any state is entitled to claim the Sloane Collection as its "national patrimony," that state is Avon. "The national artistic patrimony in this sense is of course not restricted to works produced in that country or by its nationals or having some connection with its culture: The Elgin Marbles are a part of England's national patrimony."⁴²

Finally, even if the principle of "restitution" of national patrimonies were established as a rule of customary international law, Misra's demand for the Sloane Collection would not satisfy the conditions necessary to invoke this principle. Even the strongest advocates for restitution concede that "[o]nly those objects which have an essential socio-cultural value for the countries in question should be subject to a request for restitution or return."⁴³ Misra fails to demonstrate that the Sloane Collection has ever been a significant part of its culture, other than as a political symbol of its nationalist ideology. Furthermore, advocates of restitution stress that "[i]n no case should an object restituted or returned by subject to conservation conditions that do not meet international standards." Even if Misra could prove the other elements necessary to support its demand for restitution, current high levels of pollution in Tannis justify a denial of its claim. The Sloane Collection must remain in the Avon National Museum where its safety and accessibility can be assured for future generations of mankind regardless of their nationality.

II. MISRA CANNOT OBTAIN RESTITUTION OF THE ARTIFACTS IT CEDED TO AVON IN A 1908 PEACE TREATY AS REPARATIONS FOR THE DEATHS OF AVONIAN DIPLOMATS.

A. The Artifacts Gathered by Avonian Troops Were Legally Acquired Under Principles of International Law.

Customary international law in 1908 recognized the validity of reprisals as a retaliatory measure against acts of another state or as a deterrent for the future.⁴⁴

42. P. Bator, The International Trade in Art 27 (1981) (emphasis in original).

43. Restitution, supra note 40, at 63.

44. D. Grieg, International Law 887 (2d ed. 1976).

Avon's punitive expedition was a lawful response to Misra's failure to prevent the deaths of Avonian nationals, including diplomatic personnel, during a wave of anti-western rioting that erupted in 1908 (C.4). Misra was accountable for those deaths under well established principles of state responsibility.⁴⁵

Avon's confiscation of cultural artifacts during this expedition was lawful under customary international law in 1908. Avonian troops did not destroy, but simply confiscated the artifacts. This was consistent with international law, which held that "[w]here the property of a state is seized by way of reprisals, the proceeding needs no defense"46

An act of reprisal did not create a state of war.⁴⁷ Thus, the provisions of the Hague Conventions of 1899 and 1907 did not determine the legality of Avon's action.⁴⁸ Even if the Hague Conventions were applicable, however, the actions of Avonian troops were lawful.⁴⁹ "The purpose behind these Conventions was to protect artistic treasures by laying down treatment consistent with the demands of military necessity."⁵⁰ Article 56 of the Conventions, which prohibits the "seizure, destruction or willful damage" to cultural property, must be read in conjunction with the purpose of the Convention, and

45. *Id.* at 572 (citing *Sarropoulos v. Bulgarian State* (1927-8), 4 A.D. Case No. 173 and *Zafiro* claim, 6 U.N.R.I.A.A. 160):

[U]nauthorised acts and omissions of state officials will . . . give rise to responsibility if the state failed to take adequate measures to prevent the injury to the persons or property of aliens or if there is a subsequent failure to remedy the situation (i.e. a denial of justice). The most obvious [illustration] of the former situation would be where the authorities of the respondent state failed to prevent riots directed against foreign nationals

46. T. Woolsey, *International Law* 189 (1889).

47. See *id.* at 186; S. Williams, *supra* note 3.

48. S. Williams, *supra* note 3, at 42. See also 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; 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.

49. Misra and Avon are members of the United Nations and original parties to all global agreements on the law of armed conflict currently in force (C.9).

50. S. Williams, *supra* note 3, at 18.

with other provisions, which permit the seizure of enemy property when such "seizure [is] imperatively demanded by the necessities of war."⁵¹

Avon's seizure of Misran cultural artifacts was imperatively demanded by the need to preserve the artifacts from destruction. Rioting by anti-western mobs throughout Misra and the resulting expedition by Avonian troops endangered their safety. To ensure the safety of Misran cultural artifacts, Avonian troops were accompanied by D. Van Dean, a noted art expert (C.4). This practice was entirely consistent with the efforts of other nations to implement the Hague Conventions. By 1914, at least one other country routinely assigned art officers to military units to protect the cultural property that came under their control.⁵²

The legality of Avon's actions is confirmed by the background of the Hague Conventions. The Conventions drew heavily from earlier attempts to codify the laws of war, including the Lieber Code,⁵³ formulated by Dr. Francis Lieber, a prominent international lawyer.⁵⁴ The Lieber Code condemned the destruction of cultural property during war,⁵⁵ but also provided that "if such works of art . . . can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of said nation. The ultimate ownership is to be settled by the ensuing treaty of peace."⁵⁶ Underlying both the Lieber Code and the Hague Conventions was the purpose of protecting cultural property from harm. The actions of Avonian troops in removing Misran artifacts from the field of battle were consistent with this purpose, and cannot be condemned as unlawful.

51. Id. (citing Article 23(g) of the Regulations Respecting the Laws and Customs of War on Land annexed to the Hague Conventions).

52. Id. (citing Rosner, Public Records Under Military Occupation, 49 Am. Hist. Rev. 213 (1944)).

53. Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of War, April 24, 1863, in L. Friedman, The Law of War 158 (1972).

54. S. Williams, supra note 3, at 15-16.

55. Id. at 15.

56. Id.

B. Misra Cannot Now Revoke The Terms Of Peace It Voluntarily Accepted In 1908.

Misra is not entitled to "restitution" of the artifacts ceded to Avon in the 1908 Peace Treaty. The compromis does not suggest the slightest evidence that Misra's agreement to the terms of peace were anything but voluntary. Nor may the court presume that the treaty was obtained by coercion.⁵⁷ Even if the Peace Treaty was imposed upon it, however, Misra is bound to observe its terms. As one writer observed: "[I]t cannot be said that [the] distinction [between treaties that are imposed and those that are negotiated] is of real practical importance, and it involves drawing rather fine shades of meaning, having regard to the usual position of vanquished states in relation to victorious States."⁵⁸ Thus, this is not such an "imposition" as would suffice to relieve Misra from the terms of the Treaty.⁵⁹

Before 1919, treaties concluded by the threat or use of force against a State were valid.⁶⁰ Thus, the Treaty was binding upon Misra when it was concluded in 1908. "[I]t [would be] no answer to say, that these treaties had been made necessary by unjust aggressions and unprincipled wars, because there would be an end of all faith between nations, if treaties were held not to be binding"⁶¹ Even if Avon's expedition had been unlawful, international law in 1908 clearly permitted Misra to cede its artifacts to Avon.

Nor does contemporary international law provide a basis for relieving Misra of the terms of peace that it voluntarily agreed upon. Today, treaties are void if procured by the threat or use of force.⁶² Treaty provisions that conflict with a peremptory norm of international law, at the time of their conclusion, are also invalid.⁶³ Misra, however, cannot invoke these principles to retroactively invalidate treaty obligations

57. 2 J. Stone, Legal Controls of International Conflict 640 (1974).

58. Id.

59. Id. at 641.

60. T. Elias, The Modern Law of Treaties 170 (1974).

61. Id.

62. Vienna Convention on the Law of Treaties, art. 52, U.N. Doc. A/Conf. 39/27 (1969).

63. Id., art. 53.

that have already been performed. Modern provisions governing the invalidity of treaties, contained in Articles 52 and 53 of the Vienna Convention on the Law of Treaties and Article 2(4) of the U.N. Charter,⁶⁴ are not retrospective in effect. Otherwise, it would be impossible to choose a date at which these new rules were to become operative.⁶⁵ "It is clear that the only sensible solution is to make the rule take effect in the future so as not to unsettle things done or purported to be done at a time in the past when it was lawful and perhaps also appropriate that they should have done so"66 The International Law Commission has stated that the rule codified in Article 2(4) of the U.N. Charter cannot be understood as depriving of validity ab initio a peace treaty procured by coercion prior to the establishment of modern treaty law regarding the threat or use of force.⁶⁷ "The article is, therefore, expressed in a form that recognises that the rule it embodies applies only in respect of treaties concluded since the U.N. Charter came into force."⁶⁸

Misra has also relinquished any right to challenge Avon's possession of the artifacts through its acquiescence. Misra did not protest Avon's possession of the artifacts from the time the Peace Treaty was concluded until the present proceedings. Even if Misra had protested, this would not be sufficient. Article 56 of the Hague Convention expressly provides that any question concerning the seizure of cultural property "should be made the subject of legal proceedings."⁶⁹ Because it has failed, for 78 years, to assert any right to the artifacts ceded to Avon, any rights Misra originally may have

64. U.N. Charter, art. 2, para. 4.

65. T. Elias, supra note 60, at 171.

66. Id.

67. Id.

68. Id. at 172.

69. "All seizure of . . . historic monuments, works of art and science . . . should be made the subject of legal proceedings." Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 56, 36 Stat. 227 (1907), T.S. No. 539, 3 Martens Nouveau Recueil (3d) 461.

possessed have been extinguished.⁷⁰

III. MISRA MUST COMPLY WITH ITS GOOD FAITH OBLIGATIONS UNDER INTERNATIONAL LAW BY EXTRADITING MADAME Z AND ERICH WEISS.

Misra's duty to extradite Madame Z and Erich Weiss arises not only under the extradition treaty but also under the Hague Convention of 1954⁷¹ and the UNESCO Convention of 1970.⁷² As a party to these Conventions, Misra has obligated itself to assure that crimes against cultural property will not go unpunished.⁷³ Misra's failure to fulfill this obligation violates "one of the basic principles governing the creation and performance of legal obligations, . . . the principle of good faith."⁷⁴ Avon therefore asks this Court to order Misra to comply with its international obligations by extraditing Weiss and Madame Z.

A. Misra's Refusal To Grant Extradition Of Weiss And Madame Z Violates Its Duty To Fulfill Its Obligations In Good Faith.

Misra and Avon are both parties to the Hague Convention of 1954, which requires states to "prohibit, prevent and, if necessary, put a stop to any form of theft" of cultural property,⁷⁵ and to take "all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality" who violate the Convention.⁷⁶ Misra is also a party to the UNESCO Convention of 1970, which requires

70. See J. Brierly, The Law of Nations 171 (6th ed. 1963): "Paper protests may undoubtedly be effective for a certain length of time to preserve the claim of the dispossessed state. If, however, the latter makes no effort at all to carry its protests farther by rejoining the case to the United Nations, or by using other remedies, . . . paper protests will ultimately be of no avail to stop the process of prescription."

71. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter cited as 1954 Hague Convention].

72. UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property, supra note 26.

73. 2 M. Bassiouni, International Criminal Law 102 (1980). The author notes that the UNESCO Convention supports his view that theft of national and archaeological treasures should be treated as an international crime.

74. Nuclear Test Case (Austl. v. Fr.), 1974 I.C.J. 253, 268, para. 46. See also Note, Review Essay: Good Faith in Public International Law, 77 Am. J. Int'l L. 130, 132 (1983) ("Good faith is the foundation of pacta sunt servanda, since when states enter into a contract, they are always assumed to have willingly committed themselves to its terms.").

75. 1954 Hague Convention, supra note 71.

76. Id. art. 28.

it to "prohibit the import of cultural property stolen from a museum,"⁷⁷ and to impose penalties "on any person responsible for infringing" this prohibition.⁷⁸ To fulfill these obligations in good faith, Misra must cooperate with other states to assure that fugitives charged with the theft of cultural property are brought to justice.

"Extradition agreements are an important penal aspect of cultural property law. Aut dedere aut punire (or judicare) may well be a governing principle of international law, if not a peremptory norm of jus cogens, from which no conventional derogation is permissible."⁷⁹ To comply with this principle, Misra must try offenders in its own courts, or deliver them for prosecution in the state where the offense was committed. Because Madame Z is the president of a powerful nationalist group and Weiss is a national hero, it is highly improbable that they will be prosecuted in Misra. Yet, Misra has not only denied extradition, but has refused to inform Avon the reasons for its denial.

Avon's extradition request satisfies the requirements of the treaty. Weiss and Madame Z committed a "willful act"⁸⁰ which constitutes an extraditable offense under the extradition treaty in two respects. It falls within the category of offense listed in the Appendix to the treaty, as an offense "against the laws relating to the importation, exportation, or international transit of merchandise,"⁸¹ and is therefore an offense for which "[e]xtradition shall take place."⁸² Weiss and Madame Z also violated an Avonian statute which prohibits the exportation of cultural property without an authorization

77. UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property, supra note 26, art. 7.

78. Id. art. 8.

79. Nafziger, International Penal Aspects of Protecting Cultural Property, 19 Int'l Law. 835, 851 (1985).

80. Extradition Treaty between the Kingdom of Avon and Republic of Misra, art. (2): "1. Extradition shall take place . . . for willful acts which fall within any of the clauses of the Appendix"

81. Id. Appendix, § 24.

82. Id. art. (2).

certificate,⁸³ an offense that is punishable in both Avon and Misra by deprivation of liberty for at least one year.⁸⁴ The extradition treaty does not require Avon to allege a specific offense as the basis for its request, but only a "willful act" that falls within a general category of extraditable offenses. Avon's request conforms not only to the requirements of this extradition treaty, but also to generally accepted requirements established by the extradition procedures of other states.⁸⁵

Avon has supported its request with sufficient evidence to justify the extradition of Weiss and Madame Z. The statue vanished immediately after Weiss and Madame Z had visited the Museum. Three days later, the Misran minister of cultural affairs cheerfully announced that the statue had arrived in Misra and would never be returned. He refused to answer any questions concerning the theft of the statue from the Avon National Museum. Investigative reports, however, confirmed Weiss' theft of the statue and its transfer to Misra in Madame Z's luggage. Misra cannot be relieved of its duty to extradite simply because some of this evidence may be inadmissible at an actual trial.⁸⁶ Because the evidence is sufficient to implicate Weiss and Madame Z in the theft under "general principles of law recognized by civilized nations,"⁸⁷ Misra could not deny Avon's extradition request in good faith.⁸⁸

83. Avon had adopted legislation consistent with Article 6(b) of the UNESCO Convention on the Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership of Cultural Property, supra note 26, which makes it illegal to export cultural property without an authorization certificate (C.9).

84. Extradition Treaty between the Kingdom of Avon and Republic of Misra, art. (2).

85. Draft Convention on Extradition, art. 12(2)(c), 29 Am. J. Int'l L. 160 (1935). The extradition request shall contain "[a] statement of the act or acts for which it is intended to prosecute or punish the person claimed, together with a statement of the punishment or correctional measures which may be imposed for such act or acts by the law of the requesting State"

86. Cf. *United States v. Costello*, 350 U.S. 359 (1963) (a finding of probable cause may be based upon hearsay evidence in whole or part).

87. Statute of the International Court of Justice, art. 38(c).

88. The requesting state usually need only show a *prima facie* case. See R. Hingorani, Modern International Law 181-83 (1984).

B. Misra Cannot Invoke Diplomatic Immunity On Behalf Of Madame Z.

Misra is not entitled to invoke diplomatic immunity on behalf of Madame Z. Under the Vienna Convention on Diplomatic Relations,⁸⁹ which largely codified customary international law relating to diplomatic immunities,⁹⁰ Madame Z was required to "respect the laws and regulations of [Avon]."⁹¹ Avon was not bound to grant her immunity at all except as "required to ensure [her] transit or return,"⁹² and only if she was "proceeding to take up or return to [her] post . . . or returning to [her] own country"⁹³ Madame Z's theft of the Theslon statue violated the laws of Avon, and immunity from the consequences of that theft was not in any way required to ensure her transit or return from Avon. Furthermore, Madame Z spent three days in Avon with her lover, during which she gave a lecture, attended two concerts, and visited a museum. Her activities can hardly be described as "proceeding to" her diplomatic post, or "returning to" Misra.⁹⁴ Any attempt by Misra to invoke diplomatic immunity on Madame Z's behalf is a bad faith attempt to avoid its international obligations.

C. Misra Cannot Deny Extradition Of Madame Z And Weiss Under The Pretense That Their Crime Is A Political Offense.

The extradition treaty between Avon and Misra contains no provision permitting a requested state to deny extradition by qualifying a particular crime as a "political offense." On the contrary, the treaty expressly provides that "extradition shall take place"⁹⁵ for the offenses which are described in the treaty. No rule of customary

89. Vienna Convention on Diplomatic Relations, signed Apr. 16, 1961, 23 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95 (entered into force Apr. 24, 1964), art. 40(1).

90. M. Akehurst, A Modern Introduction to International Law 112 (1982).

91. Vienna Convention on Diplomatic Relations, supra note 89, art. 41(1).

92. See id. art. 40(1).

93. Id.

94. It is clear from the wording of Article 40(1) that under such circumstances Madame Z is not entitled to any diplomatic immunity. See E. Donza, Diplomatic Law 259 (1976). See also Harvard Law School Draft Convention on Diplomatic Immunity, 26 Am. J. Int'l L. 88 (1932) (clearly, the immunity was restricted to transit; and, interruption of such transit resulted in forfeiture of the immunity).

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

international law requires that a state deny extradition of a political figure.⁹⁶ Misra's duty to perform its obligations in good faith therefore precludes a denial of extradition under the pretense that either Weiss or Madame Z committed a political offense.

D. Misra Cannot Deny Extradition Of Madame Z And Weiss On The Basis Of The Nationality Clause In The Extradition Treaty.

Misra cannot in good faith invoke the nationality clause of the extradition treaty⁹⁷ on behalf of Weiss and Madame Z. The honorary citizenship and permanent residence conferred upon Weiss do not make him a "national" of Misra within the meaning of this provision.⁹⁸ Weiss did not become an "honorary citizen" until after the crime occurred.⁹⁹ Any attempt by Misra to rely on the nationality clause could not be deemed a proper exercise of discretion by Misran authorities because the clause expressly limits Misra's discretion by imposing a good faith requirement. The reason for permitting a state to deny extradition of its own nationals "is the fear that the offender, being a foreigner in the demanding state, might have some difficulties in defending himself in a proper manner"¹⁰⁰ Madame Z is a lawyer who lived and taught in Avon, and once served as the Misran Ambassador to Avon. Weiss is an Avonian national, who is also an expert in Avonian art. Any claim by Misra that Madame Z and Weiss would be prejudiced in defending themselves if extradition were granted is completely unfounded. In any event, Misra could not legitimately invoke this justification for denying extradition unless it were willing to prosecute Weiss and Madame Z in its own

96. 6 M. Whiteman, Digest of International Law 853 (1968).

97. Extradition Treaty Between the Kingdom of Avon and the Republic of Misra, art. 12: "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."

98. See 8 M. Whiteman, Digest of International Law 14 (1967): "Conferral or receipt of honorary citizenship does not carry with it the usual legal rights and obligations existing between a state and its national"

99. See Draft Convention on Extradition, comment to Reservation Number Three, 29 Am. J. Int'l L. 237 (1935): "Certainly a reservation as to non-extradition of nationals should not apply to those who have acquired nationality . . . since the commission . . . of the act for which extradition is sought."

100. 2 M. Bassiouni & V. Nanda, A Treatise on International Law 318-19 (1978).

courts. Because Misra is clearly unwilling to do this, it cannot in good faith assert that the nationality clause justifies its refusal to grant extradition.

IV. MISRA MUST COMPLY WITH ITS GOOD FAITH OBLIGATIONS UNDER INTERNATIONAL LAW BY RETURNING THE STOLEN STATUE TO THE AVON NATIONAL MUSEUM.

Misra is responsible for the theft of the statue of Queen Theslon from the Avon National Museum. States are accountable for the actions of their diplomatic agents.¹⁰¹ The theft was arranged by Madame Z, Misra's ambassador to France. Furthermore, the Misran government ratified the theft when its Minister of Cultural Affairs cheerfully acknowledged that the statue was in Misra and unequivocally declared that it would never be returned to Avon.

The statue of Queen Theslon was documented as inventory of the Museum in 1913 after the Museum purchased it from an anonymous benefactor who had obtained Misran customs clearance to export the object. Misra is responsible for the acts of its customs officials, and has no right to complain against Avon if those officials were guilty of neglect or corruption.¹⁰² Before the Museum first displayed the statute, prompting Misra's demands for its return, Misra apparently was not even aware of the statue's existence. Even after Misra conducted a full investigation of the matter, it was unable to determine the location of the statue prior to its acquisition by the Museum. Because the Museum legally acquired the statue, Misra's possession of it is wrongful. Because Misra is responsible for the theft, customary international law requires that it make reparation by returning the statue to Avon.¹⁰³

Misra is also obligated to return the statue as a party to the UNESCO Convention of 1970,¹⁰⁴ under which Misra owes a duty to all states to ensure that stolen cultural property is returned to its rightful owner. Even if the court were sympathetic to

101. See C. Eagleton, Responsibility of States in International Law 62-63 (1982).

102. See id.

103. See Factory at Chorzow (Ger. v. Pol.), 1927 P.C.I.J. ser. A, No. 17, at 47.

104. UNESCO Convention on the Means of Prohibiting the Illicit Import, Export, and Transfer of Ownership of Cultural Property, supra note 26.

Misra's claim that the statue is part of its "national patrimony," Misra's failure to fulfill its international obligations cannot be tolerated, for "self-help measures pose a serious threat to the future of international cooperation in managing the flow of cultural property."¹⁰⁵ Avon, therefore, respectfully asks this Court to order Misra to return the statue of Theslon to the Avon National Museum.

A. Misra Has a Duty to Return the Statue Under the UNESCO Convention, to Which it is a Party.

As a party to the UNESCO Convention of 1970, Misra has undertaken "to ensure that [its] competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner"¹⁰⁶ Unlike other provisions of the Convention, the duty imposed by this Article extends to all states, not just to other states who are parties to the Convention.¹⁰⁷ Treaty provisions may establish rights in favor of nonparty states "if the parties to the treaty intend the provision to accord that right either to [a] third state, or to a group of states to which it belongs, or to all states, and the third state assents thereto."¹⁰⁸ A non-party state may invoke such a treaty provision if it "compl[ies] with the conditions for its exercise provided for in the treaty."¹⁰⁹ Avon has enacted legislation consistent with Article 13 of the UNESCO Convention, providing for the return of illicitly exported items of cultural property to their rightful owners. Because Avon has complied with all conditions necessary to invoke the right established in Article 13 of the Convention, it is entitled to demand that Misra perform its duty to return the statue of Queen Theslon, which was illegally exported from Avon after it was stolen from the Avon National Museum.

105. Nafziger, supra note 79, at 852.

106. UNESCO Convention on the Means of Prohibiting the Illicit Import, Export, and Transfer of Ownership of Cultural Property, supra note 26, art. 13(b).

107. See, e.g., id., art. 7.

108. Vienna Convention on the Law of Treaties, supra note 62, art. 36(1).

109. Id., art. 36(2).

B. Misra Must Return the Statue Immediately in Accordance with the Terms of the Extradition Treaty.

Misra is obligated to return the statue of Theslon to Avon under Article 12 of the extradition treaty. This provision requires the surrender "all articles [or] objects relating to the offense" committed by Weiss and Madame Z.¹¹⁰ This obligation is absolute, and applies "even when extradition cannot be granted due to the death, disappearance, or escape of the accused."¹¹¹ Misra must return the statue to Avon in order to comply with its good faith obligations under international law.

CONCLUSION

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

1. That the Sloane Collection legally reposes in the Avon National Museum where it has been preserved and displayed for nearly two centuries;
2. That the Sloane Collection forms part of the common cultural heritage of mankind;
3. That Misra has no right, title, or interest in the artifacts it ceded to Avon in 1908;
4. That Misra must comply with international law by extraditing Madame Z or Eric Weiss to Avon; and
5. That Misra must comply with international law by returning the statue of its ancient Queen Theslon to the Avon National Museum.

Timothy J. Grosfeld
Ernie Duhel

Respectfully submitted,

Kathy K...
Bill B. D...

Don M. ...

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

111. Id.