

Protection of Cultural Property Within the Commonwealth

A Paper presented on behalf of the Government of New Zealand

Background

The draft Scheme for the Protection of Cultural Heritage within the Commonwealth is one of several mutual assistance measures that have been considered by Commonwealth Law Ministers. The other schemes (on extradition, mutual assistance in criminal matters including confiscation of the proceeds of crime, and transfer of prisoners) have already been accepted.

There is a high level of international concern over the continuing unlawful export of items of cultural heritage. Few such items are ever recovered by the country of origin. The reason is that, without transnational legal co-operation, means of recovery are very limited. Accordingly, the broad purpose of the draft Scheme is to provide a framework for the enactment of appropriate legislation throughout the Commonwealth to facilitate the return of items of cultural heritage that have been unlawfully removed from the country to which they belong.

It is now a decade since the Law Ministers of the Commonwealth decided that it was necessary to combat the "unhealthy market in smuggled and stolen cultural objects". This decision was made on the initiative of the Government of New Zealand which had just lost the well-known case of *Attorney-General of New Zealand v Ortiz*. In that case New Zealand failed to secure the return of carved Maori panels illegally exported to England.

The draft Scheme was first put to Law Ministers in 1986 but without consensus being reached. At the 1990 Law Ministers meeting the scheme was not substantively considered because some delegations considered themselves insufficiently prepared to do so. Now, after examination by two working groups, it is ready for consideration for adoption by Law Ministers.

Further background to this agenda item, and New Zealand's interest in it, is set out in the Preface to LMM(93)3 at page v.

International Development

Comparatively recent developments illustrate the view of the international community that there must be better international arrangements to prevent the current pillage of cultural heritage. The UNESCO convention of 1970 on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property is not effective to meet the need. The International Institute for the Unification of Private

Law (UNIDROIT) was therefore asked by UNESCO to prepare a draft Convention on stolen or illegally exported cultural objects. The work of governmental experts has produced a draft Convention and there is to be a diplomatic conference in late 1994 to further consider the draft.

A second major development has been the promulgation by the Council of the European Communities of a Directive and Regulation on European trade in cultural heritage. This action flowed from the adoption on 1 January 1993 of a free internal market within the EC and the consequent need to prevent evasion of regulations on the import and export of national treasures possessing artistic, historic or archaeological value. These measures may be seen as potentially significant for future Commonwealth and international co-operation on the return of unlawfully exported objects. By taking this action European Community countries recognise the critical importance to States of their material cultural heritage and the need for legal protection, notwithstanding the principle of free trade within European Community boundaries. Countries outside the EC, and in particular Commonwealth countries, can reasonably argue that the need for mutual assistance measures is equally pressing to protect their particular items of cultural heritage.

It may be noted that the EC Directive is not markedly different in its terms from the draft Commonwealth Scheme (see below).

Third, the UN General Assembly passed a resolution in October 1991 calling on States to strengthen or adopt legislation to protect cultural heritage.

Commonwealth Developments

As a result of decisions taken to the meeting of Senior Officials in Singapore in 1992, a working group comprising representatives of 11 Commonwealth countries met in Rome on 27 February 1993 to give further consideration to the cultural heritage item. The working group decided, with a reservation expressed by the United Kingdom delegation, that the draft Scheme for the protection of cultural heritage within the Commonwealth should be considered for adoption at the Mauritius meeting of Law Ministers.

The Scheme (with the amendments recommended by the working group) is to apply to items of cultural heritage classified as such by the country of export. Items should be of national importance by virtue of specified criteria. Each country is to prohibit the export of items

covered by the Scheme unless export is in accordance with the terms of an export permit. Each country is to designate a central authority for the making and receiving of requests for the return of items covered by the Scheme unless export is in accordance with the terms of an export permit. Each country is to designate a central authority for the making and receiving of requests for the return of items covered by the Scheme and is to take other necessary measures to enable return, including the temporary safeguarding of the item. The authorities in the country where the item is found are not however required to institute court proceedings to secure return. There are provisions for fair and reasonable compensation for an innocent purchaser of an item who has acted without negligence. The country of export may be required to meet the expenses incurred in obtaining return of the item. Claims for the return of an item alleged to have been unlawfully exported must be made within 5 years of the country of export becoming aware of the location of the item.

The Scheme is not retrospective in operation.

The Changes Recommended by the Working Group

The key amendments recommended by the working group are set out below. By and large they are aimed at increased flexibility. They also bring the Scheme closer in terms to the UNIDROIT draft and the EC Directive.

Paragraph 3(3): Items covered by the Scheme

The new subparagraph (3) acknowledges that not all countries may feel able to extend protection to all the items contemplated by paragraph 3(2).

Paragraph 4(1): Validation System

A system whereby an intending purchaser of an item can request a validation certificate from the country of export is now expressed to be a voluntary system. There is no obligation on a country to set up a validation system.

Paragraph 5(2): Import Prohibition

Subparagraph (2) no longer requests countries to prohibit the import of items unlawfully exported from another country. Instead, it asks countries to take necessary measures to ensure that they have the capacity to return unlawfully exported items.

Paragraph 9(1): Institution of Proceedings in the Country of Location

Paragraph 9(1)(b) proposes that the country of location may advise the country of export to institute court proceedings with a view to securing an order for the return of the item to the country of export. This is a new option. Earlier drafts envisaged that proceedings that would be taken by the country of location or by the holder of the item. It may be noted that neither the EC Directive nor the draft UNIDROIT Convention requires the country of location to be responsible for instituting proceedings. Paragraph 9(3): Compensation

There is now a clear duty on a court to order the country of export to pay fair and reasonable compensation to the innocent purchaser of an item as a condition for the return to it of the item. Up till now, the court has simply been given a discretion to determine what, of any, compensation is to be payable by the country of export. This is an important change and, again, is in line with the EC Directive and the draft UNIDROIT Convention.

Second, it is proposed that an innocent purchaser for value must have "exercised due care and attention in acquiring the item" instead of having "taken all reasonable steps" to satisfy himself or herself about the status of the item. The amendment derives from EC Directive language.

Key Differences Between the EC Directive and the Draft Scheme as Amended by the Working Group

(a) Coverage of Items

The Directive is somewhat narrower than paragraph 3 of the draft Scheme. protected items must be classified as being among a country's "national treasures possessing artistic, historical archaeological value". The object must also belong to one of 14 categories listed in the annex and, except for archaeological objects and achieves, must have a minimum monetary value. Objects classified as national treasures and forming an integral part of public collections or inventories of ecclesiastical institutions are also covered even though they may not fall within one of the 14 categories. Dr O'Keefe argues at pages 22-23 of his paper (see IMM(93)3) that, with the exception of individual ethnographic items, the kind of items sought by Commonwealth countries would be for practical purposes much the same as those set out in the annex to the Directive. The items would also be likely to be of considerable value, given the costs to the country of export of seeking of an item.

(b) Time Limitations

The Directive is more rigorous in requiring a request for return of an item to be made within one year of the requesting State having become aware of the location of the object and of the identity of its possessor or holder. With limited exceptions, proceedings may not be brought more than 30 years after the object was unlawfully removed from the territory of the requesting State.

The draft Scheme requires proceedings to be brought within five years after the date the country of export had knowledge of the whereabouts of the item in the country of location.

A Way Forward

Given the history of the UNIDROIT initiative, more than one diplomatic conference may be required to settle the final text of the UNIDROIT Convention. After that it will take a significant time for enough countries

to become parties to make the Convention operative. An effective legal regime could be years away. In the meantime, the unlawful removal and sale of items of cultural heritage will not abate. The lack of legal controls allows full scope to those minded to profit by unlawful trafficking in cultural items.

Against that background, there is much justification for Commonwealth mutual assistance in this area as there is in the area of law enforcement and extradition.

The draft Commonwealth Scheme of the protection of cultural heritage is capable of being implemented comparatively quickly by legislation. With the necessary will among Commonwealth governments, it could therefore become effective much sooner than initiatives such as the proposed UNIDROIT Convention.

Summary of Points in Support of Adoption of the Draft Scheme

- There is wide acceptance in the international community that the loss of cultural heritage can be stemmed only by effective international arrangements, and national legislation to implement those arrangements.
- The Scheme is not intended to exclude participation, existing or future, in any other arrangements designed to protect cultural property from unlawful export and consequent loss. It is intended to be complementary to such measures. Regional arrangements are an international commonplace.

Completion of the new UNIDROIT Convention could be two years away and, because it is a formal treaty, implementing legislation must be drafted with great precision. An effective legal regime could therefore take years to achieve.

- The Scheme has the advantage that it is not a treaty. Essentially, it is a framework or guideline for legislation. This flexibility means that legislation giving effect to the Scheme may vary according to the individual circumstances of particular countries, so long as its core and spirit is preserved.

- EC countries have acted to protect their own cultural heritage. It is reasonable for Commonwealth countries to wish to do the same. There is a long tradition of mutual assistance in legal matters in the Commonwealth. The draft Scheme falls within that tradition.

- Non-adoption of the draft Scheme after so much time and effort could send an unfortunate signal that the Commonwealth does not, after all, regard the protection of cultural heritage as a matter of any special importance.

Conclusion

As the initiator of the cultural heritage item on the agenda of Law Ministers in 1983, New Zealand would now like to see the draft Scheme take its place with other mutual assistance arrangements within the Commonwealth. In New Zealand's view, adoption of the draft Scheme would:

- (a) Endorse the need for appropriate international legal arrangements both to deter the future unlawful export of items of cultural heritage and to assist in the recovery of such items if unlawful export does occur;
- (b) Encourage the enactment or improvement of national legislation designed to give international protection to cultural heritage;
- (c) Accord with the longstanding spirit of Commonwealth co-operation in legal matters.