

## PROTECTION OF CULTURAL HERITAGE WITHIN THE COMMONWEALTH

Memorandum by the Commonwealth Secretariat

This record reflects the outcome of the Meeting of the Group of Government Representatives held at Marlborough House from 15 to 17 November 1989 to give further consideration to the proposed draft Scheme for the Protection of Cultural Heritage Within the Commonwealth. The Group comprised representatives from seven countries: Britain, Canada, Cyprus, India, Malaysia, New Zealand and Nigeria.

At the last Law Ministers' Meeting in Harare in 1986 no meaningful consensus could be reached on the proposed Scheme on the Cultural Heritage. However, Law Ministers reaffirmed the "need to remedy the situation" to protect items of cultural heritage from illegal exportation and therefore asked the Commonwealth 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."

The Group met under the chairmanship of Mr Justice Loizou of Cyprus; and following the expression of general remarks by way of "country perspectives" proceeded to examine in detail the draft Scheme that was presented to Law Ministers in 1986. It was clear from the ensuing discussions that there remained a divergence in points of view over basic issues. The reasons for this have been expressed in previous discussions, and are as outlined in the opening remarks of the respective delegations and in the attached report by the Chairman of the Group.

However, the Group was able to produce the revised text which is attached as part of this record, with amendments to the proposed Scheme recommended by the Group. This text aims to remove the alternative formulations contained in the draft Scheme and otherwise differs from the arrangement and proposals of the draft Scheme placed before Law Ministers in 1986. The changes recommended are denoted and explained in the Chairman's report. As made clear in the report, the recommended text does not represent agreement among representatives in the Group. The reasons are identified in the report.

Legal Division  
Commonwealth Secretariat  
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## AGENDA

1. Opening
2. Election of Chairman
3. Country perspectives
4. Consideration of proposed Scheme
5. Report to Law Ministers
6. Record of the meeting
7. Any other business

## LIST OF PARTICIPANTS

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- Canada** -
- Mr David Walden  
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- Ms Marion Haunton  
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- Cyprus** -
- The Hon Mr Justice Andreas Loizou  
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- India** -
- Dr V K Agarwal  
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<b>Nigeria</b>	-	Mrs H U Didigu Senior State Counsel International & Comparative Law Department Lagos
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## OPENING REMARKS

Wednesday, 15 November 1989

Mr Unwin (Deputy Commonwealth Secretary-General) opening the meeting extended a warm welcome to all participants, noting that this was an important meeting to discuss further the problems relating to the protection of cultural heritage.

He said that in reading his background material to this fascinating subject he had been particularly struck by three points mentioned in his brief, namely, that illicit trade in items of cultural heritage was the biggest international crime after drug trafficking; that up to five hundred artworks disappeared each day; and that the problem was thought to be getting even worse. In respect of the last point he thought it would need to be assumed that the greater freedoms we all looked forward to were likely to exacerbate the problem. Freedom of travel, in carriage and of tourism and freedom of capital movements especially with 1992. He said he had noticed that the British Minister of Arts, Mr Richard Luce, had earlier in the week drawn attention to the problems likely to occur with reduced frontier controls, including the disappearance of artworks which might inevitably increase.

On a personal note he mentioned that he had lived in Hungary in 1984 and remembered the occasion when international art thieves broke into the Fine Arts Museum in Budapest and stole the Esterhazy Madonna, got it out of the country in hours and to the Greek millionaire, who had placed the contract for the theft in a week; and when that happened he knew that probably the Iron Curtain was either a thing of the past or was rapidly to become a thing of the past, and so it had.

This growth in the scale of the problem increased the need for the Commonwealth to find a solution, whether through an intra-Commonwealth scheme or otherwise, but it did not make it easier to find that solution and he knew that Law Ministries had been wrestling with the problem for some years. The difficulties which the Law Ministers meeting in 1983 identified showed how intractable the problem was.

It seemed there were essential questions to be resolved:

- (a) were the existing international arrangements satisfactory?
- (b) if not, did the proposed Commonwealth Scheme offer a way forward?
- (c) did self-regulation provide an efficient and sufficient basis for tackling the minority that will not keep the rules?
- (d) how could the problems of retrospection and competence of jurisdiction be solved?

He said these were problems for the Group, and that the Secretariat would do what was needed to help. Secretariat facilities were available all week with back-up services as necessary. He hoped that the special chemistry of Marlborough House which had helped to solve a lot of intractable problems in

its time may extend by contingency through to the Group's meeting at Carlton Gardens; and if that kind of contingency were not enough he proposed to fortify the participants with drinks at a reception later that evening.

Before calling for nominations for someone to preside over the meeting, he wished the participants fruitful deliberations and an enjoyable stay in London.

**Ms Haunton** (Canada) proposed the Hon Mr Justice Loizou, President of the Supreme Court of Cyprus, for election as Chairman.

**Ms McDonald** (New Zealand) said she was happy to give support to the proposal from the delegation of Canada.

There being no other nomination the Hon Loizou was elected Chairman by acclamation.

**The Chairman** (Hon Mr Justice Loizou of Cyprus) thanked the meeting for the honour bestowed by his election as Chairman and expressed the hope that he would be able with the assistance of all to bring to an acceptable conclusion the deliberations of the Group of Government Representatives. He also thanked the Commonwealth Deputy Secretary-General, Mr Peter Unwin, and expressed appreciation of the meeting for his finding time in a very busy schedule to share his thoughts with the Group and for his good wishes and kind words of encouragement.

He said the setting and significance of Marlborough House in the tradition and the achievements of the Commonwealth as so rightly recalled by the Deputy Secretary-General could not be lost on the Group. Fundamental to that tradition was a commitment to the spirit of accommodation that sought to achieve by flexibility and consensus. In that spirit one could not look at the task before the Group as other than the natural progression of the important work that was begun with the Commonwealth Scheme for the Rendition of Fugitive Offenders concluded for over twenty years in 1966; and now given serious and determined momentum with the adoption in 1986 of two other Schemes of major importance. All Schemes represented a clear declaration of will to providing effective solutions to serious legal and social problems.

He recalled that this small Group had been invited to come together at the specific request of Law Ministers who in Harare in 1986 (to paraphrase from the meeting communique) had reaffirmed the need to find effective remedy for the protection of national cultural heritage and therefore called for the formation of this Group to examine further all aspects of the problem. It was expected of the Group to determine how further progress could be assured and for that purpose to make appropriate recommendations for consideration by Law Ministers at their forthcoming meeting in New Zealand in April 1990.

There was a general understanding felt in Harare that lawyers and senior officials at their level had done what they could and that Governments now needed to reach policy decisions on very basic issues. In that respect he thought the Commonwealth Secretary-General in his letter of invitation to the seven countries represented in the Group had stated succinctly the objective of the meeting and the task before the Group, namely, to further examine the proposed Scheme not so much to go over old ground but rather to determine the way forward and to agree on a set of recommendations to be put to Law

Ministers by the Governments represented in the Group. As the Secretary-General had pointed out in his letter it would be open to the Group to recommend an approach other than that contained in the proposed Scheme. It would therefore be of great help if representatives in the Group were in a position to have the support of their respective Governments on the issues that would need to be examined and hopefully to be agreed on in the course of the meeting.

He noted that the Group was a small one entrusted with a very special and rather delicate task. Clearly its membership had been carefully drawn from countries having rich cultural traditions and with the experience to make important contributions to Commonwealth solutions being sought and so urgently needed in this area. The size of the Group allowed naturally for intimacy and informality, and with flexibility that characterised Commonwealth meetings it was hoped that these would be the guiding principles for the Group.

Before considering the agenda it was necessary to refer briefly to a few other matters. It was customary to establish a committee to prepare a draft for consideration by the meeting. Given the size of the Group it was proposed that the drafting committee comprise all seven representatives. The drafting committee could meet at the end of each day.

It would be appreciated if any prepared statements or memoranda were made available to the Secretariat. The Secretariat would prepare a summary record of the proceedings to be circulated for correction and comment before it was finalised and distributed to the Governments.

A report of the outcome of the Group's discussions and any recommendations to Law Ministers would also need to be prepared.

As the Deputy Secretary-General had already mentioned there would be a reception at the close of the day's session in honour of the participants to which all were invited.

A draft agenda was on the table, and he wished to observe that because of the nature of the task before the Group it had been felt appropriate to commence as suggested in the draft agenda by inviting each delegation to present the perspective of its own country to see how each viewed the present and what proposals might be considered in support of the proposed Scheme or in support of some other approach. He thought the meeting could then move to examine further the proposed Scheme, as no doubt it must, or some of the elements of the Scheme that remained outstanding and perhaps needing further attention. The meeting would then need to give consideration to its report and recommendations to Law Ministers.

As there did not seem to be any amendments to the draft agenda he commended it for adoption. The agenda was so adopted.

The meeting was reminded of the briefing paper prepared by Professor Patrick O'Keefe one of the consultants responsible for the ideas and drafts now featured in the proposed Scheme, which paper was amongst the documentation circulated. The paper reviewed the current situation with respect to the Scheme and referred to recent developments on cultural heritage matters affecting Commonwealth countries. The paper also offered viewpoints on several related aspects which the Group would need to address and in a manner which

was hoped would be of assistance to the Group of Representatives. No doubt delegates wished to reflect on some of the points raised by Professor OKeefe in their discussions.

He then invited the representative of Britain, doing so in alphabetical order, to open the discussion under item 3 of the agenda with a presentation of his country's perspective.

**Mr Stone** (Britain) thanked the Chairman for his remarks. He said it was very helpful to have an exchange of views. This was a subject in which the British position was clear as will be known from previous meetings on the subject. It did not mean that they were not interested in hearing other views and seeing if it were possible to get closer to an understanding of each others positions.

He noted with regret that this working Group had come rather late in the day. It was proposed after the meeting in Zimbabwe and they had assumed that there would be a number of other opportunities for discussion rather than a meeting at this late stage. This was particularly so in the case of the paper by Professor OKeefe because the paper had been received only two days previously and there really had not been an opportunity to look at the paper in any depth and to ask one or two questions. For instance it would be very interesting to find out the basis of the figure which had been quoted of the extent of trade in stolen works of art. Five hundred works a day was mentioned and it would be very interesting to know the evidence for that figure.

However, his delegation was pleased to participate and to look at the problem again. They certainly shared the worries of other Commonwealth countries about the problems of restitution of works of art. That did not mean, however, that the Commonwealth Scheme as understood in the 1986 version provided the answer to the problem from his delegation's point of view. He would try and clarify a little further what the objections were, as they may be helpful to colleagues present.

Firstly, the 1986 Scheme essentially rested on a system in which each country would be expected to honour the export laws of another country, and certainly in a number of respects Britain had gone down that road. But in this particular field they still saw difficulties in that concept. It also required another step which would create problems in the United Kingdom and that was bringing in new legislation to introduce something on the lines of the Commonwealth Scheme would affect existing rights of title which may be acquired in this country, and that again was a difficult proposition to accept. So there were some legal problems in that respect. There were also considerable practical problems that would certainly require new legislation in this country involving powers of seizure, probably powers of entry, and probably changes to existing import and export regulations. They were prepared to explain how the system worked at the moment and indeed they were currently having to consider possible changes in the context of the move towards the single market within the European Community, but it would be difficult to, as it were, take on board at the same time changes which were related to the draft Commonwealth Scheme.

The Commonwealth Scheme also introduced a concept of interest to the United Kingdom in the requirement for some sort of validation certificate. That was a new administrative problem for which they saw the argument for validation in

appropriate cases which could be obtained through the normal commercial channels but they were not convinced that it was necessary to impose as a part of a central government scheme. However it was an aspect that they would certainly be willing to discuss further.

There were also aspects of the Scheme itself about which they were concerned in previous discussions and which still needed clarification. There was the whole question of retrospection which was a difficult one. There was the provision in the Scheme to allow countries to more or less demand a blanket prohibition on the import of items which would meet appropriate criteria. In their view that would really be asking the United Kingdom to police the export problem which would be essentially arising at the country of source. It would be much more realistic in their view for the Scheme to make clear that any such prohibition should be limited to specific items accompanied by accurate descriptions and details of location.

There were a number of other problems about the Scheme which he did not wish to go into in detail at the moment, such as compensation and the difficulty of pursuing cases overseas and problems of identification, but he had to say that taking all those points together that when weighed the costs of benefits of bringing in a Scheme on the lines of the present one, it did appear to his delegation that the cost implications for the United Kingdom appeared substantial and the likely benefits seemed relatively small.

While putting that forward may appear to be a fairly negative view at the beginning of discussions, it did not mean to say that his delegation was unresponsive to the underlined problems. But first of all they had always started from the premise that the prevention was better than cure, and that the first and most fundamental step was to have satisfactory controls over exports in the country of source, the country of origin, rather than a response in the country of import. Secondly, they took the view that where things got through the net and inevitably they did, it was actually possible to do a great deal on a voluntary basis rather than a statutory one. It was far less expensive, it was far less consuming of resources and in their view was often more effective. This was the thinking behind the views put forward by Sir Patrick Mayhew recorded on page 72 of the 1986 Law Ministers record. More use should be made of diplomatic channels in processing restitution cases and they should be very happy to discuss that aspect further and to take on board any experience that other countries may have had to see whether or not that had been a useful mechanism. Thirdly, his delegation believed that very considerable controls could be exercised in the United Kingdom on the trade through codes of practice, and those codes of practice both for public institutions and the art trade had been in operation for a good many years and had been used on a number of occasions to call people to account and they had worked satisfactorily. His delegation was therefore not convinced that there was need to strengthen the existing arrangements which were already implemented in the United Kingdom.

He said he hoped he had given the view that they were prepared to look at issues and that he had also made clear that they saw genuine difficulties about the existing Scheme because of the need for new legislation; the belief that the proper way to control things were with the country of origin; the view they took that much can be done through the existing systems already in operation; the use of voluntary codes; the use of diplomatic channels and their concern that the Scheme as it stood still had built into it a lot of

problems about retrospection and policing and compensation and so on which were very far from being solved. So that the position his delegation had to take at the opening of the discussions was that they would like to continue with the arrangements now in place and were quite ready to look at proposals to improve them. His delegation was also willing to discuss further the pros and cons of the Commonwealth Scheme but would do so without any kind of commitment that it was practicable to bring a Scheme of that kind in the United Kingdom in present circumstances and they had to reserve the right to look at their problems in the context of the single market development which would come in Europe in any case.

**The Chairman** thanked the representative of Britain and invited the representative of Canada to give their statement.

**Ms Haunton** (Canada) said that as with Britain they were not able to make extensive preparations for the meeting having not received the materials a great deal ahead of time so their speech was going to be considerably shorter.

She wished to say first of all that Canada supported in principle all attempts to safeguard cultural property. In Canada it was regarded as a very significant part of the national heritage and they wanted to become involved with all attempts. In principle they agreed with the large part of the Scheme though there were a number of places where Canada had considerable difficulty with it. They preferred not to get locked into stating perspectives at this stage as they felt there was going to be progress made over the next few days and they would like simply to discuss it and then perhaps to reconsider their perspective as necessary. Also they were not in a position to commit the Government of Canada, and were at the meeting to discuss the Scheme to try and find ways in which it could be improved to tally more with the legal tradition in Canada and then to take it back for discussion by Canadian senior officials and Government members.

Primarily they had difficulty, as with Britain, in the prospect of the Scheme becoming retrospective in nature. It tended to go against their legal tradition and this aspect was worth a great deal of further discussion. Their biggest problem was where actions concerning cultural property should be heard. The idea of consfication which was what it amounted to if somebody had to go to a foreign jurisdiction in order to assert their rights was foreign to their legal tradition and they had considerable reservations about that aspect. It was their understanding that the limitation period on actions was also to be discussed. This seemed to have been a contentious issue right the way through. Canada's position on the notion of criminal sanctions against illegal import, whether or not they should be mandatory, was fairly clear but again preferred to wait and hear what others had to say in the interest of general discussion before they felt able to come down firmly on one side or the other. In the background of Canada's dealings with cultural heritage they had a Cultural Property Export and Import Act, copies of which had been passed to other delegations and in respect of which her colleague Mr Warden was to give some background relating to the Canadian experiences.

**Mr Warden** (Canada) reaffirming what Ms Haunton had said noted they had come to represent both the position of Canada and, more realistically, to offer the benefit of their experience in enforcement of cultural property legislation, some of the practical problems encountered and how some of these problems might pertain to the development of the Commonwealth protection Scheme. He

noted when, following the 1986 meeting for example, while there were thirty-three Commonwealth countries with cultural property protection arrangements only seven were signatories to an international instrument. That situation made the enforcement of Canadian legislation somewhat difficult in the sense that under their Cultural Property Export and Import Act, it was necessary for another country to be a signatory to an international agreement, and at this current juncture the only such instrument that Canada was a signatory to was the 1970 UNESCO Convention. Therefore there were some twenty-six or twenty-seven Commonwealth countries for which currently they had no reciprocity in the event that cultural property which was illegally exported from one of those countries should show up in Canada. So obviously in order to honour the legislation and recognise what had been done in those countries to date, it would be necessary for some sort of reciprocal arrangement to be brought into force. In terms of practicalities, however, the biggest problem consistently experienced with illegal exports from the country of origin and the subsequent illegal importation into Canada, was establishing the date of export from the country of origin. He felt that this should be borne in mind by the Group during its deliberations in terms of putting any sort of scheme into place that in establishing the date of an illegal export from that country it required documentation, perhaps not in the form of a validation certificate, but certainly there had to be some mechanism so there was a requirement for export documentation of some sort in order to establish that that item had left the country illegally. There was also the requirement for co-operation from the country of origin when it came to proceedings in the courts in such matters in as much as it was very difficult to prosecute a matter if there were no co-operation, if experts in law or experts in the material culture of that country were not available to testify and if there were not the willingness to provide those experts by the country of origin, and this obviously involved some expense in terms of travelling and in identifying the right people.

Finally, there was the requirement to make that legislation in the other countries known. UNESCO had published a number of documents trying to disseminate the information about what involved an illegal export from another country but if the text of that legislation were not really available for officials in other countries, both law enforcement and customs, again it was extremely difficult to establish whether or not an item of cultural heritage had left the country. He said he wished to put these matters on the table for consideration by the Group because if any sort of Commonwealth Scheme were to be concluded some of the real practicalities like those mentioned would have to be addressed to make the Scheme successful.

**The Chairman** thanked the Canadian delegation and called on the representative of India to present his country's approach to the subject.

**Dr Joshi** (India) wished to refer briefly to the laws relating to the antiquities in India before commenting on the Scheme.

There were two Acts which were implemented in India. The Ancient Monuments Archaeological Sites and Remains Act dealt mostly with the movable heritage, and in respect of the movable heritage the Antiquities in Art Treasures Act 1972 which was enforced in 1976 had been implemented. So far as the providence relating to the movable heritage was concerned the Act regulated the export, trade in antiquities and art treasures to provide for the prevention of smuggling and fraudulent dealings in antiquities, to provide for

compulsory acquisition of antiquities in art treasures for preservation in public places and to provide for certain other ancillary matters. In this Act the word antiquity had been defined to include: any coins, sculpture, painting, figures and other works of art or craftsmanship; any article, object or thing detached from a building or a cave; any article, object or thing illustrative of science, art, craft, literature, religion, customs, morals or politics in bygone ages; any article, object or thing of historical interest; and any article, object or thing declared by the Central Government by notification in the official gazette to be an antiquity for the purpose of the Act which had been in existence for not less than one hundred years. This was very important. Anything under this category which was more than one hundred years old was declared an antiquity and not allowed under this Act to go out of the country. No antiquities could be exported except in certain cases in which permission by licence had been obtained from the Director General of the Archaeological Survey of India. Under the Act there were certain articles less than a hundred years old which could be declared as art treasures or in other words any human work of art not being an antiquity declared by the Central Government in the official gazette to be an art treasure for the purpose of this Act and having regard to artistic or aesthetic value. He said that this Act had helped considerably in checking exporting of antiques out of India.

So far as the Scheme was concerned India was in agreement with it by and large and he believed it would be a very valuable contribution if the Scheme were adopted so that many of the art treasures which were being smuggled out could be stopped.

He said his colleague Dr Agarwal would react further on the provisions of the Scheme.

**Dr Agarwal** (India) referring to the question of improving the export laws agreed that prevention was definitely better than cure. No doubt every country should make maximum effort to prevent the export of such high items of cultural heritage. Nevertheless the problem arose when these items were illegally exported or unlawfully exported from the country for no matter the state of the law the possibility of some unlawful export of these items could never be avoided. So the making of the laws more strict in preventing the export just could not help in the solution of the problem, and the past experience of some of the countries represented at the meeting showed that diplomatic channels alone were not sufficient to solve this problem. Leaving aside diplomatic channels even the legal channels had not proved effective or sufficient to solve the problem of restoring the properties of cultural heritage back to the countries or nations from where they had been taken. It was quite possible that today the countries sitting on this side of the table were now facing this problem but this could be a problem for any country any day and it was therefore necessary that a Scheme which should really be workable should be adopted by the countries of the Commonwealth.

He said that everyone would agree that it was the moral and legal duty of every country to protect the cultural heritage of other countries flowing without authority in the respective countries. He said India was willing to do whatever it can do on its part, but felt that some measure was necessary, whatever that may be, in the form of the proposed Scheme or as modified or amended. But some measure was necessary between the Commonwealth countries

to prevent the inflow of these kinds of items in certain countries and outflow from others.

**The Chairman** thanked Dr Joshi and Dr Agarwal and invited the representative of Malaysia to give her statement.

**Ms Hussein** (Malaysia) stated that Malaysia agreed in principle with the Scheme. There was no doubt that there may be problems, perhaps extensive problems relating to questions of retroactive operation of the Scheme and questions of compensation, but the fact remained that the present situation was unsatisfactory. Malaysia was willing to hear and consider various views on these matters.

On the question of compensation, which seemed to be a sticky problem, she found very interesting the comments of Professor OKeefe in his latest paper on the concept of theft and passing of title in relation to the question of compensation, and would welcome further discussion on this aspect. On the question of judicial proceedings, she wished to refer to some matters of principle. There were at least two options which do not require an exhaustive understanding of the export legislations of other countries but she could not see why it was difficult for some countries to honour the export laws of other countries. She appreciated the fact that new legislations were necessary to implement the Scheme, but felt that if countries were keen enough to improve the present situation any difficulty in passing new legislation could be overcome.

**The Chairman** thanked Ms Hussein then called on the delegate from New Zealand.

**Ms McDonald** (New Zealand) believed it was helpful to review the background as well as look at more recent developments in New Zealand. She recalled that it was New Zealand which raised the issue of protection of cultural property at the 1983 meeting of Commonwealth Law Ministers, and referred to the communique of that meeting and also of the 1986 meeting of Commonwealth Law Ministers which acknowledged the central importance of cultural heritage to the life and identity of each nation, and agreed that protection of such property was a legitimate concern of the State. The flourishing illicit market that existed in antiquities meant, in her Government's view, that it was desirable for the Commonwealth to take steps to facilitate the protection of cultural property and to facilitate the return of illegally exported cultural objects.

New Zealand had taken a particular interest in this issue in part because of unsuccessful litigation for recovery of an exported Maori artifact in the Ortiz case, but also more recently because of their experience with the Cook Instruction. The document known as the Cook Instruction, was a letter written by Captain James Cook on 10 July 1776 to his second in command. The Department of Internal Affairs was alerted in April 1988 that the Poverty Bay Club of Gisborne in New Zealand had sent this document to Sotheby's for sale. The Club disputed that the letter was an antiquity and refused to return the document to New Zealand. The Club was charged with contravening the Antiquities Act and the case was heard in the Gisborne District Court in February and March 1989. The Judge ruled that the document was an antiquity under the Antiquities Act. The Club was convicted of the charge of removing the document from New Zealand without reasonable excuse and without the necessary certificate of permission of the Secretary of Internal Affairs.

What did Sotheby's do? In July 1989 Sotheby's sold that document. Legal action was not taken in the English Courts to have the letter returned to New Zealand. She said that previous experience with the Ortiz case suggested that once again the principle that English Courts would not uphold the penal or public laws of another country would have applied. Both the Ortiz case and the Cook Instruction examples illustrated that further steps needed to be taken to cover such cases under a Commonwealth scheme. That was why the New Zealand Government attached high priority to the initiative for discussion at the meeting.

As to the existing legal position within New Zealand she said that the current legislation for the protection of antiquities and artifacts was the Antiquities Act 1975 which replaced the Historic Articles Acts 1962. The title to the Act stated that it was an Act to provide for the better protection of antiquities, to establish and record the ownership of Maori artifacts and to control the sale of artifacts within New Zealand. The emphasis in the Act was upon Maori artifacts. The protection of New Zealand's cultural heritage, in the context of illicit trafficking involved a prohibition on export of antiquities without a written certificate from the Secretary for Internal Affairs or person appointed by the Secretary and the forfeiture provisions in section 10 of the Act. The Act was currently under review.

She explained that the proposed new Bill was modelled largely on Canadian and Australian legislation and was going to be a little wider in scope than the existing Act. The proposed Bill was to address three particular issues of concern; the growing concern in New Zealand that the protection of cultural property afforded by the Antiquities Act was inadequate as shown by the Ortiz case; secondly, the concern that the legislation dealing with Maori artifacts needed to take greater account of Treaty of Waitangi; and thirdly there had been since the Ortiz case a growing interest in New Zealand being able to accede to the 1970 UNESCO Convention and the regime of the Antiquities Act was not adequate for New Zealand to do that. The proposed Bill was likely to provide for recognition of the principles of the Treaty of Waitangi by vesting legal ownership of newly-found Maori objects in the Maori people rather than the Crown, and it was proposed that the decision making processes concerning both ownership and export of Maori artifacts would involve the tribal authorities. The Bill also proposed cultural heritage lists that would provide objective criteria for defining protected categories of all cultural property. Any person wishing to export an object which fell under the criteria in the list would need to seek permission of the Secretary of Internal Affairs.

As mentioned it was intended that the proposed Bill would enable New Zealand to accede to the UNESCO Convention and if they became a party to the Convention there would be an obligation on New Zealand to seize and return any cultural objects which had been illegally exported from another state party to that Convention. The proposed cultural heritage control list would satisfy the requirement to establish and maintain a national inventory of cultural property.

New Zealand's experience without doubt lead to the conclusion that the problems of removal and non-return of illegally exported items of cultural heritage did require some international legal action and control. Her

delegation believed that the Group should aim to endorse an acceptable draft scheme to place before the meeting of Law Ministers in Christchurch in 1990.

**The Chairman** thanked Ms McDonald then invited the representative of Nigeria to give the perspective of her country.

**Mrs Didigu** (Nigeria) said that she felt honoured and privileged at having been invited to participate at this working session of the Commonwealth representatives with the sole aim of examining further the revised text of proposals for the protection of the cultural heritage within the Commonwealth previously considered by Law Ministers in Zimbabwe in 1986.

Nigeria, having been described as a country possessing the richest art tradition among the black community, had a sculptural history which dated back over 2,000 years. There were Nok terracottas with origins in Jos, Northern Nigeria; the Igbo-Ukwu bronzes with origins in the eastern part of the country; Ife terracottas and bronzes and Owo terracottas all from the west; and the Ikom monoliths to name but a few.

Nigeria during its colonial era and like most other third world nations had lost a large quantity of its cultural treasures to its colonial masters. She referred in particular to the sacking of Benin (a city in mid-Western Nigeria) in 1897 by the British Expedition Soldiers who looted and carted away over 2,000 works of Benin art in bronze, ivory, terracotta, wood and beads. All attempts to recover these lost treasures post-independence had met with no success.

A more recent instance which came to mind was the case of Heller in 1983, a Canadian decision in which the Judge held that there was no evidence that the Nok sculpture concerned had been exported since the date of the imposition of export control by Nigeria, even though export control had existed in 1924 and the remains of the Nok sculpture had not been discovered till 1943.

As a result of the strong views Nigeria held about its cultural property being representative of its cultural history and heritage, Nigeria had had to purchase a number of its cultural treasures at the international market at very exorbitant prices.

Over the years and post-independence, the Nigerian legislations relating to all cultural treasures and antiquities comprised the Antiquities Ordinance of 1968, the Antiquities (Amendment) Decrees 1969 and 1978, the Antiquities (Prohibition Transfer) Decree 1974 and the National Commission for Museums and Monuments Decree No 771979. Nigeria was a party to the 1970 UNESCO Convention on Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Nigeria had also taken part in the inter-Governmental Committee set up under UNESCO for promoting the return of cultural property to countries of origin or their restitution in cases of illicit appropriation.

In 1960 when the Nigerian Museum opened, the Nigerian Government made entreaties to other countries and private individuals through the International Council of Museums (a non-Governmental organisation founded in 1946) to freely donate some of these works of art including those of Benin origin. This yielded no result.

With this background, Nigeria's commitment and support of the proposed Scheme was total. It was their view that the proposed arrangements between Commonwealth countries provided a more realistic approach to the problem of the protection of cultural heritage.

She said her delegation was aware of aspects of the proposals on which there was no consensus and which no doubt would be further discussed by the Group including issues relating to retroactivity or non-retroactivity of the Scheme, whether judicial proceedings pertaining to title and compensation should be held in the country of location or the country of export, the quantum of compensation and whether institution of proceedings for recovery should be subject to any limitation period.

However, it was their hope that this working Group being representatives of their countries and possessing their countries' mandate to agree on the way forward, would find firm and lasting solutions to these problems.

**The Chairman** thanked the representative of Nigeria.

Speaking as the representative of Cyprus he said that he hardly needed to explain his country's strong support for the promotion of any kind of international instrument or scheme aiming at the effective protection of the cultural heritage of every country including the Commonwealth countries represented at the meeting. As was well known the cultural heritage of Cyprus had been subjected to plundering and illicit export of antiquities throughout the centuries, and items taken could be found in collections in practically every museum in the world. Nor did he believe he needed to elaborate on the destruction of monuments, churches and other structures and items of the cultural heritage of Cyprus in the area occupied by the Turkish troops since 1974.

He referred to the case before the Indiana district Court which had already been mentioned in the course of this meeting and which demonstrated the problems and the concerns of his country. The issues were well known and he did not wish to develop them further at this stage.

Cyprus had manifested its interest in the preparation of a Commonwealth scheme at the Law Ministers conference in Colombo in 1983 and they had stressed the utmost importance in these times when such criminal behaviour was no longer a matter for a few individuals but usually by well organised criminal groups both in times of peace and during war activities. They had consistently supported every effort in Commonwealth meetings of Law Ministers and senior officials, and they hoped substantial progress would be made at this meeting and that there would be a constructive outcome of the Group's deliberations. It would be gratifying if a draft scheme that would facilitate, at least within the Commonwealth, the repatriation of stolen items could be agreed upon. They hoped that such a scheme would be a model for other regions and possibly also for the United Nations to follow. In that connection he reminded the meeting that the General Assembly of the United Nations had only a few days previously, on 7 November 1989, adopted a resolution in favour of the return of the cultural heritage to their place of origin confirming by it the view that such return supports international co-operation and the preservation and blooming of universal cultural values.

delegation was ready to discuss any aspect of it at this or any other meeting. The proposed Scheme which formed the basis of the deliberations at Harare, still had some outstanding issues. They would like to go into the matter of retroactivity, not as concerning the historic past which as they said in Harare could perhaps be left to bilateral discussions or diplomatic or other solutions, but in order to try and discover effective ways of recovering stolen articles taken out of Cyprus in the recent past.

**The Chairman** then invited the meeting to proceed, in accordance with item 4 of the Agenda, to discuss the provisions of the proposed Scheme. He suggested that this be dealt with paragraph by paragraph.

The attached report by the Chairman provides a summary of the Group's consideration of the proposed Scheme and its recommendations.

PROPOSED SCHEME FOR THE PROTECTION OF CULTURAL HERITAGE  
WITHIN THE COMMONWEALTH

A Report by the Hon Mr Justice A Loizou, President, Supreme Court of Cyprus, as Chairman of the Meeting of the Group of Government Representatives held at Marlborough House from 15 to 17 November 1989 to consider further the proposed draft Scheme.

**INTRODUCTION**

1. The Group of representatives drawn from Britain, Canada, Cyprus, India, Malaysia, New Zealand and Nigeria met in Marlborough House from 15 to 17 November 1989 at the invitation of the Commonwealth Secretary-General. Law Ministers at their last meeting in Harare in 1986 had requested the formation of the Group to undertake the task and with the mandate set out in their communique, the relevant paragraphs of which read:

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.
2. The meeting opened with a presentation of 'country perspectives' by all seven representatives from which it was apparent that there had been no significant change in the position taken by the respective countries on the proposed Scheme; and it seemed unlikely that the position of other Commonwealth countries not represented in the Group had altered materially. It was equally clear that there remained a divergence in points of views over basic issues, as expressed in past discussions.
  3. All representatives shared the concern about the serious and seemingly non-abating illicit trade in cultural heritage material, and the need for effective Commonwealth action. While the majority felt that the proposed Scheme held prospects for the type of protection that was needed, it was acknowledged that for some members of the Group the Scheme posed fundamental difficulties. Retroactivity remained a particular problem for some countries. The introduction of new legislation required in the operation and enforcement of the Scheme, and its effect on individual and property rights would cause policy if

not constitutional difficulties for some jurisdictions. Practical difficulties with the classification and listing of cultural heritage items, the creation of new offences in connection with their export and importation, and problems associated with their movement across international borders especially within the European Community in the near future were referred to. A number of representatives also stressed problems not adequately reflected in the proposed Scheme concerning the appropriate court for determining questions of title, ownership and the vexed question of compensation.

4. A number of representatives referred to continuing losses of highly significant items, and recalled their particular difficulties with efforts to locate or to have precious items returned, and the frustrations of unsuccessful and costly legal proceedings or recovery endeavours in other jurisdictions. At least four countries represented in the Group had been involved in expensive and major litigation over the return of cultural heritage items over the past few years. More than one country had been forced to purchase at exorbitant prices in the open market to ensure the return of important items of national culture. Strong support for the proposed Scheme was voiced by countries in this situation.
5. A briefing paper from the consultant, Professor Patrick J O'Keefe was before the meeting. It surveyed recent developments internationally and in the Commonwealth, and made comparative observations on the merits and operations of voluntary codes of practice and conduct for auctioneers and dealers, and of the 1970 UNESCO Convention of which ten Commonwealth countries were parties. The paper argued the case for intra-Commonwealth arrangements, and suggested that an import prohibition Scheme (such as already operating in Australia and Canada), as the proposed Scheme is, seemed the most suitable. It stated that on balance the proposed Scheme should have retroactive effect.
6. Against this background the Group turned to examine the draft Scheme paragraph by paragraph. Attached to this report is the text of the Scheme examined further by the Group. The Group's commentaries on each paragraph are as set out hereafter.

#### **PROPOSED SCHEME**

7. One member of the Group cannot accept the Scheme for some of the reasons indicated above and as set out in paragraph 22 of this report. The remaining members, while not agreeing entirely with particular provisions are prepared to seek common ground towards the conclusion of a Scheme for the Commonwealth.
8. After lengthy discussion members of the Group agreed to submit to Law Ministers the text attached to this report. This text differed from that submitted to Law Ministers in 1986, the changes being denoted (as relevant) by commentary or underlining. The paragraph numbering that follows refers to the new numbering as appearing in the attached text. Reservations made are recorded in this report.

#### Scheme: Paragraph 1(1)

9. No change.

Paragraph 1(2)

10. No change.
11. As to the words formerly appearing in brackets, it is the recommendation of the Group that these be omitted. Initially, there were varying degrees of support and opposition to the Scheme having retroactive effect. Some members found the retroactive aspects totally unacceptable; another considered that the Scheme should apply retroactively to items exported unlawfully and remaining so after the Scheme had been adopted; others supported some retroactivity at least for the recent past, or if it were possible to overcome the practical problems of proving the dates when the item was unlawfully exported; one representative felt that insistence on retroactive application may limit acceptability of the wider objectives of Scheme among member countries; and another while preferring a Scheme with retroactive effect was prepared to compromise to achieve consensus. After careful consideration, and noting also the provision in the second sentence of paragraph 1(2), the Group arrived at a consensus to omit the words in brackets.

Paragraph 1(3)

12. No change.

Paragraph 2

13. No change.

Paragraph 3(1)

14. The Group accepted the suggestion by one of its members that all items subject to export control under national legislation should be covered under this provision, and not simply those subject to export permit, and accordingly recommends the substitution of the word "control" in the manner indicated.

Paragraph 3(2)

15. The Group agreed with the suggestion of one of its members that items classified under this provision should be those of national importance by virtue of one or more of the criteria specified, and recommends the change indicated in the attached text.
16. Another member of the Group had suggested that the definitions used in this context in the UNESCO Convention should be adopted in the Scheme for reasons of uniformity and ease of implementation.

Paragraph 4

17. The Group considered it logical and appropriate within the framework of the Scheme to move the provisions dealing with the Validation System from its present numbering (paragraph 13) to become paragraph 4. There would be consequential re-numbering. It so recommends.

Paragraph 4(1)

18. No change.

Paragraph 4(2)

19. No change.

Paragraph 4(3)

20. The Group considered it necessary to clarify that the application for a validation certificate should be determined, by grant or refusal, within a specific period of six months from receipt of the application. Members felt that the four month period was inadequate. The changes indicated, are recommended.

Paragraphs 5(1) & (2)

21. The Group recommends recasting this provision to set out more clearly its two essential components.

22. One member of the Group has fundamental difficulty in accepting this provision.

Paragraphs 6(1) & (2)

23. No changes.

Paragraph 7(1)

24. The Group recommends the deletion of the words "in the country of location" (as appearing in the proposed Scheme), as being superfluous.

Paragraph 7(2)

25. The insertion of the words "of export", for greater clarification, is recommended.

26. One member of the Group suggested that the country of location should proceed with the request of the first country which made a request; and another suggested that "first" or "originally" be substituted for the word "last".

Paragraph 7(3)

27. The change indicated is recommended to provide greater clarity and precision.

Paragraph 7(4)

28. No change.

Paragraph 8

29. The change indicated is recommended not only to strengthen the security and care of the item, but also to provide for the position of those Commonwealth countries under whose law it was not possible to process a request unless and until court proceedings had been commenced.

Paragraph 9

30. This provision was previously stated in three alternatives. After long discussion the Group arrived at a consensus which enabled it to recommend that alternatives 8(2)(A) and 8(2)(C) be discarded.

Paragraph 9(1)

31. the changes recommended make clear the two choices available to the authorities of the country of location of either giving notice to the holder of the item about the possibility of the item being returned to the country of export unless relevant court proceedings were commenced, or the authorities instituting the relevant proceedings.

Paragraph 9(2)

32. The change to this provision (previously 8(2)(B)) is recommended as following necessarily by way of clarification from the recommended change to paragraph 9(1).

33. A number of representatives in the Group would have preferred alternative 8(2)(A) but having regard to the need for consensus were prepared to support the Group's main recommendation.

Paragraph 9(3)

34. The changes indicated are recommended as necessary for clarity.

Paragraph 9(4)

35. This provision was the last sentence of what was previously 8(2)(B)II. Its separation is recommended for greater clarity. It was suggested that the use of "may" rather than "shall" reflects more accurately the position under the law and practice of some Commonwealth countries.

Paragraph 10

36. No change.

37. A member of the Group wished to record its reservation about the right given to "any person" to take the proceedings referred to.

Paragraph 11

38. No change.

Paragraph 12

39. No change.

Paragraph 13

40. This provision was previously numbered paragraph 10, and recommended for relocation, without change, as more suitable to the general layout of the Scheme.

#### Paragraph 14

41. This provision was consequential re-numbered following the change in order of two other provisions. The first change recommended makes clear that the claim referred to is one made under the Scheme; and the second change recommended reflects the consensus of the Group that five years (and not one of the other alternatives previously discussed) is sufficient and the most appropriate limitation period.

#### Paragraph 15(a)

42. The Group recommends the insertion of "unlawfully" to correct and to bring this provision in line with other similar provisions in the Scheme.

#### Paragraph 15(b)

43. After discussion it was agreed that "may" is the more appropriate alternative allowing to each country the necessary flexibility to decide the legislative form according to its laws and practices.

#### Paragraph 16(1)

44. Words previously appearing after "heritage" (i.e. "including the expenses of seizure, custody, conservation, transportation and insurance") have been omitted. The Group agreed with the suggestion that the provision as previously worded does not add materially to its meaning; and that it fails to deal with the important question of the costs of litigation, which costs would normally fall within the ambit of "expenses necessarily incurred".

#### Paragraph 16(2)

45. No change.

#### Paragraph 17

46. Like other provisions moved, in the interests of better organisation, this provision is suggested for relocation to the end of the Scheme. The recommended change is for the required consultation to be made through the Commonwealth Secretariat.

#### **CONCLUSION**

47. The Group was conscious of the limited effectiveness of a Scheme of this nature to which not all Commonwealth countries could subscribe. However, subject to the position of one member of the Group which cannot accept the proposed Scheme, the Group believes that its recommendations contained in the attached text may indicate the way forward.
48. There is a pressing need for action on all fronts and by all countries. The Group recommends that where possible countries should implement the Scheme as a matter of priority and that those not in a position to do so forthwith should take additional interim measures to strengthen existing arrangements. In this way maximum progress would be made towards affording greater protection to the cultural heritage.

SCHEME FOR THE PROTECTION OF  
CULTURAL HERITAGE WITHIN THE COMMONWEALTH  
REVISED BY SENIOR OFFICIALS AND REFERRED TO  
LAW MINISTERS FOR COMMENT  
(WITH AMENDMENTS RECOMMENDED BY THE GROUP)

**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 shall 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.

**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" shall be 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.

### VALIDATION SYSTEM

4. (1) As part of the Scheme, a system of validation shall be introduced whereby an intending purchaser of an item of cultural heritage or any other interested person shall be 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 shall 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 shall 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 shall be precluded from claiming that the item has been unlawfully exported from that country.

### OPERATION OF THE SCHEME

5. (1) Each country shall prohibit the export of items covered by the Scheme except in accordance with the terms of an export permit.
- (2) Each country shall prohibit the import of items covered by the Scheme which have been unlawfully exported from another country.
6. (1) Each country shall designate a central authority for the making and the receiving of requests for the return of items covered by the Scheme.
- (2) Each country shall 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 shall give sufficient detail to clearly identify the item and where possible its location and shall be accompanied by a certificate from the country of export to the effect that the item is covered by the Scheme and has been unlawfully exported.
  - (4) The certificate shall be prima facie evidence of the matters stated therein.
8. Upon receipt of a request, the country of location shall 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 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 may 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, the court shall determine whether the item is covered by -
    - (a) the Scheme;
    - (b) an export permit;
    - (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 shall order that the item be returned to the country of export.

- (3) Prior to ordering the return of the item the court shall determine whether the holder of the item is an innocent purchaser for value having taken all reasonable steps to satisfy himself that the item was not an unlawful export under the Scheme, and, if it is proved that the holder is such an innocent purchaser with valid title to the item, the court may determine what, if any, compensation shall 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 shall 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 the validation system under the Scheme.

10. The central authority in the country of export to which an item is returned shall be required to hold the item for a period of twelve months. During this period it shall 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 shall 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 shall have due regard to the relevant laws of the country of export.
13. The person adjudged to have title in the item shall 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) shall make it an offence to unlawfully export an item of 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 shall 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 shall as far as is practicable use standard forms which shall be settled by consultation through the Commonwealth Secretariat.

**SCHEME FOR THE PROTECTION OF CULTURAL HERITAGE WITHIN  
THE COMMONWEALTH REVISED BY SENIOR OFFICIALS AND  
REFERRED TO LAW MINISTERS FOR COMMENT**

**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 shall 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.

[There was strong support at the meeting of Senior Officials for the Scheme to have retroactive effect. Such an effect however would require a recommendation of Law Ministers which should be taken at their forthcoming meeting at Zimbabwe bearing in mind the provisions of paragraph 21 of their 1983 communique in Colombo to the effect that "... whatever the position with regard to matters in the historical past ..." what was now required was a scheme to protect cultural heritage in Commonwealth countries.]

- (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.

**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 even "unlawful export" shall be deemed to have occurred as 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 permit by, the country of export.
- (2) In making the classification the country of export may apply 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.

#### OPERATION OF THE SCHEME

- 4. Each country shall prohibit the import of items covered by the Scheme which have been unlawfully exported from another country.
- 5. (1) Each country shall designate a central authority for the making and the receiving of requests for the return of items covered by the Scheme.
- (2) Each country shall notify the Commonwealth Secretary-General of its central authority.
- 6. (1) When the country of export learns of the whereabouts of an item covered by the Scheme in the country of location, it may request the country of location for assistance in the recovery and return of that item.

- (2) Where two countries 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 shall give such details as are available and shall be accompanied by a certificate from the country of export to the effect that the item is covered by the Scheme and has been unlawfully exported.
  - (4) The certificate shall be prima facie evidence of the matters stated therein.
7. Upon receipt of a request, the country of location shall take appropriate steps in accordance with its laws and the request made to secure the item pending consideration being given to its return.
8. (1) The authorities in the country of location shall give notice to the holder of the item that unless court proceedings contesting the matter are commenced within a stipulated period, the item will be returned to the country of export.

[EITHER

- (2)(A) In any such proceedings the court shall determine whether the item is covered by -
- (a) the Scheme;
  - (b) an export permit;
  - (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 shall order that the item be returned to the country of export, where any question of title and compensation to the innocent purchaser shall be determined.

OR

- (2)(B)(I) In any such proceedings, the court shall determine whether the item is covered by -
- (a) the Scheme;
  - (b) an export permit;
  - (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 shall

order that the item be returned forthwith to the country of export.

- (II) Prior to ordering its return the court shall determine whether the holder of the item is an innocent purchaser for value having taken all reasonable steps to satisfy himself that the item was not an unlawful export under the Scheme, and, if it is proved that the holder is such an innocent purchaser, the court may determine what, if any, compensation shall be payable to the holder as a condition for the return of the item to the country of export. In the absence of any such determination, however, all questions of title and compensation shall be determined by proceedings in the country of export. In any proceedings in the country of location, the holder of an item shall, unless the contrary be proved, be presumed not to be an innocent purchaser for value if he has neglected or failed to utilise the validation system under the Scheme.

OR

- (2)(C)(I) In any such proceedings the court shall determine whether -
- (a) the item is covered by the Scheme;
  - (b) the item is covered by an export permit or a validation certificate; and
  - (c) the holder has established that he is an innocent purchaser of the item, and if so whether he has acquired good title to it under the law of the country of location.
- (II) (a) If the item is not covered by the Scheme or if such a permit or certificate has been issued, the court shall order that the item be returned to the holder.
- (b) If the item is covered by the Scheme and is not covered by a certificate or permit and the holder has failed to establish that he is an innocent purchaser with good title, the court shall order that the item be returned forthwith to the country of export.
  - (c) If the item is covered by the Scheme and is not covered by a permit or a certificate but the holder established that he is an innocent purchaser and has acquired good title under the law of the country of location -
    - (i) the court shall order that the item be returned forthwith to the country of export notwithstanding the existence of an innocent purchaser; and
    - (ii) the country of export shall recognise the title of the innocent purchaser; and
- (iii) the return of the item to the country of export in such circumstances shall not in itself give rise to any right to re-export it.

(III) Legislation may establish criteria for determining whether or not any person is an innocent purchaser].

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

10. The person adjudged to have title in the item shall 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.

11. In the event that proceedings to establish title are not commenced within the twelve month period, the central authority shall 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 shall have due regard to the relevant laws of the country of export.

#### **VALIDATION SYSTEM**

13. (1) As part of the Scheme, a system of validation shall be introduced whereby an intending purchaser of an item of cultural heritage or any other interested person shall be 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 shall 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 the grant of a validation certificate in respect of any item the application shall be granted or refused. If the application is not granted or refused within the period of [four months] the country of export shall be precluded from making any subsequent claim, in proceedings for the recovery of the item, that the item has been unlawfully exported from that country.

#### **STANDARD FORMS**

14. In implementing the Scheme, each country shall as far as is practicable use standard forms which shall be settled by consultation in terms of the Scheme.

#### **LIMITATION PERIOD**

15. No claim for the return of an item alleged to have been unlawfully exported may be made 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

16. Each country -

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

## COSTS

17. (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 including the expenses of seizure, custody, conservation, transportation and insurance.
- (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 shall 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.