NO.

IN THE

INTERNATIONAL COURT OF JUSTICE, THE HAGUE, NETHERLANDS

APRIL TERM, 1986

THE REPUBLIC OF MISRA APPLICANT

v

THE KINGDOM OF AVON RESPONDENT

ON SUBMISSION TO THE

INTERNATIONAL COURT OF JUSTICE

MEMORIAL FOR THE REPUBLIC OF MISRA

ERRATA (MISRA)

1. Under Questions Presented delete " Earl " and insert " Ehrich ".
2. Page 1, para. 2, lines 1 & 2 : delete " dearest dearest " and insert " clearest ".
3. Page 6, para. 1, line 10 : delete " and " insert " end ".
4. Page 6, para. 2, line 7 : delete " c173 " ; insert " 173 ".
5. Page 7, Para. 2, line 15 : delete " accounts " ; insert " accounts"
6. Page 7, para. 3, line : " " (quotation sigh) between " wright" and"violence" .
7. Page 8, para.2, line 2 : delete " on " and insert " in ".
8. Page 10, para.2, line 1 : delete " examination " and insert " ex-
9. Page 10, para. 2, line last and penultimate : delete " were " and " theirs ", insert " was " and " its " respectively.
10. Page 12, para. 2, line 6 : delete " conversation " ; insert " conservation ".
11. Page 13, line 3 ; closed quotation mark must be inserted after " journalists ".
12. Page 13, line 6 : open quotation mark must be inserted before " remains ".
13. Page 13, para.3 : delete open quotation mark which precedes " subsequent ".
14. Page 13, para. 3 : The second sentence should read " Misra could therefore quite properly refuse the request by Avon given the the evidential standard required under Article 8 of the Treaty".
15. Page 14, last para., 2nd sentence " asertion"should be corrected to read " asportation ".
16. Page 14, last para., 3rd sentence : " Weiss and A should read

" Weiss and Z ".

17. Page 15 : The correct name of the case cited in the last para. is United States v. William Rauscher .

18. Page 16, last para. first line : " contrived " for " continued ".

19. Page 17, line 2 : substitute " custom " for " pattern ".

20. Page 17, last line of second para; substitute " Bassiouni " for " Bossiouni "

21. Page 17, end of fourth para. : " form " should read " from ".

22. Page 17, : The correct name for the case cited in the last para R. v. Governor of Brixton Prison ex parte Kolczynski

23. Page 17, last para, third line : the word " broader " must be inserted in the space preceding " meaning ".

24. Page 18, line 1 : must read " Shearer concludes that the Polish Seaman's Case ... "

25. Page 18 ; " ore " in the first sentence under Nationality sub-heading should read " are ".

26. Page 18 : in the second para . under the Nationality subheading, the sentence "Can the " act of state" doctrine stand before I.CJ. ?" must be deleted.

27. Page 18; delete in the second to last para., the sentence " was this necessary in the first place ".

28. Page 19 : in the second line of the extract " nations " should be corrected to read " national ".

29. Page 19, last para., line 1 : " testified " should be corrected to read " identified ".

30. Page 20, para. 3 , second sentence : the word " elevated " should be entered into the space which is immediately after the word " being ".

31. Page 20, para 3, last line : " strong should be corrected to read " stronger ".

32. Page 21, para. 2, Line 3 : " international " must be corrected to " internationally ".

33. Page 21, last para. : The correct name of the convention is The UNESCO Convention on the Illicit Movement of Art Treasures.

34. Page 22, para 3, : " irrevocable " should be " invocable ".

35. Page 26, : Footnote 56 should read : " Supra Re Goilwey".

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2. Brownlie I. International Law and the Use of Force by States.
3. Deak, 19 American International Law cases.
4. Denza E., Diplomatic Law Commentary on the Vienna Convention on Diplomatic Relations . (1970).
5. Harris, Cases and Material on International Law. (3rd Ed. 1983)
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7. Phipson, Phipson on Evidence. (12th Edn. 1982).
8. Schultz H., The Classic Law of Extradition and Contemporary Needs in International Criminal Law.
9. Shearer I.A., Extradition in International Law . (1971).
10. Ulassic Ed., Explorations in Aerospace Law. (1968).
11. Oppenheim, International Law (8th Edn. 1955).
12. Great Britain - Israel Treaty of 4th April, 1960. T.S.No. 77 (1960) Cmml. 1223.
13. Hague Peace Conferences 1899 and 1907 ; done at the Hague 29th July 1899 and October 1907 respectively.
14. Hague Convention on certain questions relating to the conflict of Nationality Laws 179 LNTS 89.
15. Vienna Convention on the Law of Treaties , May 23rd, 1969.

PERIODICALS

1. Deere, Political Offences in the Law and Practice of Extradition 27 AJIL 247.

2. Lauterpacht E, 23 British Yearbook of International Law 218 (1946).

3. Smith, 23 British Yearbook of International Law 226 (1946).

4. Lauterpacht E, 30 British Yearbook of International Law.

5. Wright 26 American Journal of International Law. 26 (1946).

STATUES

1. Statue of the International Court of Justice.

2. Lietchenstein, Law of Jan, 4th, 1934.

ADDITIONAL PERIODICAL

Whiteman M, Whiteman's Digest of International Law (1968).

JURISDICTION

Litigation is commenced in accordance with:

1. The Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, done at Paris on the fourteenth day of November 1970.

2. The Hague Peace Conferences, done at the Hague on the eighteenth day of October, 1907 and the twenty-ninth day of July, 1899.

3. The Vienna Convention on the Law of Treaties, done at Vienna on the twenty-third day of May, 1969.

4. The Extradition Treaty between the Governments of the Kingdom of Avon and the Republic of Misra.

5. The provisions of Article 38 (1) of the Statute of the International Court of Justice.

STATEMENT OF FACTS

The Republic of Misra was a poor country colonized by the Empire of Salamis during which time Major Harrison Sloane was appointed as the Kingdom's consul there in 1802.

Sloane, an art collector, was denied permission from the Provincial Bey to undertake measures for the historic preservation of Misra's ancient capital of Tannis. He successfully appealed to the Emir of Salamis. Under the " Fezgrina Directive " issued to him, he was authorized to remove " quelques pieces de pierre avec inscriptions et figures " , over 200 crates of remains were shipped to Avon.

The art treasures were sold by Sloane to his government after a study commission appointed by it approved the circumstances under which they were acquired. They were placed in the government-owned Avon National Museum, and inspired worldwide interest in ancient Misran art, including humans remains containing jewellery, and documents.

Misra achieved independence on July 4,1826 and its immediate and subsequently consistent requests to Avon for the return of the Sloane Collection were refused with equally consistency. Anti-Avonian sentiment in Misra resulted in the violent deaths to several Avonian citizens including diplomats. Avon therefore launched a punitive expedition against Misra. An art expert, D. Van Dean, accompanied the Avonian troops and acquired many Misran artifacts which were ceded to Avon as " war reparation " under the peace treaty concluded between the two countries "

In 1913, a marble bust of the Ancient Misran queen Theslon was excavated and exported from Misra. No evidence of compliance with Misran 1827 regulations prohibiting such acts without governmental consent was shown. Inconclusive evidence of bribery and deception existed, but the entire circumstances of its excavation and export were never conclusively established. The best were added to the Sloane Collection.

Misra's requests for the bust and the Sloane collection were all denied . Avon claimed ownership on the basis that the collection was part of the common cultural heritage of mankind , and that it was subject to damage on outdoor display in Misra. Misra claimed the collection on the basis of it being illegally acquired by Avon and it being Misra's cultural patrimony.

On July 1984, the marble bust of Theslon was removed from the Avon National Museum and returned to Misra in undisclosed circumstances. Investigative journalisn revealed that it was removed by Madame Z, the Misran ambassador to France who was on a 3 days stopover in Avon en route from Tannis to Paris and Ehrich Weiss, the lover of Madame Z. Both persons were visitors at the Musuem immediately before the bust was missed. Erich Weiss was accorded Misran honorary citizenship and permanent residence, and was treated as a national hero in Misra. Without explanation, Misra has denied Avon's request for the extradition of Madame Z and Ehrich Weiss to face charges of theft , and for the return of the marble bust.

Both countries are original parties to all global agreements on the law of armed conflict and signatories to the UNESCO Convention on the Means of Pronibiting and Preventing the Illicit Import,Export and Transfer of Ownership of Cultural Property done in 1970.

Both signed it in 1975, but only Misra has ratified it and Avon is not now likely to do so. They are also parties to bilateral treaty on extradition which contains the following provisions:

ARTICLE 2
Extraditable Offences

1. Extradition shall take place, subject to this Treaty, for wilful 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 wilful 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 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 satisfactory assurance from the requesting Party that the articles 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.

****

1. Bergman v. re Sieves 191 Federal Supplemental 334 (1946).

2. British Guiana v. Venezuela Boundary Arbitration 92 B.F.S.P 160 (1899-1900).

3. The Charmanski's Case Periodques Belges Vol.24 (1911) no.854.

4. Charmezal Arbitration Case 5 A.J.I.L. 782 (1911).

5. Chorzow Factory Case P.C.I.J. Rep. Series A, No.17.

6. Menzel v. Liszt 49 Misc. 2d 300, 267 N.Y.S. 2d 804.

7. Nottebohm Case 1955 I.C.J Rep 4.

8. R. v. Governor of Pentonville ex parte Teja /1971/ 2 All ER 9.

9. R. v. Guildhall Magistrates Courts ex parte Jarrett Thorpe The Times , Oct.5,1977 (Q.B.D.)

10. R. v. Governor of Brixton Prison ex parte Kolcizynki /1955/ 1 Q.B.D 540.

11. R. v. McDonald ex parte Strutt /1901/ Q.L.J. 85.

12. re Galway /1896/ 1 Q.B.D. 230.

13. Right of Passage Case I.C.J. Rep. 1960 ; page 6.

14. S. v. Pirzenthal /1969/ 2 S.A. 224 (T).

15. United States v. Rosenberg etal (1946) 6 F.R.D. 69.

16. United States v. WilliamRauscher 119 U.S. 407 (1866).

QUESTIONS PRESENTED

I. Whether the Government of Misra must comply with the Extradition Treaty made with the Government of Avon and return the Bust of Queen Theslon and Madame Z and Earl Weiss to Avon.

II. Whether the Government of Avon is under an obligation to return the Sloane Collection to Misra, according to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of ownership of Cultural Property.

III. Whether the Sloane Collection was lawfully taken from Misra by Major Sloane and under "the peace Treaty" of 1908.

IV. Whether the Marble Bust of Theslon was lawfully removed from Misra in 1913, or from Avon in July 1984.

SUMMARY OF ARGUMENTS

1. The Sloane Collection was unlawfully taken from Misra because:

   (i) Major Sloane exceeded the authority of the Fezgrina Directive.

   (ii) The Peace Treaty of 1908 was unlawfully procured by duress.

   (iii) Such items of cultural property could not be lawfully removed under then applicable rules of war.

   (iv) The marble bust of Queen Theslon was illegally exported from Misra.

2. The Sloane Collection is not a subject of the common heritage of Mankind in such a way as to deprive it of its rightful national ownership.

3. There is no evidence to satisfy the charge of theft laid against Madame Z and Earl Weiss so as to make them extraditable under the bilateral extradition treaty between Avon and Misra.

4. Even if there was such evidence, Madame Z is not prosecutable in Avon because of her diplomatic privilege, and Earl Weiss is now a Misran citizen over whom discretionary power of non-extradition is exercisable.

5. If Madame Z and Earl Weiss committed any crime in Avon, such was a political offence for which extradition is not allowable under international law.

I. THE SLOANE COLLECTION RESULTED FROM COMMON THEFT BECAUSE AUTHORITY FOR ITS AUTHORITY FOR ITS ACQUISITION WAS EITHER LACKING OR WAS EXCEPTED

(i) The Fezgrina Directive, even if lawfully issued, was exceeded

Even if the Fezgrina Directive could legally override the decisions decisions of the Provincial Bay, it cannot be relied on to justify all the types nor amount of objects taken by Major Sloane. No reasonable interpretation of the French translation could include preserved human remains nor the documents and jewellery they obtained. The number of crates, men and years used by Major Sloane was excessive enough to evoke great protest not only from the citizens of Misra, but also from the Government of Salamis.

The latter's protect to Major Sloane's government is the dearest dearest and strongest indication of the good that the government of Salamis has decided that the authority conferred by the Fezgrina Directive has been exceeded.

Major Sloane's excesses were acts for which he could have been been expelled from Misra. A consul guilty of illegal or improper conduct is liable to have his exequator revoked.[1] Salamis was under no obligation to retain Major Sloane as Avon's consul if, for any reason, he became unacceptable to the Salamis government.[2] The fact that Salamis protest stopped short of expulsion could not make Sloane's ultra vires actions a legal or proper one. The art objects taken by Sloane were therefore taken as a result of common theft.

(ii) The Punitive Expedition and the Events Thereof Cannot Justify the removal of art treasures from Misra in 1908

The punitive expedition launched against Misra was an unlawful act of war, and did not produce a state of war. Mere hostilities are not enough to produce a state of war.[3] The parties involved must intend to be, and recognize that they are, in a state of war.[4] The existence of a war was never admitted by either Avon or Misra during hostilities, if indeed there were any.

The expedition was therefore only an unlawful use of force short of war. It was unlawful for two main reasons. Firstly, even if the anti-Avonian sentiments in Misra were sufficient prima facie justification for such a reprisal[5], Avon undertook no alternative mode of redress before such drastic action. International law has always recognized the need to exhaust peaceful remedies before resort is had to hostile and violent ones.[6] Secondly, the expedition was used as a means of plunder, and not only as a proportionate and lawful reaction to a perceived wrong.[6A]

2. THE HAGUE CONVENTIONS 1899 AND 1907

Assuming, while not conceding, the existence of a state of war and not merely an act of war, the expedition was still illegal for non-conformity with then applicable laws and rules governing the conduct of war. The Hague Peace Conferences 1899 and 1907[7] contain explicit prohititions against acquisition of art treasures as war booty or loot. Article 56 of the 1899 treaty prohibits the seizure of "works of art". It also prescribes that such property, "even when state property, shall be treated

as private property." Article 46 states, inter alia, that "private property cannot be confiscated." Article 47 states simply that "pillage is formally prohibited."[8]

In the face of these express and unequivocal prohibitions against taking art treasures during the course of a war, Avon can sustain no claim to be the lawful owner of the property in question. Breach of these regulations has been held to deprive subsequent purchasers of title to such property.

In Menzel v. Liszt[9], the plaintiff brought an action in replevin to recover a painting by Marc Chagall which she and her husband had left in their apartment in Brussells when they fled in March 1941, before the oncoming of Nazis. It was taken by the Nazis and bought by Liszt from an art gallery. Arthur G. Klein, J. held that the seizure of the painting by the Nazis could not "be treated as lawful booty of war by conquering armies," and that the seizure, if classifiable at all, must be classified "as plunder and pillage, as those terms are understood in international and military law". Klein, J. went on to hold that the painting was not booty as described in the Annex to the Hague Convention of 1907. Instead, it was returnable because "where pillage has taken place, the title of the original owner is not extinguished." The plaintiff's action accordingly succeeded.[10]

3. THE ILLEGAL ROLE OF ART EXPERT D. VAN DEAN IN THE EXPEDITION

An examination of the applicable rules and customs of International Law shows that D. Van Dean acted illegally in taking Misran art treasures during the punitive expedition. Firstly, he had no right whatsoever to

capture war booty. Under both the Hague Peace Conferences of 1899 and 1907, Articles I[11] confer the rights and duties of war[12] on volunteer corps if they fulfill four conditions, the last of which is "to conduct their operations in accordance with the laws and customs of war." By capturing works of art, D. Van Dean was in breach of the very convention from whch he could have derived the rights and duties of the armed forces. He was never, therefore, elevated from the status of a private citizen committing acts of plunder and pillage upon a foreign besieged nation. Such persons have always been treated as thieves in International Law. Moore[13] quotes from "Instructions for the Government of Armies of the United States in the field, General Orders, No. 100, April 24, 1863 "to show how such persons have been seen in the practice of states: "Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction and plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, ... such men, are not public enemies, and therefore, if captured ... shall be treated summarily as highway robbers or pirates."

Secondly, there is no evidence to suggest that D. Van Dean was acting on the instructions of his government, a fact which reinforces the conclusion that his were private acts of theft and pillage. But it was held in U.S. v. Rosenberg et. al[14] that such acts did not become legal simply because the marauder was appointed by his government. Rosenberg was designated by Hitler on January 29th 1940 as Head of the Center for National Socialist Ideological and Educational Research. This organization seized enormous quantities of cultural property after Rosenberg was issued to decree to "search libraries, lodges and

cultural treasures owned by Jews"[15]. The court in Menzel v. Liszt adopted the reasoning in the Rosenberg case and held that the property in the former was illegally obtained. Since the Nazis could not pass any title better than that which they could obtain from their illegal act, the ownership remained in the plaintiff. The court also held that the museum and the defendant could not benefit from the doctrine of equity which protects a bona fide purchaser for value, nor could they set up a defence under the relevant Statute of Limitations.

4. THE SO-CALLED PEACE TREATY COULD NOT TRANSFORM ILLEGALLY ACQUIRED LOOT INTO WAR REPARATIONS

There are two main reasons why the so-called Peace Treaty of 1908 1908 cannot bind Misra. The first involves a question of fraud and the second one of coercion.

There is no evidence to show that Avon intended to create a state of state of war against Misra, nor that misra considered itself at war with Avon. To cover illegally acquired loot with the respectability of "war reparation" is all Avon sought to achieve by the treaty. This should not be allowed to succeed. It would amount to a retroactive declaration of war on Misra. Avon cannot be allowed to term the hostilities as "war" in order to cloak its illegalities. That would be to allow an act tantamount to fraud, which, under the Vienna Convention on the Law of Treaties of 1969[16], is a ground for invalidating treaties. Even if the 1969 convention cannot effectively govern the events of 1908, the same results could be achieved if this court applies the general equitable principle that a party will not be allowed to benefit from its illegal acts. This the court is allowed to

do under Article 38(1)(c) of the Statute which sets it up. This argument has the support of eminent academic opinion. Commenting in the Blockade of Venezuela by Germany, Great Britain and Italy in 1902-3 to force the Venezuelan governments to recognize claims for injuries to their subjects, Brownlie[17] describes the action against Venezuela thus: "In form a war blockade it was in essence a pacific blockade conducted in an illegal manner." He concluded that the British Prime Ministers claim that a state of war existed "was merely a cloak for the illegal form of the pacific blockade". Though no peace treaty was signed with Venezuela, there was an exchange of protocols to and hostilities, and the positions of Misra and Venezuela are strikingly similar.

Secondly, Misra would no doubt be forced to agree with whatever conditions Avon imposed for the cessation of hostilities. Here a newly independent under-developed state was feeling the heels of a more powerful country. The concept of war duress is therefore available to Misra, and should be employed to override any concept of pacta sunt servanda. This vitiating doctrine of coercion was recognized and applied in Bernstein v. N.V. Nederlandsche-Amerivanshe etc. C173F.2d 71 [C.A. 2d. 1949]) Bernstein was imprisoned in Germany in 1937 and was in prison compelled by Nazi officials to execute documents purporting to transfer some of his property to a Nazi designee. In litigation concerning this property, the plaintiff alleged duress, and in light of the government's policy "to undo forced transfers and restitute identifiable property to victims of Nazi persecution wrongfully deprived of such property ...",[18] the court held that it had jurisdiction to entertain Bernstein's claim

despite the fact that it involved enquiry into the acts of a foreign government.

In light of the Vienna Convention on the law of treaties 1969 Article 52 which makes a treaty void if procured by the threat or use of force in violations of the principles of international law, it is clear that this Court can apply the Bernstein principle to assist Misra. Just as how Bernstein was influenced by the fact that his 'ife was in danger if he did not comply; so, it is submitted, was Misra influenced by the fact that non-compliance with Avon's wishes would result in a prolongation of the punitive expedition. Brownlie[19] mentions that the customary or classical rule that duress does not render a treaty void or voidable is now questionable, and that a number of eminent jurists have committed themselves to the contrary view. It is submitted that an international jus cogens has developed whereby the classical doctrine no longer prevails. This jus cogens has arisen from the numerous opinions[20] and decisions[21] against the recognition of the fruits of unlawful aggression. This new trend accounts with United Nations declarations against colonial domination and military oppression,[22] and culminates in the provision of the 1969 Vienna Convention Article 52.

Adoption of this line of reasoning by this Court can result in a most desirable result possibly best enunciates by Quiney Wright[23]. Violence and war would cease to have value in advancing the legal position of States .... It would remain an outlaw if attemped to utilize the fruits of its violence, and would be fair game for all states or insurgents who sought to embarrass its enjoyment of those fruits."

(iii) THE MARBLE BUST OF QUEEN THESION WAS ILLEGALLY REMOVED AND EXPORTED FROM MISRA

There is no evidence to even faintly suggest that the Marble Bust of Queen Theston was exported from Misra in accordance with the 1827 regulations. No governmental consent for excavation is evident, and such consent for export of the bust - if existent, was obtained by fraud and/or corruption.

The absence of consent for the examination is shown by the fact that the location of its final and circumstances of its acquisition were never fully disclosed. It is difficult to imagine that consent would have been granted to an anonymous person to excavate the bust from an unknown site.

The customs clearance alleged to have been obtained is equally illusory. The facts suggest that the customs official had been led to believe that the case presented to him contained only minor artifacts of no "historical value or significance." Alternatively, his consent, if present, was procured by an act of corruption and cannot bind the government of Misra for whom he worked.

It is a recognized doctrine in international law that corruption will vitiate consent. This is so in relation to treaties according to the Vienna Convention 1969 article 50. It should apply equally to matters within the domestic jurisdiction of a state and to officials acting on its behalf.

The Government of Misra therefore begs the court to declare that the Sloane collection resulted from common theft.

II. AVON IS BOUND BY INTERNATIONAL LAW TO RETURN THE SLOANE COLLECTION TO MISRA

Under the principles enshrined in the UNESCO Convention on the illicit movement of art treasures 1970,[24] and enshrined in the municipal laws of both Avon and Misra, and under the general principles governing restitution in international law, Avon is bound to return the Sloane collection which is a part of Misra's national cultural heritage.

(i) Avons obligation under the 1970 convention

Since Avon has not ratified the 1970 convention, it may be assumed, though not conceded, that it is not bound by it in the sense that the Convention is not in force with respect to Avon according to Article 21. This does not mean Avon is not bound by the principles contained in the Convention.

Avon has not only signed the Convention, but has implemented its provisions in its municipal laws. Its refusal to ratify the treaty, contrary to its intention up to the time of this dispute, is meant to defeat the objects and purposes of the treaty to which it is a signatory.

Such an act is prohibited by the Vienna Convention on the Law of Treaties 1969[25] which in Article 18 states that a signatory to it should refrain from acts which would defeat its object and purpose. Thus while Avon is not technically bound by the 1970 UNESCO Convention per se, it is bound to act according to its local laws which have implemented the Treaty's provisions.

Article 13 of the 1970 UNESCO Convention demands, inter alia, that states "ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owners" and "admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners".

These obligations are not conditioned by the date on which the illicit exports, loss of theft occurred,[26] and are therefore applicable to the Sloane Collection. Indeed Article 11 recognized this by stating that "the export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit."

(ii) Avon's obligation under the customary international law principle of restitution

It is a well recognized principle of municipal and international law that where there is a right there is also a remedy. On the Chorzow Factory Case 1928[27], the Permanent Court of International Justice was concerned with the seizure of a nitrate factory in Upper Silesia by Poland. It laid down the greatly respected principle that "it is a general conception of law that every violation of an engagement involves an obligation to make reparations". The court further added that it is "a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured state have suffered as a result of the act which is contrary to international law." Since the Sloane collection is still possessed by the Government of Avon, its restitution is possible in a form which is most convenient and has been requested by Misra. The applicability of the Chorzow principle becomes even greater. This court is urged to follow the lead of Menzel v. Liszt[28] where the painting concerned therein were taken from the subsequent purchaser and restored to their rightful owner.

(iii) The Sloane Collection is Returnable as Part of Misra's National Cultural Heritage

The preamble to the 1970 UNESCO Convention acknowledges that "cultural property constitutes one of the basic elements of civilization and national

culture." Avon would seek to deny Misra of what is hers by a claim that the property belongs to the common cultural heritage of mankind.

This claim is deficient in logic and authority. The property could only belong to the world if it belonged to some nation in the world. It is Misra's first and the world's next.

Cultural property is indeed beneficial to civilization as a whole, but to claim that it belongs to any nation which had the means of acquiring it, in preference to the nation which originally housed it, is to sanction the idea that might is right. Such property belongs to the world only in existence and historical significance.

The high seas and outer space are truly the common heritage of mankind, being, as they are, so unsusceptible to appropriation. The analogy of these geographical areas with cultural property becomes absurd when it is remembered that cultural property is not only capable of appropriation, but was made in most cases, by man. Indeed, the day is already being contemplated when the concept of common heritage of mankind may not be applicable to the moon itself.[29]

(iv) <u>Misra's alleged inability to preserve the Sloane Collection</u>

It is now an accepted principle of international law that the rights of states should not be denied on the basis of their economic disabilities. This has been recognized in several United Nations declarations and resolutions. The U.N. Declaration on the granting Independence to Colonial Territories and People[30] 1960 provides in Paragraph 3 that "inadequacy of political, economic, social or education preparedness should never serve as a pretext for delaying independence". Similarly, the Charter of Economic Rights and Duties of States 1974[31] states in Article 2 Paragraph 1, that "every state has and shall freely exercise full permanent sovereignty,

including possession, use and disposal, over all its wealth, natural resources and economic activities".

This principle has been adopted by the 1970 UNESCO Convention which provides in Article 17 that States may obtain the advice and assistance of UNESCO in dealing with their cultural property. The UNESCO Recommendation concerning the Protection, at a National Level, of the Cultural and Natural Heritage 1972[32], provides in VII 66 that "Member States should co-operate with regard to the protection, conversation and presentation of the cultural and natural heritage, seeking aid, if it seems desirable, from both international organizations, both inter-governmental and non-governmental." It seems clear then that Avon cannot justifiably refuse to return the Sloane collection on the pretext that Misra cannot take care of them. Indeed, Misra's inability relates only to "outdoor display", and there is no evidence to show that the collection cannot be housed indoors.

(i) INSUFFICIENCY OF EVIDENCE

The Kingdom of Avon has sought to make a request of extradition based on a charge of theft. This is based on 'subsequent investigative journalism, by foreign journalists. It is the only evidence. It merely reveals that the two subjects 'arranged' for the removal of the bust. Indeed up until now, how Erich Weiss is supposed to have removed the bust remains a mystery'.

The evidence amounts to nothing more than what is known to English derived common law as hearsay. Article 8 of the Treaty has provided that the evidence must be sufficient according to the laws of the requested Party to justify committal for trial. If, as is quite probable, Misra is of a common law or American type legal system then it would be constrained to abide with one of the basic tenets of evidence, the Rule against hearsay. This is ably enunciated in Phipson on Evidence:

> "Former statements of any person whether or not he is a witness in the proceedings, may not be given as evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them, unless they were made by a party or in certain circumstances, the agent of a party to those proceedings. The rule at common law applies strictly to all classes of proceedings and there is no special dispensation for the defendant in a criminal case.:

Clearly then, if Misra is a common law jurisdiction and therefore employs the Rule against hearsay, then such evidence as 'subsequent investigative journalism would be inadmissible under the laws of Misra the requested state and would inevitably prove insufficient. Misra could therefore quite properly refuse the request by Avon. The evidential standard required under Article 8 of the Treaty.

The possibility exists however that Misra might not be of a jurisdiction which employs the Rule against Hearsay. In such a case then

the reporter's evidence may well be admissible before a Misran court. Even then it seems that the evidence is of such a tenuous nature so as not to satisfy the requisite standard of Article 8 thus entitling Misra to refuse.

It is submitted that what is required is a prima facie case of guilt against the parties for the crime of theft. This is well supported by the views of one publicist, I.A. Shearer who identifies the prima facie requirement as it arises in some treaties. He cites as an example of a provision which gives rise to such a requirement, a treaty between Great Britain and Israel. Article 11 of that treaty states:

> Extradition shall take place only if the evidence be found sufficient, according to the laws of the territory from which extradition is desired, either to justify the committal of the person claimed for trial, if the offence of which he is accused had been committed in that territory, or to prove that he is the identical person convicted by the courts of the requesting Party.

The similarity between this provision and Art.8 of the Misra-Avon Treaty is striking. If as Shearer argues, the above provision heralded the requirement of a prima facie case of guilt then by analogy Article 8 must do the same.

The question is whether, in the light of the fact that how Weiss removed the bust remains a mystery, it can be said that there is a prima facie case of guilt. It seems not. Where the material act of removal or ascertation is clouded in doubt and mystery and where the circumstances linking Weiss and A to the theft are largely fortuitious and inconclusive, then no prima facie case could possibly be made out. Weiss is an art historian and is therefore acting quite normally in visiting a museum with his girlfriend. That the bust disappears immediately after their departure is purely co-incidental. No evidence can be adduced to establish

how Weiss took the piece out of the museum, therefore it cannot be proved that he did in fact commit the act. There is therefore no prima facie case.

Article 2 para 3 allows as another class of extraditable offences, those which have a minimum sentence of not less than a year. Although offences number 24 and 25 of the Appendix may be alleged to have been committed by Weiss and Z it is submitted that in the event (as is here argued) that the subjects are charged for one offence - in this case theft - the requesting Party cannot afterwards try a fugitive for another crime other than the one alleged in the request.

This is a statement of the general principle of the Rule of Speciality recognized by international tribunals, therefore being a source of international law as recognised by Article 38 of the Statute of the International Court of Justice.[7]

Article 13(2) of the Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth formulated at a meeting of Commonwealth Law Ministers, London April 26 - May 3, 1966[8] is an example of the enunciation of the rule. It basically provides that a fugitive offender cannot be tried for any other offence except the one charged, with the exception being where the other offence is a lesser one than that previously charged.

A more restrictive formulation of the Rule is laid down in the case of the United States v William Boucher[9] which held that a fugitive offender may not be charged for any other offence. Importantly the rule was invoked here even when the relevant treaty was silent as to its application.

For the purposes of the present case it is argued that Misra not being satisfied that sufficient evidence of theft had been adduced, was not

required to consider if other charges could be substantiated on the facts as given as Avon could not prosecute on any other of these grounds anyway. (The allowance for a lesser offence cannot seriously be considered here where there is no suitable yardstick for measuring the magnitude of the offences).

Misra therefore asks the Court to find that since it was not satisfied pursuant to Article 8 of the Treaty as to the sufficiency of the evidence supporting the request, that it had acted properly in refusing the extradition.

(ii) POLITICAL OFFENCE

Even if it is found that there was sufficient evidence to establish a prima facie case and commit Weiss and Z to trial, it is strongly contended by the Republic of Misra that the act in question could only be classified as a political offence which, as is established in international law is non-extraditable.[10]

Madame Z is the leader of the Misran National Organisation which above all, stands for restoring cultural heritage and national pride. The Government of Misra (two of whose Ministers are M.N.O. leaders) has repeatedly asked the Kingdom of Avon for the return of the bust and the rest of the floor collection which in Misra's view was never legally acquired. Erich Weiss is an art historian and the lover of the M.N.O. leader.

If it is assumed (without conceding) that both parties continued to restore the bust to Misra, and since there is no evidence of any personal financial gain by either party as the bust was immediately given to the Minister of Culture for Misra, it is submitted that the act was for an over-ridingly political objective and must therefore be classified as a political offence. Although the present Treaty is silent on the point, it must be accepted that given the underscale usage of the concept as an

exception to extradition, if a particular treaty is silent on the issue, it may be invoked as an established international pattern.

For Misra's purposes, one is concerned with the relative political offence. "A relative political offence is an ordinary crime committed under such circumstances that its political character is dominant."[11] This definition is supported by Bossiouni.[12]

In one Belgian case[13] the court said:

> In the present case, in order to determine the nature of the act which the accused is said to have committed, the situation in Poland must be taken into account, for the act cannot be isolated from the events which accompanied its commission. The circumstances of time, place and persons show that it was inspired by revolutionary opinions and had a political objective in view.[14]

Applied to the present case it seems that with the repeated requests by Misra for the return of the Sloane Collection to its rightful place and with the equal refusals by Avon; with the ascendance of the M.N.O. in the Misran political arena and the fact that Z is the leader of that movement is ample evidence to put the act correctly in its context as a relative political offence. The 'theft' was merely a means to a dominant political end. The perpetrators of the act are therefore political offenders and thus exempt frm extradition.

The English case of R v Governor of Brixton Prison ex parte Kolczyniki [1955] 1 Q.B. 540 saw counsel for the fugitive sailors arguing successfully that a meaning ought to be assigned to the words 'offence of a political character' in the light of changed political conditions in the world. Goddard, L.J. declared that in certain situations, it is necessary if only for the sake of humanity to give a wide and more generous meaning to the words 'offence of a political character'.[15]

[16] Shearer concludes that the Polish S marked an extension of the categories of political offences to limits to be determined only 'broad considerations of humanity'.

Misra considers itself impelled by such an interpretation of a political offence in light of the fact that Avon has up until the present stubbornly refused to return the cultural property which is rightfully Misra's, thus fomenting the steps taken by the two accused to defeat this Avonion policy of non-reparation.

The Government of Misra for these reasons refuse to grant the request for extradition.

(iii) NATIONALITY

Article 12 of the Treaty between Misra and Avon provides that neither party is bound to deliver up their own nationals and ore allowed a discretion in doing so or not.

J.A. Shearer in his treatise "Extradition in International Law[17] identifies authority from England and the United States which state that where the treaty provides for discretionary surrender of nationals, the discretion is exercisable by the executive and is not a question cognizable by the courts. Can the "act of state" doctrine stand before the I.C.J.? Re Galway [1896] 1 Q.B. 230; R v McDonald ex porte Strutt [1901] Q.L.J. 85; S v Pirzenthal [1969] 2 S.A. 224 (T). One of the relevant authorities.

It means then that the Government of Misra was under no duty to put any question to the judiciary. Was this necessary in the first place? It was acting in its own right when it refused the extraditon of Madame Z.

The Government of Misra also contends that Article 12 of the Treaty between itself and Avon also affords its discretionary probation to Erich Weiss. Weiss has become a Misran national.

Whiteman comments that:[52]

> "The determination of whether a fugitive from justice found in the requested state is a nation of that State, is the prerogative of the requested State."

Whiteman seems to make the point that this (determination of nationality by the requested state) is specifically so in the case of an extradition request.

The Nottebohn Case[53] however lays down the rule that where such a question is put before an international tribunal, it is the international law which will be applied to such a question. This seems consistent with Article I of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws.[54]

In that case, the Court when determining the question of nationality enunciated certain principles which can be used to establish beyond doubt that Weiss had become a naturalized Misran. The Court did not propose to go beyond the limited scope of the question before it. What was involved is not recognition for all purposes but merely for the purposes of the admissibility of the Application.

It is perhaps correct then to argue as Whiteman seems to indicate that for purposes of extradition it is the law of the requested state that matters.

Even so the court testified certain indecia which would be useful in establishing whether the nationality in question was 'real and effective'. The factors thus identified which Misra now adduces for the court's consideration are "the centre of his interest, his family ties, his participation in public life, attachment shown by him for a given country..."

Weiss, an art historian, must surely have been cognizant of the 'tug-o-war' that had existed between Avon and Misra concerning the art treasures. He must have known of the Avonian Governments repeated refusals to Misra's requests for reparation. Based on his close affiliation wth Madame Z he must be taken to be informed of the ascendency of the M.N.O. to the executive level of Misran government, and of their primary object being the restoration of cultural heritage. He would have acquired this intelligence from his lover, Madame Z, the president of the M.N.O.

Nevertheless he (allegedly) perpetrated a criminal act against Avon which is almost treacherous in nature. Here is a government which steadfastly maintains a policy of non-reparation vis-a-vis another government; and here is a subject of that country thoroughly frustrating that stated policy and purpose by delivering the most prized object of that controversy into the hands of a foreign government. And this without any evidence of any mercenary or commercial involvement.

Surely as far as the Nottebohm indicia are concerned he has illustrated his manifest interest which importantly runs counter to that of his government. Surely, since he has now taken up residence in Misra, and apparently has no intention to return to Avon, and since upon being
to the status of national hero, thus becoming prominent in public life, he has manifested a strong factual tie now to Misra than to Avon.

Indeed, it is submitted that the crux of the distinction between Nottebohm's situation and Weiss' is the fact that the latter has committed an act against his state of residence which is almost irrevocable in its effect. This is coupled on the other hand with a new and intense involvement in the social and public life of Misra. It may therefore be said that this constituted the judicial expression of the fact that (Weiss)

is in fact more closely connected with the population of (Misra) than with that of any other state.[55]

Misra submits therefore that Avon is under an obligation to observe and recognize that the 'honorary citizenship' granted to Weiss is in fact a valid and international cognizable grant of nationality. Weiss is thus affected by Article 12 of the Treaty. And on the authority of Re Galway,[56] the matter is entirely up to the Misran executive act on or refrain from the discretion (as it did) contained in the Article.

(iv) The bust of Queen Theslon is reposing legally in Misra, its rightful owners. Misra is therefore under no duty to return the bust to Avon. Misra, under the Treaty with Avon has no duty to surrender the bust. Article 22 of the Treaty states that a surrender of property related to the offence shall be effected upon the granting of the extradition. There has been no such grant and Misra argues that there should be no such grant. There is no duty to surrender nor should there be.

Even if there is a ruling by this court to grant extradition Misra would be impelled to impose a condition of return prior to any surrender of property pursuant to the provisions of Article 22. As there is no assurance moving from Avon that the bust will be returned, Misra will therefore not surrender.

Though Misra is a party to the UNESCO Convention On The Illiat Movement of Art Treasures[57], Avon is not. Whatever obligations Misra might have incurred under the Convention is of no avail to Avon who cannot compel Misra to comply with the Convention. Avon has not ratified the Convention, pursuant to Article 19 which provides for the ratification or acceptance of the convention by all UNESCO States. Avon has only signed the Convention and enacted similar municipal legislation.

Even to argue that the internal legislation is indicative of on acceptance is not sufficient. Article 19 para 2 stipulates that the instruments of ratification or acceptance shall be deposited with the Director-General of UNESCO. Not having done this Avon is clearly not a ratifying, full member of the Convention.

Article 16 para (b) of the Vienna convention on the Law of Treaties[58] provide that:

> "Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon: (b) their deposit with the depositary"

Avon not having deposited its instruments has not ratified the Convention and is therefore not capable of requesting compliance, as a member to it could.

But Misra submits that even if the UNESCO Convention was irrevocable as between them and Avon, the very provisions of the Convention would be supportive of Misra's claim to retain Theslon. Article 7 provides that States Parties to this Convention should take steps to prevent museums etc. in their territories from acquiring property "originating" in another State. Surely Avon cannot claim that Theslon's bust originated in Avon. On the contrary the historical origin of the bust is unquestionably in Misra itself.

Article 13 para (b) charges all States Parties to ensure their co-operation in facilitating the earliest possible restitution of illegally exported cultural property to its rightful owner. This it is argued is precisely what Misra purported to do. Misra is the rightful owner of the bust which is part of its patrimony. It is clear also that based upon the notation of the 1827 enactments regarding the removal of historical property, the bust was illegally exported. No consent was given by the

Government and the circumstances surrounding the exportation is questionable. It seems clear therefore that Misra has a superior claim to the bust.

For these reasons the Government of Misra asks this Court to find that it is under absolutely no duties to surrender either the Bust of Theslon or Erich Weiss or Madame Z.

RELIEF SOUGHT

In light of the above arguments, the Government of Misra asks the Court 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 of immediate restitution of the Collection to Misra.

Further, the Government of Misra asks the Court for a declaration that it is under no duty to extradite either Erich Weiss or Madame Z, nor to return the statue of the Queen Theslon to Avon.

NOTES

1. See V Moore, A Digest of International Law #700 at 19 (1906).

2. Id. 23.

3. See generally Ian Brownlie, International Law and the Use of Force by States, 26 et. seq. (1963), VII Moore, A Digest of International Law #1100 at 153 et seq.

4. See examples cited by Brownlie, especially the French Military operation in Annum 1882 - 1885; The Collective Intervention in China 1900 - 1; and the Pershing Expedition in Mexico in 1916.

5. This may be conceded.

6. See Moore op. cit. 31095 at 123. "The Making of a Reprisal is a serious thing..."; The Hague Peace Conferences 1899 and 1907 (require recourse to peaceful efforts before violence is used).

7. Done at the Hague 29th July 1899 and 18th October, 1907 respectively.

8. See Regulations respecting the Laws and Customs of War on land; Annex to the Convention, Section III.

9. 49 Misc. 201, 300, 267 N.Y.S. 2d. 804 (Sup. Ct.) 1966; also reported Deak, 19 American International Law Cases (1783 - 1968) 259 - 274.

10. The consensus among academic writers accords with this judicial decision. See E. Lauterpacht, The Hague Regulations and the Seizure of Munitions. De Guerre 23 B.Y.I.L. 218 (1946). H.A. Smith, Booty of War 23 B.Y.I.L. 226 (1946); E. Lauterpacht, The Limits of the Operation of the Law of War, 30 B.Y.I.L. 206 (1953).

11. See Annex to the Convention, Regulations respecting the Laws and Customs of War on Land, Chapter 1, Article 1 of the 1899 and the 1907 Peace Conferences.

12. Which includes the right to capture war booty restricted by the duty to capture only property of military necessity.

13. Op. cit. #1109 at 174.

14. 6 F.R.D. 69 (1946) and mentioned in Monzel v Liszt 49 Misc. 2d. 300, 267 N.Y.S. 2d. 804 (Sup.Ct.).

15. 19 American Law Cases (1783-1968 259 at 207.

16. Done at Vienna, May 23rd, 1969.

17. Brownlie, op. cit. 35.

18. Department of State Bulletin (Vol. xx May 8, 1949 pp. 592-593).

19. Op. Cit. 404.

20. See for example the Stimson Note of January 7, 1932 sent by the U.S. to China and Japan. See comments by 1. Wright, 26 A.J.I.L. 342 (1932).

21. See U.N. Security Council Debate on the Invasion of Goa in P.J. Harris, Cases and Materials on International Law 172 (3rd Edn. 1983).

22. Harris op. cit. 172. Comments on the March 11, 1932 legislation of the Assembly of the League of Nations that Members should not "recognize any situation, treaty, or agreement brought about by means contrary to the covenant of the league of Nations".

23. Op. cit. 348.

24. Done at Paris, November 14, 1970. Hereinafter called the 1970 Unesco Convention.

25. Done at Vienna, May 23rd, 1969. Hereinafter called the 1969 Vienna Convention.

26. Unlike the obligations of Article 7.

27. P.C.I.J. Series A. No. 17 P.29.

28. See Note 10. Supra.

29. See J.C. Cooper, Who will own the Moon? The need for an answer in I.A. Vlosic (Ed.). Explanations in Aerospace Law 339 (1968).

30. G.A. Resolution 1514 (XV) Dec. 14, 1960. G.A.O.R. 15th Sess. Supp. 16 P.66; Harris, Cases and Materials in International Law 95 (3rd Edn. 1983).

31. G.A. Resn 1803 (XVII), G.A.O.R. 17th Session. Supp. 17 P. 15. Harris, op. cit. p. 423.

32. G.A. Resn. 3281 (XXIX) 14 I.L.M. 251 (1975) Harris, op. cit. P. 429.

33. Adipted on November 16, 1972.

34. Unesco Convention on the Illicit Movement of Art Treasures, Paris, Nov. 14, 1970, ILM Vol. 10, 289.

35. Phipson S.L. - Phipson on Evidence, p. 329, 12th Ed. 1982.

36. Ibid. Para 16-02.

37. Shearer I.A. Extradition in International Law, Manchester University Press (1971) p. 150, 1st ed.

38. Ibid, p. 151.

39. Great Britain - Israel, Treaty of 4 April 1960, Art. 11, T.S. No.77 (1960) Cmnd. 1223.

40. Statute of the International court of Justice.

41. Shearer, supra, note 37 at

42. United States v William Rauscher 119 U.S. 407 (1866).

43. Whiteman M., 6 Whitemans Digest of International Law p. 799-800 (1968).

44. Schultz, H. Vol. The Classic Law of Extradition and Contemporary Needs, Bassouni and Nanda (Editors) - A Treaty on International Criminal Law. 1983, p.317.

45. Ibid. at p. 315.

46. Bassiouni, M.C., International Extradition and World Public Order, 1974, p.387. Sythoff - Oceana Publications, p.387.

47. The Chimanski's Case Pendectes Periodques Belges Vol.24 (1911) No. 854 p. 597.

48. Deere, L. Political Offences in the Law and Practice of Extradition, p.261, 27 ATIL 247.

49. R. v Governor of Brixton Prison ex Parte Kolcqynoki [1955] 1 Q.B. 551.

50. Shearer. Supra at p.173.

51. Ibid. P.100.

52. Marjorie Whiteman Vol.8 - Digest of International Law p.50 - 1967.

53. Nottebohm's Case - 1955 ICJ Rep. 4.

54. 1930 Hague Convention on certain questions relating to the conflict of Nationality Laws, 179 LNTS 89.

55. See Nottebohm's Case above.

56. Supra, Re Galway.

57. Unesco Convention on the Illicit Movement of Art Treasure done at Paris, May 23rd, 1969.

58. Done at Vienna, May 23rd, 1969.

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