

Mutual Legal Assistance, Bank Secrecy and Business Regulatory Agencies

Proposed Commonwealth Scheme for the Protection of the Material Cultural Heritage

PREFACE

Concern for adequate international protection being afforded to items of countries' material cultural heritage has been on the Commonwealth agenda now for over ten years. It was at the 1983 Meeting of Commonwealth Law Ministers, held in Colombo, Sri Lanka, that the New Zealand Minister of Justice and Attorney-General, the Hon Jim McLay, first proposed concerted Commonwealth action to redress the continuing problem of items of deep cultural significance being smuggled out of Commonwealth (and, indeed, other) countries - in circumvention of legislation designed to prevent the problem and enable return but to which courts outside a country were, at times, reluctant to give effect on the grounds of extra-territoriality.

The Minister observed that politics was the art of the possible, and that there was no point in looking back at past misdemeanours, whatever they were and however strongly some might think about them. He stressed that the co-operation he was seeking to engender was not designed to recapture for his own country the many important and irreplaceable Maori items held in museums around the world (which could only be dealt with, if at all, by bilateral negotiations between the governments and institutions concerned). What he asked for was a scheme that would apply only to the future, but one which would be more effective than the UNESCO Convention on the subject, which was widely regarded as having serious shortcomings.

The proposal was endorsed unanimously both by those who spoke and in the communique.

As requested by the Meeting, the Secretariat arranged for the preparation of a draft scheme by expert consultants, which was considered by Senior Officials at their 1986 Meeting, and again by Law Ministers when they met in Harare, Zimbabwe later in the year. It is fair to say that work on the cultural heritage proposal was to some extent delayed by the compelling need to finalise the Commonwealth Scheme for Mutual Legal Assistance in Criminal Matters, the Commonwealth Scheme for the Transfer of Convicted Offenders and the revisions of the London Scheme for the Rendition of Fugitive Offenders. As a consequence, progress was not as rapid as some clearly wished.

When the matter came before Law Ministers in Harare, it was clear that the requisite degree of consensus on what could be done had not yet been achieved. Accordingly the Meeting invited the Secretary-General to establish a small working party to examine and refine the proposal and to make a firm recommendation to the

next Law Ministers' Meeting, in Christchurch, New Zealand, in 1990.

The working party was established, under the chairmanship of Justice Andreas Loizou of Cyprus, and it reported in time for the Christchurch Meeting. However, although there was broad support for the recommendations made by the working party, it was felt that the requisite degree of active support that might be achieved had not yet been evidenced. Accordingly, it was decided to invite the Secretary-General to reconvene the working party and for it to re-examine its recommendations in the light of the discussions at Christchurch. This the Secretary-General has done, and this is its report. The meeting was held in Rome at the headquarters of UNIDROIT, immediately after the UNIDROIT meeting on the revision of the UNESCO convention.

For ease of reference, relevant extracts of the minutes and communiqués of the 1983, 1986 and 1990 Ministerial Meetings, and the Senior Officials Meeting of 1992 are annexed. It will be noted that the working party has now produced a revised scheme which it has recommended be adopted by Law Ministers when they meet in Mauritius in November, 1993.

The Secretariat wishes to express its appreciation to Mr Malcolm Evans, Secretary-General of UNIDROIT, both for his personal and his institutional assistance with the meeting.

*Legal Division
Commonwealth Secretariat
August 1993*

28th June 1993

Mr Emeka Anyaoku
Secretary General
Commonwealth Secretariat
Marlborough House - Pall Mall
London SW1Y 5HX
UNITED KINGDOM

Dear Secretary-General

You will recall that in 1990, Commonwealth Law Ministers when they met in Christchurch, New Zealand, asked that the working group on the protection of the material culture heritage within the Commonwealth reconvene after an appropriate interval.

I now have the honour to submit the Further Report of the Working Party, which met in Rome, Italy on 27 February 1993. Although this letter of transmittal is signed by myself as Chairman, the report has been agreed among all its members.

You will note that the Group concluded that the Scheme which has now been under consideration by Commonwealth governments for ten years, ought now to be considered for adoption as a Commonwealth Scheme so that those governments who wish to further co-operation in this most important area could do so within a commonly-agreed Commonwealth framework.

It is my hope that this matter will be concluded when it comes before Commonwealth Law Ministers when they meet in Mauritius in November of this year.

Each member of the Working Group has greatly enjoyed the privilege afforded to them by working on behalf of the Commonwealth on this most important area of potential cooperation.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'A. Loizou', with a stylized flourish at the end.

Andreas N Loizou
Chairman

Enc

/AvPh

Further Report of the Working Group on the Protection of the Material Cultural Heritage within the Commonwealth

1. The further Meeting of the Working Group on the Protection of the Material Cultural Heritage within the Commonwealth, requested by Commonwealth Law Ministers when they last met, in Christchurch, New Zealand in 1990, was held on 27 February 1993 at the offices of UNIDROIT, Rome, Italy.

2 The meeting was attended by -

Australia

Dr. Rosalie Balkin
International Law Division,
Attorney-General's Department

Canada

Ms Marion Haunton
Legal Counsel,
Department of Communications

Cyprus

The Hon. Andreas Loizou
President of the Supreme Court
of Cyprus

India

Mr. R. S. Agarwal
First Secretary
Embassy of India (Rome)

Malaysia

Ms Noraini Bt. Abdul Rahman
Deputy Head of Advisory and International Division,
Attorney-General's Chambers

Malta

The Hon. Dr. Anthony Borg-Barthet
Attorney-General

Mauritius

Mr. E. Balancy
Parliamentary Counsel
Attorney-General's Office

Papua New Guinea

Mr. Peter Peraki
Principal Legal Officer
Ministry of Culture and Tourism

New Zealand

Mrs Janice Lowe
Chief Legal Adviser
Department of Justice

Nigeria

Mrs. Henrietta U. Didigu
Principal State Counsel
Attorney General's Chambers

United Kingdom

Ms Carolyn Morrison
Head of Cultural Property Unit
Department of National Heritage

Mr. Charles Bird
Treasury Solicitors' Department

Also present -

Mr. Malcolm Evans,
Secretary General
UNIDROIT
Mme Marina Schneider,
UNIDROIT
Dr. Lyndell Prott
UNESCO
Mr. Jeremy Pope
Commonwealth Secretariat.

AGENDA ITEM 1: ELECTION OF CHAIRPERSON AND ADOPTION OF AGENDA

3. The meeting elected The Hon. Mr. Justice Andreas Loizou of Cyprus as its Chairman.

4. The attached Draft Agenda was adopted as the agenda for the meeting.

AGENDA ITEM 2: ADDRESS AND BRIEFING BY UNIDROIT SECRETARY-GENERAL

5. At the invitation of the Chairman, Mr. Malcolm Evans, Secretary-General of UNIDROIT, briefed the meeting on the weeks' developments within the UNIDROIT Forum. He was gratified by the number of Commonwealth countries present at those deliberations, and expressed particular pleasure at the decision of the Governments of Cyprus and Malta to join the Organisation shortly. He noted that in recent years there had been three initiatives within the same field - the European Directive (in an association with institutional links between 12 countries) the Commonwealth (with shared values and legal traditions within 50 countries) and within UNIDROIT (on a global basis). These involved different groups but the aims were largely the same and there were no real inconsistencies that could not be resolved.

6. He explained that the UNIDROIT initiative had been taken in response to an invitation from UNESCO and had to be seen in the light of the 1970 UNESCO Convention, and in particular the cleavage between civil law and the common law on the question of a purchaser of stolen property in good faith.

7. He felt that the European Directive was a signpost for at least part of the way ahead. He was pleased to be cooperating with the Commonwealth, and with the measure of cooperation his Organisation was receiving from it.

AGENDA ITEM 3: CONSIDERATION OF BACKGROUND PAPERS

8. The meeting then considered the attached background paper prepared by Dr. Patrick O'Keefe, Consultant to the Commonwealth Secretariat. Dr. O'Keefe's paper was introduced by Dr. Prott who emphasised the common features of all three initiatives. She detected no significant differences between the various schemes. In particular, none of the three was retrospective in effect.

AGENDA ITEM 4: CONSIDERATION OF THE PROPOSED SCHEME FOR THE PROTECTION OF CULTURAL HERITAGE WITHIN THE COMMONWEALTH

9. The Chairman noted that the Scheme, in certain respects, might need scrutiny to bring it into line with international developments and understandings reached subsequent to the 1989 revision of it.

10. The Commonwealth Secretariat tabled additions to **Paragraph 1 (3) and additional paragraph 3(3)**.

11. The first amendment was accepted without discussion. On the second, Britain noted that the suggested wording appeared to be designed to accommodate a British position. However, Britain faced a wider problem: it was a member of a single market designed to promote freedom of trade in goods with no internal customs controls. The movement of cultural items within the EEC was governed by a Directive, and the level of co-operation required that return could only be requested within certain cash limits and defined categories. Britain would have to examine the application of any arrangements for export to third countries in the light of its obligations within Europe. The EEC had reached agreement, proportionate to the problem perceived by it, that would enable protection of another Member State's "national treasures".

12. If Britain were to consider becoming party of a Commonwealth Scheme, it would have to question the ability of so doing as the Scheme would singularly restrict Britain's freedom of trade within the EEC, thus uniquely discriminating against traders in the U.K. and therefore liable to command the attention of the Commission as imposing restrictions on free trade within the community. Such a problem would not exist under the proposed UNIDROIT Convention, if all 12 countries were covered by it.

13. There would be no means by which Britain could control exports until an application was made for an export permit. However, if an item had been illegally removed from a Commonwealth country to say, France, and then brought to the U.K. it would have required a "certificate of free circulation" from the French authorities (which would have only asked and answered the

question "Is this a French national treasure?") which would then have automatically conferred a licence to export that item anywhere within the Community.

14. In reply to a question as to how EEC member States who were parties to the 1970 UNESCO Convention were managing to square both sets of international obligations, the delegate said that she was unable to offer an explanation as Britain was not a party to the UNESCO Convention.

15. There was, too a question of political will, she continued. If Britain were to participate under a Commonwealth Scheme then it would be to disadvantage trade in Britain destined for third countries. This raised political difficulties, and also for the Commission.

16. In reply to a question as to whether Britain could argue within the EEC that it had a moral and historic special duty to provide such assistance, the delegate asked in turn whether the European Court of Justice would adopt such a viewpoint, as art traders in Britain could mount a Court challenge to such arrangements as they would consider themselves to be uniquely affected by them.

17. A delegate stressed that the Commonwealth Scheme was not an international treaty, but a flexible framework for domestic legislation.

18. Britain drew attention to the fact that at Singapore its delegate had mentioned that there was probably only an opportunity in Britain to enact legislation once in every ten years. She endorsed this as being the position. A Statutory Instrument would implement the EEC Directive, which contained important principles, and this was a difficult piece of legislation, although not primary legislation, and not particularly agreeable in some political circles. In particular, powers of entry and search had been criticised. The problem was whether it might be politically possible in terms of both concept and of legislative time.

19. It was suggested by another delegate that the suggested Clause 3 (3) might usefully be included for the time being on the basis that this might be helpful to Britain should it need time to consider. It could be inserted in the Scheme for the time being, and amended if and when necessary.

20. On this basis the Chairman noted agreement that the amendment be incorporated.

21. It was suggested that the validation system provided under **Paragraph 4** should become optional rather than mandatory under the Scheme, as this would make it more palatable to some countries and would certainly expedite the Scheme coming into practical effect.

22. This was agreed.

23. There followed discussion on the time limit for the issue of a Validation Certificate under **Paragraph 4 (3)**. One delegate suggested that six months was a rath-

er high time limit and that it would prefer two months for its part. However, another noted that the process could take somewhat longer and would have been minded to suggest a longer time frame.

24. On this basis no change was recommended.

25. As to the operation of the Scheme, provided for by Paragraphs 5 and 13 inclusive, discussions took place in respect of **Paragraph 5(2)** and the extent of the obligation on a country to prohibit the import of items covered by the Scheme. The criminalisation of the import of items unlawfully exported by other countries did not present a problem to some delegates. Indeed it reflected their present legal position. For others, legislation would be required and the question was asked whether the sub paragraph required a criminalisation of such conduct or whether it would be open for there to be a civil sanction. It was common ground that criminalisation was an option, not a pre-condition, and that arrangements for the return of such items could be administrative. However, the deterrence factor was also noted. In order to clarify the situation it was agreed that Paragraph 5 (2) should be amended "each country will take the measures necessary to ensure the return of items covered by the Scheme to the country of export".

26. On the question of **Paragraph 7 (3)** attention was drawn to the reference to a certificate and it was agreed that as this would take the form of documentation other than a certificate, the words "a certificate" should be replaced by the words "an official notification". A consequential amendment to **Paragraph 7 (4)** was agreed with the words "The Certificate being replaced by the words "Such notification". There followed discussion on **Paragraph 9**.

27. It was noted that under Paragraph 16 of the Scheme, a requesting State was to meet the costs of a requested State. Nevertheless, attention was drawn to the fact that **Paragraph 9 (1)** was silent as to whether court proceedings in the country of location should be commenced by the government of that country or by that of the country of export.

28. Following agreement, the view of the meeting was that there was an element of discretion and that what might be done in any particular case would be governed largely by the circumstances of that case. The British delegation asked that the British view be recorded, namely that it envisages that normally Britain would expect a country of export to take the proceedings.

29. It was agreed that Paragraph 9 (1) be amended in the following respects:-

- (a) that "(a)" be inserted before the word "give";
- (b) that "(b)" be inserted before the words "institute proceedings"; and
- (c) that the phrase "or advise the country of export to institute proceedings" be inserted after the words

"or institute proceedings," and before the words "with a view to".

30. A consequential amendment was agreed to **Paragraph 9 (2)** by inserting the words "or of export" after the words "in the country of location". It was further agreed that the word "or" should be inserted at the end of **Paragraph 9 (2)(b)** after the words "export permit";.

31. There was then a discussion on the question of the compensation payable, provided for by **Paragraph 9(3)**.

32. It was noted that there was no specific reference to a successor to an innocent purchaser for value of an item, but it was accepted that the Scheme was "broad brush" in nature and that the omission of any reference did not imply exclusion.

33. On the question of whether a Court should be required to order compensation rather than simply have a discretion, in cases where the court had determined that the holder of the item was "an innocent purchaser for value having taken all reasonable steps to satisfy himself that the item was not an unlawful export under the Scheme", the point was made that UNIDROIT draft now required fair and reasonable compensation and that to so provide in the Commonwealth Scheme would not only bring it into line with developments in other fora, and so reflect international consensus, but would markedly increase the political attractiveness of the Scheme. After some discussion it was agreed that the words "the Court may determine what, if any, compensation shall be payable" be deleted from **Paragraph 9 (3)** and the following words substituted "the Court will order that fair and reasonable compensation be payable".

34. An amendment was agreed to **Paragraph 9 (4)** consequential to the amendments previously agreed to Paragraph 4 by deleting the word "the" where it appears before the words validation system under the Scheme and that it be substituted with the words "any relevant".

35. There was then a discussion on the limitation period provided for by **Paragraph 14**. It was noted that the five year period was an upper limit but that the Scheme would need to recognise the fact that different countries had different limitation periods. The limitation periods prescribed by the internal law of the countries would generally apply to claims here as in other matters. It was noted that the five years maximum period suggested in Paragraph 14 was there for the protection of an innocent possessor of an item. It was further noted that the draft, UNIDROIT Convention gave the choice between three and five years, and that the one year provided for in the European Directive was essentially geared to European conditions. It was agreed that the time provided should not be too short in order to allow time for adequate inquiries to be made. It was agreed that no change was called for.

36. There was also a discussion of criminal proceedings provided for under **Paragraph 15** for the sake of clarity, it was agreed that the following amendments should be made to Paragraph 15 (a):-

(i) that the words "its own" be inserted immediately before the words "cultural heritage"; and

(ii) that the words "from its territory" be inserted before the words "an item of".

37. It was further agreed that the expression "shall" was more appropriate to the language of treaties rather than to Commonwealth schemes and so should be replaced by the word "will" wherever it appeared in the draft Scheme.

Recommendation to Law Ministers

38. The Chairman then put the question as to whether the working group would recommend adoption of the Scheme to the forthcoming Meeting of Commonwealth Ministers in Mauritius.

39. The delegate from New Zealand expressed her country's abiding interest in the Scheme from 1983 when it was first put forward by her then Law Minister. They had been heartened in Singapore by the remarks of the British delegate, who had acknowledged the problem as being both serious and soluble. The strong view had been expressed by other delegates that the time had come for further action and it was her hope that Britain as a major art importer might find a way to afford the Commonwealth some assistance in this area. She urged that the Law Ministers Meeting in Mauritius was an appropriate place for that action to take place. She asked that, in a spirit of long standing Commonwealth cooperation, that the Scheme go forward to Law Ministers for consideration for adoption and that in the interim that it be carefully considered by Governments ahead of the meeting in Mauritius.

40. The British delegate said that in a spirit of consultation its delegation would take the matter back to its capital as a serious concern but would have preferred the recommendation by the meeting to be not that the Scheme be adopted but be considered by Senior Officials at Mauritius.

41. The Chairman, speaking for Cyprus, expressed the view that the Scheme should be adopted as soon as possible in order to protect others from the plight that Cyprus had suffered in this area.

42. The Chairman noted that the decision of the Group was that, with the reservation expressed by the delegation of the U.K., the Scheme should be considered for adoption at Mauritius.

ITEM 5: REPORT TO SENIOR OFFICIALS AND LAW MINISTERS

43. The Chairman invited the Secretariat to prepare

and distribute a draft report as soon as possible so that it could go to the Secretary-General for him to forward to governments well ahead of the meeting in Mauritius.

ITEM 6: ANY OTHER BUSINESS

44. A delegate asked that the Commonwealth Secretariat investigate ways in which it might be able to provide more support for Commonwealth countries in their endeavours to locate and obtain the return of illicitly exported items of their material cultural heritage. It was suggested that this might include:

(i) Compilation of a list of suspected collectors and dealers of items of cultural heritage, based on information available to governments;

(ii) Compilation by the Commonwealth Secretariat of a list of collectors and dealers in items of cultural heritage for circulation to member countries; and

(iii) Maintenance by member countries of an index on stolen works of art and the circulation thereof to other members.

45. In the discussion that followed it was pointed out that there were a number of initiatives dealing with aspects of the concern expressed. Among them was the Canadian Government database of stolen objects.

46. The meeting felt that the Secretariat should avoid duplication of existing efforts, but that a discussion by Law Ministers would be useful to identify a possible role for the Secretariat's Commercial Crime Unit in providing a liaison facility. To facilitate an informed discussion, it was suggested that the Secretariat consider organising the preparation of relevant background papers for the Ministerial meeting.

47. The Secretariat expressed its thanks to Mr. Malcolm Evans and staff of UNIDROIT for their co-operation and assistance in making the meeting in Rome possible. It also recorded its gratitude to Dr. Prott and to Dr. O'Keefe for the assistance given to the undertaking.

48. A vote of thanks to the Chair was carried by acclamation.

Revised Draft Agenda

1. Election of Chairperson.
2. Address and briefing by Mr Malcolm Evans, UNIDROIT, Secretary-General, on the UNIDROIT consultations.
3. Consideration of papers:
 - (a) Background paper by Dr Patrick O'Keefe, Consultant
 - (b) Other papers
4. Consideration of proposed Scheme for the Protection of Cultural Heritage within the Commonwealth.
5. Report to Senior Officials and Law Ministers.
6. Any other business.

SCHEME FOR THE PROTECTION OF CULTURAL HERITAGE WITHIN THE COMMONWEALTH (with amendments recommended by the Working Group in Rome underlined)

OBJECTIVES OF THE SCHEME

1. (1) The provisions of the Scheme govern the return by one Commonwealth country of an item of cultural heritage found within its jurisdiction following export from another Commonwealth country contrary to its laws.

(2) The provisions of the Scheme will apply to the export and import of items which take place after the adoption and implementation of the Scheme. The Scheme adds to and in no way derogates from future and existing means of recovery of items of cultural heritage.

(3) The Scheme is intended to be complementary to, and does not in any way exclude, full participation in other international arrangements such as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, the European Communities directive on the return of cultural objects unlawfully removed from the territory of a member State and the regulation on the export of cultural goods from member States of the European Community.

DEFINITIONS

2. For the purposes of the Scheme -
 - (a) "country" means:
 - (i) each sovereign and independent country within the Commonwealth together with any dependent territories which that country designates; and
 - (ii) each country within the Commonwealth which, though not sovereign and independent, is not a territory designated for the purposes of the preceding sub-paragraph.
 - (b) "country of export" means the country from which an item covered by the Scheme has been unlawfully exported.
 - (c) "country of location" means the country where an item which has been unlawfully exported is located at the time the provisions of the Scheme are invoked by the country of export for the return of the item.
 - (d) "unlawful export" in relation to any country means an item which was exported from that country in contravention of its law: it includes an item which has been taken out of the country of export under a conditional permit and where there has subsequently been a breach of the conditions of the permit, in which event "unlawful export" is deemed to have occurred as of the date of the breach of the condition.

ITEMS COVERED BY THE SCHEME

3. (1) The Scheme covers all items of cultural heritage so classified by, and subject to export control by, the country of export.

(2) Items classified should be of national importance by virtue of one or more of the following criteria -

- (a) the close association of the item with the history or life of the country;
- (b) the aesthetic qualities of the item;
- (c) the value of the item in the study of the arts or the sciences;
- (d) the rarity of the item;
- (e) the spiritual or emotional association of the item with the people of the country or any group or section thereof;
- (f) the archaeological significance of the item.

(3) Where a country is unable by reason of laws pursuant to other international obligations to extend protection to all such items it shall be open to other countries similarly to restrict the protection they afford to that country under this Scheme.

VALIDATION SYSTEM

4. (1) As part of the Scheme, a system of validation may be introduced whereby an intending purchaser of an item of cultural heritage or any other interested person is enabled to request of the central authority of the country of export a validation certificate to the effect that the item is not an unlawful export from that country.

(2) Such a validation certificate would constitute a complete defence to any claim by the country of export that the item had been unlawfully exported.

(3) Where an application is made for a validation certificate in respect of any item, the application should be granted or refused within six months of receipt of the application. If the application is not granted or refused within that period, the country of export should be precluded from claiming that the item has been unlawfully exported from that country.

OPERATION OF THE SCHEME

5. (1) Each country will prohibit the export of items covered by the Scheme except in accordance with the terms of an export permit.

(2) Each country will take the measures necessary to ensure the return of items covered by the Scheme to the country of export.

6. (1) Each country will designate a central authority for the making and the receiving of requests for the return of items covered by the Scheme.

(2) Each country will notify the Commonwealth Secretary-General of its central authority.

7. (1) When the country of export learns of the whereabouts of an item covered by the Scheme, it may request the country of location for assistance in the recovery and return of that item.

(2) Where two countries of export make a request for the return of the same item, the request of the country from which the item was last exported will be proceeded with; but that will not prejudice further requests in respect of the item.

(3) The request will give sufficient detail to clearly identify the item and where possible its location and shall be accompanied by an official notification from the country of export to the effect that the item is covered by the Scheme and has been unlawfully exported.

(4) Such notification will be prima facie evidence of the matters stated therein.

8. Upon receipt of a request, the country of location will take appropriate steps in accordance with its laws to secure or safeguard the item.

9. (1) The authorities in the country of location may either -

(a) give notice to the holder of the item that unless court proceedings are commenced within a stipulated period, the item will be returned to the country of export, or

(b) institute proceedings or advise the country of export to institute proceedings with a view to securing an order for the return of the item to the country of export.

(2) In any proceedings instituted either by the holder of the item or by the authorities in the country of location or of export the court will determine whether the item is covered by -

(a) the Scheme;

(b) an export permit; or

(c) a validation certificate.

If the item is covered by the Scheme and such a permit or certificate has been issued, or if the item is not covered by the Scheme, the court may order that the item be returned to the holder. If the item is covered by the Scheme and such a permit or certificate has not been issued, the court will order that the item be returned to the country of export.

(3) Prior to ordering the return of the item the court will determine whether the holder of the item is an innocent purchaser for value having exercised due care and attention in acquiring the item and, if it is proved that the holder is such an innocent purchaser with valid title to the item, the court will order that fair and reasonable compensation be payable by the country of export to the holder as a condition for the return of the item to the country of export. All other questions of title and compensation will be determined by proceedings in the country of export.

(4) In any proceedings in the country of location, the holder of an item may, unless the contrary be proved, be presumed not to be an innocent purchaser for value if he has neglected or failed to utilise any relevant validation system under the Scheme.

10. The central authority in the country of export to which an item is returned will be required to hold the item for a period of twelve months. During this period it will be open for any person to take proceedings in the country of export to determine any question of title and compensation.

11. In the event that proceedings to establish title are not commenced within the twelve month period, the central authority will deal with the item in accordance with the law of the country of export.

12. In any proceedings in a country of location, the court will have due regard to the relevant laws of the country of export.

13. The person adjudged to have title in the item will not have any right to remove the item from the

country of export otherwise than by the process of applying for and obtaining an export permit.

LIMITATION PERIOD

14. No claim for the return of an item alleged to have been unlawfully exported may be made under the Scheme more than five years after the date the country of export had knowledge of the whereabouts of the item in the country of location.

CRIMINAL PROCEEDINGS

15. Each country -

- (a) will make it an offence to unlawfully export from its territory an item of its own cultural heritage covered by the Scheme; and
- (b) may make it an offence to unlawfully import an item of cultural heritage covered by the Scheme unlawfully exported from another country.

COSTS

16. (1) The country of location in implementing the Scheme may require the country of export to meet the expenses necessarily incurred in implementing the request of the country of export for the return of any item of cultural heritage.

(2) If in the opinion of the country of location the expenses required in order to comply with the request are of an extraordinary nature, that country will consult with the country of export as to the terms and conditions under which compliance with the request may continue, and in the absence of agreement the country of location may refuse to comply further with the request.

STANDARD FORMS

17. In implementing the Scheme, each country will as far as is practicable use standard forms which will be settled by consultation through the Commonwealth Secretariat.

ANNEX 1

UNLAWFUL EXPORT OF CULTURAL HERITAGE; THE COMMONWEALTH SCHEME -

THE UNIDROIT DRAFT AND THE EEC
DIRECTIVE AND REGULATION:
A COMPARISON

*A paper prepared for the Commonwealth Secretariat
by Dr Patrick O'Keefe*

Commonwealth Scheme

Ten years ago the Law Ministers of the Commonwealth resolved that it was necessary to combat the "unhealthy market is smuggled and stolen cultural objects". A

"Scheme Relating to the Protection of the Cultural Heritage within the Commonwealth" was drafted. This failed to achieve a consensus. A refined version is on the agenda for consideration by the Law Ministers at their 1993 meeting.

It must be recognised that the Scheme does not stand alone. It takes a place in an evolving world-wide network of international arrangements all designed to prevent the depredations of those who would steal and smuggle cultural heritage. Two of these are particularly relevant in that they were not in existence when the Law Ministers last considered the Commonwealth Scheme in detail. The changes they are bringing about show that the Scheme lies in the mainstream of current developments. Any past objections to the Scheme should be reconsidered.

International Developments

In point of time the first of these two developments is the Draft Convention on Stolen or Illegally Exported Cultural Objects produced by the International Institute for the Unification of Private Law (referred to hereafter as the "UNIDROIT draft"). The original draft was prepared by a study group of international specialists on the subject during the years 1988 to 1990. Two meetings of governmental experts have been held to consider the draft and a third is scheduled for February 1993. When agreement is reached on the text it will be submitted to a diplomatic conference for consideration and eventual adoption.

The second development is the preparation by the European Community (EEC) of a Directive and Regulation on European trade in cultural heritage. On 1 January 1993 a free internal market came into effect within the European Community countries - currently Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, United Kingdom. However, under the Treaty Establishing the European Economic Community 1957 (Treaty of Rome) Member States are able to maintain regulations on the import and export of "national treasures possessing artistic, historic or archaeological value". With the disappearance of customs controls there was anxiety that existing regulations would be evaded.

Consequently, in the late 1980's the Commission of the European Communities commenced work on "a new legal regime. In November 1992 the Council of Ministers agreed on a "Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State" and a "Regulation on the Export of Cultural Goods" from the EEC. The Directive has still to be considered by the European Parliament and then returned to the Council of Ministers for approval. If the Parliament makes no changes, the earliest date for adoption of the Directive is the end of March 1993. It then has to be enacted into national law. In the case of Belgium, Germany and the Netherlands this must be

done within 12 months of the date of adoption; for the other Member States within nine months. The Regulation comes into force (i.e. becomes part of national law) three days after publication of the Directive. Both measures are retrospective to 1 January 1993. They are intended to supplement existing national legislation rather than replace it.

The only Commonwealth country affected by the Directive and Regulation is the United Kingdom. However, in view of that country's position in the international trade in cultural heritage, its implementation of these instruments should have a considerable flow-on effect for arrangements such as the Commonwealth Scheme, particularly if the latter can be seen as complementing the EEC arrangements.

The following discussion will concentrate on the Directive as it is this instrument which makes provision for return of material unlawfully exported - the same objective as has the Commonwealth Scheme. Almost invariably, if stolen cultural heritage is exported, it will be done unlawfully and consequently will be subject to the procedures for return. Some argue that theft is more reprehensible than unlawful export and should be subject to a more restrictive regime for return. This view appears in the UNIDROIT draft but will not be discussed further in this paper apart from noting that the procedure for return under the Directive is stated to be without prejudice to any civil or criminal proceedings that may be brought in respect of stolen cultural objects.

This paper must be read on the basis that all three arrangements under discussion are liable to change. The EEC Directive may be changed by the European Parliament e.g. the Greek delegation at the Council of Ministers meeting in November voted against the Directive and Regulation. Both the UNIDROIT Draft and the Commonwealth Scheme have yet to be subject to scrutiny at the political level. The UNIDROIT draft currently has numerous alternatives for each Article. Some of these are mutually conflicting.

Cultural Heritage Affected

The Commonwealth Scheme "covers all items of cultural heritage so classified by, and subject to export control by, the country of export". The items classified "should be of national importance by virtue of" the following criteria:

- (a) the close association of the item with the history or life of the country;
- (b) the aesthetic qualities of the item;
- (c) the value of the item in the study of the arts or the sciences;
- (d) the rarity of the item;
- (e) the spiritual or emotional association of the item with the people of the country or any group or section thereof;

- (f) the archaeological significance of the item.

Although "should" is used and not the imperative "shall", in the context of a voluntary Scheme such as this, the country of export has an obligation to comply with the spirit of the arrangements and restrict its controls to cultural heritage which is of real importance. On this basis the country of location knows that claims under the Scheme are restricted to important items.

The UNIDROIT Draft refers to "cultural objects" which were defined originally to mean "any material object of artistic, historical, spiritual, ritual or other cultural significance". The current Draft has a number of alternatives to this but basically they divide into those which use an objective criteria as above and those which allow the State concerned to specify what, for it, is a "cultural object". Under the original Draft not all cultural objects would be subject to return after illegal export. The requesting State would have had to prove that one or more vital interests from a given list was impaired. Nevertheless, the thrust is still toward restricting the operation of return procedures to significant material.

The Directive contains a mixture of the two approaches. The term used is "cultural object". This is any object classified by a Member State, "before or after its unlawful removal from the territory" of that State, as being among its "national treasures possessing artistic, historic or archaeological value". In addition, the object must belong to one of 14 categories listed in an Annex and have a minimum monetary value as set out in that Annex. For example, archaeological objects more than 100 years old and coming from archaeological sites are included irrespective of their monetary value. Pictures and paintings executed entirely by hand are only included if their value exceeds 150,000 ecus. Even though an object does not fall within one of the 14 categories, it may still be a "cultural object" if it forms an integral part of a public collection "listed in the inventories of museums, archives or libraries' conservation collection" or the inventories of ecclesiastical institutions.

Comparison

The crucial part of the Directive definition is the Annex which qualifies the concept of "national treasure" as adopted by Member States. The 14 categories are obviously designed for European conditions. Nevertheless, they would appear to cover most of the material that Commonwealth States would want to include under the Scheme with the exception possibly of ethnographic items. Some of these could be included under categories such as "original sculptures" and category 12(b) which includes collections of ethnographic interest. The application of monetary values would, on the face of it, appear to mark the greatest difference between the two systems. Most Commonwealth countries do not at present use monetary criteria for establishing what cultural heritage cannot be exported - exceptions are Aus-

tralia and Canada for particular types of material such as paintings. However, in practical terms any object that a Commonwealth country is likely to seek the return of will be significant. It is simply not worth the effort in time and cash to seek the return of insignificant material. But significance means that the object will usually have a high monetary value and thus bring it, for practical purposes, into line with the criteria of the Directive. Consequently, we would argue that, while the Directive is much more specific in establishing its coverage, in practical terms it and the Commonwealth Scheme would cover much the same sort of material.

Retrospectivity

All three arrangements *prima facie* eschew retrospectivity. The Commonwealth Scheme specifically states that it applies only to the export and import of cultural heritage taking place after the adoption and implementation of the Scheme. The UNIDROIT Draft only applies to claims in respect of a cultural object stolen or illegally exported after both Contracting States concerned had become parties to the Convention. The Directive applies "only to cultural objects unlawfully removed from the territory of a Member State on or after 1 January 1993". The Directive does state that Member States may apply its provisions to material removed earlier if they so wish, as does the UNIDROIT draft.

Prohibited Export

Operation of the UNIDROIT Draft in respect of unlawful export is based on Member States having laws prohibiting certain exports. On the other hand, the Commonwealth Scheme requires each Member Country to actually "prohibit the export of items covered by the Scheme except in accordance with the terms of an export permit". For most Commonwealth countries this provision would pose no problems. Some 32, including the United Kingdom, already have export prohibitions for cultural heritage. The Directive talks of "cultural objects which have been unlawfully removed", meaning thereby those which have been "removed from the territory of a Member State in breach of its rules on the protection of national treasures" or in breach of the Regulation - it also includes those not returned at the end of a period of temporary removal.

There would not seem to be any significant differences between the Commonwealth Scheme and the other two arrangements in respect of prohibiting exports. All three recognise the right of States to impose controls on export of particular cultural heritage.

Prohibited Import

The Commonwealth Scheme requires each country to "prohibit the import of items covered by the Scheme which have been unlawfully exported from another country". This was inserted to provide a legal basis for the process whereby the authorities first secure or safe-

guard the item and then institute proceedings for its return. It was felt that, without such provision, the constitutions of many member countries would not allow action to be taken for return. It was also designed to overcome arguments that laws prohibiting export are public laws and the courts of one country will not enforce the public laws of another country.

There is no requirement in the Directive or under the UNIDROIT draft to prohibit imports. Article 2 of the Directive states:

Cultural objects which have been unlawfully removed from the territory of a Member State shall be returned in accordance with the procedure and in the circumstances provided for in the Directive.

The Directive has to be implemented in national law. In some countries constitutional law and the rules of private international law may be such that a simple provision requiring return of "cultural objects" unlawfully exported from another Member State of the EEC would be sufficient. In others, imports may have to be prohibited in order to provide the necessary legal basis for return. This is a matter each State will have to consider in light of its law.

The Commonwealth Scheme's requirement that imports be prohibited should thus not be regarded as something distinguishing it from the arrangement under the Directive. It may be that the United Kingdom itself will have to introduce such a provision in order to effectively implement the Directive.

Administration

The Commonwealth Scheme and the Directive both require designation by parties of a central authority to carry out the tasks set by the respective instruments. In the case of the former, the Commonwealth Secretariat is to be notified of the designated authority; in the case of the latter, the Commission.

In certain other respects, the Directive goes much further than the Commonwealth Scheme. For example, under the latter the country of export may request the country of location for assistance in the recovery and return of an item, when the country of export learns of its whereabouts. The country of location, on receipt of the request, must "take appropriate steps in accordance with its laws to secure or safeguard the item". This does not necessitate actual searching for an item.

By contrast, the requested State (the country of location in the terminology of the Scheme) under the Directive, must play a more active role. Firstly, when a request is made, the requested State must take positive action to "seek a specified cultural object which has been unlawfully removed from" the territory of the requesting State, "identifying the possessor and/or holder". That this requires an actual search is clear from the requirement that the "application must include all information

needed to facilitate this search, with particular reference to the actual or presumed location of the object". Secondly, the Directive obliges a State to notify another Member State where a cultural object is found in its own territory and there are reasonable grounds for believing that it had been unlawfully removed from the territory of that other State. If this does happen, a procedure comes into operation whereby the requesting State must be given access to the object to check that it is a cultural object; measures for physical preservation of the object must be implemented and any action to evade the return procedure prevented. The last two measures are not available if the requesting State takes no action to check the object within two months of notification by the requested State. It is thus clear that the obligations cast on the requested State under the Directive are greater in degree than those on the country of location under the Scheme.

Return

The procedures for return lie at the heart of all three arrangements we are discussing. The basic objective from the point of view of the State that has lost cultural heritage is to get it back in the simplest possible way and at the least cost. The State where the cultural heritage has been found may have conflicting objectives: protection of its art market particularly where this contributes substantially to national income; a desire not to tie up the bureaucracy in costly procedures; a need to maintain good relations with other States.

The Commonwealth Scheme and the Directive are identical in requiring proceedings to be implemented by presentation of a document stating that the object concerned is one covered by the arrangement and that it has been unlawfully removed or exported from that State. The original UNIDROIT draft goes further in that the requesting State must provide information "regarding the conservation, security and accessibility of the cultural object after it has been returned to the requesting State". Proposed amendments would indicate that this requirement will be dropped in the final version.

The Directive does indicate the possibility of the requested State facilitating the implementation of arbitration under its laws provided the requesting State and the possessor or holder give their formal approval. The Scheme does not refer to arbitration but there would be nothing to stop the parties using it if they so desired. Recourse to arbitration would mean the loss by the requesting State or country of export of the right to the court procedures under the respective arrangements.

The initiation of proceedings reveals what could be, depending on the circumstances, a significant difference

between the arrangements. Under the Directive, the "requesting State may initiate, before the competent court in the requested Member State, proceedings against the possessor or, failing him, the holder, with the aim of securing the return of a cultural object which has been unlawfully removed from its territory". On the other hand, the Commonwealth Scheme provides for institution of proceedings either by the authorities in the country of location or by the holder of the item. The latter would be given notice by the authorities that, unless he commences proceedings, the item will be returned to the country of export.¹ Who is required to institute proceedings can be very significant. Although proceedings would need to be conducted by lawyers in the requested State, the time of senior officials would be needed for briefing and preparation of evidence. There could be psychological reluctance to commence proceedings in a foreign country. Costs would not matter, as both arrangements in effect provide for them to be paid by the State requesting return.

Apart from the above, the Commonwealth Scheme and the Directive have broadly similar approaches to the actual process for return although the former is more detailed. The latter merely states that, subject to time limitations, "the competent court shall order the return of the cultural object in question where it is found to be a cultural object within the meaning of Article 1(1) and to have been removed unlawfully from national territory". The Scheme refers to the documentation that the court must consider and the effect if any of this is defective. The UNIDROIT draft also requires the court to order return of the cultural object to the requesting State, but only if that State "proves that the removal of the object from its territory significantly impairs one or more of the following interests:

- (a) the physical preservation of the object or of its context;
- (b) the integrity of a complex object;
- (c) the preservation of information of, for example, a scientific or historical character;
- (d) the use of the object by a living culture;
- (e) the outstanding cultural importance of the object for the requesting State".

The issue of compensation is differently treated in the Directive as opposed to the other two arrangements. All three arrangements provide for the payment of compensation, in certain circumstances, as a condition precedent to return. If the possessor was bona fide in acquiring the object then compensation is payable. The Directive requires the court to award the possessor fair compensation provided "that it is satisfied that the pos-

¹ The current wording of the Scheme appears to leave either action at the option of the authorities. However, the underlying basis of the Scheme indicates that the authorities should be required to undertake one of the actions. This should be made explicit.

essor exercised due care and attention in acquiring the object". Various types of evidence may be relevant on this point e.g. whether databases of stolen cultural heritage were consulted; whether the provenance of object was discussed with experts in the field. More important is the question of the burden of proof. It is much easier for the possessor if the requesting State has to prove that he was not bona fide than if he has to prove he was.

The Directive leaves this issue to the legislation of the requested Member State. The Scheme requires the holder to have been innocent at the time of purchase i.e. he "must have taken all reasonable steps to satisfy himself that the item was not an unlawful export under the Scheme". Although it is not specifically stated in the Scheme, the context indicates that in practice it would be for the holder to convince the court that he had made all reasonable investigations. Failure to use the validation system provided by the Scheme means that the "holder of an item may, unless the contrary be proved, be presumed not to be an innocent purchaser for value". The Scheme requires that, in addition to the above, the holder has to prove that he has "valid title to the object". The Scheme does not expressly regulate the question of title. Presumably, the issue of whether title was valid would be determined by the *lex situs* including its rules of private international law. A determination of whether the title was valid goes only to the question of compensation and not to whether the item will be returned.

All three arrangements under discussion require payment of compensation to be made by the requesting State, which need not be the owner of the object. The Directive states that such payment is without prejudice to the requesting State's right to take action to recover the amount from the persons responsible for the unlawful removal. The Scheme and the UNIDROIT draft have no provision on this.

Both the Directive and the UNIDROIT draft have provisions stating, in effect, that a possessor who acquires by gift or inheritance is in no better position than the person from whom he made the acquisition. The Scheme has no provision on this.

After Removal

Under the Directive and the Scheme, proceedings in the requested State go only to the issue of whether the object is covered by the arrangement in question and to the payment of compensation. Ownership is not at issue. The Directive provides that ownership "of the cultural object after return shall be governed by the law of the requesting Member State". The Scheme broadly provides to like effect although there is more detail. For example, the State is to hold the item for 12 months during which

time any proceedings regarding title must be commenced. If no claims are made during this time, the country of export deals with the item in accordance with its law.

Time Limitations

It is difficult to compare the Directive and the Commonwealth Scheme in respect of the time limitations they impose on the right to bring proceedings for return of the object, although the former is probably more restrictive than the latter. Under the Directive, such proceedings must be brought no more than one year "after the requesting Member State became aware of the location of the cultural object and of the identity of its possessor or holder". Under the Commonwealth Scheme, the period is five years "after the date the country of export had knowledge of the whereabouts of the item in the country of location". One year is obviously a very short period of time for the machinery of government firstly, to decide on the institution of proceedings, and then to actually take action. On the other hand, the one year dates from the State becoming aware of the identity of the possessor or holder. In the case of the Scheme, the five year period dates from State having knowledge of the whereabouts of the item in the country of location - a vaguer concept.

Under both arrangements, difficulties will arise in establishing the date when the State gained the knowledge. The wording seems to suggest that subjective knowledge is necessary - that knowledge cannot be imputed to the State e.g. a diplomat seeing the object in a museum would not be sufficient to ground the State with knowledge.

The Directive is more restrictive than the Scheme in that it provides for maximum time limitations. No proceedings for return may be brought more than 30 years after the object was unlawfully removed from the territory of the requesting Member State. In the case of objects forming part of public collections and "ecclesiastical goods in the Member States where they are subject to special protection arrangements under national law" the period is 75 years except in those Member States where proceedings are not subject to a time limit.² An early version of the Scheme contained an overall limitation period, at one time 30 years, but it has now been omitted.

The Directive provisions on time limitations owe much to those proposed for the UNIDROIT draft. The original draft proposed five years from the time the "requesting State knew or ought reasonably to have known the location, or the identity of the possessor, of the object" together with an overall period of 20 years from the date

2 The provisions of the Directive are obviously based on those of the original UNIDROIT draft although the limitation periods are different. The latter now contains many suggested time periods.

of export. There is a distinction from both the other arrangements in that the UNIDROIT draft fixes the State with an objective standard of knowledge - "ought reasonably to have known" - as well as the subjective standard. The current draft contains various proposals. The time periods are three or five years from the gaining of knowledge and six, ten, 20 and 30 years overall.

Validation Certificates

The Commonwealth Scheme has a provision not found in the Directive or the UNIDROIT draft - that dealing with validation certificates. These reflect a practice which has grown up whereby certain museums and similar institutions write to a country when they are considering making a purchase of cultural heritage to enquire whether the administration there has any knowledge of the provenance or previous ownership of an item. Under the Scheme, intending purchasers of cultural heritage would be able "to request of the central authority of the country of export a validation certificate to the effect that the item is not an unlawful export from that country". As indicated above, a validation certificate is said to constitute a complete defence to any claim by the country of export that the item had been unlawfully exported.

Conclusion

The above analysis shows that there are five points of possible significant difference between the Directive and the Commonwealth Scheme.

1. Administration - the Directive requires authorities in the requested State to take a more active role compared to that under the Commonwealth Scheme - pp.10-12.
2. Institution of Proceedings - these are more onerous for the requested State under the Commonwealth Scheme - pp.13-14.
3. Compensation - it should be more easy for the holder to obtain compensation under the Directive but only in those countries where the plaintiff has to prove lack of bona fides - pp.15-16.
4. Time Limitations - in general these favour the possessor and the requested State under the Directive as opposed to the Commonwealth Scheme - p.17.
5. Validation Certificates - these are unique to the Commonwealth Scheme - pp.18-19.

It is impossible to state that one arrangement is inherently superior to the other. The above shows that certain aspects of both the Directive and the Commonwealth Scheme favour the requested State and others the requesting State. It would be possible to create an arrangement which favoured wholly one State at the expense of the other. This would not be a political or practical solution. The Commonwealth Scheme must be considered in the light of the other two arrangements. Although the earliest of the three, it will be seen

to be within the mainstream of international developments, offering a practical solution to a problem that is clearly of concern to Commonwealth countries.

ANNEX 2

EXTRACTS FROM MINUTES AND COMMUNIQUE OF 1983 COMMONWEALTH LAW MINISTERS MEETING, COLOMBO, SRI LANKA

Protection of Cultural Heritage

20. Ministers acknowledged the central place occupied by cultural property in the national heritage. Historically, many major cultural items had been removed from their country of origin.

21. They firmly believed that, whatever the position with regard to matters in the historical past, it was now widely recognised in Commonwealth jurisdictions that the protection of significant items of national heritage was a legitimate concern of the State. Most countries had legislation which attempted to provide protection, but this could be immediately frustrated when items were smuggled abroad. To this end it would be desirable for the Commonwealth to take affirmative steps to facilitate the protection of cultural property and, in particular, combat the unhealthy market in smuggled and stolen cultural objects.

22. The practical and legal problems involved in attempting to retrieve cultural property once it had been illegally removed from the relevant national jurisdiction were acknowledged. The problem was essentially one of jurisdiction, and Ministers considered that a Commonwealth solution should be sought.

23. The discussions indicated that the UNESCO Convention on the Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 had not proved to be a wholly satisfactory solution, as many countries had experienced difficulty in implementing its provisions.

24. Ministers felt that the special ties within the Commonwealth association provided a promising basis for more effective action. Accordingly they asked the Commonwealth Secretary-General to initiate consultation with Governments directed towards this end.

Mr McLay (New Zealand) said that before introducing Paper LMM(83)38, he wanted to make it clear that he did not wish to repeat material in the Paper itself.

Rather, what he wanted to make was some suggestions as to possible lines of further action, and hoped that these suggestions, together with the issues raised in the Paper, would form the basis of a constructive discussion.

The Ortiz case was before the House of Lords and he was anxious not to say anything, even privately, which might be seen as designed to influence the outcome.

Nonetheless, he could provide some interesting side-lights on the Ortiz case itself, but again only to ministerial colleagues. The carvings in question were sold in 1973 by the original owner who had found them in a swamp, for about £3,000. They were almost immediately resold to Ortiz, a Swiss citizen, for over £40,000. Today they could be valued at something more than £1.5 million. The issue involved was one of considerable moment to all parties involved, not the least of which was Sotheby's, who had to store them pending resolution of the matter.

The second matter of interest to delegates was that Mr Ortiz only offered the carvings (and a number of other artefacts from his collection) for sale because, in 1978, his daughter had been kidnapped and he had had to raise a very substantial ransom. Happily, she had been released without the need to sell these particular carvings, and they continued to be held by Sotheby's pending the decision of the House of Lords. In considering the Agenda item he believed that the Meeting had to bear in mind a number of points. First, cultural property was an integral part of a nation's heritage, and as such, representatives of individual governments with particular responsibility for the administration of their countries laws, they all had an obligation to see that their jurisdictions provided laws that protected that heritage. Equally, cultural property was also the heritage of mankind of large, and an appreciation and understanding of the cultural heritage of other countries could make a very important contribution towards achieving understanding between peoples, particularly in the cause of peace.

From those two observations flowed a third. One could not assume that in every single case the removal of an artefact from its country of origin was necessarily objectionable, whether in national or in international terms. What was objectionable was the illegal removal of such artefacts, without the prior knowledge and consent of the appropriate national authority. He personally could derive some considerable personal satisfaction from the fact that a visitor to the Smithsonian Institute in Washington was able to see Maori artefacts, however they got there which demonstrated that six hundred years before Columbus, at a time when Europeans still thought the world was flat, Polynesian navigators were leading major migrations right across vast reaches of the Pacific Ocean. At the risk of attributing views to others, he suspected that the Sri Lankans might derive some satisfaction from the fact that visitors to many museums around the world could be informed of their country's very long history of civilisation.

Finally, at the risk of incurring the wrath of the Lord Advocate, there were some Greeks who could gain amusement from the fact that in the British Museum there was irrefutable evidence to support the view that the Scots were not the inventors of the bag-pipes! So

there was something to be gained from the fact that all of them could look, see and endeavour to comprehend the artefacts of other countries in their own museums.

The fourth point he wished to make was that any solution reached at the international level would have to combine political and legal elements.

Politics was the art of the possible. Accepting that definition, he suggested that the Meeting had to accept that there was no point in looking back at past misdemeanours, whatever they were and however strongly Ministers might individually feel about them. If they tried to remedy past wrongs, Ministers would be condemning this particular exercise from the outset. No one should suppose that as a result of these discussions, New Zealand would seek the return of Maori artefacts held in overseas museums, or for that matter the return of Polynesian artefacts held in New Zealand museums to the particular island countries from whence they had come. Any such returns would occur only as a result of arrangements made either between the relevant Governments or, where necessary, between those non-governmental organisations which now had possession of the items in question.

Nor could the discussions affect the outcome of the Ortiz case. For better or for worse, what had been done in the past had been done. As Law Ministers they could look only to the future. That offered the best chance of achieving the politically possible, and of devising a scheme that would resolve such problems for the future. He looked for a possible Commonwealth scheme to protect cultural property.

He recognised the very difficult definitional problem of what was in fact "cultural property". This was not something that could be ignored. But the first need was to encourage Commonwealth countries to enact laws that required prior government consent for the export of cultural property. Most Commonwealth countries already had such laws. The second step was that, in addition to providing for local penalties whether by fine or imprisonment, the law should also provide for the automatic forfeiture to the State of any goods exported without prior consent. Again, many states had laws to that effect. Thirdly - and this was the difficult part - because the illegal export of such cultural property inevitably meant that the objects were no longer within the jurisdiction to which they have been forfeited, the effect of such laws was going to have to be backed up either by an international convention or, perhaps initially, by a Commonwealth Scheme, pursuant to which participating countries would enact legislation that provided for the reciprocal recognition of forfeitures. That, in essence, was the solution hinted at by Lord Denning in his judgment in the Court of Appeal decision in Ortiz, he said frankly that the laws of various countries were inadequate to deal with the problem, and it had to be dealt with at the international level.

Such a scheme would have to apply only to the future. It could not in any way be retrospective. It would have to avoid the legal and political shortcomings of the UNESCO Scheme referred to in the Paper. It would have to address itself to the problems of definition that he had glossed over, and the question of compensation for bona fide purchasers. It would also have to deal with the obligations of the States to which the smuggled objects have been taken. What did they have to do in order to actively secure the return of these objects to the country from which they had been taken? And it would also have to provide some element of safeguard against vexatious claims being made. Those seemed to be the essential elements which the Meeting needed to address.

This was a problem that affected each and every one of the countries present. Every Commonwealth country both received and lost cultural property. Some lost more than they gained, others vice-versa. But none was immune from the problem. They could only protect their own cultural heritage if they were also prepared to reciprocate and protect that of others as well. The Meeting had a chance to take a step in the direction of affording that protection.

Mr Justice Loizou (Cyprus) recalled that the protection of the cultural heritage of a country was a subject to which Cyprus attributed the utmost importance, as its own national heritage had been the object of plundering, looting, tomb-robbing and smuggling from time immemorial in times of peace, but mostly when it had come under conquest in its past and very recent history.

No doubt this was a problem of universal concern and it was with great interest that he had read the document LMM(83)38 entitled "Protection of Cultural Property", a paper prepared by the Minister of Justice of New Zealand. He did not intend to refer to the details of recent incidents of antiquities smuggled from Cyprus abroad, but he could not but refer with appreciation to the British Customs and the British Police and to the authorities of the Netherlands and the Federal Republic of Germany, on account of whose efforts a great number of Byzantine ikons, amphora and other antiquities which had been taken from the Northern occupied part of his Island had been recovered and returned to the rightful owners the Church and the Museum of Cyprus, as well as to the owner of a Registered Collection which he had left in his home in the northern part when he had fled in a hurry.

The Chairman, in opening the discussion, had remarked humorously about the anxiety that the debate on the question of the repatriation of artefacts might cause to the British Delegation as regards the fate of the British Museum! He might alleviate their fears by assuring them that he had not come to raise claims to the contents of the British Museum but to discuss and find solutions of the serious problem regarding happenings

during the recent past, the present and the future. Credit, however, had to be given to the British, who had furnished the Cyprus Museums and introduced the first legislation to protect the antiquities of the Country as from the end of the 19th century.

It appeared that the cornerstone for the protection of the national heritage of each country was the establishment of a universal system of legal standards for the international protection of cultural property by clarifying as international offences of a number of acts directed against such cultural property.

No doubt this was necessitated by the fact that national legislation of many states revealed diversity between the existing legal systems in the field of protection of cultural property, particularly as regards the criminal prosecution and punishment of offences of such property which was likely to hamper any effort to ensure an adequate protection at an international level. Therefore, the "internationalisation" by means of a Convention of offences against cultural property appeared to be the obvious way. In that case a duty for the contracting States to adjust their legislation could arise, not only from the precise conventional obligations which they explicitly accepted, but more generally also from the widely accepted principle of the supremacy of international law over domestic law. This became obvious from the fact that in all the cases to which he had just referred, no criminal prosecution had been instituted against anyone.

He referred briefly to the various efforts that had been made at the international level as far back as the 19th century to protect the cultural heritage of countries, at least in time of war, and which had never met the problem. The last was the UNESCO Convention on the Means of Prohibiting and Preventing Import, Export and Transfer of Ownership of Cultural Property, in 1970, but which, however, had not proved to be as effective and satisfactory solution as its authors had intended it to be. It was because of this, and the seriousness of the problem that was posed, that he wished that an effort be made within the Commonwealth. In that respect they could draw from the experience of the Council of Europe and its efforts made in this respect where a draft Convention had already been prepared, namely, the Convention on the Suppression of Offences Against Cultural Property (Document CDPC(81)16).

Mr Mokama (Botswana) (in the Chair) cautioned distinguished delegates, that he would call upon the UK to reply should they be making too many claims on the British Museum!

Lord Mackay of Clashfern (Britain)

Finally, with regard to the protection of cultural property, he much appreciated the constructive and forward-looking spirit in which the Attorney-General of New Zealand had dealt with this difficult issue. He entirely

agreed that past controversies in this field must be left to the historians, and present disputes to the judges. Their concern as Law Ministers should be with the future. Accordingly, the United Kingdom was very willing to join in discussions that aimed to seek an agreed basis for the harmonisation of legislation in this field. The UK had been taking part in such discussions within the Council of Europe - discussions which had demonstrated how difficult some aspects of the subject can be, particularly the question of defining the property to be protected and of making just provision for the protection of *bona fide* purchasers. But the problem was one that needed to be discussed, and they looked forward to joining in discussions for that purpose with other Commonwealth countries.

The distinguished delegate from New Zealand had been so bold as to suggest that there existed irrefutable evidence that the bag-pipes were not invented in Scotland. He would not wish to join issue with him on that question, and would content himself with the claim on behalf of Scotland for having perfected their use!

Dato Haji Suhaimi (Malaysia) strongly supported the suggested Commonwealth Scheme for Mutual Assistance in Criminal Matters. The strategy for establishing such a Commonwealth system ought to be on the line of the Commonwealth Scheme on the Rendition of Fugitive Offenders, and as they had been comparatively successful in establishing that Commonwealth Scheme he saw no reason why they ought not to be successful, if not more successful, in establishing such a new Commonwealth Scheme.

He felt the need for international co-operation for the protection of cultural property. The relevant law in Malaysia was the Antiquities Act 1976, which covered both antiquities and historical objects. "Antiquities" were defined generally as being any object of human or animal remains which is at least 100 years old. It also included any objects of any age which were gazetted as being "antiquities". "Historical objects" were defined as being any artefact or other object to which religious, traditional or artistic or historical interest was attached.

Section 3 of the Act provided that every antiquity discovered in West Malaysia on or after the date of coming into force of the Act, and all undiscovered antiquities, were the absolute property of the Government. There was also provision for the Government to pay reasonable compensation to the finder of an antiquity and to the owner of land on which it was discovered. The Government had no property in historical objects. The export of any antiquity out of Malaysia was prohibited unless the exporter was licensed so to do.

In the case of historical objects, the approach was somewhat different. There was no requirement for an export licence, probably because by definition such object was comparatively indeterminate in character. However, an authorised officer could detain an object about to be ex-

ported if he had reason to believe it was or would be of lasting national importance or interest. If the Director General of Museums so confirmed, the object could be prohibited from being exported.

In the case of both antiquities and historical objects, the owner was entitled to reasonable compensation if an article could not be exported.

The statutory position was such that it was very easy to export historical objects. The Government's right to a particular object only began when it prohibited the export and paid compensation for it. The position was stronger in the case of antiquities. There, export provisions applied to all antiquities, both those discovered before the Act was passed and those discovered afterwards.

It was obvious that there was an urgent need for international legal co-operation in this matter. The question, as he saw it, was whether Ministers should start with Commonwealth co-operation in the first instance or move at once to include non-Commonwealth members in any possible convention.

Shri Azad (India) thanked the Secretariat for the excellent papers on the subject. The distinguished delegate from Malaysia had made some eminently sensible and concrete suggestions based on practical experience, and if the Meeting were to take positive action on this matter, the points made by him deserve detailed consideration, particularly the suggestion that Ministers might have to make a new departure from the normal principle of private international law that a State does not recognise the judgments passed by the criminal courts of another State. This principle had been evolved at a time when the activities of states were very limited and when problems of this nature, dimension and magnitude were unknown. It was for serious consideration whether this principle should not be modified in the light of practical experience, subject, of course, to certain safeguards.

He also expressed his wholehearted agreement with the delegate from Bangladesh who had highlighted the problems being experienced in many countries, particularly in Asia. He, too, had given support for the need for a different approach and for concrete action. India particularly endorsed the suggestion that there be detailed and elaborate study of the position and that a study team go into the matter not only in broad principle but also in detail. This was a matter of urgency and great practical importance, and it was proper that the Commonwealth Secretariat's Legal Division, apart from ensuring that the matter was considered at later gatherings, should also keep Member countries posted with the developments on the subject both in the national and international sphere.

Mr MacGuigan (Canada) wished to emulate the distinguished representative of India in making very brief

comments on two of the issues that had been raised. First, with respect to the question of cultural property. It seemed to Canada that the beginning of wisdom in this field was adherence to the 1970 UNESCO Convention. That, of course, was not perfect, as he understood that it was limited to prosecution in respect of the import of cultural property where it had been taken from a museum or a public monument. But nevertheless it was to that extent rather effective, and there were few countries in the Commonwealth which had chosen to adhere to that treaty.

At the present time there was a case involving a Nigerian sculpture which was brought into Calgary from New York. The main evidential problem faced was that the artefact had not been documented in Nigeria. But as far as the law was concerned, if certification could be provided the position was very clear. In fact, Canadian law went beyond the provisions of the UNESCO Conven-

tion. It provided that where such an artefact came out of a country, whatever its source, it would be equally proscribed. But the legislation was used as a trigger to adhere to the UNESCO Convention.

If New Zealand were an adherent to the Treaty, and if the Maori carvings were in Canada instead of in London, they would be subject to being returned to New Zealand. He urged all countries to examine the effectiveness of the UNESCO Convention.

The Chairman observed that they had all had a most interesting discussion on a very important subject, with many valuable ideas being put forward. He suggested that it would be the collective wish that the Secretariat examine these in detail for future consideration by Ministers, but that in the meantime all countries should endeavour to do what they could to assist the other countries in these matters.

Extracts from Minutes and Communique of 1986 Commonwealth Law Ministers' Meeting, Harare, Zimbabwe

PROTECTION OF THE CULTURAL HERITAGE

27. Ministers acknowledged the central importance of the cultural heritage to the life and identity of each nation. It was thus the duty of each government to protect items of its cultural heritage from illegal exportation. A flourishing illicit market existed in antiquities, cultural artefacts and religious treasures which threatened to impoverish further the national heritage.

28. Officials had considered a possible Scheme intended to facilitate the return of illegally exported items while establishing a validation system to protect *bona fide* purchasers, but a meaningful consensus had not yet been achieved.

29. Ministers reaffirmed the need to remedy the situation and therefore asked the Secretary-General to invite a small number of representative countries to form a group to examine further all aspects of the problem and report in time for the next meeting of Senior Officials, and Ministers looked forward to examining the matter further when next they meet.

5(g) Protection of the Cultural Heritage

The Chairman said that the meeting of Senior Officials held in Marlborough House in January 1986 had settled two draft schemes which had already been adopted. Its work on a third scheme relating to the protection of cultural heritage did not reach that stage, but senior officials had produced a revised text which was reproduced in paper LMM(86)13, the report of the Chairman of the Meeting, the Hon M D Mokama, Attorney-General of Botswana. He invited Mr Justice Loizou of Cyprus, who had chaired the meeting's deliberations on the protection of the cultural heritage, to open discussions.

Mr Justice Loizou (Cyprus) said that his task to introduce the item on the protection of the cultural heritage had been made an easy one in view of the wealth of precise information contained in the documents that had been made available in preparation for this conference. However, a brief reference had to be made to certain aspects of the matter.

The Senior Officials at their meeting in January 1986, which he had the honour to chair, considered and revised a draft scheme, which was now tabled for the resolution of and directions on certain matters on which further progress could not be made without more detailed instructions from Governments.

The first item to be addressed was the non-retroactivity of the scheme. The drafting committee, as pointed out in the chairman's report, found that the method of im-

port prohibition could not without fundamental difficulties be suitably adapted to cover items already transferred. Strong views were expressed by some delegates for extending the Scheme to cover exports going back many years. In fact, Law Ministers in their communiqué of the conference at Colombo, had addressed themselves to future dealings and left open the issue of the past for further reconsideration. It was therefore decided at the meeting of the Senior Officials to leave the possibility of a separate scheme to cover these aspects to Law Ministers for further action if they so wished. So Article 1(2) provided that 'the Scheme adds to and in no way derogates from future and existing means of recovery of items of culture heritage.' The non-retroactivity, therefore, of the Scheme did not affect existing claims arising out of the unlawful possession of items in the past.

He then turned to the operation of the Scheme, and addressed the three alternatives to be found in section 8(2) which referred to the question of where the judicial proceedings relating to the return of the items should be held. Those three alternatives were indicative of the divergent views advanced at the Senior Officials Meeting.

The first alternative was to be found in section 8(2)(A) that the only matters to be discussed in the courts of the country of location would be whether the item was subject to the Scheme and if so whether it was covered by an export permit or validation certificate. If the item was covered by the Scheme and no such permit or certificate had been issued, the item would immediately be returned to the country of export and any other questions relating to the item such as any question of title and compensation to the innocent purchaser would be determined there. Proceedings in that respect would have however to be commenced within 12 months.

The second alternative set out in section 8(2)(B) was to provide that the courts of the country of location should first determine whether the item was subject to the Scheme and whether an export permit or validation certificate had been issued. If both existed, the court would order its return to the holder. If it was not covered by a permit or a certificate, the court of the country of location would order its return to the country of export. An innocent purchaser, however, might seek an order for compensation prior to the return of the object to the country of export. This would be the only issue of title cognizable in the courts of the country of location, and the person would have the burden of proving that he had taken all reasonable steps to satisfy himself that the item was not an unlawful export, unless he has used the validation procedure which was set out in section 13,

and which was intended to give purchasers additional protection.

The third alternative which was embodied in section 8(2)(C) was for the court of location to determine whether the item was covered by the Scheme and whether an export permit or validation certificate had been issued and whether the holder had established that he was an innocent purchaser of the item and if so whether he had acquired good title to it under the law of the country of location. If the court determines that he had so acquired the title then the item was returned to the country of export which was however obliged to recognise the title so determined. The holder could enjoy the item in the country of export or he could apply for an export licence in the normal way, or of course he might decide to sell it there.

The innocent purchaser was safeguarded by all three alternatives. First, there was the validation certificate procedure. By that means he was given the opportunity to remove any doubts about the export requirements regarding the object. Under the first alternative, the innocent purchaser would have the protection accorded to him by the existing law of the country of export. Under the second alternative, his status as innocent purchaser would be assessed in the country of location and then the appropriate compensation would also be assessed there as a condition for the return of the object to the country of export. If the latter decided not to pay that compensation, he would retain the object.

Under the third alternative, he would retain his title and could either enjoy the object in the country of export, apply for an export licence and export it, or, if that were refused, sell it. Under the first and third options, the item would at all events, find its way back to the country of export provided of course it was covered by the Scheme and no permit or certificate had been issued. Under the second alternative, many small countries might never be able to have material returned to them as the payment of compensation at the rate which was likely to be assessed in a country which was an important international art market, might prove an insurmountable obstacle. Under the third alternative, a country might have to recognise the title of the innocent purchaser, although according to its own legislation, the state itself had title in the object.

What was an innocent purchaser might also be established in several ways. Under the first alternative, it was left to the country of export. In the case of the second and third alternatives, those factors fell to the decision of the country of location. In the case of the third alternative, however, countries of export which were bound to recognise the title of an innocent purchaser, who by the standards applied in its courts would not have been regarded as innocent, might raise some objections.

The Scheme did not make provision as regards the measure of compensation. The issue, however, was set-

tled by deciding which courts were to have jurisdiction to decide which issues. There existed three possibilities: first, the value which the item would have in the open market in the country of export; secondly the sum which the purchaser actually paid for the item; third, the value of the item in the open market.

There was a wide diversity of views expressed on the issue of the limitation period at the meeting of Senior Officials. One was that it should be left to the normal rules of limitation. Another that there should be no limitation and another that there should be a relatively short period. The consultants had suggested a period of thirty years, which was a period of one generation and was also recommended by Professor Chatelain in a Council of Europe consultative document. However, such a limitation was not finally included in the European Convention on Offences relating to Cultural Property 1985.

It had to be concluded therefore that in each of the three alternative modes of operation of the scheme, there was an element of compromise. That was why a decision of Law Ministers was essential. Such a decision would be a major step forward and would allow a further development of an operative scheme. Likewise, a decision had to be taken on the question of non-retroactivity of the scheme. These were the more serious problems that had to be resolved.

He suggested that the meeting authorise the Commonwealth Secretary-General to set up a working group or a team of representatives to proceed with the matter further. The preservation of the cultural heritage of every country was an obligation to the next generation which also had the right to know their roots, and to link with that their own creative developments.

Mr Liveras (Cyprus) said that the Island of Cyprus had an historical past of over 9,000 years and vestiges of civilisation of various periods were scattered throughout its territory. There were Neolithic settlements, Bronze Age towns, Classical palaces, Hellenistic and Roman public buildings, Byzantine and mediaeval churches. This rich cultural heritage, some of which UNESCO had included in the World Heritage List because of its importance, was protected by the Antiquities Law, which was enacted in 1935. At the same time the Department of Antiquities was created, which was entrusted with the task of looking after their antiquities.

In 1974, Turkey had invaded Cyprus and continued to occupy ever since nearly 40% of the island's territory. The invasion and subsequent occupation caused human, political, economic and other problems, and serious violations of human rights. The Government of Cyprus and the Department of Antiquities were prevented by the Turkish Military Force from having access to the occupied area of the island where, incidentally, lay the most famous relics of ancient Cypriot civilisation. The Antiquities Law could not be ef-

fectively enforced in the occupied area and the monitoring of numerous violations was impossible in the prevailing circumstances. Moreover, the Turks had persistently refused to consent to the establishment of a permanent UNESCO representation in the occupied area of Cyprus with the view of safeguarding the cultural property of the island. By reason of the circumstances now prevailing in the occupied area of Cyprus and the exacerbation of international crime in relation to antiquities, desecration of churches and tombs, looting of museums and private collections, and the illicit trafficking of antiquities had reached alarming levels.

The Cyprus Government wished to extend its appreciation for the co-operation of museums and other institutions abroad in combating the illicit export and trading of Cypriot antiquities. Special mention had to be made of the British Museum and the Louvre for their valuable assistance.

They believed that it was the utmost duty of every national government to preserve its history and civilisation and the protection of antiquities was the most effective and successful method of achieving that objective. Therefore they welcomed the initiative of the Commonwealth Law Ministers in promoting a scheme for co-operation between member states for the suppression and elimination of the illicit export and trading in items of the cultural heritage.

Sir Patrick Mayhew (Britain) believed that everyone would have listened with understanding and deep sympathy to what had been so movingly said by the distinguished delegate from Cyprus. All who knew and loved the world of art and antiquities would have sympathised deeply with his account of the problems which the draft scheme was intended to solve. Britain had given the scheme careful study and we deplored the illegal export items of its natural cultural heritage. This discussion was therefore about ways and means, about mechanics, rather than about the objective.

It had to be recognised that the art market was of substantial advantage to all the economies of Commonwealth countries in various degrees, and only a tiny minority of transactions were illegitimate. They had a constructive proposal to make, but the draft scheme did present them with such difficulties that they felt they could not accept it, grateful as they were for the removal from the Scheme of the element that was originally there. They would be greatly concerned about its conflict with their existing legal practice in matters of title for example, matters of seizure, the recognition of foreign laws and regulations, entitlement to compensation and other matters. That certainly did not mean that they did not wish to see practical progress made in the problem. It was customary in the United Kingdom to rely heavily on systems of self-regulation. Such self-regulation in the art trade was already an established reality. It had been so for many years.

He referred to what the distinguished delegate from Cyprus had said about the British Museum's approach to these matters. But he believed it to be a representative approach amongst museums and art trade in Britain. Of course inevitable abuses did occur but there were existing avenues for redress. It was possible to bring a case for the return of cultural property in the courts, and in addition they could point to very recent cases where the voluntary codes adopted by the art trade and museums had been invoked with success. They proposed building upon that with a resolution that Commonwealth countries should agree without reservations to secure the urgent exchange of information regarding the illegal export of cultural property. An agreement of that kind would have the effect of putting the museums and art traders on notice that the object was of dubious origin or illegal export, and it would be accompanied by the active involvement of the Government of the country of location. The Government would transmit full information about means of identification, legal status, export, and the whereabouts of the illegally exported property, and it would fall on the Government of the country of location to use its best practical measures, whether legal or administrative, to induce the return of the requested property. Britain would undertake to deal as promptly and effectively as possible with requests from other Commonwealth countries. In their implementation of the arrangement, they would rely primarily upon the established codes of practice which worked well, and which regulated the acquisition and handling of items of dubious origin.

A copy of the proposal had already been circulated to Commonwealth officials. This was a different approach from the one advocated in the draft Scheme, but it was a realistic one which all countries could subscribe to without delay. The text of the proposal read as follows:

"Commonwealth countries agreed to use diplomatic channels to advise urgently the appropriate authorities in other Commonwealth countries of the illegal export of cultural heritage of outstanding significance in respect of which they require assistance in their recovery. In such cases they agreed to supply full information about the provenance, legal status, export, means of identification and whereabouts of the items in question. Each Commonwealth country undertook to use its own good offices to induce the return of any such property, and to keep the requesting country fully informed of the progress and of the outcome. In this context, each Commonwealth country undertook to use the best practicable means available to this end, including existing formal and informal provisions, whether legal or administrative."

They knew in Britain from experience that approaches from government to government could work and they knew in this forum particularly that they could work.

They could work efficiently and effectively. He hoped that he had succeeded in persuading his distinguished colleagues that this alternative approach proposed by Britain did not derive from any lack of sympathy with the objectives of the scheme as advocated by the distinguished delegate of Cyprus. Being half Irish himself, he reacted particularly warmly towards his account of the depletion of the cultural heritage of his island.

Dr Amerasinghe (Sri Lanka) said that Sri Lanka had a draft Bill prohibiting the export of all cultural property except on licence. Export was already controlled under section 361 of their Antiquity Law number 9 of 1940. But the new Bill sought to streamline the law and make it more comprehensive.

With regard to the Commonwealth Scheme, they found the criteria to be quite acceptable although in their proposed legislation, they had by and large, followed the UNESCO definition of cultural property. The prohibition of imports was a desirable provision which they would recommend for inclusion in their proposed legislation.

In this connection, they noted that section 308 of the United States Public Law Number 97/446 of January 12, 1983 provided as follows: "No article of cultural property documented as appertaining to the inventory of a museum or similar institution in any State Party, which is stolen from such institution after the effective date of this title, or after the date of entry into force of the Convention for the State Party, whichever date is the later, may be imported into the United States." Their delegation welcomed the suggestion that a committee be appointed to further consider these matters.

Mr Palmer (New Zealand) said that New Zealand had a special interest in this matter. Their own inability to recover Maori carvings of great spiritual, aesthetic and historical significance highlighted the great defects that existed in the law around the Commonwealth on this subject. In 1973 a dealer in art had come to New Zealand and purchased some exquisitely carved Taranaki panels for \$NZ6,000. The dealer took them out of New Zealand contrary to New Zealand law, particularly the Historic Articles Act of 1962. The dealer sold them to a collector, that collector later sent them to Sothebys to be sold at auction. When the catalogue came to the attention of the New Zealand Government, they issue a writ in the United Kingdom claiming a declaration that the carvings belonged to the New Zealand Government since they had been smuggled out of New Zealand, contrary to New Zealand law. That case was litigated through the courts, and ended up in the House of Lords. The New Zealand Government lost because only if forfeiture was automatic would the Government of New Zealand have become the owner of the panels. That case showed dramatically the defects that presently existed in this matter. He could not accept that the re-

sponse of the United Kingdom Government was a sufficient one in these circumstances.

He cited Lord Denning in the Court of Appeal in the *Ortiz* case who said: "Best of all, there should be an international convention on the matter, where different countries can agree and pass the necessary legislation. It is a matter of such importance that I hope steps can be taken to this end." So even though New Zealand lost its case in the United Kingdom's courts, it nevertheless was seen by Lord Denning, to have some justice on its side. In those circumstances, they strongly favoured the scheme which was being developed. They believed that while it was not perfect, it was certainly better than the existing situation, and it was a matter of urgency that some progress be made on this matter.

They agreed that it ought not to be retrospective. Of the various options available in relation to *bona fide* purchasers, they preferred the second option, option (B): that the court in the country of location determined the compensation payable to the *bona fide* purchaser as a precondition for the return of the item to the country of export. They also preferred the proposal which was in the consultative document for a period of thirty years as the limitation period. They thought that that had the great advantage of certainty.

But since there seemed not to be the necessary degree of consensus on the matter they would support the view that a working group be set up, by the Commonwealth Secretary-General, to try to make some further progress on this matter. While he accepted that the proposal of the United Kingdom Government was put forward in an attempt to make some progress in this matter, the Commonwealth should continue to strive to arrive at systematic arrangement that could perhaps be embodied in an international convention of the type that Lord Denning had in mind. The Commonwealth might very well make progress more easily and more rapidly than UNESCO on this question.

Mr Liveras (Cyprus) reiterated their proposal, supported by other delegates, that a committee should be appointed to inquire further into the matter, in the hope and in an effort to find mutually acceptable ground for a uniform agreement that would allow for the issues raised. Whilst they appreciated the effort made by the British Delegation they were not absolutely happy with it. He felt that it could be improved and the best forum for that was not this forum, but a committee that would really look into the matter in more detail.

Dr Shahabuddeen (Guyana) said that the advocacy of the United Kingdom's Solicitor-General had been so very persuasive as to make him feel rather graceless to disagree. But having regard to the deep-seated consideration underlying this matter, there was really no option for him but to support the Scheme, in the terms in which it had been presented. They were dealing with

the identity of countries, the very soul of peoples, and of nations. The features of those very subtle and indefinable elements of national personality were spread out and distributed in a number of artifacts, works of art, and other bits of cultural heritage. A connection between these items and the identity of a nation made the issue so very urgent and pressing. The entitlement of a nation to its cultural heritage was a matter of paramountcy, which should at all times prevail, whatever might be the other competing interests. Certainly, there might be cases in which it would be just to provide for compensation to someone who might have suffered injury in the course of the contorted processes of the market place. But it would be wrong, whilst seeking in proper circumstances to provide for compensation, to do this in a way which subordinated the entitlement of the state of export to the item in question to any other claim, whether by compensation or otherwise.

He then gave a hypothetical example of the theft of the crown jewels, being traded on the open market and bought by an innocent purchaser. He hoped that the state of the law as it stood would support the paramount title of the United Kingdom to items of that kind.

Taking that approach, he examined the three options referred to and explained by the distinguished delegate of Cyprus. Two previous speakers had opted for the second option. Under this second option, the court of location, if it decided in favour of the state of export, might make an order for compensation in favour of an innocent purchaser. But this seemed to imply that compliance with that compensation order was a condition precedent to the realisation by the state of export of its theoretical entitlement. He found this approach defective, because it did not honour the supreme and paramount entitlement of the state of export to its cultural heritage. He would therefore favour the first option, but would accept the second option if it were the consensus. He would also support the establishment of a working group.

Mr Lubuva (Tanzania) said that protection of the cultural heritage was a matter which transcended national boundaries, and Tanzania was no exception to that. Tanzania would suggest that the matter be deferred for further studies by a committee, taking into account the various aspects raised in these discussions.

The Chairman suggested that, as a preliminary matter, the meeting examine whether or not they found the British proposal acceptable, and, if so, to incorporate it in the communiqué, while having it clearly understood that the more detailed scheme would be referred by the Commonwealth Secretary-General to a committee of experts.

Mr Palmer (New Zealand) said that the New Zealand Government was against the British proposal and thought it should not be adopted. Therefore all the meeting needed to do, having discussed it, was to refer

the whole matter back to a small working group.

Mr Chigaga (Zambia) thought that the meeting should agree to defer the subject and send it back to the officials to consider it and study it and make recommendations. It would be premature to put up something as agreed at this stage. That would be the right procedure and it would cause nobody inconvenience. The consensus was that the matter should be referred to the officials.

Mr Liveras (Cyprus) said that very often people thought that when a matter was to be killed it was best sent to a committee. It was bad enough that the proposition entailed reference to a committee. If the meeting were in addition to risk referring matters to the committee, having already adopted an interim proposal, that would make matters worse. The matter should be left open so that all countries could try to reach agreement.

Shri Sen (India) felt that the proposal of the New Zealand Government was worthy of consideration. India had been very badly affected. Recently a valuable temple statute had been taken away and they had been hunting all over the world. There were many cases which had yet to be finalised. Therefore, in order to achieve a comprehensive scheme which would be worthy of being applied with effectiveness, it would be better to set up a very small working group to devise rules for the purposes of combating this particular problem.

Sir Patrick Mayhew (Britain) saw the force of what had been put forward firstly by the distinguished delegate of New Zealand and then by the distinguished delegate from Zambia. There was an element of prematurity in adopting the British proposal if they then went on to set up a committee to consider the whole subject. The United Kingdom would therefore be quite content with the proposals as formulated by the distinguished delegate from Zambia that the whole subject be referred to a small committee to see whether progress could be made.

The Chairman noted that the decision was that this agenda item should be referred to a small group by the Secretariat and that this group would make a proposal.

Extracts from Minutes and Communique of 1990 Commonwealth Law Ministers' Meeting, Christchurch, New Zealand

Proposed Scheme for the Protection of the Cultural Heritage within the Commonwealth

18. The Meeting had before it the Report of a Working Group which had been appointed by the Commonwealth Secretary-General, as requested by Ministers when they last met. The Group had examined and revised the Proposed Scheme for the Protection of the Cultural Heritage within the Commonwealth in an effort to accommodate the views expressed by governments.

19. Ministers expressed their gratitude to the Working Group. They acknowledged that a number of them were not yet in a position to express a final view on the proposal as processes of consultation with other interested ministries were not yet concluded. The Meeting asked that once this process was complete, the proposal should come before Senior Officials when they next met, so that Law Ministers would be in a position to take a firm decision on the matter at their next Meeting.

Agenda Item 2(e): Draft Scheme for the Protection of the Cultural Heritage

The Chairman recalled that when Law Ministers had met in Harare in 1986 they had asked for a Working Party to be convened by the Commonwealth Secretary-General to examine the proposed Scheme for co-operation in this area and to report back to Ministers. The report of that group made it plain that unanimity had proved elusive, although the Working Party had been able to make considerable progress at their meeting. When their report had come before Senior Officials on Sunday, the view had been expressed by a number of delegations that there had been insufficient time for the necessary policy decisions to be taken in capitals.

Thus, this Meeting was not in a position to adopt the Scheme formally. Senior Officials noted in their report that the matter required further consideration and consultation with other ministries responsible for the protection of cultural property. This being the case, he suggested that the Meeting consider remitting the Scheme back to Senior Officials. It could then be considered by them in the light of those further consultations so that Ministers would be in a position to come to a final decision when next they met.

The Hon Christodoulos Chrysanthou (Cyprus) believed the question of the proposed Scheme for the protection of cultural heritage was of the utmost importance to them all.

As was well known, the cultural heritage of Cyprus had been subjected to plundering and there had been illicit exports of antiquities throughout the centuries. Items so

taken could be found in collections in practically every museum in the world. He stressed that the recent destruction of monuments, churches, and other archaeological structures and items of the cultural heritage of Cyprus stolen and being the subject of illicit sales throughout the world from the area occupied by Turkish troops since the invasion in 1974, was destruction and plunder of unprecedented magnitude.

He recalled the background of the subject. The matter had been discussed with the assistance of two experts, Dr Patrick O'Keefe and Dr Lyndel Prott, as a result of the mandate for the consideration of the subject which came directly from the Law Ministers at their 1983 meeting in Colombo, at which they had asked the Commonwealth Secretary-General to initiate consultation with Governments towards finding effective solutions and, as they put it, "to take affirmative steps to facilitate the protection of cultural property and in particular combat the Commonwealth market in smuggled and stolen cultural objects."

It was a problem not devoid of difficulties, especially in the field of jurisdiction, but it had been believed that a Commonwealth solution should be sought. He recalled the paper prepared by the Hon JK McLay, MP, the then Attorney-General and Minister of Justice of New Zealand, for the Colombo Meeting. He had - and rightly so - stressed that in the absence of international co-operation backed up by agreed legal measures, purely domestic legislation might be of limited efficacy in curbing the illicit transfer of cultural property or securing its return. He and his country had had a bitter experience in the matter as manifest in the *Ortiz* case, which found in the House of Lords a sad end for New Zealand and for all of them and which had been ringing a bell ever since for the need for international co-operation and action for combating this kind of international crime, which was second in extent only to that of narcotics trafficking.

His own country had also been compelled to engage in the United States in similar litigation. Precious Byzantine mosaics of the early sixth century AD, were removed from a church in the occupied north of Cyprus and, through illicit trading, found their way to Indianapolis where proceedings were successfully pursued by the Government of Cyprus and the Greek Orthodox Church of Cyprus before the Indianapolis Division of the District Court of the State of Indiana. On 3 August 1989 judgement was given in favour of the Cyprus authorities, but this first instance judgement was now under appeal and the mosaics were still in a bank vault. The issues before the courts of the United States were

those that Cyprus would like to see simplified and made less costly through the adoption of a Commonwealth Scheme.

Reverting to the successive efforts made to that end, he mentioned that the concept of a Commonwealth Scheme was also pursued at the Zimbabwe Meeting in 1986 of the Law Ministers at which New Zealand's present Prime Minister as a Law Minister then, had taken a strong stand and had argued vigorously the case for the proposed Scheme. In view of the difficulties that were encountered, once more Law Ministers asked the Secretary-General to invite a small number of representative countries to form a group to examine further all aspects of the problem and to report in time for this meeting in New Zealand.

The report of the working group, which the Hon Justice Loizou had the honour to chair, was now before delegates. Cyprus supported this report. They looked forward to having such a Scheme agreed to at this meeting, which would facilitate at least within the Commonwealth the repatriation of stolen items and which might be a model for other regional or international organisations to adopt.

In this connection he reminded the meeting that the General Assembly of the United Nations, on 7 November 1989, had adopted a resolution in favour of the return of the cultural heritage to their place of origin, confirming by it the view that such a return support international co-operation and the preservation and blooming of universal cultural values. Cyprus had hoped that what was started by New Zealand on account of its own bitter experience could have come to a happy end here in their host country. Bearing in mind the views already expressed at the Senior Officials Meeting on account of the matter not having been given the opportunity for exhaustive discussion, he suggested the following:

1. That the meeting express gratitude for the work done by the working group.
2. That the meeting acknowledge the fact that a number of Governments were not yet in a position to express a final view on the proposal as it now stood, but should be within the next few months.
3. That once Governments had formulated their policies in respect of the proposal, the proposed Scheme as amended by the working group should be considered by Senior Officials so that when Law Ministers next meet they would be in a position to make a firm decision on the matter.

Prince Bola Ajibola (Nigeria) said that unfortunately, the issue of cultural heritage was the only one left untackled on their agenda when they had last met, in Harare. Four years had now elapsed and they had not been able to do anything concrete. He commended the efforts of the working party chaired by our Justice

Loizou. However, regrettably one could see that progress had not been as expected.

Comparatively, they had been able to make considerable progress on all other Schemes except this particular one, despite some countries being very keen to ensure that Ministers instituted a Scheme of this nature.

He suggested that the time had come when this body of Law Ministers should meet more often than it did now. He felt that waiting four years for resolutions and decisions about urgent and important matters allowed many of them to lapse. Since he would not be able to be present as he might have to leave, he suggested that Ministers seriously consider on Friday the possibility of their meeting more often than they do now. He appreciated the fact that their Senior Officials met more often than Ministers did, however, there was a lot to be said for Ministers meeting more often perhaps every two years or so - in order to be able to approve, ratify, or make use of the suggestions and recommendations of their Senior Officials.

The Hon DR G W Kanyeihamba (Uganda) understood that the item would be postponed for future discussion. He shared the views expressed by the distinguished delegate from Nigeria that matters of this kind should be dealt with expeditiously.

Having said that, he would like to mention one or two points about the report. First, in relation to the certificate which authorises the items to be taken out of the country, the Scheme should provide for fraud. Certificates could be obtained by fraud, and he thought there should be a defence for the country claiming back the object to show that fraudulent dealings were involved in the matter. Second, the six months time period after the object had been obtained was too short. The period should be extended to enable the country of origin to make the necessary searches and investigations to ensure that the objects of art were not taken from the country illegally or fraudulently.

The Chairman observed that his government had a strong view on this issue in favour of reform, and he gave an example of what had happened to them. New Zealand lost an item of cultural heritage - it was a letter written by Captain James Cook, and all would appreciate the historical importance of that personality to all in the Pacific. Captain Cook had written a letter to his second-in-command in 1776 and it had fallen into the hands of a club in New Zealand. In April 1988, the New Zealand Government was advised that the club which owned the letter had sent it to England for sale. The club was duly convicted of the charge of removing a document of special value from New Zealand without reasonable excuse and without the necessary certificate of permission from the relevant government authority, contrary to the Antiquities Act. The government did not take action in the English courts to have the letter returned because previous experience suggested the prin-

ciple that English courts would apply would be not to uphold the penal or public laws of another country, as foreshadowed in the Ortiz case. However, the episode had had a happy ending. Through the great generosity

of the City of London, the Cook instruction had been purchased by it and returned to New Zealand as a 1990 gift.

The CHAIRMAN then put the suggestion and this was adopted.

Annexe 3

Extracts from Discussions at Senior Officials' Meeting, Singapore, 1992

The Hon Tan Boon Teik (Chairman) in introducing the next agenda item said that it concerned the material cultural heritage and was set out in paper SOLM(92)20 which had been circulated. The paper contained the proposed scheme on the material cultural heritage within the Commonwealth. This was a matter that had become caught up in both the efforts of UNIDROIT to effectively redraft the UNESCO Convention and with moves within the European Community to afford protection to material cultural heritage in advance of the single market that was to come into being in 1993. Paper 20 was submitted by New Zealand and it might therefore be appropriate for the distinguished delegate from New Zealand to introduce the discussions.

Mrs Janice Lowe (New Zealand) said that New Zealand had a long standing interest in the matter going back to 1983. The purpose of the draft scheme for the protection of the cultural heritage within the Commonwealth was to secure legislation in the Commonwealth that would enable the return of cultural property that had been lost or stolen or unlawfully exported from the country of origin. To that extent it was not dissimilar to other Commonwealth arrangements such as that relating to extradition. Items of cultural heritage continued to be lost at an alarming rate to the countries of origin because of inadequate international cooperation to secure their return. It seemed fairly clear to her that the situation would not improve until there was much greater mutual assistance between countries to attack the problem. They therefore felt that the draft scheme on the protection of the cultural heritage fitted in very well with the rest of the Commonwealth programme on mutual assistance. They believed that it was actually a very advanced document of its kind. Nonetheless they also felt that it was perhaps a little too advanced and probably its time had not yet come. Whatever the reason their assessment was that it had not yet achieved the degree of support necessary for it to be implemented at this particular stage but that equally it was important to make some progress on the matter because cultural property continued to be lost to its country of origin. There were, as the Chairman had indicated, some very encouraging developments going on in other forums - the Commission for the European Communities had recently issued a draft directive for consideration by member states of the community to give some protec-

tion in the light of the pending move to a single European market at end of 1992.

The second development was that UNIDROIT, the Institute for the Unification of Private Law based in Rome, had actually prepared a draft treaty on the return of stolen and illegally exported cultural objects. As she understood it the proposal being developed by UNIDROIT was however expected to proceed only quite slowly with perhaps an outer limit of about 1995 for something to be finalised. Against this particular background New Zealand had made some proposals in Paper No. 20. There were 2 proposals which appeared on page 8 of that paper. She wanted to make it clear at this stage that proposals A and B on page 8 were actually a package. They were meant to be taken together and were not meant to be alternatives and she apologised if there was some lack of clarity there which may have confused some delegates. The 2 proposals were to be taken together as a package.

The first proposal, proposal A, was that further consideration of the draft Commonwealth Scheme should be deferred for the time being and the position reviewed at the next regular meeting of Senior Officials, that is to say, the next meeting of this nature after the Mauritius Meeting of Law Ministers. As she had just mentioned the question of providing adequate protection for cultural property was being discussed elsewhere and there could well be advantages in awaiting developments on those processes without necessarily regarding them as a solution to all the problems. The second proposal, proposal B, was meant to complement the first proposal and it would ask Law Ministers Meeting in Mauritius to consider the desirability of promoting not the draft Commonwealth Scheme at this stage because it seemed rather premature for that but some more basic, less ambitious, legislation that would at least assist the return of unlawfully exported items within the Commonwealth in the meantime. Some states around the table had adequate legislation already and she believed Australia was one of them. The legislation contemplated in proposal B would deal with the situation where an item of cultural property had been unlawfully exported to another country within the Commonwealth. Essentially the legislation would allow the courts in the country of import i.e. the place where the cultural property was found, to recognise and deal with claims for the return

of that property to the place from which it had been stolen or from which it had been unlawfully exported. That was the essence of proposal B, that domestic legislation in each Commonwealth country would empower the courts of that country to deal with claims from other countries for the return of unlawfully exported or stolen cultural property. The legislation would have to address some other matters as well and among these would be what was meant by cultural property, time limits within which claims for the return of cultural property would have to be made, and also very importantly the prospect of compensation for *bona fide* purchasers of stolen or illegally exported property.

The Appendix to paper 1 sets out in very tentative form only an example of what the legislation might look like but she could not stress too strongly that there were obviously different ways of legislating on the matter and what was set out in the appendix was merely an example of how one might tackle the problem. She believed that the precise content of the legislation would be a matter for the domestic law and practice of each Commonwealth jurisdiction. New Zealand was very relaxed about the scope of any such legislation might take so long as it was effective enough to achieve its purpose and that would be to secure the return of cultural property lost from now on to its country of origin. She wanted to clarify that there was no question politically at this stage of making such legislation retrospective in the sense of picking up articles that were removed long ago. The critical factor was that the operation of any such legislation should not have to be dependent on the existence of a treaty relationship between the country where the property turned up and the country claiming it back. She thought that if it was based on treaty relationships it would become cumbersome and unworkable. In other words, the legislation would operate in a similar way to the legislation that gave effect in each country to the Commonwealth Scheme on the Rendition of Fugitive Offenders. No treaty would be necessary. Nor did she think that the legislation should be based on strict reciprocity in what countries were prepared to offer. In other words she thought it would be rather unfortunate if country A would only return items to country B if country B gave exactly the same facility on the basis of reciprocity. If one allowed more flexibility in the nature of the legislation there would be more prospect of getting legislation around the Commonwealth on the books somewhat more quickly.

Finally they in New Zealand believed that it was urgent to take some action as soon as possible to stem the tide of current losses of cultural property. They did not think it was really a matter on which the Commonwealth could afford to wait until schemes in other forums were completed because the time frame for that could be quite lengthy. Their proposals were put forward in a spirit of compromise with a real desire to make progress

and if it should find favour, New Zealand would be very happy to participate in a small committee of interested countries which could work on the details of a suitable paper that could go to Law Ministers in Mauritius. Essentially she contemplated that the paper would be a recommendation for legislation along the lines of proposal B but that could be subject to development as well.

The Hon Tan Boon Teik (Chairman) invited delegates who wished to make comments to do so.

Dr V K Agarwal (India) said that India fully supported the proposal of the New Zealand Government. The problem of the protection of cultural property was of significant magnitude in some of the Commonwealth jurisdictions and India was one such country facing problems in this area. Earlier a working group had been constituted to look into the problem and to prepare a draft scheme. Much time, labour and money had gone into it and a scheme had been prepared but somehow the scheme did not find wider support from some jurisdictions and had to be kept pending. He felt that the present proposal by the New Zealand Government to promote basic legislation for the purpose of protection of cultural property deserved serious consideration by Senior Officials and they supported proposal B and he suggested Law Ministers be asked to consider the desirability of promoting legislation the details of which could be worked out by another working group after the proposal had been accepted in principle.

Mr Amjad Ali (Pakistan) said that as the distinguished delegate from India had just commented, Pakistan was also one of the countries which was suffering because of the transfer of cultural heritage. It was not just the cultural heritage but they were also losing some rare birds such as the eagle and certain other birds that were being exported out of Pakistan. They fully supported the passing of legislation which should be considered as part of mutual assistance. They also supported the proposal that the matter should be placed on the agenda of the next Law Ministers Meeting.

Mr Petros Clerides (Cyprus) said that his country strongly supported the proposal by New Zealand. As delegates knew Cyprus had been consistent in supporting every proposal of this kind. As the distinguished delegate from New Zealand had said the topic was receiving attention elsewhere and he felt that the Commonwealth should not be the last to take measures for the protection of its cultural heritage. This matter had been discussed in 1983 in Colombo and then again in 1986 at Harare and yet again in 1990 at New Zealand. He therefore thought that it was about time for measures to be taken as the delegate of New Zealand has proposed.

Mr P B Herat (Sri Lanka) said that it was a matter of great concern to Sri Lanka since it was proposed in Co-

lombo. They strongly supported the proposal by New Zealand and wanted the matter to be placed on the agenda for the Law Ministers Meeting in Mauritius.

Dr Silvio Camilleri (Malta) said that he was sure that New Zealand's proposal would find support among all the countries around the table because after all this matter should be considered as an appeal for solidarity between member states of the Commonwealth, solidarity in so far as cultural matters were concerned. The only reasons he could think of which might have caused postponement of the scheme and he remembered discussing the scheme in London and had thought that some progress had been made but which apparently had now stalled would be the technical aspects involved like certification procedures, classification and the question of title and compensation. These were all technical matters and he did not see any reason why in principle there should not be basic agreement on the possibility of such a scheme and he could not see any problem as far as Malta was concerned even though there had been a number of instances where attempts had been made to illegally export items of important historical value out of Malta and there had been a public outcry. Nevertheless he supported agreement on the basic principle of the scheme namely that all efforts should be made to see that cultural items illegally exported from their country of origin were returned to the country of origin and he did not see that there should be any disagreement of principle and why discussions and further attempts should not be made to try to avoid these technical difficulties which were causing obstacles to finalisation of a scheme of this sort.

Mr Don Piragoff (Canada) said that Canada's position was one of qualified support for the proposals by New Zealand. They supported the first proposal but were concerned that the matter not be deferred for as long as New Zealand had proposed, namely to the next meeting of Senior Officials which would essentially not be for another three years and that it not be discussed by Law Ministers at their meeting in Mauritius except in principle. Secondly, he felt that a rose was a rose by whatever name one wished to call it. Proposal B talked about the creation of draft model legislation and Canada did not really see that as being any different from the notion of the original draft model scheme which had been developed over the last couple of years, in particular, by a working group that had consisted of representatives of Britain, Canada, Cyprus, India, Malaysia, New Zealand and Nigeria and which last met in November 1989. The draft model scheme which was currently on the table was not necessarily treaty based. It was not necessarily reciprocity based. It was essentially a scheme, a model being recommended to Commonwealth countries to implement the scheme. They all knew the way in which schemes were currently implemented within the Commonwealth; that is, each Com-

monwealth jurisdiction passed legislation and provided some sort of reciprocal benefits or direct benefit to other Commonwealth countries. So whether one was talking about draft model legislation or completion of the scheme already in the process of being drafted, they were really talking about the same thing. The way the scheme was to be implemented was for each country to follow the principles of the scheme and adopt legislation. Therefore, he did not see the need to drop the scheme and start drafting model legislation because the principles that would be in a draft model legislation would be the same principles that would be in the scheme.

That brought him to the second point where his delegation had great concern with the proposal on the table. This was on the draft model legislation proposed by New Zealand, and he took it that New Zealand had indicated that this was not necessarily a firm proposal but that this was merely an example of how it could be done, and there could be other ways in which the legislation could be done. Canada was supportive of further work being done on the draft model scheme and that it be completed. They preferred the type of scheme which existed currently in the draft model, which was a scheme essentially based on the notion that a country designated classes of property that it considered to be of cultural heritage and importance to it and that another country, and courts of another country, would recognise that designation, and there would be 2 questions or 3 questions for the court of the other country to determine:

1. Was the property in question a member of a class designated by the other country?
2. Had the property been exported illegally out of that country? and
3. Determine the question of compensation or any third party rights that may exist.

The concern that Canada had about the proposal in B was that it was not based on a designation scheme but rather on a scheme based on legal title, determining legal title, i.e. that the courts of the requesting state should have the power and the jurisdiction to determine issues of legal title. In their opinion, questions of legal title and trying to determine return of property based on legal title really complicated the matter and it was a sure way to ensure that the property was not returned. Questions of who had legal title were difficult. Who had legal title if an artifact was dug out of the ground and found. Was it the individual who found it? Was it the employer of that individual? Was it the financier who had embarked upon an archeological expedition to dig, or was it the lease holder who leased the land, or was it the property owner of the land upon which the artifact was found? Was it, perhaps the mortgage holder of the property because the property was mortgaged to the bank, or was it some other institution within the government? Was it the government of the requesting state

which had the proper legal title, or was it some third party? These were all questions of legal title that had to be resolved by the requesting state. To ask of the court of the requested state to start applying foreign law, which was totally foreign to it, in order to determine questions of legal title as to whether the property should be returned merely complicated the matter. He thought that the scheme which was currently being developed was a much simpler scheme, which essentially was that the requested country did not really care about who had title; i.e. was it the tenant, was it the government, was it the church, was it some special cultural agency in their country? What it was concerned about was that that country had designated the property as being of cultural importance to it, that the property had been illegally exported and that it was sufficient for the requested country to determine that the property be returned subject to questions of compensation for innocent third party purchasers. That was the scheme that has been developed to date and they would not like to see the simplicity of that scheme tied up with murky legal concepts such as title.

Having said that, they would like to see further work undertaken on the scheme, whether it was called the scheme or model legislation or whether it was called the basis upon which countries may draft model legislation. That was a question of a rose being a rose. To that extent, if New Zealand was indicating that what they would really like to see was that countries enact legislation and that the Commonwealth should devise a basis for what the commonality of the legislation should be, they were in support. Their point of difference was that they were not in agreement with the scheme which was attached as an annex to the New Zealand paper. In terms of the principle, they were in support of that but their recommendation would have been that another meeting of the small experts body meet possibly in a year's time from now, after UNIDROIT had met in October 1992. The expert body could look at the results of what had happened at the UNIDROIT Meeting to see if there would be any need for further amendments to be made to the draft scheme. If the draft scheme was not ready for ministers to adopt at their meeting since there might not be an intervening Senior Officials Meeting, at least there would be a progress report which would say that officials had done some more work, that they had looked at what had happened at UNIDROIT and other meetings and had made some recommendations and that that was a status report for the Law Ministers Meeting. The next Senior Officials Meeting would have a more advanced discussion and a product to look at.

He would also refer to a brochure that been distributed the day before containing some information on protecting movable cultural property which tied in with the computerisation project, both in terms of the online and

also the advantages of the CD-Rom. Canada had made an offer to the United Nations at the 8th UN Congress to make available to the United Nations, and essentially the world at large, access to a computerised data base which was currently in operation in Canada on a commercial basis to a number of museums and a number of countries around the world. The idea was that the data base was a repository of various artifacts that had either been classified by countries as being of importance or missing or had been stolen. The data base could be used by police agencies to try to find out if an object which had come into their possession was stolen or had been illegally exported, because they could have quick reference to the data base to determine whether it had been stolen. Museums could have quick access to the data base to determine if something which they had acquired, or were about to acquire, was illegally exported or had been stolen from another country.

The scheme operated or could operate in two different ways: one by online access to the data base for which the current costs were approximately US\$40 an hour. The time to access the data base took only a few minutes of online time in order to get on to do a search. The other more economical way was that CD-Roms would be produced, the CDs would be sent to individual countries who could then use an ordinary PC and they would have their own repository of the exact data base so that they could check locally as opposed to doing it by means of telecommunications. The plan was that the CDs would be updated periodically, once or twice a year, such that, like the law reports and the idea of maintaining a CD data base of legislation and jurisprudence of the Commonwealth, there would be a CD-Rom library of a list of artifacts which have been stolen. The material which he had distributed provided greater detail than he had just recited and also details where one could write in order to seek further information concerning the proposal. On that basis he would close by saying that they were supportive of the matter moving forward, but that they did not wish to lose a lot of the work that had already been accomplished on the basis of the draft model by merely shifting gears and moving to another type of scheme which was based on something different from what the experts had already been working on over the last few years within the Commonwealth.

Mrs Janice Lowe (New Zealand) said that she wanted to clarify one or two matters arising from what the delegate from Canada had said. Proposal B did not in fact suggest model legislation at all. All it proposed was that Law Ministers look at the desirability of promoting some basic legislation without indicating that there was to be any model or uniform legislation. The idea was to enable each individual country to go as far as they wished and felt able to in protecting cultural property without feeling hamstrung by the existence of a formal model or scheme. That was the philosophy behind pro-

posals B. It was not aimed at setting out a piece of model legislation in opposition to a draft scheme that they already had but of enabling countries to do what they could to help other countries who have lost cultural property. That led on to the second proposal that she mentioned when discussing the item and that was there should be a small group to settle before Mauritius the exact nature of the paper that would go to Mauritius and that would enable consideration to be given to what developments there had been in both the European Communities forum and UNIDROIT forum. She hoped that this clarified matters and she did not know that there was too much difference in the light of that explanation between the position of New Zealand and that of Canada and she was heartened to hear the support of Canada for the draft scheme. She also wished to add that if in pursuance of proposal B countries wished to implement the draft scheme in their law then proposal B was quite flexible enough to accommodate that also, because what it was saying to countries and what it would be suggested that Ministers consider, would be that countries legislate in whatever manner they felt comfortable with and appropriate to their own legal systems in order to achieve the goal of securing greater protection for cultural property.

The Hon Tan Boon Teik (Chairman) suggested that instead of forming another group to look into the matter to progress it, it might be better to ask the already existing group that has done some work on the matter to take on the lead role and perhaps meet after UNIDROIT and EEC have come up with their own recommendations. He thought it would be to the advantage of this working group that they wait for the results of the deliberations by these two other bodies and some others that may be in existence before meeting again so that some concrete proposals could be made for consideration at some later meeting by Law Ministers. He did not think it would be sufficient to wait for the next meeting of Law Ministers. Perhaps this working group should convene as suggested by Canada about a year from now by when the reports by UNIDROIT and the EEC group would be available.

Ms Segopolo (Botswana) said that Botswana would like to support the suggestion put forward by New Zealand that work on this particular scheme should not stop and that efforts should continue to be made to resolve the problems that face a lot of Commonwealth countries among which was Botswana from which a lot of cultural objects had been removed unlawfully. They found out that if they were not careful there would be no cultural objects left to talk about. They would therefore support any moves towards solving this problem. She would agree with the delegate from Canada that the matter of legal title was one that should be looked at very carefully because it could get very complicated if this issue took on a complexion which made it difficult

for requested countries to determine who owned the property. Basically what they were concerned about was the return of those objects in the manner suggested broadly under the scheme by designating what was a cultural object for the purposes of the country concerned and obtain assistance from the state in which the object happened to be. She agreed that the scheme in its present form needed a bit of modification so that everybody could reach a point of agreement and then move forward from there.

Mr Austin Wilson (Britain) said that he would say a few words about the United Kingdom position generally and then comment on the New Zealand proposal. On the UK position generally he wanted to make it as clear as he could that the United Kingdom fully recognised that what they had been discussing over the last few years was a very real and distressing problem. They did not believe this was a problem that could not effectively be tackled. Indeed they were of the opposite view and that was why they had participated in good faith in a number of international cooperative efforts to deal effectively with it. At the same time however they had recognised that the problem was one which, if it was to be effectively addressed, could only be so addressed if there was an effective legislation within each state. They recognised they were one of those states to which cultural property had a habit of coming and therefore they would need to have in place effective legislation. That was not technically easy or technically impossible either because they did not think there were any problems that could not be overcome. They would like to do something and it was their intention to do so.

However they also recognised that this was a problem that was not confined to the Commonwealth. There were countries not within the Commonwealth who had experienced some of the difficulties and depredations to which reference had been made. As the meeting had been reminded, there was across the world community, going wider than the Commonwealth, an attempt being made to deal with the problem - indeed in the UNIDROIT negotiations to which reference had been made, and, as he had indicated, the U.K. was playing its part in those discussions which were ongoing. The last discussions were in January 1992 and some of the delegates around the table would know because their countries were represented and there would be another UNIDROIT meeting in October 1992 and the United Kingdom hoped very much that within the UNIDROIT umbrella they would find some effective means of dealing with the problem which they saw as being beyond the Commonwealth.

The other area, in which the United Kingdom, and he was using that expression geographically, was involved was the European Community where there was another complication facing them. Like all member states in the European Community, the United Kingdom had an ob-

ligation under the Treaty of Rome to promote what is described as legitimate trade in cultural goods within the single market. As everyone knew the internal barriers within that market would be finally removed at the end of 1992 on 1 January 1993. That created the possibility that those barriers could facilitate the removal of cultural objects illegally within the community from one country to another.

To meet that problem the Commission of the community had produced a draft directive which although still a draft, could provide a mechanism, a court based mechanism, which would provide for the return of national treasure unlawfully removed after 1 January 1993. By a little later on in 1992, about the time the UNIDROIT second meeting took place, he thought the United Kingdom would be in a much better position to know what its obligations were likely to be under the European Community framework and they would also know where they were at the end of the UNIDROIT discussions. Against that background the United Kingdom was very ready to give what he thought the Canadian delegate described as qualified but not in fact very qualified support to the New Zealand proposal. They agreed very much with the New Zealand delegate's view that they had not quite reached the time when it could be said that the moment for the Commonwealth Scheme had come but they were in favour of making progress and they believed it would be worthwhile for Commonwealth Ministers when they meet in Mauritius to at least take stock of where they were at that point when they would know on the United Kingdom side where they stood in relation to Europe. Other countries would also know the stage of the UNIDROIT discussions so that by the time of Mauritius it should be possible for Law Ministers to reach some view on what would be the best way forward. That might be a view that concludes that the right way would be for the Commonwealth to go on its own with a Scheme or it might be a conclusion that it might be best for everybody to get under the umbrella of the UNIDROIT multilateral arrangement. The United Kingdom saw no special benefit in there being a Scheme confined simply to the Commonwealth unless the view is taken that there would be no progress on a wider front, in which case the value of a Commonwealth Scheme becomes the greater.

In conclusion, the United Kingdom agreed that there was a problem that should be tackled. It wanted to play its part in tackling that problem. It did not believe that they were ready yet to take action which in their terms could only mean legislation which had to be got right as they would have only one chance to legislate in the next ten years or so and it would be best to get it right the first time. They thought Mauritius in about eighteen months time would be the right time to take stock and if the New Zealand proposal could be interpreted in that way, without any preconceptions as to where they might be,

they would be very glad to see the item included as an item in that Meeting's agenda.

The Hon Tan Boon Teik (Chairman) proposed a short break before continuing the discussion to consider whether the matter should be placed before Law Ministers in Mauritius.

The Chairman called the Meeting to order and invited the distinguished delegate from Nigeria to speak.

Mr Yemi Osinbajo (Nigeria) said that he wished to express the support of Nigeria for the proposal by New Zealand. In particular they would like to say that having regard to the slow pace at which the Scheme had been moving the proposal for specific legislation by individual member states was a worthwhile one and they thought that it should be considered whether such legislation should be in the form already proposed by New Zealand or in whichever form individual nations would rather have such legislation. He would also suggest that the issue should be placed again before Ministers in Mauritius. He noticed that it was not on the draft proposals for Mauritius but hoped it would be included.

The Hon Tan Boon Teik (Chairman) said that he believed this would be done and invited more views.

Mrs Priscilla Madzonga (Zimbabwe) said she believed that when the last small group met in 1989 they were mainly concerned with producing a draft Scheme on this subject and she wondered whether when the group would meet again after the UNIDROIT meeting in October they would again be concerned with producing a Scheme. She would propose that there should be a draft to be put before Law Ministers for their consideration and perhaps if there was time the draft should be circulated before the Senior Officials Meeting so that they could consider it ahead of their meeting.

The Chairman invited the distinguished delegate from New Zealand to respond.

Mrs Janice Lowe (New Zealand) said she had not envisaged the small group meeting as actually a drafting meeting but more as a meeting to settle the shape of the proposals that would go to Ministers in Mauritius. She thought it would be difficult at this stage to say what should be the brief of the small group meeting because there were developments going on which might influence the shape of the agenda the small group would have. She would however suggest that the broad nature of the work of the small group could perhaps be clarified towards the end of 1992 and at any rate after the UNIDROIT meeting. She hoped that would meet the concerns of the distinguished delegate from Zimbabwe.

Mrs Priscilla Madzonga (Zimbabwe) said that for the sake of progress on this issue there needed to be something to be put before Law Ministers for their consideration otherwise there was a risk that the matter will again be deferred at the next meeting.

The Hon Tan Boon Teik (Chairman) agreed that the distinguished delegate had made a valid point but said he was certain the group would not allow that to happen as there was already a draft, but it should not be called a draft model as otherwise Law Ministers might feel they were being presented with a *fait accompli*.

Mrs Priscilla Madzonga (Zimbabwe) commented further that a lot of work had gone into that draft and if the small group was to meet before the Mauritius Meeting they should be able to present to Law Ministers at least what was there and what was being proposed after a revision.

The Hon Tan Boon Teik (Chairman) agreed that that was what would be done and the brief would be a broad one so that the group would not be tied.

Mr Austin Wilson (Britain) said that his understanding of what the meeting would be agreeing to was simply that they should have as proposed, as soon as convenient after the UNIDROIT meeting in October, a meeting of the small working group which would in effect take stock of the position that had been reached following the two developments to which the New Zealand delegate referred to at the beginning, one being the European Community initiative and secondly the UNIDROIT discussions. That meeting should decide in principle in so far as it would be able and in so far as they were 5 member states what would in effect be a proposal to put to the meeting in Mauritius, not necessarily with any preconception that that proposal would be an invitation to the ministers to agree on a draft scheme because it would be possible, and he put it no higher than that, that the meeting of that small working group might conclude, in the light of progress made at the UNIDROIT discussion, that what was required at the ministers' meeting was not so much endorsement of a Commonwealth scheme but an invitation to members of the Commonwealth to adhere to the UNIDROIT scheme. He therefore thought that it was as open as that but that there should be available to ministers in Mauritius, in good time, picking up the point made by the distinguished delegate from Zimbabwe, a proposal on the way forward. There was general agreement on that but not as to the precise nature of the proposal.

Mrs Janice Lowe (New Zealand) said that she did not think New Zealand would wish to necessarily preclude the possibility of doing some drafting in the small group, nor would it wish to say at that stage that the small group must have as part of its brief a draft in the sense suggested by Zimbabwe. They would prefer the terms of reference of the group to be kept comparatively flexible, not to close off any options whatsoever and to take stock when the group met which she understood would be not later than March 1993 so that there would be plenty of time before the Ministers' Meeting for the paper to be prepared in whatever form it was thought

desirable or necessary having regard to those developments.

The Hon Tan Boon Teik (Chairman) observed that he shared the anxieties of the distinguished delegate from Zimbabwe. All he was concerned with was to see the matter progressed and that Senior Officials did not go from Meeting to Meeting determining the scope of the inquiry they were embarking upon.

Mr P B Herat (Sri Lanka) wanted to know whether there was any possibility of any other interested country participating in the group.

The Hon Tan Boon Teik (Chairman) said that if he wished to volunteer his services his participation would be gladly accepted.

Dr V K Agarwal (India) said that in view of the proposal by the distinguished delegate from Zimbabwe which had been accepted as well as those by the UK and New Zealand, he wondered whether a specific item could be added to the document SOLM(92)24 Annex B as an item of agenda on this particular subject because at present it was not included in the draft agenda for the Law Ministers Meeting.

The Hon Tan Boon Teik (Chairman) confirmed that this would be so and in summarising said that he believed it was the desire of the meeting that the matter should be progressed further and that the working group would meet not later than February or March 1993 and that a definite approach be proposed for consideration by Law Ministers at their meeting in Mauritius in 1993.