

**THE LAW REFORM COMMISSION**  
**AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ**  
**(LRC 55-1997)**

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**REPORT ON**  
**THE UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY**  
**EXPORTED CULTURAL OBJECTS**

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**IRELAND**  
**The Law Reform Commission**  
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## THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the *Law Reform Commission Act, 1975* on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

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# *The Law Reform Commission*

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15th October 1997

An Taoiseach Bertie Ahern T.D.,  
Office of the Taoiseach,  
Government Buildings,  
Dublin 2.

Dear Taoiseach,

Pursuant to the provisions of the *Law Reform Commission Act, 1975*, I have the honour to transmit to you herewith the Commission's *Report on the Unidroit Convention on Stolen or Illegally Exported Cultural Objects*.

The Commission proposes to publish this Report in the near future.

Yours sincerely,

  
ANTHONY J. HEDERMAN  
PRESIDENT

Encl.

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In the course of preparing this Report, we received advice, information and assistance from a number of people, to whom we extend our thanks:

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## CHAPTER 1: INTRODUCTION

1.1 The *Unidroit Convention on Stolen or Illegally Exported Cultural Objects* aims at protecting cultural property by conferring on dispossessed owners - whether States, institutions or private individuals - the right to seek the return of objects stolen from them or illegally exported from their territories.

1.2 The drafters' objective was to strike an acceptable balance between the interests of those countries from which cultural property is routinely misappropriated and those which import and provide a market for such material. The Convention therefore reflects the tension between two opposing interests, that which favours retention of cultural heritage and that which seeks the continued growth of trade in art.

1.3 The need for an international instrument protecting cultural property is beyond doubt. The saleability of cultural objects has flourished since the end of the Second World War; inevitably the demand has encouraged organized crime in their theft or looting.

1.4 It is estimated that art smuggling is second only to drug dealing as the most lucrative crime in the world.<sup>1</sup> In South America alone, it is estimated that between 2 and 10 billion dollars worth of art objects are lost each year through theft and smuggling.<sup>2</sup> In Ireland, conservative figures suggest that more than £2 million of antiques are removed from this jurisdiction each year.<sup>3</sup> The objects tend to re-emerge in markets in wealthy developed countries. No price can be put upon the archaeological losses which are being sustained although there is general agreement that the number of treasure hunters has increased substantially in the past twenty years, with the widespread availability and use of cheap metal detectors.<sup>4</sup>

1.5 The last fifty years has seen a proliferation of international declarations, resolutions and treaties - bilateral, regional and universal in scope - which assert the fundamental importance of the protection of cultural heritage and pledge the

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1 See, for example, Boroughs, L., *The Hidden Art of Theft*, U.S. News and World Report, April 2, 1990.

2 *Ibid.*

3 This information is based upon the assessment of professionals in the field. It is understood that at present the Gardai are in the process of setting up a data-base of stolen objects.

4 See, for example, Kelly, E., *Protecting Ireland's Archaeological Heritage in Antiquities Trade or Betrayed: legal, ethical and conservation issues*, Tubb, K. (ed.) (An Archetype publication, 1985), p.235 *et seq.*

support of the Contracting States for various methods of enhancing that protection. A number of these international instruments are concerned with the illicit movement across borders of cultural objects.<sup>5</sup> The continued and almost exponential growth in the illicit trade in art in that same period suggests that they have had only limited success. In the light of this limited success, however - and it is not intended to suggest that international legal activity can resolve this problem on its own - a greater consensus has emerged regarding the need to take effective international action to remedy those legal shortcomings which are currently utilised by international "cultural criminals" to their own advantage. The Unidroit Convention<sup>6</sup> is the most recent of these instruments.

### The significance of cultural property

1.6 "Cultural Objects" have a significance which may be described but not fully understood in purely logical terms. Thus, resolution of the problems which aspects of cultural heritage face today, at a national and international level alike, cannot be secured by reference to rational considerations alone. Some prior grasp of the "public interest" in such objects is vital.

1.7 Cultural objects "tell us who we are and where we come from".<sup>7</sup> The extent to which they nourish our sense of national identity, in the broadest sense in which that term can be understood, is reflected in Finlay C.J.'s judgment in *Webb v. Ireland*:<sup>8</sup>

"It would, I think, now be universally accepted, certainly by the People of Ireland, and by the people of most modern States, that one of the most important national assets belonging to the people is their heritage and knowledge of its true origins and the buildings and objects which constitute keys to their ancient history. If this be so, then it would appear to me to follow that a necessary ingredient of sovereignty in a modern State and certainly in this State, having regard to the terms of the Constitution, with an emphasis on its historical origins and a constant concern for the common good is and should be an ownership by the State of objects which constitute antiquities of importance which are discovered and which have no known owner".<sup>9</sup>

1.8 This view has subsequently found statutory expression in section 2 of the *National Monuments (Amendment) Act, 1994* which asserts that all archaeological

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5 A number, however, deal with other protective issues; see for example the 1956 UNESCO Recommendation on the International Principle Applicable to Archaeological Excavations, the 1966 UNESCO Declaration of the Principles of Cultural Co-Operation, the 1969 European Convention on the Protection of the European Cultural Heritage, the 1972 UNESCO Convention for the Protection of the World Cultural and National Heritage, the 1978 UNESCO Recommendation for the Protection of Movable Cultural Property and the 1981 European Convention on Offences against Cultural Property.

6 The text of the Convention is attached hereto as Appendix A.

7 Eisen, *Why Do We Care About Art*, 27 Hastings L.J. 951 at 952.

8 [1988] IR 353.

9 *Ibid.*, p.383.



objects found after its implementation are in the ownership of the State.<sup>10</sup>

1.9 Cultural objects also have a "universal" dimension, however. An object which has a "national" value to the descendants of its creator may also be valued by other peoples who respond to its broader human *components*, "and its invocation of a common human enterprise"<sup>11</sup>. This "planetary ideology" finds expression in a number of international instruments. The *European Cultural Convention 1954*, for example, states that:

"Each Contracting Party shall take appropriate measures to safeguard and to encourage the development of its national contribution to the common cultural heritage of Europe ... [and] ... shall regard the objects of European cultural value ... as integral parts of the common cultural heritage of Europe, shall take appropriate measures to safeguard them and shall ensure reasonable access thereto".<sup>12</sup>

1.10 In legal terms, this ideology appears to imply a dual obligation for States; an obligation to ensure the conservation of its own cultural heritage and a collective obligation to contribute to the protection of the "common cultural heritage of mankind". Excessive restriction upon the export of cultural objects - developing States are often accused of this by art-market States - is said to be inimical to this obligation because it ensures that the universal community will not derive any benefit from such objects.

1.11 Support for freedom of the market in cultural property is based, in part, on the view that maximum movability promotes a free exchange of cultural goods across borders. This serves to increase accessibility, thereby maximising exposure to and appreciation of different cultures. This aim is said to be frustrated where restrictive export laws are implemented. One might argue instead that the funding of moving international exhibitions, an increased willingness on the part of museums and galleries to loan material to other similar institutions and the availability of the Internet for exhibiting material and text would equally promote the interest of cultural exchange, without the attendant risk of contributing to illicit trade. Indeed, those objects which are sold through the art market, far from being made more accessible, often remain in private hands and thus are inaccessible to all but their owners.

1.12 While international movement of cultural objects is perceived as a good, it is clear that it is not an unqualified good. Many disadvantages attach to the

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10 In *Webb*, Finlay CJ in an *obiter* commentary, limited the objects to which the State had title to those traditionally falling within the parameters of the "treasure trove" concept, i.e., the objects must be made exclusively or substantially of gold or silver and hidden with the intention of recovery. Griffin and Henchy JJ. agreed with the Chief Justice's judgment. McCarthy, on the other hand, did not envisage that the State's ownership should be confined to objects traditionally defined as "treasure trove". Walsh J. did not comment on this point. Section 2 of the 1994 Act ostensibly eliminates any confusion by extending the State's ownership to all "archaeological objects", as defined in the *National Monuments Act, 1930* as amended; the case and the ensuing legislation are considered further in Chapter 4.

11 Elsen, *op. cit.*, at 956.

12 Articles 1 and 5. The Convention is reproduced in 11 *Accounts and Papers* No. 35 (United Kingdom State Papers, 1954-55).

untrammelled free transfer of cultural objects across national borders. Arguably, its worst effect is one of "lost familiarity" with history;

"The most significant disadvantage of the excessive movement of the cultural heritage which began with colonialism and increased booty-taking in war and has culminated in the huge post World War II trade, licit and illicit, is the isolation of whole communities from their own culture".<sup>13</sup>

1.13 Movement also results in the destruction of context, which for some objects is an all-important value. Decontextualised - taken from the entirety of which they were a component - both the entirety and the individual objects lose significance; "the parts together have more beauty and significance than the sum of the dismembered pieces".<sup>14</sup> The cultural object's role of "bear[ing] witness to epochs and civilizations"<sup>15</sup> is hindered by the destruction of the context which limits its educative potential to the detriment of scholars and the community alike.

1.14 Clearly, the weight of the "context" argument varies according to the object involved: an absolute adherence to it in respect of all objects would render them all static, contrary to the interest of international access. Its importance is primarily confined to objects which are movable without significant damage or loss to their "explanatory powers" or aesthetic value.<sup>16</sup> This is consistent with the absolute ban set out in the *National Monuments Act, 1930, as amended*, on the export of "national monuments", which are by definition rooted in the ground.

1.15 O'Keefe and Prott also make an interesting point about the peculiarly Western significance of movement:

"These values [of curiosity, exploration and desire for change] in post-Renaissance Europe, fostered the restlessness which resulted in exploration and ultimately colonization, scientific experimentation leading to great technical achievements and to a particular thirst for the rare, the foreign and the exotic which fuelled the museum movement. These values, which have been of cardinal importance in Western societies, have not necessarily motivated other culturally rich communities in the past, and are not necessarily as significant to some of them now. It is important, therefore, within the current debate on movement, to appreciate that the values related to movement, though universally significant, are not universally dominant; that where they seriously threaten other values important to a community, such as tradition and stability, insensitive promotion of them is a form of

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13 O'Keefe, P. and Prott, L., *Law and the Cultural Heritage, Volume 3 - Movement* (Butterworths, 1989), p.11, para. 108.

14 Merryman, J.H., *Thinking About the Elgin Marbles*, (1985) 83 Michigan Law Review 1881 at 1918.

15 *European Cultural Convention, 1954, op. cit.*, n.12.

16 For a discussion on the limitations of the "context" argument, see Merryman, *op.cit.*, p.1911 *et seq.*

ethnocentrism which may prevent appropriate appreciation of the differently ranked values of the other culture".<sup>17</sup>

1.16 The disadvantages of movement have only become readily apparent in the wake of the huge increase in the trade - both licit and illicit - in works of art since the end of the Second World War:

"...the existence of an art and antiques market in every country, the mobility of cultural property and even its exportation are long-established and perfectly natural phenomena which have, over the past few decades, simply grown out of hand as a result both of the organization and general extension of the market and of the increasingly artificial notion of the art work or *objet d'art*, itself linked to the concept of the museum and the sacredness of culture."<sup>18</sup>

1.17 The illicit trade in cultural objects is clearly thriving. But how does one determine the exact parameters of "licit" and "illicit" trade? All are in agreement about the evils of the theft of cultural objects. Differences emerge, however, when one considers the illegal export of objects. Some states do not impose any restrictions on the export of an object; in others, the export of a similar object would be restricted, if not indeed entirely prohibited. Thus, what is licit in the eyes of one State is a breach of acceptable standards in another. The opinions of the former group are generally based in the politically and legally entrenched concepts of private property including the right to alienate, and the supremacy of the free market. The desire of the latter group to retain the object in its country of origin runs counter to such orthodox values.

1.18 Ultimately the different approaches reflect ideological differences as to the appropriate source of regulation of the international movement of cultural objects - the free market or the State. It is commonly stated that there are two dominant and conflicting schools of thought on this issue, although examination suggests most approaches fall somewhere between the two extremes.

1.19 The first school underlines the economic and cultural advantages which attend a market which is in principle unfettered, thereby permitting everybody to have access to the cultural heritage of mankind. Apart from the economic advantages which the free market approach offers, proponents argue that maximum marketability in art is also beneficial and desirable from the cultural point of view as it "will indisputably contribute to that dialogue between national cultures which many see as the principal element directed towards concord among the peoples of the world".<sup>19</sup> Others retort that such arguments are merely ploys to "ennoble the mercantile aspect of trade and commerce in

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17 O' Keefe and Pratt, *op. cit.*, p.10, para. 105.

18 de Varine, H., *The Rape and Plunder of Cultures: an Aspect of the Deterioration of the Terms of Cultural Trade between Nations* (1983) 35 *Museum* 152 at 156.

19 See, for example, the comments of the Unidroit Secretariat, *Draft Unidroit Convention and Explanatory Report* (Dec. 1994) in *Acts and Proceedings of the Diplomatic Conference for the Adoption of the Draft Unidroit Convention* (UNIDROIT 1996), p.19, para. 7.

cultural property."<sup>20</sup>

1.20 The freedom of movement argument is, of course, propounded in those States where the art trade is prospering and there is abundant capital in search of investment while at the same time the amount of cultural property available internally may be relatively small. On the other side, "exporting States" which have a rich indigenous culture but may be poor in terms of material wealth, adopt a more retentive approach, attempting to curtail the operation of the free market by means of export prohibitions. These strategies range from blanket bans in some jurisdictions on the export of certain items, such as statues of the *Buddha* - regardless of their age, form or value - or documents written in a specific language, to restrictive measures using quotas, licences and export duties.

1.21 It should be noted that not all States can be neatly compartmentalized into the "importing" and "exporting" categories. Japan is an example of a key figure in the international art-arena as importer and exporter alike. In relative terms, Ireland cannot be regarded as a major player in the world of art,<sup>21</sup> although the trade in foreign cultural objects is evidently expanding.<sup>22</sup> Although the size of the losses sustained may not compare with those in many developing states, a significant quantity of Irish objects are finding their way onto the international market. Until recently, there were relatively few operative export restrictions in force in this jurisdiction,<sup>23</sup> although recent legislative action on the part of the European Union has expanded the export regulatory regime.

1.22 It should also be noted that commentaries on the different approaches tend, in addition, to make a false dichotomy between the two schools of thought, treating the views of "exporting" and "importing" States as polar opposites. Without wishing to deny the serious and sometimes fundamental differences which exist, rigid adherence to the tenets of either approach would render international co-operation between members of these two schools futile and, indeed, impossible. As we shall see, the second half of the century has seen much international co-operative action in the field of cultural protection.<sup>24</sup> The extent of the problem is commonly recognised and there is at least a *moral* consensus about the need for a response.

1.23 It is clear, then, that illicit trade in cultural goods is a thriving source of criminal activity and one which poses a significant threat to the preservation and development of cultural knowledge. The question is whether the Convention presents a workable, efficient and accessible basis for ensuring not only the return of stolen or illegally exported material but also for discouraging illicit trade *per se*.

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20 Rodota, S., *The Civil Law Aspects of the International Protection of Cultural Property in International Legal Protection of Cultural Property*, p.99 (Council of Europe, 1984).

21 See Kelly, E., *op. cit.*, n.4.

22 This view has been expressed by a number of professionals in the field.

23 The Irish export regime is considered in Chapter 5.

24 See Chapter 2.

1.24 This Report examines whether Ireland should accede to the *Unidroit Convention on the International Return of Stolen or Illegally Cultural Objects*. We will first look at previous international and regional instruments and illustrate the differences between the various regimes. This review points up the need, notwithstanding the existence of these regimes, for an instrument which is international in character and attracts widespread support, particularly from "importing" States.

1.25 We will then consider the Convention text Article by Article, pointing out the areas which necessitate changes in Irish law and presenting recommendations. The particular issues raised by our law of larceny are considered in Chapter 4, where we focus on the adequacy of that law and on the question of whether it forms a satisfactory basis on which to pursue a claim under the Convention. The *Webb* decision and the *National Monuments* legislation are also considered, particularly in the context of ownership of material recovered from land. In Chapter 5 we look at the Irish export regime and at the extent of protection afforded by it in the context of Chapter III of the Convention. The procedures available for the pursuit of a claim for return of objects to and from Ireland are considered in Chapters 6 and 7 respectively. Our conclusions on the Convention are set out in Chapter 8. A summary of our recommendations is provided in Chapter 9.

## CHAPTER 2: THE UNIDROIT CONVENTION: A COMPARISON WITH EARLIER INTERNATIONAL AND REGIONAL INSTRUMENTS

2.1 That there has been progress towards greater co-operation between States and a move away from the supremacy of the market in national law is clear from the development, since the 1940s, of various international and regional instruments dealing with heritage protection. In anticipating the potential for success of the Convention, it is significant that progress is being made, particularly at regional level, towards instituting schemes which recognise and promote mutual respect for heritage and the idea of a collective right to culture. Such recognition necessitates the overriding of individual property rights and the demands of the market to achieve a particular goal, one which has not, heretofore, gained universal support.

### Earlier international instruments

2.2 The protection of cultural heritage began to assume real importance in the international community only towards the end of the Second World War. *The Declaration of London, 1943*, concluded by the Allied Powers, expressly provided for the return of objects removed from occupied territories, regardless of whether the objects had been acquired as a result of

"transfers or dealings which had taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected".

2.3 The Declaration imposed an absolute obligation upon the possessor to return objects which had been removed from occupied territories, regardless of whether he or she acquired the object in good faith.<sup>1</sup> Adherence to this Declaration meant that some States had to overturn the protection which their

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<sup>1</sup> The Declaration provided that it was a "a formal warning to all concerned, and in particular to persons in neutral countries, that [the Allied Powers] intend to do their utmost to defeat the methods of dispossession practised by the Governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled". Following the War, France, the United Kingdom, the United States and the USSR each implemented laws governing restitution in their respective zones of occupation, which overrode national provisions protecting transferees: O'Keefe, P and Prott, L *Law and the Cultural Heritage, Volume III: Movement* (Butterworths, 1989) para 1505 *et seq.*

national laws afforded good faith purchasers and possessors. This approach was also adopted in another instrument of similar scope, the *Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954*. 74 States have accepted this Protocol. Ireland, however, has not done so.

2.4 The particular post-war conditions with which these two instruments were concerned made the solutions advocated therein acceptable to much of the international community. This consensus disappeared, however, when normal civilian life resumed and the question of the competing interests of the dispossessed owner and the good faith possessor acquired prominence in international deliberations.

### ***The UNESCO Convention: A Public Law Approach***

2.5 The *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970*<sup>2</sup> was the first international instrument to recognise a general obligation on States to take steps to prevent illicit movement in cultural property. The obligation to return cultural property is imposed, however, only in respect of limited categories of object: those which constitute inventoried material belonging to a "museum or a religious or secular public monument or similar institution".<sup>3</sup> The Unidroit Convention, by contrast, imposes an obligation to return in respect of all cultural objects "of importance for archaeology, prehistory, history, literature, art or science" which belong to one of the categories in its Annex. The Annex to the Unidroit Convention corresponds exactly with Article 1 of the UNESCO Convention. Such exact correlation is designed to enable the two Conventions to work hand in hand to the best possible effect. The scope of the UNESCO Convention is limited, however, by the fact that objects constitute cultural property only if, in addition to belonging to one of the categories laid down in Article 1, they have been "specifically designated" by each State as being of importance for archaeology, prehistory, history, art, science or literature. The Unidroit Convention, on the other hand, provides an independent definition of cultural object which does not rely in any way on government designation. Its operation does depend on government action in respect of illegally exported, as distinct from stolen cultural objects, in that such objects are "illegally exported" only if export restrictions have been imposed on them under the domestic law of a Contracting State.

2.6 Ireland in common with a number of other EU member states has not become a party to the UNESCO Convention. It is essentially a public law treaty which requires the Contracting States themselves to take various protective measures, such as setting up an inventory of important public or private cultural property,<sup>4</sup> promoting the establishment and development of institutions to ensure

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2 The text of the Convention and a list of the States Parties thereto are attached hereto as Appendix B.

3 Article 7(b)(i) and (ii).

4 Article 5(6).

the protection of cultural property,<sup>5</sup> establishing ethical guidelines for collectors and curators<sup>6</sup> and taking educational measures to stimulate and develop respect for the cultural heritage of all States.<sup>7</sup> The Convention does, however, contain one vital private law provision; Article 7(b)(ii) provides for the restitution of illegally exported cultural objects, even when they are in the hands of persons who acquired them in good faith.<sup>8</sup> The good faith possessor may, nonetheless, obtain compensation.<sup>9</sup> Reichelt refers to the "commonly accepted opinion [that Article 7(b)(ii) is] the principal obstacle to a more general acceptance of the UNESCO Convention."<sup>10</sup> Civil law states did not wish to abandon the fundamental concept of the protection of the good faith possessor which, in their opinion, was central to the free circulation of goods and consequently ensured the vitality of the market. A number of States, many of which were "Market States", also believed that the scope of application of the Convention was not sufficiently clear and felt, therefore, that a wide interpretation of its scope could significantly hinder the conduct of the *legal* trade in cultural property.

2.7 Despite its flaws, the UNESCO Convention represented a significant step forward in laying the foundations of an effective international law of cultural property and in enunciating certain principles and values "which regrettably continue to be honoured more in the breach than in the observance".<sup>11</sup> It may, perhaps, have been before its time; the 25 years between the adoption of the UNESCO and the Unidroit Conventions have brought about a change in attitude on the part of many States. Prott refers to a

"tidal wave of theft of cultural objects [which] swept over wealthy as well as poorer countries. The losses from museums, private collections, country houses and churches, even in countries which had traditionally seen themselves as "art market" States had become so serious that they were prepared to consider more drastic action in respect of stolen cultural objects, in fact to accept that all such stolen cultural objects should be returned. This change was also partly due to a change of attitude in these countries engendered by the 1970 UNESCO Convention and UNESCO's work to sensitize the populations of those countries to the enormous damage to humanity's heritage by removal of cultural objects from their context."<sup>12</sup>

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5 Article 5(c).

6 Article 5(e).

7 Article 5(f).

8 Subject to the precondition that the object is a "designated" one and is exported from the territory of one State Party to the Convention to that of another after the entry into force of the Convention in the two States concerned.

9 The reluctance on the part of many States to endorse this principle was augmented by the fact that Article 7(b)(ii) did not set out any limitation period within which restitution must be pursued.

10 See Reichelt, G., *International Protection of Cultural Property*, *Uniform Law Review* (1985) 43 at 55.

11 Schneider, M., *The Final Text - The Unidroit Convention on Stolen or Illegally Exported Cultural Objects*, p.1. This paper was presented at the *Art Theft Conference*, London, 15th November 1995.

12 Prott, L., *UNESCO and UNIDROIT: A partnership against trafficking in cultural objects* (Paper presented at the *Art Theft Conference*, London, 15th November 1995). The author added that "another factor behind the change in attitude was the efforts of UNESCO, of ICOM (International Council of Museums) and of informed professionals such as archaeologists and anthropologists, to illustrate the ways in which stolen cultural objects were filtering into the illicit trade, thus implicating well-meaning collectors and museums in the damage".



2.8 Thus, there emerged on the part of a number of scholars, interested professionals and States alike, an admission that the protection of cultural objects necessitated the abandonment of the protection which civil law jurisdictions had traditionally afforded to the good faith purchaser and possessor. The notion of automatic restitution to the dispossessed owner, regardless of the *fides* of the possessor, gained momentum.

2.9 A supplementary instrument was required which would provide clear and specific obligations in respect of both stolen and illegally exported cultural objects; this instrument would respond to the concerns of States which felt that the 1970 Convention was not adequately precise.<sup>13</sup> This instrument would focus on private law aspects of the illicit trade in cultural objects - primarily, the resolution of the competing claims of the dispossessed owner and the *bona fide* purchaser. As private law matters remained, for the most part, outside of the remit of UNESCO itself, it approached UNIDROIT in this regard. Previously, Unidroit had prepared the *Draft Uniform Law on the Acquisition in Good Faith of Corporeal Movable, 1974*, which touched upon many issues of interest to the resolution of the owner versus *bona fide* possessor debate. Unidroit then prepared a first study on the international protection of cultural property in the light especially of its 1974 draft and of the 1970 Convention. A second study followed which dealt specifically with the rules of private law governing the transfer of title to cultural property.<sup>14</sup> The draft Convention which emerged sought to introduce a regime of common minimal rules which would ensure that the differences between legal systems could no longer be exploited to the benefit of the illicit trade.

2.10 Before considering the Unidroit Convention in detail, we will look at a number of other international instruments of similar scope and purpose to that of the Convention.

### ***Regional Schemes: Council Directive 93/7/EEC***

2.11 *Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State*<sup>15</sup> was adopted on 15 March 1993, and is aimed at providing, as between the EU Member States, a simple and efficient regime for the return of cultural objects as defined in the Directive. These include "national treasures" possessing artistic, historical or archaeological value under national legislation which also fall into one of the categories specified

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13 Indeed, UNESCO itself has commented that the very flexibility of the Convention has proved detrimental in that it allows of diverse interpretations and a resulting reluctance to adhere to it: Unesco Comments on the Draft Convention in *Acts and Proceedings of the Diplomatic Conference for the Adoption of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects*, June 7-24, 1995, p.85.

14 These two studies were entrusted to Ms G. Reichelt of the Vienna Institute of Comparative Law.

15 OJ No L 74/74, 27.3.93. The *European Communities (Return of Cultural Objects) Regulations, 1994* (SI No 182/94) (hereinafter referred to as the '1994 implementing Regulations') give effect to the Directive in Ireland. The text of the Directive is attached hereto as Appendix C.

in the Annex to the Directive.<sup>16</sup> Various financial thresholds apply, but only to some of the categories: archaeological objects, for example, are covered regardless of value.<sup>17</sup>

2.12 Unlawful removal is defined as removal in breach of a Member State's own rules on the protection of national treasures or in breach of Regulation 3911/92,<sup>18</sup> or not returned at the end of a period of lawful removal. *Council Regulation 3911/92 on the export of cultural goods* requires cultural goods destined for export beyond the EU to be accompanied by a licence issued by the Member State in which the object is located. Such licence may be refused where the object is covered by the legislation of a Member State pertaining to protection of national treasures of that State.

2.13 The Directive and Regulation do not provide any means of retrieving objects which are exported beyond the territory of the EU. The Regulation merely seeks to monitor such export while allowing individual Member States a margin of discretion within which they may retain certain objects of particular significance to them. Its usefulness in terms of return is limited to objects which, having been transported beyond the EU without a licence, return to the EU: such objects may then be characterised as having been removed in breach of the Regulation. If they remain outside the EU, the provisions of the Directive cannot be invoked to secure their return, that instrument being enforceable only as between EU Member States.<sup>19</sup>

2.14 The potential success of the EU arrangements remains to be seen. Several Member States were late in implementing the Directive, some not doing so until mid-1995, so that sufficient time has not elapsed to properly evaluate its efficacy or indeed to suggest changes to the existing scheme. According to the European Commission, no claims have as yet been resolved by means of litigation, whereas several claims have been settled through collaboration between Member States, as provided in Article 4. Given the potentially high cost of pursuing a claim before a foreign court, it is likely that a State would consider doing so only if the object were of outstanding importance to the Member State; the irony here is that such objects are also likely to be the most closely monitored and therefore the least likely to be capable of illegal export. In practical terms,

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16 The categories of object laid down in the Annex are more limited in some respects than those in the Unidroit Convention, for example the Directive covers archaeological objects more than 100 years old which derive from archaeological sites, excavations or collections, while the Unidroit Convention covers such objects regardless of age; the Directive imposes an age limit also in respect of "elements forming an integral part of artistic, historical or religious monuments which have been dismembered" while the Convention does not. Contrary to this pattern, the Directive, unlike the Convention, contains a catch-all category under which any antique item more than 50 years old and valued at more than 50,000 ecus may be dealt with under the Directive.

17 Financial value is that of the object in the State from which return is requested.

18 The Regulation definition of cultural object differs from that in the Directive in that it does not contain the proviso that objects contained in the Annex (which is largely similar to that in the Directive) must also constitute national treasures. (Member States do have the power, however, to refuse licences where the object is a national treasure under domestic law). In effect, therefore, all cultural objects must have a license before they may be exported beyond the territory of the EU under the Regulation; only those cultural objects which satisfy certain additional criteria under the Directive must be returned to a requesting State. The text of Regulation 3911/92 is attached hereto as Appendix D.

19 The Directive and Regulation are discussed further in Chapter 5.

therefore, the most significant aspect of the EU scheme is the obligation imposed on Member States to co-operate and undertake consultation to secure return.

2.15 The existence of a European system for return represents a significant development. It does not, however, avail us in securing return from non-EU States to which much of our cultural heritage is exported, thus illustrating the need for a system which is international in nature and which attracts maximum support in the form of accessions.

### ***Regional Schemes: The Commonwealth***

2.16 The *Scheme for the Protection of Cultural Heritage within the Commonwealth*, adopted by the Meeting of Commonwealth Law Ministers in Mauritius in 1993 governs 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".<sup>20</sup> It is intended to be complementary to other arrangements such as the UNESCO Convention 1970, the Unidroit Convention and the European Communities Directive 7/93 and Regulation 3911/92, Article 1(3) of the Scheme stating that it does not preclude participation in any of these instruments. While the Scheme is not directly relevant to Ireland, the apparant enthusiasm for it within the Commonwealth<sup>21</sup> would suggest a concomitant willingness on the part of those States to become parties to other international agreements such as the Unidroit Convention.

2.17 The Scheme differs in certain respects from the Directive and the Unidroit Convention, for example the range of objects covered is more limited.<sup>22</sup> Each of the instruments recognises the legitimacy of imposing restrictions on export of particular objects of cultural importance although they differ in the manner in which such restriction is to be realised. The Scheme also differs from the other instruments in that in addition to directing Member States to make it an offence to unlawfully export cultural property, it provides that States may make it an offence to *unlawfully import* such material. This provision was included, albeit on a non-mandatory basis, in order to overcome the argument that laws prohibiting export are public laws and the courts of one country will not enforce the public laws of another country.

2.18 A similar provision was not included in the Unidroit Convention, presumably due to an "evolution in legal thinking" which shows an increasing willingness to take into account the mandatory rules of law of another State.

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20 Article 1(1). The text of the Scheme is attached hereto as Appendix E.

21 There are currently 53 States in the Commonwealth, the unanimous support of which was required for adoption of the Scheme.

22 O'Keefe points out, however, that this distinction may be insignificant in practice given that States will be unlikely to go to the trouble and expense of pursuing objects of lesser significance. Furthermore, the more significant the object, the greater its monetary value is likely to be, so that the financial thresholds in the Directive will not present an obstacle: O'Keefe, P., *Unlawful Export of Cultural Heritage: the Commonwealth Scheme, the Unidroit Draft and the EEC Directive and Regulation: A Comparison*, Meeting of Commonwealth Law Ministers, Mauritius 15-19 November 1993, Memorandum Part I pp.199-204 (Commonwealth Secretariat, 1995).

Article 7 of the 1980 *Convention on the Law Applicable to Contractual Obligations* (the Rome Convention) and Article 19 of the *Swiss Law on Private International Law*, the case law of many countries and the EC Directive and Regulation demonstrate a move away from the notion that recognition of foreign public law represents an intrusion on the sovereignty of a state.<sup>23</sup> It was recognised by the committee of experts, however,<sup>24</sup> that notwithstanding this evolution, the requirement to so recognise would have to be narrowly drawn in order to gain wide acceptance. To this end Article 5 gives supremacy to the cultural significance of the object; while a claim for return may be brought on the basis of illegal export, the authority in the requested State is obliged to order its return only where it is satisfied that its removal from the requesting State "significantly impairs" one or more interests such as the "physical preservation of the object or its context" or the object is of "significant cultural importance" for the requesting State. These provisions represent a compromise between those States which favour automatic return of objects exported in breach of national law, and those which favour minimum restriction on the movement of cultural objects. The latter were already concerned that the breadth of the definition of cultural object in Article 2 posed a serious threat to that objective. Both the Directive and the Scheme treat unlawful export, once established, as conferring an automatic right to return, while the Convention does so only in respect of stolen objects.

### ***Regional Schemes: A Comparison with the Convention***

2.19 The common aim of the Convention, the Scheme and the Directive is to provide a cost-effective and accessible means of securing return of cultural property across national boundaries. Under the Convention, the Contracting States are obliged at the time of ratification to specify the authority to which a claim for restitution or return is to be directed, be it the courts, an authority specially established for the purpose, or through diplomatic channels. Under the Directive and the Scheme, each country must nominate a central authority which will make and receive requests for the return of property covered by them.<sup>25</sup> A request must give information sufficient to identify the object and where possible its location. Both the Scheme and the Directive differ from the Convention in that they impose specific obligations on the country of location in relation to the object, once identified; for example, on receiving a request a State must take

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23 Unidroit Secretariat Explanatory Report in *Acts and Proceedings of the Diplomatic Conference*, *op. cit.*, p.33, para. 74.

24 A group of governmental experts was convened by the Governing Council of UNIDROIT at its 69th session in April 1990, to discuss and revise the text of the preliminary draft Convention. The preliminary text had been prepared by a study group set up by the UNIDROIT Governing Council in 1988. The text was considered at four meetings, chaired by Mr Pierre Lalive, between 1991 and 1993. These meetings were attended by representatives of fifty of the fifty-six member States of UNIDROIT, twenty-five non-Member States, eight inter-governmental organisations, and of a number of non-governmental organisations and professional associations. See Unidroit Explanatory Report in *Acts and Proceedings of the Diplomatic Conference*, *op. cit.*, p.18, para. 4.

25 The Court designated in the 1994 implementing Regulations is the High Court; the Minister for Arts Culture and the Gaeltacht is nominated the central authority to carry out the functions provided for in the Directive. The Minister may apply to the Court for an order *inter alia* to enable the requesting State to determine that the object is in fact a cultural object and for the preservation of the object: SI 182/94, *op. cit.*, Regulation 5.

steps to protect the object.<sup>26</sup> By contrast, the Convention provides that protective measures available under the law of the State of location of the object *may* be invoked, even where the claim for restitution or return is proceeding in another jurisdiction.<sup>27</sup> Under the Scheme, the authority may then either notify the holder that if proceedings are not initiated within a specified period, the object will be returned on foot of the request by the requesting state, or institute proceedings or advise the requesting state to do so with a view to securing return of the object.

2.20 The Directive, unlike the Convention, contains specific direction as to the procedure to be followed in seeking return: the requesting State may initiate proceedings in the requested State against the possessor, or failing that, the holder of the object in order to secure its return. Such proceedings may only be brought where they are accompanied by documentation describing the object in question and establishing that it is a cultural object, and a declaration that the object has been removed unlawfully from the requesting State.<sup>28</sup> The court is obliged to order return where both of these elements are established.<sup>29</sup> The Convention, however, provides a range of possible forums; a claim for restitution or return may be brought in the Contracting State of location or in courts or other competent authorities having jurisdiction under the law in Contracting States.<sup>30</sup> Both instruments make provision for submission to arbitration with the consent of the parties.

2.21 Under both the Convention and the Directive, time begins to run against the claimant from the time that it knew the identity of the possessor *and* the location of the object, while the Scheme requires knowledge only of the location of the object. The time limits are three, one and five years respectively, the longer time afforded by the Scheme being offset by the fact that time may be triggered against a claimant more easily than under either the Convention or the Directive. An upper time limit is imposed under the Directive and the Convention of 30 and 50 years respectively from the date of the theft or the illegal export<sup>31</sup> while no upper limit is provided in the Scheme.

2.22 Notwithstanding the long limitation periods, claimants would be well advised to pursue an investigation into the location of the object and the possessor's identity as expeditiously as possible, even where the objects are of a type which are not subject to an upper time limit, since the task of proving the facts of the initial acquisition is likely to become increasingly onerous with time, particularly where the object has been passed on to successive purchasers. The

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26 Directive 93/7, Article 4(4); Commonwealth Scheme, Article 8.

27 Convention, Article 8(3).

28 Directive 93/7, Article 5.

29 Directive 93/7, Article 8.

30 Convention, Article 8(1).

31 The Convention further provides that objects which form an "integral part of an identified monument or archaeological site or [belong] to a public collection" are not subject to this upper time limit; a State may, however, declare its own upper limit, either 75 years or such longer period as is provided in its law: Article 3(3), 3(4) and 3(5). The Directive contains a similar provision in respect of "ecclesiastical goods" and objects "forming part of public collections".

identity of those who may pursue a claim under the various instruments also differs, the Convention being unique in not limiting pursuit of a claim to States.<sup>32</sup>

2.23 The Unidroit Convention, the Commonwealth Scheme and the Directive each contain provisions relating to compensation of a *bona fide* purchaser. The Convention requires payment of "fair and reasonable compensation" to the possessor of a cultural object which was illegally exported, provided that he or she neither knew nor reasonably should have known at the time of acquisition that it had been illegally exported. Where the object was stolen, the possessor is also required to prove that he or she exercised due diligence when acquiring the object. The Scheme provides that compensation is payable where the holder is an innocent purchaser for value who exercised due care and attention in acquiring the object; where the holder has failed to utilise any validation system<sup>33</sup> provided under the Scheme, he may be presumed, unless the contrary is proved, not to be an innocent purchaser.

2.24 The Directive provides that the possessor who has exercised due care and attention in acquiring the object is entitled to such compensation as is deemed fair in the circumstances. The burden of proof is governed by the legislation of the requested Member State<sup>34</sup> which is significant because, as O'Keefe points out, the possessor is in a more favourable position if the requesting State has to prove that he was not a good faith purchaser than if he has to prove that he was.<sup>35</sup> Under the Directive as implemented in Ireland, the High Court is not obliged to order the payment of compensation by the requesting State "unless it is satisfied that the possessor exercised due care and attention in acquiring the cultural object" in question.<sup>36</sup> As the 1994 implementing Regulations are silent on the question of the onus of proof, the law remains unchanged in this regard. It is for the possessor to establish, on the balance of probabilities, an entitlement to compensation.

2.25 In respect of stolen cultural objects, the Convention places the burden of proof on the possessor to prove that he or she exercised due diligence when acquiring the object. In the case of illegally exported objects, however, it is silent as to where the burden lies so that the position depends on the law of the Contracting State hearing the claim.<sup>37</sup>

2.26 While the Directive and the Scheme make the provision of compensation mandatory where good faith is established, the Convention, by way of Article 9, allows States to rely on domestic law where to do so is more favourable to restitution or return. States may, therefore, under the Convention, unilaterally

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32 This is true only of stolen objects; claims arising out of illegal export may be pursued only by Contracting States.

33 Article 4 provides that parties to the Scheme may introduce a validation system whereby a person intending to purchase an item of cultural heritage may request the country of export to issue a validation certificate stating that the item is not an unlawful export from that country.

34 Directive 93/7, Article 9.

35 O'Keefe, *op. cit.*, n.22 at 203.

36 Regulation 8, 1994 implementing Regulations.

37 The burden and standard of proof are considered *infra* at para. 3.118 *et seq.*

decide against providing for compensation of good faith possessors.<sup>38</sup>

2.27 All three instruments differ from the UNESCO Convention in one significant respect: they each impose obligations on Contracting States in explicit terms. That the UNESCO Convention takes a non-mandatory approach to the protection of cultural property reflects the era in which it was drafted. There is evidence that a more pro-active approach is now being taken in respect of that Convention, with many Member States having recently introduced legislation to regulate the export, import and trade in cultural property. In both Canada and the United States, which became parties to the Convention in 1978 and 1983 respectively, prosecutions have been secured and cultural property returned<sup>39</sup> under legislation implementing the Convention.<sup>40</sup> Such successes suggest that the UNESCO Convention may become more rather than less relevant in the future, as the normative effect of other instruments, both international and regional, makes the international community more receptive to wider ranging control of illicit trade.

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38 For a discussion of Articles 4 and 9, see para. 3.68 *et seq.*

39 Reports of Member States on measures they have adopted to implement the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970)*, presented to the Unesco General Conference, 28th Session, Paris 1995.

40 In Canada, the *Cultural Property Export and Import Act 1977*; in the United States, the *Convention on Cultural Property Implementation Act 1983* 19 U.S.C. §§2601-2613 (1988 and Supp. 1994). The Act implements Articles 7 and 9. Because it is non-retroactive, it covers only those objects stolen after April 12, 1983, the effective date of the Act.

## CHAPTER 3: THE UNIDROIT CONVENTION: THE TEXT

### Introduction

3.1 The proliferation of illicit trade in art since the Second World War is largely attributable to the increasing demand for art objects and consequently their rise in market value, advances in technological sophistication which facilitate international communication and transfer of funds and the ease in crossing international borders. These advances compound existing difficulties in detecting illicit activity; in general, police and customs officials are neither adequately trained nor resourced to curb the outflow of art works from their jurisdictions. Ideological differences at supra-national level have resulted in the international community failing repeatedly in the past to compromise on the issue of reconciling conflicting legal rules.

3.2 That the Convention will not by itself produce a solution to the problem of illicit trade but rather constitutes the beginning of a process by which it is hoped to promote international cultural co-operation is acknowledged in its Preamble. It also states that implementation should be accompanied by other effective measures for protecting cultural objects, such as the development and use of registers, the physical protection of archaeological sites and technical co-operation. That it is no panacea for all of the ills caused by the illegal movement of cultural objects may be a self-evident point, but it is nonetheless a point which must be borne in mind when analysing the Convention and considering the merits of becoming a party thereto:

"The instrument should not seek to do too much: after 30 centuries of relocation of cultural objects in peace and war, one instrument cannot turn the tide of history. What this instrument can do is take one or two clear steps to reversing the current tide of theft, illegal excavation and illegal export of cultural objects which will result in their return by practical legal steps."<sup>1</sup>

3.3 In the words of the Preamble, the Convention seeks to introduce a regime of "common minimal legal rules" in as many States as possible in order to ensure that differences between various legal systems cannot be exploited to

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<sup>1</sup> UNESCO, Comments on the Draft Unidroit Convention (April 1995), in *Acts and Proceedings of the Diplomatic Conference*, *op. cit.*, p.88.



the benefit of the illicit trade. Arriving at the content of these minimum rules was not an easy task. The drafters, in so doing, sought to

"draw upon the progress that had been permitted by the evolution of ideas ... and to show how the national character of the protection of cultural heritage may be adapted to, or be accompanied by, the growth of solidarity between States".<sup>2</sup>

3.4 It would, however, be unduly optimistic to assert that ideas have evolved to such an extent that there was a clear uniformity of approach among the different negotiating States. Many States attached significance to the free international circulation of cultural objects and sought, thus, to limit the scope of the application of the Convention to the greatest extent possible. On the other hand, certain States - as a rule, the exporting States - sought to extend as far as possible the application of the principles of restitution and return and to preserve the priority enjoyed by the dispossessed owner. It is not surprising, therefore, in the light of such diverging viewpoints that it took six years to reach a final agreement.

#### **The Convention: Scope of Application and Definition**

3.5 The philosophy, aims, role, limitations and content of the Convention are summarised in its Preamble which provides an insight into the various competing interests with which the framers of the Convention had to contend. The Preamble speaks of the dual needs of protecting cultural heritage and of facilitating licit trade therein. It endorses the concept of the "common cultural heritage of mankind", yet also notes the importance of retaining objects in their proper context in order that national and international communities alike may benefit. It seeks to impose minimum protective rules yet enables Contracting States to avail of their own more protective rules. Finally, it acknowledges that, if the ongoing impoverishment of cultural heritage worldwide is to be stemmed, a multifaceted approach must be adopted.

3.6 Although the Convention aims to establish a framework of "common, minimal legal rules" in the Contracting States upon which domestic legislation must build, it nonetheless grants the States authority to alter that framework and deviate from the norms expressed therein in limited circumstances. As will be seen, declarations relating to the applicability of aspects of the Convention may be made under Articles 3, 13 and 16.

Article 1 of the Convention provides that it shall apply to:

- "claims of an international character for:  
(a) the restitution of stolen cultural objects

- (b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage (hereinafter "illegally exported cultural objects")."

***"Claims of an international character"***

3.7 Thus, the Convention has no application to claims arising from purely domestic transactions. But once the cultural object at the heart of a claim crosses national frontiers, questions as to the applicability of the Convention arise. It is clearly applicable when an object is taken from Contracting State A - following a theft or as a result of illegal export - and brought to Contracting State B. If, however, the same object is subsequently re-introduced into Contracting State A, would an ensuing claim for restitution or return be of an "international character"? Some have suggested that such a claim would be beyond the scope of the Convention.

3.8 The facts of *Winkworth v. Christie, Manson & Woods Ltd.*<sup>3</sup> fall within this hypothetical model. In that case, cultural objects were stolen from an English collector and brought to Italy. They were then sold to an Italian purchaser who, two years later, presented them for sale at Christie's in London. In an action in conversion and detinue before an English court, the question arose as to whether English or Italian law applied to the issue of title to the goods as between the dispossessed owner (the plaintiff) and the *bona fide* purchaser.

3.9 The defendant argued that Italian law applied because under private international law, the validity of a transfer of movable property was governed by the *lex situs*, the law of the country in which the property was situated at the time of the transfer.<sup>4</sup> According to the defendant, under Italian law a purchaser acquired good title, even against the dispossessed owner, despite defects in the seller's title if he or she acted in good faith, was unaware of the unlawful origin of the goods and the transaction was accompanied by the appropriate documentation.

3.10 The plaintiff, while accepting the *lex situs* rule as one of general application, argued that the case had a strong connection with England which placed it beyond the rule's application. The Court rejected this assertion and applied the principle enunciated by Pollock CB in *Cammell v. Sewell*<sup>5</sup> to the effect that if "personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere". This principle was affirmed in later cases and is widely accepted as a correct

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3 [1980] 1 All ER 1121.

4 A number of exceptions to this rule were cited, none of which was asserted by the plaintiff, for example where the purchaser has not acted in good faith, or where the English court considers the *lex situs* to be contrary to English public policy.

5 (1858) 157 ER 1371.

statement of the law. Slade J was of the view that

"[i]ntolerable uncertainty in the law would result if the court was to permit the introduction of a wholly fictional *situs*, when applying the principle to any particular case, merely because the case happened to have a number of other English connecting factors".<sup>6</sup>

3.11 The framers of the Convention, alive to the difficulty - if not the impossibility - of reaching agreement on a definition of "claims of an international character" have left this matter in the hands of national legislatures, courts or other competent authorities. It appears preferable to recognise that claims for the return or restitution of objects which have returned to the jurisdiction from which they were previously removed, as in the case of *Winkworth*, should be deemed to be "claims of an international character": any other approach would provide an incentive to dishonest dealers in cultural objects to remove or "launder" the object through another more convenient jurisdiction and then return the goods, when appropriate, to the initial jurisdiction. If the Convention had been available to Mr Winkworth, he would have been entitled to automatic return of the objects on proof of the theft and regardless of the law relating to ownership in the place where the transfer occurred. The Convention, therefore, avoids many of the conflicts of law issues normally associated with the retrieval of objects from a foreign jurisdiction by basing the right to return on the theft of the object under the law of the State in which the taking occurred.

3.12 Although the transactions must be international in character (in the sense in which this term will be interpreted in the different Contracting States), transactions following the theft of a cultural object need not be from one Contracting State to another. Article 1(a) simply states that the Convention shall apply to the restitution of stolen cultural objects. It makes no reference to the jurisdiction in which the theft<sup>7</sup> occurred.<sup>8</sup> Thus, a claimant whose cultural object is stolen in a non-Contracting State may avail of the legal regime established under the Convention as long, of course, as the object in question is removed to a state which is a Contracting State. The decision to omit such a reference was based upon the assertion that "theft was an act which is condemned and punished under all national laws and that the proposed restriction would encourage the theft of cultural objects on the territory of non-Contracting States."<sup>9</sup>

3.13 In respect of illegally exported cultural objects, however, the export provision violated must be that of a Contracting State. Underlying the distinction between this provision and that concerning stolen cultural objects was the

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6 [1980] 1 All ER 1121 at 1132.

7 Note that for the purposes of the Convention, reference will be made to the word "theft" rather than "larceny", the appropriate term in Irish criminal law.

8 Article 10(1), however, limits the circumstances in which claims in respect of stolen objects may be brought: see below, para. 3.137 *et seq.*

9 Unidroit Secretariat, Draft Unidroit Convention and Explanatory Report (Dec. 1994) in *Acts and Proceedings of the Diplomatic Conference*, *op. cit.*, p. 23, para. 23.

framers' perception that:

"only States prepared to recognise the relevant rules of other States, within the limits imposed by the [Convention], should benefit from its provisions, which would moreover constitute an incentive to States to ratify it."<sup>10</sup>

3.14 Finally, it should be noted that the language of Article 1(b) refers to the illicit removal of objects contrary to the law regulating export of cultural objects *for the purpose of protecting its cultural heritage*. Thus it is crucial that the provisions which are violated are those specially designed to further the protection of cultural heritage and not merely general provisions of national export law. Thus the Convention will not apply to exports deemed to be illicit by reason of the failure to respect fiscal regulations.

#### *Definition of "cultural object"*

"The delimitation of the category of cultural objects whose return may be requested is the most fundamental one for the scope of an international convention concerning cultural property, and at the same time one of the most delicate to resolve. The difficulties are moreover multiplied in the case of an international treaty as opposed to purely internal protective legislation since it is necessary to establish a general definition that will take account of the cultural circumstances of each State and of its particular needs. Stress was laid [by those engaged in drafting the Convention] on the difficulty of framing *in abstracto* an objective definition of cultural objects since the attribution of the epithet "cultural" to an object is the consequence of a value judgment."<sup>11</sup>

3.15 In resolving this difficult issue, the framers of the Convention have combined a general definition of cultural object with an enumerative and exhaustive list thereof. Article 2 provides that, for the purposes of the Convention, a "cultural object" is one which:

"on religious or secular grounds, [is] of importance for archaeology, prehistory, history, literature, art or science and belong[s] to one of the categories listed in the Annex".

3.16 The list of objects set out in the Annex to the Convention is extremely extensive. It refers to;

- (a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;

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10 Prot, L *UNESCO and UNIDROIT: A partnership against trafficking in cultural objects*, p.13. (paper presented at the Art Theft Conference, London, November 15, 1995).

11 *Ibid.*

- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
  - (i) pictures, paintings and drawings produced entirely by hand on any surface and in any material (excluding industrial designs and manufactured articles decorated by hand);
  - (ii) original works of statuary art and sculpture in any material;
  - (iii) original engravings, prints and lithographs;
  - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.;;) singly or in collections;
- (i) postage, revenue and similar stamps, singly or in collections,
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments.

3.17 As we have seen, an object must fall within one of the above categories *and* be of importance, on religious or secular grounds, as far as one of the interests specified in Article 2 is concerned. In addition, the object must have been either stolen or exported contrary to the export regulations of a Contracting State.<sup>12</sup> If it was both stolen and illegally exported, the claimant will have a choice as to which part of the Convention to invoke in order to secure return.

## A. RESTITUTION OF STOLEN CULTURAL OBJECTS

### 1. *Balancing the interests of dispossessed owners and bona fide purchasers*

3.18 The task of the framers of the Convention was, in essence, to protect cultural heritage by curbing the illicit traffic in cultural objects. They sought to

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<sup>12</sup> The law regarding regulation of export from Ireland of objects with which the Convention is concerned is considered in detail in Chapter 5.

fulfil this task through the introduction of uniform legal rules regarding restitution and return in the Contracting States. Thus, the framers engaged in a comparative analysis of the private law rules governing priority in title between dispossessed owner and good faith purchaser, with a view to identifying the rule which - if applied uniformly throughout the Contracting States - would most effectively hinder the illicit traffic. Attention was therefore focused upon the rules of civil law systems which tend to protect the claims of good faith purchasers against dispossessed owners; although this rule promotes the maximum marketability of cultural objects, logic and the emphatic conclusions of a number of expert studies<sup>13</sup> point to the fact that it also promotes illicit trade. These expert studies concluded that:

"the only way substantially to hinder the illicit trade in cultural property is to ensure the return of cultural objects to the original holder after a theft, even at the cost of changing the rule in many European legal systems protecting the *bona fide* purchaser of stolen goods."<sup>14</sup>

3.19 The framers of the Convention heeded this advice. Article 3(1) establishes the general principle of the restitution of stolen cultural objects. The possessor is required to comply with this principle whether or not he or she acquired the object in good faith. The *fides* of the possessor only assumes importance when one proceeds to consider his or her entitlement to compensation.<sup>15</sup>

3.20 Article 3(1) does not specify the party to whom the object must be returned. Although this will normally be the dispossessed owner, circumstances may arise in which a museum or art gallery, for example, which has been in possession of an object on a long term loan may pursue a claim for restitution and find itself in conflict with the owner of the objects who also seeks their return. In the event of competing claims to possession between such parties, it will be for the court of the State hearing the case to resolve competing claims according to the applicable rules of law.

## 2. *The Common Law approach to transfer of title in stolen property: the "nemo dat" rule and market overt*

3.21 The approach adopted in the Convention represents a fundamental change for many civil law jurisdictions and some have already expressed reservations about their willingness to abandon their entrenched national provisions.<sup>16</sup> It conforms closely with the position in Irish law and that in other

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13 See Chatelain, J., *Means of Combatting the Theft of and Illegal Traffic in Works of Art in the Nine Countries of the EEC* (European Commission, XII/757/76-E, 1976).

14 UNESCO Comments on the Draft Unidroit Convention, in *Acts and Proceeding of the Diplomatic Conference*, *op. cit.*, p.93.

15 The issue of payment of compensation to a *bona fide* possessor in Irish law is dealt with below at para. 3.66 *et seq.*

16 See, for example, Bengana, S., *Sales of Works of Art: France*, the International Bar Association (Paris, September 21, 1995).

common law jurisdictions. The contrast between the position adopted in Common Law countries is one of protection of the rights of the owner while, as a general rule, the Civil Law endorses the rights of the *bona fide* purchaser. The maxim "*nemo dat quod non habet*"<sup>17</sup> represents, it is said, "the most important conveyancing principle in English commercial law". In jurisdictions based upon the English common law, therefore, owner-protection takes priority in principle, as theft cannot give rise to a valid right in favour either of the thief or of successive holders to obtain the property from him or her directly or indirectly.<sup>18</sup> This principle finds statutory expression in Ireland in section 21(1) of the *Sale of Goods Act, 1893* which provides that:

"[W]here goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had."<sup>19</sup>

3.22 The principle having been established, however, the dictates of commerce have necessitated a number of exceptions.<sup>20</sup> Only one of the exceptions, however, is relevant to situations involving theft.<sup>21</sup> It offers protection to a *bona fide* purchaser of stolen objects who acquires at a market overt i.e., an open public market held on days prescribed by charter, statute or custom and conducted within daylight hours. This exception finds statutory expression in Ireland in section 22(1) of the *Sale of Goods Act, 1893*;

"Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on

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17 One cannot give what one does not have.  
 18 The provision for prescriptive acquisition by the thief in Section 12 of the *Statute of Limitations, 1957* represents an exception to this rule; *infra*, para. 3.62.  
 19 56 & 57 Vict. c.71. In England, this provision was reproduced in section 21(10) of the *Sale of Goods Act, 1979*.  
 20 As Denning L.J. commented in *Bishopsgate Motor Finance Corporation v. Transport Brakes Ltd.* [1949] 1 KB 322 at 336-337;

"In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle had held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times."

21 The other exceptions modifying the *nemo dat* rule relate to (i) situations in which the owner is, by his or her conduct, estopped from denying the seller's authority to sell (a common law exception) (ii) sales under voidable title (per section 23 of the *Sale of Goods Act, 1893*), (iii) circumstances in which the seller enters into a sale of goods with purchaser A, yet the seller retains possession of the goods sold and purports to sell them on to a third party. If that third party acquires the goods in good faith without notice of the prior sale, he or she will obtain a good title, provided the goods or documents of title are transferred to him or her (per section 25 of the *Sale of Goods Act, 1893*), (iv) section 25 also introduces another exception to the *nemo dat* rule, albeit arguably one of less practical significance as far as cultural objects are concerned: it provides that when a buyer has agreed to buy goods from the seller and obtains possession with the latter's consent, then he or she may sell to a *bona fide* third party, overriding any unpaid lien or other right of the original owner, (v) section 2(1) of the *Factors Act, 1889* provides that "[w]here a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same, provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same": 52 & 53 Vict. c.45 (emphasis supplied).

the part of the seller".<sup>22</sup>

3.23 The market overt concept - and its underlying rationale - are perhaps most easily explained by reference to the decision of the English Court of Appeal in *Reid v. Metropolis Police Commissioner*.<sup>23</sup> In this case, the plaintiff's antique candelabra was stolen and subsequently purchased by an art dealer at a public market. This purchase was made in the half-light of early morning. The art dealer in question did not inquire as to the origin or source of the candelabra and almost immediately sold it on to an antiques dealer, in whose possession the candelabra was sighted by the plaintiff. In the ensuing action, the art dealer claimed that he had good title, having bought the item in market overt. In the Court of Appeal, Scarman LJ discussed the history of the market overt exception and the fact that it was the openness of the transaction which enabled a sale therein to confer a good title on a good faith purchaser. He stated:

"When shops were scarce, the market was the place, and market day the occasion for the public to buy and sell. The market was regulated by the franchise-holder; the place, the day, and the hours of business were established under the authority of the franchise and were well known. Thus any person whose goods had been stolen would know where and when the thief was likely to seek to dispose of them, and would have an opportunity of finding and recovering them before they were sold in the open market."<sup>24</sup>

3.24 In order to destroy the owner's title, however, an acquisition in market overt must be made between sunrise and sunset. As Denning L.J. commented:

"The goods should be openly on sale at a *time* when those who stand or pass by can see them. Thus it must be in the day time when all can see what is for sale; and not in the night time when no one can be sure what is going on. And if in the day time, what better test can you have than between sunrise and sunset? No half-light then, but full daylight."<sup>25</sup>

3.25 In this case, the art dealer made his purchase before sunrise and as a result, the Court of Appeal ordered that the candelabra must be returned to the plaintiff-owner.

3.26 Some English commentators have suggested that the concept never applied in Ireland, but the Irish courts in *Delaney v. Wallis & Son*<sup>26</sup> proceeded upon the assumption that it was operative here.<sup>27</sup> This case arose out of a sale in the Cattle Market operated by Dublin Corporation. It may well be that only

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22 56 & 57 Vict. c.71.

23 [1973] 2 All ER 97.

24 *Ibid.*, at 101-102.

25 *Ibid.*, at 100.

26 (1884) 14 LR Ir 31.

27 In that case, the market at issue was the New Cattle Market established by the Corporation of Dublin under the provisions of the *Dublin Improvement Act* (12 & 13 Vict. c.97, s.80).



in such formal public markets does the doctrine of market overt apply in Ireland. It does not, however, appear to have been availed of in this jurisdiction in the last 100 years.

3.27 In any event, the protection afforded to a purchaser in good faith at a market overt is not absolute; section 24(1) of the *Sale of Goods Act, 1893* provides that upon the conviction of the thief title automatically reverts in the person from whom the object was stolen.

3.28 The rule was criticised by the Law Reform Committee of England and Wales as one which was

"capricious in its application and we think it should either be abolished or else extended so as to cover all retail sales at trade premises as well as sales by auction. Which solution is adopted plainly depends on whether it is thought better to protect property rights or to facilitate commercial transactions ...".<sup>28</sup>

A majority of the Committee favoured extension of the rule so that where stolen goods were bought by a purchaser either at a public auction or "by retail at trade premises" in good faith and without notice of any defect in title on the part of the owner, he would acquire good title to them.<sup>29</sup>

3.29 Lord Donovan dissented on this point, arguing that if this approach were adopted purchasers of stolen property would have less to fear than they had under the existing law, making it easier for thieves to find purchasers for stolen property. He pointed out that where unique and irreplaceable goods were stolen, the provision of monetary compensation as a substitute for restitution would be "no real recompense".<sup>30</sup> O'Keefe and Prott have expressed agreement with this view, arguing that in those jurisdictions in which the market overt exception continues to apply, the law should be amended to exclude its application to cultural objects.<sup>31</sup>

3.30 Abolition of the exception was achieved in England by the *Sale of Goods (Amendment) Act, 1994*,<sup>32</sup> supported by the police, antiques dealers and auction

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28 Law Reform Committee Twelfth Report (Transfer of Title to Chattels), 1966, (Cmnd 2958) p.13.

29 *Ibid.*, p.16. "Trade premises" was defined as "premises open to the public at which goods of the same or a similar description to those sold are normally offered for sale by retail in the course of business carried on at those premises": Twelfth Report, p.14, para. 33.

30 *Ibid.*, p.18.

31 *Law and the Cultural Heritage, Volume III: Movement, op. cit.*, para. 747, p.400.

32 Section 1 of the *Sale of Goods (Amendment) Act, 1994* removed this "senseless and antisocial medieval survival" - per Lord Oliver in the House of Lords debate on the Bill. Its abolition was welcomed by many sectors in England particularly in view of the fact that since the Middle Ages, all shops in the city of London to which the public have access without permission have been deemed to be market overt every day of the week except Sundays and holidays for the sale of the type of goods normally handled by the trader. The exception did not apply, however, to goods belonging to the Crown. It was likewise inapplicable in Scotland and Wales. Section 22(3) of the *Sale of Goods Act, 1893* and its successor, section 22(2) of the *Sale of Goods Act 1979* specifically provided that the market overt exception did not apply to Scotland. Although Wales is not specifically excluded, it would appear that there have never been such markets in Wales; see the general note on Section 22 of the *Sale of Goods Act, 1979* in *English Current Law Statutes, 1979* (Sweet & Maxwell).

houses as well as consumer organisations.<sup>33</sup> Its complete abolition suggests a recognition of the scale of the problem of illicit trade and acceptance of the need to place restrictions on the freedom of the market.

3.31 In the context of the Convention, by expressing the obligation to return in absolute terms Article 3(1) effectively nullifies the exception in respect of claims under the Convention. The rationale on which the exception is based - that a dispossessed owner would know where to go to retrieve his property and would have an opportunity of retrieving it before its disposal in an open market - no longer reflects commercial reality, nor indeed the degree of sophistication of international illicit trade. Stolen objects may quickly be transported within and across national boundaries and transferred to others involved in illicit trade before being sold to an innocent purchaser; the likelihood of their being intercepted by the owner before such sale is, therefore, extremely remote.

3.32 As a general matter, it would seem that in logic the exception has no place in the modern commercial world and should be abolished, particularly in respect of objects of cultural significance.

### 3. *Article 3(2) and the protection of excavated material*

3.33 Article 3 (2) provides that, for the purposes of the Convention,

" a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State in which the excavation took place."

3.34 The motivation behind Article 3(2) was to ensure that objects which were procured through clandestine excavation would be afforded the maximum protection available under the Convention. Early drafts made no mention of domestic law, so that even if such objects did not constitute stolen objects under domestic law, they could be treated as such for the purposes of the Convention.

3.35 The addition of the final clause confines application of the paragraph to those situations in which the unlawful dealings with the excavated object constitute theft in the domestic criminal regime. Thus, if the criminal law of a Contracting State does not categorise such activities as theft, Article 3(2) may not be relied upon for retrieval of the material. Retrieval will then depend on whether the object has been illegally exported, in which case recourse may be had to Chapter III. The extent to which it is "consistent" with Irish law to consider as stolen objects procured in this way is considered in Chapter 4.

3.36 If the criminal law of a Contracting State deems a cultural object which is unlawfully excavated or lawfully excavated but unlawfully retained to be a

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33 It is interesting to note that a similar range of bodies had favoured its abolition when asked for their views by the Law Reform Committee in preparing its Twelfth Report.

stolen object and such object is also the subject of a protective export restriction which is violated by its transfrontier movement, recourse may be had to the provisions of Chapter II on the restitution of stolen cultural objects or, alternatively, to Chapter III on the return of illegally exported cultural objects. Advantages and disadvantages attach to both options.

3.37 The principle advantage attaching to reliance on Chapter II over Chapter III is the fact that the obligation to return a stolen object is absolute. Under Chapter III, on the other hand, four "interests" are set out, at least one of which must be shown to have been "significantly impair[ed]" by removal of the object before return is obliged. Furthermore, there is no limitation under Chapter II on those who may pursue a claim, while claimants under Chapter III must be Contracting States. In evidential terms, Chapter III is the better base for a claim, given that it is easier to establish a breach of domestic export law than it is to prove a theft.

3.38 States which impose wide ranging export restrictions are likely, given the choice, to prefer reliance on Chapter III. This does not, however, avail the private owner unless the State is willing to seek return on the owner's behalf. Questions of *locus standi* do not arise in this context given that a State is entitled to pursue a claim under the Convention solely on a breach of national export law. Conversely, if the State wishes to pursue an object stolen from an historic site which is not covered by export restrictions, problems of *locus standi* may arise for the State where it is not the owner of the site. Where the object is one in which the State has an interest, for example in preserving the site for the benefit of the public, it is likely that this would constitute sufficient standing.

#### 4. *Limitation Periods*

3.39 Article 3(3) - (8), which set out the operative limitation periods within which an action for the restitution of a stolen cultural object must be brought, were among the most hotly contested provisions during the drafting history of the Convention. Some negotiating States argued against imposing any limitation period on the ground that it would add legitimacy to a situation which was from the beginning tainted with illegality. Those who insisted upon the inclusion of time limitations argued that the imposition of such periods, especially of short periods, would encourage potential claimants to act with desirable expedition and thus avoid the disruption of long established possessions. These two schools of thought corresponded roughly with the exporting and the importing countries respectively. By way of compromise, it was ultimately agreed that there should be two limitation periods.

3.40 In general, a claim must be brought within 3 years of the time when the claimant came to know the location of the object and the identity of its possessor, with an upper limit of 50 years from the date of the theft. A special regime was introduced for cultural objects forming an "integral part of an identified monument or archaeological site, or belonging to a public collection", to which

no upper time limit applied. The claimant would, however, be bound by the three year limit referred to above.

**(a) Special regime in respect of tribal and indigenous communities**

3.41 Article 3(8) provides that claims for the restitution of sacred or communally important objects belonging to and used by a tribal or indigenous community shall have the same limitation period as that applicable to those which fall within the terms of Article 3(4).

3.42 International law has assigned specific meanings to the terms "tribal and indigenous communities"; an International Labour Organization Convention refers to

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; and (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.<sup>34</sup>

3.43 It would appear that no community in this jurisdiction satisfies these requirements. The *Report of the Task Force on the Travelling Community* refers with approval to a definition of Travellers as

"... an identifiable group of people, identified both by themselves and by other members of the community (referred to for convenience as the "settled community") as people with their own distinctive life style, traditionally of a nomadic nature but not now habitual wanderers. They have needs, wants and values which are different in some ways from those of the settled community."<sup>35</sup>

3.44 Travellers maintain a distinctive culture and language but are not distinguishable from the "settled community" on the basis of descent from a population which was present at the time of colonisation. The special regime available under the Convention does not, therefore, apply to Travellers so that artefacts of cultural importance to that community would depend for protection

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34 The International Labour Organisation's *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 1989 (No. 169).

35 *Report of the Task Force on the Travelling Community*, July, 1995, para. 1.5. The definition was developed by the *Travelling People Review Body* which reported in 1983.

on provisions elsewhere in the Convention. The Annex to the Convention refers to "objects of ethnological interest"; given that there is movement towards recognition of Travellers as an ethnic group,<sup>36</sup> it is to be hoped that objects of cultural significance specifically to Travellers will be afforded protection under this provision.

3.45 Notwithstanding the authority which Article 9 grants to Contracting States to utilise more generous limitation periods than those set out in Article 3(3), the negotiating States:

"agreed that an exceptional regime could be contemplated for those objects which lie at the very heart of each State's cultural heritage, namely those objects belonging to public collections, which often enjoy a special legal status in some countries. This exception is dealt with in *paragraph 4* of Article 3 and is based on the solution to be found in Article 7 of the EEC Directive under which this category of objects is subject to a longer limitation period of seventy-five years".<sup>37</sup>

3.46 The adoption of the principle of imprescriptibility in an unqualified manner would have rendered the Convention unacceptable to many States, particularly to those with substantial art-markets whose accession is essential to its success. Consequently, Article 3(5) was added, which enables Contracting States to declare that they will apply a limitation period of seventy five years or more in respect of those objects which are the subject of Article 3(4).

3.47 The second sentence of Article 3(5), which states that a declaring State "shall also be subject to that time limitation" prevents declaring states from having it both ways, however: in respect of claims made by a declaring state the limitation period which governs is that which it has declared so that the declaration operates both to its benefit (where a claim is made against it) and to its detriment (where it makes a claim against another state).

3.48 Notwithstanding the difficulty, referred to earlier, of compartmentalising States neatly as exporting and importing States, Ireland may under modern conditions be characterised as an "exporting State"; it is thought, therefore, to be in our interest not to make a declaration, thus availing of the Article 3(4) option of imprescriptibility. The practical benefit in doing so is, however, unclear: assuming that importing states will, by and large, favour time limitation, in any dispute between Ireland and an importing state it will be that state's limitation

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36 The Committee on the Elimination of Racial Discrimination, which was established under Article 8 of the *Convention on the Elimination of all Forms of Racial Discrimination, 1965*, has expressed concern about the "lack of adequate protection [in Northern Ireland] available to *ethnic minorities including, in particular, Travellers and persons of Chinese origin*". The Task Force on the Travelling Community points out that this demonstrates that Travellers are considered an ethnic group for the purpose of the Covenant: para. CR.12.1, pp.95-6. The Programme for a Partnership Government 1991-1997 states that the Government will ratify this Convention. Legislation is required in order for Ireland to fulfil its obligations under the Convention; both the Equal Status Bill and the Employment Equality Bill contained provisions aimed at achieving this. Both Bills have, however, been declared unconstitutional and are currently being redrafted: *In the Matter of the Employment Equality Bill*, 15 May, 1997; *In the Matter of the Equal Status Bill*, 19 June, 1997.

37 Unidroit Explanatory Report in *Acts and Proceedings of the Diplomatic Conference*, *op. cit.*, p.28, para. 48.

period rather than our provision for imprescriptibility which will govern. We stand to benefit from the absence of a time limitation only where we are involved in a claim against a state which likewise has not made a declaration. A state which has not limited the time within which a claim in respect of Article 3(4) may be brought is likely to be an *exporting* state assuming that such states will, like Ireland, favour imprescriptibility in the belief that it will maximise their chances of retrieval.

3.49 The second sentence of Article 3(5) overlooks the situation where a claim arises between two declaring States, as opposed to a claim between a declaring State and one which has made no declaration and therefore has no upper time limit. In the event of a claim in respect of an object stolen in one declaring state against another declaring state, a question arises as to which time limit governs in the event of a conflict. It is necessary to refer to the policy reasons behind the section in resolving this question since the wording of the Convention is unhelpful. Given that the purpose of the second sentence was to impose the burden of a declaration on a state wishing to benefit by it, it would seem that State A (with a period of 75 years) which makes a claim in State B (with a period of 100 years) will be bound by the 75 year limit (a declaration being burdensome on the state making it). A claim made by B in A will also be bound by A's 75 year limit, as A must benefit as well as be burdened by its declaration.

3.50 By contrast, if State X, with no limitation period, makes a claim in Y, with a 75 year limitation period, the wording is unambiguous: a "Contracting State may declare that a claim is subject to a time limitation of 75 years or such longer period as is provided in its law" so that X's claim is subject to the 75 year limit regardless of its own law. Similarly, if Y makes a claim in X, Y cannot benefit from the absence of limitation in X because "a claim made in another Contracting State" for restitution of an object displaced from a "Contracting State making such a declaration shall also be subject to that time limitation", that is, the period imposed by the declaring State.

3.51 It is significant that the Article does not allow States which have opted for imprescriptibility to impose this on those States which have not done so, so that while the Article purports to favour no limitation, in practice it effects the opposite. The drafters may have been better advised to effect a compromise by laying down a longer limitation period in respect of particular classes of object. They would thereby have appeased importing states by maintaining the principle of limitation while at the same time satisfying concerns of exporting states that they would be in a position to pursue objects within a satisfactorily lengthy period from the time of the theft.<sup>38</sup>

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38 The confusion arising under the Convention does not arise under Directive 93/7, Article 7(1) simply providing that in those States which do not apply limitation periods the 75 year period will not apply. Thus, proceedings brought there in respect of the special class of objects will not be time limited, even if the requesting State does apply the 75 year limitation in proceedings brought in its own jurisdiction.

3.52 Evidence from interested professionals in this jurisdiction suggests that, as a rule, objects "surface" in foreign markets very quickly after their theft. It has also been said that important and recognisable objects are kept off the market for a considerable number of years by, for example, "freezing" them in bank vaults. It is, nonetheless, difficult to imagine a situation in which a thief or a "handling" dealer would keep the object frozen for a period exceeding the average person's working life, thus reducing - if not negating - any benefits he or she might derive therefrom. The 50 year ceiling may, in practice, represent an adequate limitation period.

3.53 We consider first those cultural objects to which Article 3(4) applies. Consideration will then be given to the advisability of introducing a limitation period of seventy-five years or more in respect of those objects. If a Contracting State wishes to impose a limitation period of 75 years or more in respect of objects described in Article 3(4), it must do so by entering a declaration at the time of signature, ratification, acceptance or approval.<sup>39</sup> No declaration is required if imprescriptibility is favoured.

3.54 Objects shall be deemed to "belong to a public collection" for the purposes of Article 3(4) if they are owned by:

- (a) a Contracting State,
- (b) a regional or local authority of a Contracting State,
- (c) a religious institution, or
- (d) an institution that is established for an essentially cultural, educational or scientific purpose in a Contracting State and is recognised in that State as serving the public interest.<sup>40</sup>

3.55 The text of the Convention does not provide guidance as to the nature or extent of State recognition required to bring objects within the scope of Article 3(7)d. To suggest that gestures such as endorsement by public representatives of the work of a cultural, educational or scientific institution is surely to overstretch the meaning of the words in this context; whether, on the other hand, the recognition must have legal force is another matter. Clearly, Article 3(4) does encompass those situations in which the State gives legal recognition to the institution which owns the public collection in question; in fact an early draft of the Convention made explicit reference to "tax exemptions" as one such acceptable form of recognition. In Ireland, cultural, educational or scientific institutions, amongst others, which show to the satisfaction of the Revenue Commissioners that they were established for *purely* charitable purposes,

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39 Per Article 3(6).

40 Per Article 3(7).

can avail of an extensive range of tax benefits.<sup>41</sup> An organisation is deemed to be charitable if it is engaged in the advancement of education or of religion, the relief of poverty or other works of a charitable nature beneficial to the community. Institutions carrying out cultural functions would satisfy the last criterion.<sup>42</sup>

3.56 Certain tax benefits may also accrue to those who permit the public to have reasonable access to their building, the building being one which is deemed by the Commissioners of Public Works intrinsically to be of significant historical, architectural or aesthetic interest.<sup>43</sup> It is, however, open to question whether an owner/occupier can reasonably be described as an "institution" for the purposes of Article 3(4), although if a company owns or occupies the building in question it is more likely to be regarded as an "institution". The same queries apply to the exemption from capital acquisitions tax enjoyed in respect of pictures, prints, books, manuscripts, works of art, jewellery, scientific collections or other things not held for the purposes of trade which are deemed by the Commissioners of Public Works to be of national, scientific, historic or artistic interest, which are kept permanently in the State except for authorised absences and in respect of which there are reasonable facilities for viewing by the public, recognised bodies or associations of persons.<sup>44</sup>

3.57 The object must also be "inventoried or otherwise identified" in order to attract the limitation period afforded to "object[s] belonging to a public collection" for the purposes of the Convention.<sup>45</sup> Thus, for example, national monuments which are owned by the State and in respect of which the Commissioners of Public Works are obliged, pursuant to section 12(1) of *The National Monuments (Amendment) Act, 1994*, to maintain a record would satisfy this criterion. The Commissioners are also obliged to maintain a record of those places in which they believe such monuments to be; in such circumstances is the object itself deemed to be "inventoried or otherwise identified" or does

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41 For example, income tax relief may be obtained pursuant to Sections 333 and 334 of the *Income Tax Act, 1967*, incorporated companies may obtain benefits under Sections 11(6) and 13(2) of the *Corporation Tax Act, 1976*; benefits may also be obtained under Section 22 of the *Capital Gains Act, 1975*, Section 38 of the *Finance Act, 1986* (Deposit Interest Retention Tax), *Capital Acquisitions Tax Act, 1976* and Section 108(a) of the *Finance Act, 1984* (both capital acquisition tax benefits), pursuant to Section 50 of the *Finance Act, 1979* (stamp duty on a transfer or lease of land) and, finally, Section 112(b) of the *Finance Act, 1993* (probate tax). As a rule, charitable organisations are not regarded as carrying on their activities in the course or furtherance of business and would not therefore normally be required to register and account for VAT. This does not mean, however, that they are entitled to purchase goods or services free of VAT.

42 National cultural institutions, as defined in the *National Cultural Institutions Act, 1997*, would clearly satisfy the criteria in Article 3(7)d, given that they are established for cultural, educational or scientific purposes and are recognised, by statute, as serving the public interest: see section 45 of Act. It is questionable whether smaller, privately owned galleries which are open to the public on a limited basis would so qualify.

43 See Section 19 of the *Finance Act, 1982* which provides income tax or corporation tax relief to the owner/occupier of an approved building in respect of repair, maintenance or restoration. Such expenditure may be treated as if it were a loss in a separate trade carried on by the owner/occupier and the standard rules for giving tax relief for such a loss will then apply.

44 Section 55 of the *Capital Acquisitions Act, 1976*.

45 As we have seen, the terms of Article 3(4) also apply to objects which constitute integral parts of *identified* monuments or archaeological sites. Reference to Article 3(7) and the words "inventoried or otherwise identified" helps to clarify what the drafters had in mind when referring to such objects. 'Identification' must, therefore, be understood to refer to the various methods by which such matters as the existence, characteristics, condition, location and ownership of the object may be recorded. It embraces, *inter alia*, the scheme established pursuant to Section 12(1) of the *National Monuments (Amendment) Act, 1994*.



identification refer only to the location? A record of the place in which it is believed national monuments are located is surely a form of identification of the monument itself. The position as regards archaeological objects, however, is not as satisfactory as many items of vital cultural importance would not meet the criterion imposed in order to secure the protection of Article 3(4). It is obvious that the opportunity does not arise to inventory or otherwise identify many archaeological objects taken at source. Such objects may nonetheless enjoy the added protection of Article 3(4) if they are deemed to constitute "an integral part of an identified archaeological site", as, for example, is the case if it is integral to a site recorded under section 12 of the 1994 Act. In the event that the extraordinary regime contained in Article 3(4) does not apply, the provisions of the standard limitation periods set out in Article 3(3) will nonetheless have effect.

**(b) *Should Ireland enter an Article 3(5) declaration?***

3.58 Having identified the subject matter to which Article 3(4) applies, it is necessary to consider the question of whether claims for the restitution of such objects should be subject to time limitation, as provided for in Article 3(5). The option which paragraph 5 presents appears advantageous at first glance, at least for Member States of the European Community, given that *Directive 93/7 on the return of cultural objects unlawfully removed from the territory of a Member State* makes provision for an exceptional limitation period of seventy-five years - or such longer period as is provided in domestic law<sup>46</sup> - for certain illegally exported cultural objects.

3.59 Many objects are, of course, both stolen and illegally exported. There may indeed be merit in applying the same period under both the Convention and the Directive in respect of objects which are both stolen and illegally exported. The adoption of a seventy five year period, however, would not necessarily entail a harmonious relationship between the two instruments as a number of other differences remain between them. The Directive provides that a claimant must bring a claim within *one* year of learning of the location of the cultural object and the identity of its possessor or holder. More important, perhaps, is the fact that the definitions of those objects to which the special limitation periods shall apply are not always co-extensive. Thus, for example, the definition of public collection in the Directive does not encompass objects owned by a private institution, unless the institution is significantly financed by the Member State in question.<sup>47</sup> As we have seen, such objects could attract the protection of the Convention as long as their owner institution is established for an essentially cultural, educational or scientific purpose in a Contracting State and is recognised as serving the public interest.

3.60 Thus, an object owned by an institution which met the UNIDROIT

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46 Article 7(1) allows Member States which do not impose time limits to apply these rules to claims under the Directive; it also allows States which conclude bilateral agreements to lay down a period exceeding 75 years. See Article 1, Directive.

criteria but failed those set out in the Directive would, if stolen and illegally exported, be subject to different regimes. The fact that Ireland has opted for the 75 year limitation period under the Directive does not, therefore, represent a compelling argument against departing from that period in the case of the Convention.

3.61 The Convention itself sets out different limitation periods for stolen and illegally exported objects. There is no exceptional regime akin to that set out in Article 3(4) in respect of illegally exported objects. Thus, if an object which satisfies the criteria set out in Article 3(4) is stolen in one Member State and illegally exported to a non-Member State, it shall - as a stolen object - be subject to a minimum limitation period of 75 years (and possibly to no limitation period at all), whilst, if treated as an illegally exported cultural object, it shall be subject to a ceiling of fifty years. (The three years requirement applies throughout). The framers of the Convention did not, therefore, feel compelled to apply identical limitation periods in respect of stolen and illegally exported cultural objects where the object was one with which Article 3(4) was concerned.

3.62 Although Irish law does not expressly provide that a claimant shall have an unlimited time within which to assert his or her title by pursuing an action for restitution, it is submitted that the principle of imprescriptibility is consistent with many of the principles underlying our domestic cultural heritage law, as expressed by the Supreme Court in the *Webb* case<sup>48</sup> and in the *National Monuments (Amendment) Act, 1994*. The Act does not, however, provide alternative limitation periods - or no limitation at all - in respect of objects to which the State may claim ownership. Therefore, the possessors could, in theory, with the passage of time and despite their offence, obtain title to the archaeological object in question. Section 12(1)(b) of the *Statute of Limitations, 1957*, states that the title of the owner shall be quieted after the passage of the relevant limitation period of six years from the date of the commission of the tort of detinue, that is, from the date of the possessor's refusal to accede to the owner's request for the return of the object.<sup>49</sup> It is difficult to envisage circumstances in which the State would allow six years to pass after such a refusal. But, more importantly, the State is unlikely to pursue this option, in the light of Section 9 of the *National Monuments (Amendment) Act, 1994* which states that, where it is reported to the Director of the National Museum or a designated person that any archaeological object has been found in the State after the 21st November 1994 the Director shall, as soon as practicable, take possession of such object and retain it on behalf of the State. The adoption of such a route avoids the possibility of time running against the State and consequently of the loss of title.

3.63 In conclusion, although the *Statute of Limitations, 1957* applies to archaeological objects as defined which are found after the coming into force of

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48 *Webb v. Ireland* [1988] IR 353.

49 The effect of this section seems for all practical purposes to be to vest title in the wrongdoer even though, in extinguishing the owner's title, it does not explicitly do so; see further, para. 6.34.

the Act of 1994, thereby presenting the possibility of the loss by the State of its title, it is submitted that this eventuality is unlikely to materialise in practice. Furthermore, such an outcome would be contrary to the spirit of the National Monuments legislation which reflects the philosophy that the State should, as custodian of the interests of the People, own such objects of national importance and should further prevent dealings with them by private parties.

3.64 Nonetheless, it remains a possibility, in theory at least, that the State could lose its title by virtue of the application of the *Statute of Limitations, 1957*. *In order to avoid this outcome, we are of the view that a provision should be introduced expressly overriding the limitation periods provided in the Statute of Limitations, 1957; such provision should state that the limitation periods provided in the implementing legislation shall have effect in place of any other enactment as to the limitation of actions.*

3.65 *On balance, we are of the view that Ireland should not enter an Article 3(5) declaration, but instead should impose no limitation period in respect of the objects described in Article 3(4). We have pointed out that the practical benefit for Ireland in doing so is at present unpredictable, depending as it does on whether other States adopt a similar view. It is worth noting in this regard that of the 22 States which signed the Convention, only one - the Netherlands - entered a time limiting declaration. We are of the view that to adopt a position which favours maximum return is consistent with the ideological precepts underlying the Convention. States should not seek to benefit from the acquisition in dubious circumstances of objects from States which may not, for political or economic reasons, be in a position to adequately protect their national heritage.*

## **5. *Compensation for the return of stolen cultural objects***

3.66 Although the protection of the *bona fide* purchaser represents a vital component of the commitment of many negotiating States to the free circulation of goods, there was, nonetheless, a willingness on the part of many States which had traditionally offered legal protection to such a purchaser to change their law as far as cultural objects were concerned. This change would, however, have been politically unfeasible, and indeed, in some jurisdictions, legally impossible unless, in return, the Convention made provision for the payment of compensation to a purchaser deprived of the object which he or she acquired in good faith. Thus, Article 4(1) was included which states that:

"The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object."

3.67 The provision of compensation was not, however, uncontested. The reluctance of some States was based on difficulties in domestic law while in

others, often developing countries, the lack of financial resources available to pay compensation was the principal concern.

3.68 The issue of compensation is also affected by the provisions of Article 9, which permits States to apply rules "more favourable to the restitution or return" of cultural objects than those provided in the Convention. It is clear from the drafting history of Article 9, if not from the text itself, that it is not obligatory for Contracting States to provide for payment of compensation. This is so despite the mandatory language in Article 4(1). Article 9 was included as a means of ensuring that States which go beyond the Convention in terms of protection of the dispossessed owner, for example by not requiring him to pay compensation to the possessor, should be facilitated in continuing to do so. The Convention sought to lay down only minimum rules of protection and therefore should not impede States which afford further protection.<sup>50</sup>

3.69 There was disagreement as to whether an exhaustive list of the situations in which States could employ rules more favourable to restitution or return should be provided, for example the refusal of compensation to a good faith purchaser of stolen objects or the extension of limitation periods. Ultimately, it was decided that to do so could prove counter-productive in that it could result in certain situations being inadvertently omitted.<sup>51</sup>

3.70 That Article 9 is aimed at the more favourable treatment of *claimants* is not immediately evident from the text of the Article. When read without reference to the Preamble<sup>52</sup> or the *travaux préparatoires*, one could equally assert that it is the provision of compensation which is more favourable to return since it would increase the willingness of a possessor to deliver up an object.

3.71 Article 9 reflects the philosophy behind the Convention, which was to increase the diligence required of prospective purchasers. The most effective way to achieve this would have been to provide for return without compensation; however, certain States would have been presented with constitutional difficulties if restitution or return were required in the absence of compensation.<sup>53</sup>

3.72 Given that Article 4 makes the payment of compensation a prerequisite to return (a possessor "*shall* be entitled, *at the time* of its restitution"), in those States in which the law requires compensation of *bona fide* possessors, claimants will be obliged to so pay before the object will be returned. The practical effect

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50 Unidroit Explanatory Report in *Acts and Proceedings of the Diplomatic Conference*, *op.cit.*, para. 122, p.41. Unesco in its Comments on the Draft Convention stated that

"at no stage was it ever intended to suggest that national systems which already provided for return of stolen cultural objects without compensation to the possessor should change this rule by providing compensation." (at p.234).

51 Unidroit Explanatory Report in *Acts and Proceedings of the Diplomatic Conference*, pp.41-2 paras. 122-127.  
52 "Emphasising that this Convention is intended to facilitate the restitution and return of cultural objects, and that the provision of any remedies, such as compensation needed to effect restitution or return in some States, does not imply that such remedies should be adopted in other States".

53 Unesco Comments in *Acts and Proceedings of the Diplomatic Conference*, p.234.

of Article 9 on the operation of Article 4 is, therefore, that States which choose to rely on Article 9 will avoid this result, thereby entitling claimants to automatic return.

3.73 It should be noted, however, that a decision to apply alternative rules is a unilateral act which does not place any obligation on other States to apply those rules. Should Ireland decide not to alter its law so as to provide compensation to a possessor of a stolen object, this would only affect claimants before an Irish court. Should an Irish claimant pursue a possessor before the courts in the possessor's jurisdiction, that claimant may be ordered by the competent authority in that jurisdiction to pay compensation to the possessor. Accession to the Convention will place an obligation on the Irish courts to enforce such an award notwithstanding the fact that a similar award cannot be made by the Irish equivalent of the awarding foreign authority.<sup>54</sup> Article 9(2) relieves States which do not depart from the provisions of the Convention of the obligation to enforce decisions of foreign authorities which do so depart; it does not, however, confer a similar latitude on Contracting States which depart from the Convention by not providing compensation to refuse to enforce decisions of competent authorities which abide by the Convention regime.

**(a) *Defence of due diligence***

3.74 Those States which wish to provide for compensation in respect of stolen objects will be required to do so only in very limited circumstances. In practice, it is unlikely that many possessors will successfully establish that they exercised due diligence when acquiring the stolen object and still proceeded to acquire it. The fact that Article 4 imposes upon the possessor the obligation of showing that he or she exercised due diligence is also extremely significant. This represents a considerable departure from the situation which prevails in a number of civil legal systems in which the good faith of purchaser or possessor is assumed, the burden being on claimants to establish *mala fides*. Such a situation often:

"left unchallenged a very large area where purchasers simply did not pursue inquiries, through apathy, ignorance or intent, and were nonetheless protected by the rules as to good faith. This has enabled a large share of cultural objects in the international market to be transferred as a matter of course without clear evidence of provenance."<sup>55</sup>

3.75 The decision to impose upon the possessor the burden of showing that he or she exercised due diligence ought to make significant inroads into these practices. Indeed, this entire Article seeks to offer incentives to dealers and others to act in good faith and to penalise those who fail to make adequate

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54 Enforcement of judgments and the changes to our law which would be necessitated by accession are considered at para. 6.5 *et seq.*

55 UNESCO Comments on the Draft Convention, in *Acts and Proceedings of the Diplomatic Conference*, p.97.

inquiries in relation to the origin of objects with which they come into contact. It is hoped that, faced with the prospect of losing the object in question without compensation, potential purchasers will refrain from proceeding to purchase unless satisfactory provenance is forthcoming. This reluctance to purchase "unauthenticated" objects will, in turn, reduce the market for stolen objects and should ultimately, therefore, have a deterrent effect upon the level of theft of cultural objects.

3.76 In determining whether a possessor did in fact exercise due diligence in the course of the acquisition of an object, the court or other competent authority seised of the issue shall, in accordance with Article 4(4), have regard to:

"all the circumstances of the acquisition, *including* the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances."<sup>56</sup>  
(italics supplied)

3.77 Article 4(5) attempts to eradicate a practice by which possessors who acquire with knowledge of the illicit provenance of an object attempt to attract for themselves the mantle of good faith. Many museums are bound by the code of ethics propounded by the International Council of Museums which prohibits the acquisition of objects which have been stolen, illegally exported or clandestinely excavated. It has been reported that some museums have avoided this prohibition by encouraging potential donors to acquire an object in which the museum is interested, in the expectation that the museum will ultimately receive the desired object as a gift.

3.78 The fear expressed by some states that they would in practice be precluded from securing the restitution of objects stolen from their jurisdiction by an obligation to pay the price paid or the object's commercial value proved misplaced: should the court or other competent authority seised of the issue concede that the possessor did in fact act with due diligence when acquiring the object, he or she shall be entitled to *fair and reasonable* compensation. The Convention does not set out any criteria with which to guide judges upon whom falls the task of deciding the quantity of compensation to be awarded. Nonetheless, the drafters noted that:

"the concept of fair and reasonable compensation [lays] down a very strict limit on compensation and [allows] regard to be had to the restricted financial resources of some claimants. It was observed that a specific reference to the price paid or to the object's commercial value would encourage the judge to give too much weight to those factors in

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56 It should be noted that in recent years international databases of stolen cultural objects have been created to which ready access is available.

determining what is fair and reasonable and the [drafters] therefore preferred to leave it to the discretion of the judge to reach the same result. It may likewise be recalled that in public international law in connection with compensation for nationalisation, judges have for many years applied this notion on the understanding that it may correspond to a sum lower, and sometimes very much lower, than the real commercial value of the object or the price actually paid for it."<sup>57</sup>

**(b) Who is liable for the payment of compensation?**

3.79 Guidance on this question is only partially to be found in Article 4(2) and (3) which establish that:

"(2) Without prejudice to the right of the possessor to compensation ... reasonable efforts shall be made to have the person who transferred the cultural object to the possessor, or any prior transferor, pay the compensation where to do would be consistent with the law of the State in which the claim is brought.

(3) Payment of compensation to the possessor by the claimant, when this is required, shall be without prejudice to the right of the claimant to recover it from any other person".

3.80 Thus in essence, the Convention envisages that the possessor shall obtain compensation from one of the parties in the chain between theft and his or her acquisition of the object, at least where that is consistent with the law of the Contracting State seized of the claim.

3.81 While Irish law does not provide for the payment of compensation to *bona fide* purchasers, it does, however, permit him or her to secure repayment from the person from whom he or she acquired the object in question. There are two possible (and alternative) bases for such a claim. On the one hand, reliance may be placed upon Section 12 of the *Sale of Goods Act, 1893* which inserts into contracts for the sale of goods:

"an implied condition [t]hat the seller has the right to sell the goods and, in relation to an agreement to sell, that the seller will have the right to sell the goods, at the time property is to pass".

3.82 Breach of this condition entitles the purchaser to an award of damages comparable to the price paid. The fact that the seller acquired the goods in good faith, believing that he or she thereby acquired good title does not affect the purchaser's claim.<sup>58</sup> Is such a claim affected, however, by the bad faith of the

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57 Unidroit Explanatory Report, in *Acts and Proceedings of the Diplomatic Conference*, p.30, para. 60.  
58 See, for example, the decision of the High Court in *O'Reilly v. Finnegan* [1942] IR Jur. Rep. 36.

purchaser? In the absence of specific reference to this issue in the Act, the answer to this question may be derived from the maxim that a statute shall not be used as an instrument of fraud. It is also arguable that the fact that a bad faith purchaser does not place reliance upon the alleged title of the purchaser when deciding to proceed to purchase may deprive him or her of the right to recover in such circumstances. This conclusion is reached by analogy with a number of cases concerning section 13 of the *Sale of Goods Act, 1893*, which states that it shall be an implied condition of sales by description that the goods sold shall correspond with the description rendered. The case law qualifies this assertion somewhat, with the result that only those buyers who placed reliance upon the description may obtain damages for breach of this condition. Section 61(1) of the *Sale of Goods Act, 1893*<sup>59</sup> provides, however, that this statutorily implied condition as to good title may, however, be circumvented by the parties to an international contract for the sale of goods. Although the Act does not define the characteristics of an "international contract", it is deemed to arise where the places of business of the parties to the contract are located in different states; regard is also had to the fact that the sale transaction involves "the movement of goods from one state to another."<sup>60</sup> The parties to such an agreement may, however, only circumvent the terms of section 12 by precise and clear drafting.<sup>61</sup>

3.83 Alternatively, a purchaser may elect to pursue a restitutionary claim by alleging total failure of consideration. In this context, the term "consideration" has a narrower meaning than that which it enjoys when determining whether a binding contract has been formed; failure of consideration essentially implies a failure of the basis of the transaction. Thus, if the transaction centres on the acquisition by the purchaser of the ownership of a cultural object in return for the payment of an agreed sum, the absence of title on the part of the seller amounts, in effect, to a total failure of consideration and a court shall, in the absence of any recognised defence, order the return of the purchase price paid.<sup>62</sup> The Irish courts have, however, accepted that if the parties to an agreement enter into a contract with knowledge of the fact that doubt hangs over the seller's title, the purchaser may not secure the return of the purchase price paid.<sup>63</sup> Therefore, if the courts are not willing to accede to the purchaser's request in those circumstances, it is surely inconceivable that they would do so in the event that a purchaser knew of the absence of the seller's title, although the seller himself did not.

3.84 If, however, the possessor cannot locate the person from whom he or she acquired the object, or, indeed, if the law of the Contracting State does not admit of such a claim, Article 4(2) and (3) provide that the possessor may obtain compensation from the owner of the object in question. In accordance with the

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59 As amended by s.24(10) Sale of Goods Act, 1980.

60 *Law Reform Commission Report on the United Nations (Vienna) Convention on Contracts for the International Sale of Goods 1980* (LRC 42-1992), p.5.

61 *Ibid.*, p.10.

62 *Griffin v. Caddell* (1875) IR 9 CL 488.

63 *Ibid.*



terms of Article 4(3), an owner may then secure repayment of the amount forwarded to the possessor from "any other person". Irish law does not at present place any parallel obligation upon an owner to a purchaser (regardless of the *fides* of the latter). An owner who chooses to pay a sum to a good faith possessor may not subsequently pursue any other party through the courts for repayment of the amount paid over, on the basis that he or she has voluntarily assumed a risk not mandated by the law.<sup>64</sup> It is submitted that it would be unfair to oblige the owner of an object, the innocent victim of a theft, to pay for the return of their own stolen object, regardless of the good faith of the party then in possession of it.

(c) *Should Irish law provide for compensation of bona fide purchasers of stolen objects?*

3.85 As we have seen, Irish law provides for recovery of the purchase price by the possessor from a prior transferor in certain circumstances. We will now consider whether the range of options open to a possessor should be extended to allow recovery of compensation from the original owner. It may often be the case that a possessor is unable to locate a prior transferor, in which case he or she is without a remedy. The person who acquires an object in the honest belief that the seller has the right to sell it and without any indication that the sale is not legitimate is innocent of any wrongdoing; both he and the dispossessed owner are victims whose respective interests must be protected by the law. It could be said that where the possessor is unable to recover from a prior transferor fairness demands some remedy, even if this may appear harsh on the original owner.

3.86 *The Law Reform Commission recommends that compensation by dispossessed owners in respect of stolen objects should not be provided in our law.*

3.87 Firstly, the Convention aims at affording maximum protection to the dispossessed owner; during deliberations on the draft Convention, those States which currently do so were urged not to change their law in this regard. The balance struck in favour of dispossessed owners by the Common Law was clearly supported by the drafters.

3.88 Secondly, it would be unacceptable to place what would amount to a double burden on the dispossessed owner by obliging him or her to pay compensation in addition to what may have amounted to significant costs in securing the return of the object.

3.89 Thirdly, to provide further protection to the possessor in addition to the ability to pursue a prior transferor would be to give undue weight to the interests of the possessor at the expense of the original owner.

3.90 Finally, the purpose of the Convention and like instruments is to discourage illicit trade by requiring purchasers of cultural objects to enquire into provenance. The success of the Convention depends, therefore, on significant changes in the practice of those involved in transactions of this kind. The denial of compensation is of normative significance in this regard by indicating that the behaviour expected of potential purchasers is measured against a strict standard. It also serves, in a practical sense, to discourage illicit behaviour by denying purchasers a remedy which might be easier to pursue than, for example, a claim against a prior transferor.

## 6. *Alternative remedies available to the possessor*

3.91 The procedures to be instituted to facilitate pursuit of compensation are left to the national law of Contracting States under the terms of the Convention. Article 4(2) provides that reasonable efforts shall be made to have the person from whom the possessor acquired the object, or any prior transferor, pay the compensation where this is consistent with the law of the State in which the claim is brought.

3.92 The most efficient mechanism by which to pursue compensation is by way of joinder of a prior transferor by the possessor, which has the advantage of allowing all issues in relation to the object to be resolved in the course of a single action. The Rules of Superior Courts, 1986 provide that a defendant may join a third party where he or she claims entitlement to contribution or indemnity<sup>65</sup> (which will not be the case in relation to a claim in respect of a cultural object as there is no question of payment to the plaintiff claimant), the subject matter of the claim for a relief or remedy from the third party is substantially the same as some relief or remedy claimed by the plaintiff,<sup>66</sup> or

"any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and the third-party or between any or either or them".<sup>67</sup>

In a claim for return under the Convention, the subject matter of the claim is the cultural object to which the plaintiff establishes an entitlement to return. While it could be argued that the issue of a right on the part of the possessor to recover the purchase price from a prior transferor is not, strictly speaking, "substantially the same as some question or issue arising between the plaintiff and the defendant",<sup>68</sup> the Courts have repeatedly demonstrated a flexible approach to

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65 Order 16, Rule 1 (a), Rules of the Superior Courts, 1986.

66 Order 16, Rule 1 (b), RSC.

67 Order 16, Rule 1 (c), RSC.

68 Order 16, Rule 1 (c), Rules of the Superior Courts, 1986.

third-party procedure. In the case of *International Commercial Bank v ICI*,<sup>69</sup> for example, Finlay CJ found that

"[t]he modern development of procedures against third parties in respect of claims for contribution or indemnity ... indicates a clear recognition by the Courts of the requirements of justice which so frequently involves the necessity as far as possible to ensure that a party against whom a claim has been made and who has legal rights against some other party which may relieve him from some or even all of the consequences of that claim should be entitled to have the issue of his liability and of his consequential rights determined in a single set of proceedings and as far as possible at the same time".<sup>70</sup>

3.93 In an application for joinder under the broad provisions of Order 16, Rule 1 (c), the requirements of justice arising in the context of a claim under the Convention - particularly the interest in resolving all issues relating to the object in question in the same action - clearly favours the granting of leave to join. This would save court time and avoid the additional expense to the possessor which would result if a separate action were required.

We are of the view that implementing legislation should make clear that where a claim for return is brought under the Convention, possessors may invoke Order 16; this is not to limit the discretion afforded to the judiciary to refuse joinder in cases where it would be inappropriate, but merely to clarify that existing procedures may appropriately be adapted to the particular demands of the Convention.

3.94 In summary, Irish law entitles the *bona fide* possessor to obtain contractual or restitutionary damages from the party from whom he acquired the cultural object in question but does not extend the obligation to pay to the owner thereof. The Commission is of the view that no further provision should be made in this regard: those avenues, outlined above, which are currently open to the possessor, together with the availability of third-party procedures which facilitate pursuit of the transferor, provide sufficient latitude to the possessor to recover compensation in appropriate cases.

## **B. THE RETURN OF ILLEGALLY EXPORTED CULTURAL OBJECTS**

### **1. *Article 5: A conditional right to return***

3.95 While the principal problem arising in relation to the theft of cultural objects was the question of the *bona fide* purchaser, the principal difficulty in respect of illegally exported cultural objects was the matter of the recognition by

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69 [1989] ILRM 788. See also, *Quirke v. O'Shea* [1992] ILRM 286 at 290-1.  
70 [1989] ILRM 788 at 799-800.

States of foreign public laws, of which foreign export laws are a clear example.

3.96 Here we encounter the commonly accepted rule of non-recognition and non-enforcement of such laws. The International Law Association has monitored a tentative movement away from that approach in recent years and its replacement, in a limited number of situations, by a willingness to so recognise. It is nonetheless premature to claim that the recognition of foreign public laws has crystallized into a norm of public international law. It remains the exception rather than the norm.

3.97 To this list of exceptions may now be added the Unidroit Convention, which imposes a conditional obligation upon Contracting States in which illegally exported cultural objects are located, to return them to the Contracting States from which they were removed, upon the request of that State. The duty to return is a conditional one in the sense that it applies only to those objects whose removal from the requesting State significantly impairs one of a specified number of cultural interests<sup>71</sup> or is otherwise shown to be of "significant cultural interest".<sup>72</sup> As we have seen, the regime introduced by Chapter III differs from its counterpart in respect of stolen cultural objects which envisages automatic return from possessor to dispossessed party.

3.98 Article 5 provides that a Contracting State shall, at the request of another Contracting State whose protective control regulations have been violated, return the illegally exported cultural object if its removal significantly impairs, *inter alia*, "the physical preservation of the object or its context". The Convention is here concerned with those situations in which physical damage is sustained by monuments and archaeological sites as a result, for example, of illegal excavations and pillage, as well as physical damage to delicate objects because of careless handling by looters, smugglers, dealers and other parties implicated in the illegal export.

3.99 A cultural object shall also be returned to the Contracting State from which it was illegally exported if its absence therefrom significantly impairs "the preservation of information of, for example, a scientific or historical character". The reference to the "preservation of information" reflects a concern not only for the culture of the requesting State but of that of humanity as a whole. In order for humanity as a whole to benefit from such objects, however, they must be placed in their proper context. If displaced, the pool of information surrounding the objects and the importance of the collection of which they were a part, are diminished.

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71 These interests are alternative rather than cumulative.

72 Article 5(3) asserts that the requesting State shall *establish* that the removal of the object has the requisite significant effect. The use of the word "establish" instead of "prove" in this regard is significant: it is indicative of the compromise which Article 5 represents between two groups of States - those which wished to limit the removal of cultural objects from their territory and equally advocated the automatic return of objects so removed and on the other hand, those which favoured a more liberal approach to the international movement of such objects. The latter group advocated the use of the word "prove" in order to indicate clearly the burden placed on the requesting state.

3.100 An object shall likewise be returned if the requesting State establishes that its removal significantly impairs its traditional use by a tribal or indigenous community. We have previously given consideration to these terms.<sup>73</sup>

3.101 The conditional obligation in Article 5 to return illegally exported cultural objects shall not, pursuant to Article 7(1)a, apply when the export of a cultural object is no longer illegal at the time at which the request for return was made. It is conceded that there is little merit in calling upon a court or competent authority of another State to implement an export policy which is at that time deemed too restrictive by the requesting State itself.

3.102 Article 7(1)b refers to another situation in which the principle of return established in Article 5 shall not apply. By asserting that the provisions for return shall be inapplicable in respect of objects exported during the lifetime of the person who created it or within a period of fifty years after his or her death, the sub-paragraph represents an attempt to ensure that the operation of the Convention does not interfere with the ability of artists to obtain foreign exposure for their work, to make themselves known to a wider audience, or to provide for their families after their death. Thus, although a State may impose restrictions under its domestic law upon the export of the work of such artists, those restrictions will not be given effect under the Convention. This provision reflects the philosophy of the *1980 UNESCO Recommendation on the Condition of Artists*, as well as the national legislation of many States on the protection of cultural objects which excludes the work of living artists from their scope of application. The framers of the Convention did, however, feel the need to make one inroad into this exception. This is embodied in Article 7(2) which states that notwithstanding Article 7(1)b, the regime for the return of illegally exported objects shall apply to those objects made by one or more members of a tribal or indigenous community where such objects were designed for traditional or ritual use by that community.

3.103 The dangers inherent in using a listing technique as a means of definition are well documented; it is virtually impossible to foresee, and thus list, all possible permutations which will warrant legal protection. The standard device used to remedy this situation is the inclusion of a general catch-all phrase under which those objects which do not fall into any of the specified categories may be included. Chapter III of the Unidroit Convention adheres to this method of drafting by introducing the fact that removal of the object "is of significant cultural importance for the requesting State"<sup>74</sup> as an alternative criterion for the return of the object.

3.104 Article 5(2) adds that, for the purposes of this Convention, an object which has been temporarily removed from the territory of a requesting State for exhibition, research or restoration purposes pursuant to a permit issued for that purpose and not returned in accordance with the terms of that permit shall be

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73 See para. 3.41.

74 Unidroit Convention, Article 5(3).

deemed to have been illegally exported. In these as in all other circumstances, requests for return shall be accompanied by such information of a factual or legal nature as may be of assistance to the court or other competent authority seized of the issue.

3.105 Finally, Article 5(5) sets out the applicable limitation periods for claims for the return of illegally exported cultural objects. The period established therein is the same as the basic period established in Article 3(3) in respect of stolen cultural goods. Thus, a request shall be brought within a period of three years from the date on which the requesting State knew both the location of the object and the identity of the possessor. A ceiling of fifty years from the date of illegal export is imposed. Unlike its counterpart in respect of stolen cultural objects, there is no extraordinary limitation period for those objects which form an integral part of an identified monument or an archaeological site, or belong to a public collection. The absence of such a regime is due, of course, to the fact that the return procedure set out in Chapter III only applies, in the first instance, to objects of some importance, as recognised in Article 5(3).

## 2. *Compensation for the return of illegally exported objects*

3.106 Article 6 establishes a compensation regime for the *bona fide* purchaser of illegally exported objects.<sup>75</sup> The regime differs in a number of important respects from that which is set out in Chapter II in respect of stolen cultural objects. It states that the possessor shall be entitled to fair and reasonable compensation provided that he or she neither knew nor ought to have known at the time of acquisition that the object was an illegal export. Unlike Article 4, there is no reference to the possessor's obligation to prove that he or she exercised due diligence in the course of the transaction in question. Indeed the Convention is silent on the matter of the party on whom the burden of proof shall fall in these circumstances. This matter is in effect left to national law. The Convention's silence on this point reflects a feeling on the part of many States that "the stigma attaching to theft ought not to be transposed to illegally exported cultural objects".<sup>76</sup>

3.107 While the standard imposed is somewhat less onerous than that imposed in Chapter II, it does not necessarily follow that it is easy for the possessor of illegally exported cultural objects to obtain compensation. The requirement that he or she neither knew nor ought reasonably to have known represents a substantial obstacle to compensation. This is especially true in the light of the publication by UNESCO in 1984 of the export control laws of over 140 countries.<sup>77</sup> The court or other competent authority to whom the task of determining whether the possessor had actual or constructive knowledge of the

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75 Article 7(b)(ii) is its equivalent in the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 1970.

76 Unidroit Explanatory Report in *Acts and Proceedings of the Diplomatic Conference*, p.39, para. 108.

77 Irish export laws were among those included in UNESCO's review.

illicit provenance of the object shall, according to Article 6(2), have regard to the circumstances of the acquisition, including the absence of an export certificate required under the law of the requesting State. That absence of an export certificate required by the national law of the requesting State may prove fatal to the possessor's claim to compensation is particularly significant for Ireland given the broad range of objects so requiring under the *National Cultural Institutions Act, 1997* which also attract the protection of the Convention.

3.108 If the court or other organ dealing with the issue concludes that compensation shall be paid to the possessor, it shall be a fair and reasonable sum; the use of this approach rather than one in which the market price was used to measure compensation is, according to the UNIDROIT Secretariat:

"justified by the extremely high prices which works of art presently command, the limited financial possibilities of many States to pay compensation and the need to discourage speculation."<sup>78</sup>

3.109 The Secretariat adds that all of the above factors, plus the commercial value of the object in the State of origin and in the State which seeks its return and any other relevant circumstances which would assist the court or other competent authority may be considered in determining the amount of compensation payable in each individual case.

3.110 Article 6(2) states that the requesting State shall pay the compensation owing, and Article 6(4) adds that it shall also meet all costs which accrue in securing the return of the object. Nonetheless, it does not preclude action by those States to secure the repayment of monies which they have paid in order to facilitate an object's return.

**(a) *Should Irish law provide for compensation of bona fide purchasers of illegally exported cultural objects?***

3.111 At present, the question of removing an illegally exported cultural object from a possessor and the attendant issue of payment of compensation to that possessor does not arise: the non-enforcement of foreign public laws protects the possessor in such circumstances. If, however, the Convention were adopted, a *bona fide* possessor might, in the appropriate circumstances, avail of section 12(2) of the *Sale of Goods Act, 1893* in order to secure damages from the other party to the contract to purchase the illegally exported cultural object. Section 12(2) states that it shall be an implied condition of a contract for sale that the buyer shall have quiet possession, a condition which is obviously breached when the object is returned under the Convention. It is submitted that the damages would only be awarded under Section 12(2) if the possessor purchased in good faith. Likewise, if the contract is an international one, as defined in section 61 (1) of

the *Sale of Goods and Supply of Services Act, 1980*, the parties may choose to circumvent the terms of Section 12(2), thereby removing the *bona fide* purchaser's ability to claim damages thereunder. The Convention does not, however, refer to the fact that the State engaged in such a request for return may retrieve these sums from the party or parties responsible for the illegal export.

3.112 The considerations to be assessed in relation to compensation of a possessor of an illegally exported object are considerably different from those in respect of stolen objects, title to which is tainted from the outset by reason of the theft. Firstly, illegal export *per se* does not prevent title from passing. It has implications for the illegal exporter in that he or she may be fined or imprisoned under the *National Cultural Institutions Act, 1997*. His or her title in the object may also be adversely affected: where such person is found guilty of an offence in relation to export of an object which is either a registered cultural object which prior to the conviction had been in the control of a public institution or is an archaeological object, that object may be forfeited to the State. The owner or any person claiming to have an interest in the object may apply to the Court to be heard on the issue of why forfeiture should not be ordered.<sup>79</sup> Thus, a person who purchased the object from the illegal exporter or a subsequent owner may argue against forfeiture on the grounds that the object was purchased in good faith and without knowledge of the illegal export. Clearly, if the object is registered, such an assertion would be unlikely to succeed as failure to consult with the register would show a lack of due diligence; it may not be as difficult to show the requisite diligence where unregistered archaeological objects are concerned.

3.113 Where the object is still owned by the person convicted of the attempt to illegally export it, no issue arises as to compensation. It is possible, however, that the order for forfeiture may affect a subsequent purchaser, who has title in the object at the time that conviction of the illegal exporter is secured. Similarly, situations may arise where the exporter and the purchaser both have an interest in the object at the time of the conviction, for example where a portion of the purchase money has been paid. The question then arises as to what avenues of redress are open to the *bona fide* purchaser. He or she may recover the purchase money from the exporter on the basis, for example, of a breach of the implied covenant to quiet possession. Under the Convention, such a person would be entitled to compensation by the State requesting return, it then being a matter for the State to recover such monies from any other person. The Convention, therefore, envisages more favourable treatment of the purchaser than does domestic law in this regard.

3.114 We are of the view that compensation should be payable by the State requesting return of illegally exported cultural objects in circumstances where the purchaser acted in good faith. This is already available in our law under the *European Communities (Return of Cultural Objects) Regulations 1994* (hereinafter

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*National Cultural Institutions Act, 1997* section 49(10).



the "1994 implementing Regulations"); a similar provision should be enacted in respect of the Convention. It is possible, in our view, to distinguish between the case of illegal export and that of theft. Firstly, there is a difference in terms of legal principle: title does not pass in the case of theft (although, as we have seen, there are a number of exceptions to this rule),<sup>80</sup> while this is not the case in relation to illegal export. Secondly, there is the issue of balance between the interests of the respective parties; the owner of a stolen object should not be further burdened by a duty to pay compensation, while in the case of illegal export it is the State and not a private party which pursues the claim for return. While the State may have been deprived of the enjoyment of the object and burdened by the need to pursue its return, this is not, in our view, enough to justify State interference with the property rights of a person who did not know, and could not have known, that the object was illegally exported.

3.115 The State should, however, be facilitated in pursuing the illegal exporter under domestic law for recovery of the sums paid. This avenue is not currently available to the State either under the existing law of contract, in contrast with the position in regard to stolen objects, nor would it be possible in all cases to effectively reimburse the State under the *National Cultural Institutions Act, 1997*, given that the maximum fine for illegal export is £50,000. Such penalty may not be sufficient to reimburse the State in a case involving a particularly valuable object.

3.116 Where the claim is in respect of an object which was in private hands prior to the illegal export, it will either have been stolen from the owner so that Chapter II of the Convention applies (with the option to pursue damages open to the possessor), or the original owner is in some way implicated in the illegal export, in which case the State may order forfeiture under the 1997 Act. Alternatively, a situation may arise where an object which is on temporary loan abroad is not returned in accordance with the terms of the export licence; Article 5(2) provides that such object shall be deemed to have been illegally exported.

3.117 The 1994 implementing Regulations provide for payment of compensation where the Court is satisfied that the possessor exercised due care and attention in acquiring the object. *We recommend the introduction of a provision similar to that Regulation, requiring the Court hearing the claim for return to order payment by the requesting State of such compensation as it deems "fair and reasonable" in all the circumstances of the case and provided that the possessor neither knew nor ought reasonably to have known at the time of the acquisition of the object that it had been illegally exported.* The Court should not be bound by the levels of damages afforded in actions in contract, but rather should take into consideration factors such as those laid down in Article 4(4): the price paid, the character of the transferor and failure by the transferee to take steps which any reasonable person would have taken in acquiring an object in similar circumstances.

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80 See paras. 3.62 and 6.34.

**(b) Burden and standard of proof**

3.118 The Convention leaves the question of the burden and standard of proof largely to domestic law. While it is specific as to where the burden lies in certain instances, it is silent on the standard of proof to be applied. The issue arises in two related areas, that of the determination of a claim for return of an object and, depending on the outcome of such a claim, that of entitlement to compensation.

3.119 Two questions arise for consideration. Firstly, on whom should the burden rest and secondly, what standard of proof should be required in order to satisfy that burden.

3.120 The question of the party on whom the burden lies must be distinguished from that of the standard of proof, which refers to the size of the legal burden of proof. In civil cases, the standard is proof "on the balance of probabilities", although this is not always applied rigidly. In cases where the repercussions are particularly serious or far-reaching the standard may be augmented.<sup>81</sup>

3.121 In civil cases generally, the burden of proof is said to rest on "he who affirms rather than he who denies", although, as Fennell points out, this is an uncertain guide. By contrast, in a criminal case the burden rests with the prosecution to prove each element of its case. Where a claim is brought for the return of an illegally exported object, the court in the requested State is obliged to order return where one or more of the interests described in Article 5(3) are established as having been significantly impaired. The burden of so establishing is placed on the requesting State by Article 5(3).

3.122 Following a successful claim by a State, the question arises whether it is for the State to prove that the possessor is not entitled to compensation, or for that person to prove that he or she is so entitled. Applying the common law principle that the burden lies on the party who would be unsuccessful in the case if no evidence at all were proffered, it is for the possessor to establish his or her right to compensation. There seems no reason to deviate from this for the purposes of the Convention, particularly in light of the favour extended to dispossessed owners elsewhere in the Convention.

3.123 Where a claim is brought under Chapter II, the claimant will be required to prove a taking and carrying away of something capable of being stolen without the owner's consent. It will then be for the possessor to prove any defences, such as a superior right to possession as against the claimant. It is arguable that where the "penalty" is forfeiture of what may be a very valuable object, a higher standard than that of proof on the balance of probabilities should be imposed on the claimant in order to establish an entitlement to return. *We are of the opinion that, in the interest of promoting maximum return, the civil standard - proof on the*

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81 See Fennell, C, *The Law of Evidence in Ireland* (Butterworths, 1992), p.49.

*balance of probabilities - should apply. We therefore recommend that in the interests of clarity a provision to that effect should be included in implementing legislation.*

3.124 In relation to claims for compensation for return of stolen objects, the Convention places the onus of proving due diligence on the possessor of such an object. In the case of illegally exported objects, however, the Convention is silent on where the burden lies, so that the matter is left to the law of the State in which the claim is made. Under our law it would be for the possessor claiming compensation to establish that he or she did not know or should not have known of the theft or illegal export.

3.125 *We recommend that implementing legislation should include a provision explicitly requiring the possessor in all cases to establish his or her entitlement to compensation rather than leaving the issue open, as is the case in the 1994 implementing Regulations, or relying on common law principles.*

3.126 We have also considered whether implementing legislation should go so far as to require the possessor to prove due diligence in respect of acquisition of an illegally exported object. It may be argued that given the international trend towards restricting and monitoring exports, and the accessibility of national legislation, this would be an acceptable burden. On the other hand, these factors are of a kind which should be taken into account as a matter of course by courts when assessing actual or constructive knowledge on the part of the possessor. Given that our law places the burden of showing a lack of the requisite knowledge on the possessor, he or she will be required to give evidence of inquiry into provenance. In countries which, unlike Ireland, extend greater protection to the possessor than to the dispossessed owner, latitude is afforded by the Convention to place the burden on the claimant to establish a case against compensation rather than on the possessor to establish his or her entitlement thereto. The effect of Irish rules of evidence is, however, to place a burden akin to a showing of diligence on the possessor, making it somewhat unnecessary to introduce further legislation to that effect.

3.127 The committee of experts also decided against inclusion of an irrebutable presumption of bad faith in the absence of an export certificate. They reasoned that to include such a provision would be to assume the possessor's knowledge of the export legislation of every country and to render almost impossible the acquisition in good faith of any cultural object.<sup>82</sup> The absence of such a certificate may, however, be taken into account by the court in assessing whether the possessor knew or ought reasonably to have known that the object had been illegally exported.

3.128 The fact that no such negative presumption was provided in the Convention does not prevent national law from so providing. Having considered whether Irish law should deviate from the Convention in this regard, the

reasoning of the committee of experts referred to above is, in our view, persuasive. By the same token, the *existence* of an export certificate should not be dispositive either; forgery of export documents occurs on a large scale worldwide and is often of a very high quality. The better course seems to us to be to allow judges to have regard to all the relevant circumstances attending acquisition of an object and to reach a decision based on a consideration of all of the facts.

## GENERAL PROVISIONS

### 1. *Article 8: Jurisdictional Matters*

3.129 Article 8 deals with a number of pertinent jurisdictional issues. Article 8(1) lays down a uniform rule regarding jurisdiction to hear claims for the restitution and return of stolen and illegally exported cultural objects. It establishes that such claims may now be conducted in the jurisdiction in which the object is located. This jurisdiction is in addition to those already found in Contracting States. The decision to grant this jurisdiction to courts so located in respect of claims for the restitution or return of stolen or illegally exported cultural objects represents a welcome advance upon the position pertaining to date. Such a claim is now much more likely to achieve a successful conclusion if brought before the court of a place where the object is located since problems of enforcement of a foreign judgment ordering return shall not arise.

3.130 Article 8(2) permits Contracting States to agree to submit disputes to a jurisdiction of their choice or to arbitration. It has been noted that:

"the choice of forum, which is widely recognised in private international law, is an essential procedural freedom and that the omission of a provision to that effect could create an obstacle for certain States to ratify the ... Convention."<sup>83</sup>

3.131 Arbitration has a number of attractive features for the parties to those claims envisaged under the Convention. One distinct advantage is the confidentiality which surrounds such procedures. Its chief merit, however, appears like the new jurisdictional basis set out in Article 8(1), to lie in its promotion of the enforcement of decisions regarding restitution or return. It is envisaged that enforcement problems would be reduced to the extent that the institution of arbitral proceedings is dependent upon the consent of both parties.

3.132 Finally, Article 8(3) states that:

"resort may be had to the provisional, including protective, measures available under the law of the Contracting State where the object is

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83 Unidroit Explanatory Report in *Acts and Proceedings of the Diplomatic Conference*, p.41, para. 120.

located even when the claim for restitution or request for return of the object is brought before the courts or other competent authorities of another Contracting State."<sup>84</sup>

3.133 If, for example, the claimant chooses to institute proceedings before a court in the State in which the defendant is domiciled, he or she may also apply to the courts of the Contracting State in which the object is located in order to avail of an appropriate provisional or protective measure, such as an injunction to prevent the sale, export or any further dealing in the object in question.

3.134 As we have seen,<sup>85</sup> Article 9 allows Contracting States to rely on alternative rules to those provided in the Convention where to do so would be more favourable to restitution or return. It should, however, be noted that Article 9 does not *oblige* the Contracting States whose rules are more protective of cultural objects to apply those in preference to the terms of the Convention; the matter remains at the discretion of the individual Contracting States. It is clear, however, that the adoption of the higher standard where feasible would be more consistent with the protective spirit of the Convention.

3.135 A claimant from a Contracting State which chooses to apply its own more favourable rules to the claims brought before its courts cannot expect similar latitude when he or she pursues a claim in another Contracting State. This is made clear by Article 9(2) which provides that the preceding paragraph:

"shall not be interpreted as creating an obligation to recognise or enforce a decision of a court or other competent authority of another Contracting State that departs from the provisions of this Convention."

3.136 There may, however, be occasions on which a claimant from a Contracting State can benefit from the more generous provisions of that State's laws. If the law to be applied is the law of that State, as for instance if the object in question was located in that State, or a relevant transaction affecting the object was governed by the laws of that State, then that law, even though more favourable to the claimant than the Convention, can be invoked.

## 2. *Non-retroactive Nature of The Convention*

3.137 Although the principle of non-retroactivity of treaties has the force of customary international law and is set out in the *Vienna Convention on the Law of Treaties, 1969*<sup>86</sup> (which Ireland has not yet ratified), the drafters of the Convention concluded that it was advisable to make specific reference to this point to avoid any contrary interpretations by some Contracting States. This

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84 This provision is designed to promote international co-operation by taking over the formula to be found in Article 24 of the Brussels Convention concerning protective, including provisional, measures available under the law of the Contracting State where the object is located, when a claim is brought in another jurisdiction.

85 The interplay between Articles 9 and 4 is considered *supra* at para. 3.68 *et seq.*

86 Article 28.

issue proved to be one of the most controversial and sensitive in the drafting history of the Convention. Opposition to retroactivity came largely from developed States, whose representatives felt that granting retroactive status to the Convention would have extensive political repercussions and cause insurmountable legal problems<sup>87</sup> and stated that they could not partake in any Convention in which this principle applied. On the other hand, many States felt that because their most important cultural objects had already been taken from them in circumstances in which they had no opportunity to resist, it would be politically impossible for them to accept any wording which implied the recognition or legitimation of such prior transfers. The inclusion of such a provision in the Convention could likewise deter those States from adopting the Convention. Ultimately, however, the preference of the former group prevailed.

3.138 Thus, Article 10 establishes that the Convention shall not have retroactive effect. As far as Chapter II is concerned, the regime established thereunder shall be operative only in respect of those cultural objects stolen after the Convention entered into force in the State in which the claim for restitution is brought, and,

- (a) the object was stolen from the territory of a Contracting State following the entry into force therein of the Convention; or
- (b) the object is located in a Contracting State following the entry into force of the Convention therein.

3.139 In submissions to the Law Reform Commission following publication of our Consultation Paper, concern was expressed that the wording of section 10(1)b was ambiguous and, despite the non-retroactive nature of the terms of the Convention, needed to be clarified. We had commented in our Consultation Paper that a literal interpretation of the paragraph might suggest that the Convention could be invoked where an object was introduced into the Contracting State before the entry into force of the Convention, as long as it was still located there at the date of entry into force. We are now of the view that this interpretation is only possible if sub-paragraph b and paragraph (1) are read disjunctively.

3.140 Consider the result of a claim in the following circumstances: Ireland accedes to the Convention on December 1, 1997, Britain on September 1, 1997. A cultural object is stolen from an individual in Ireland in November 1997 and surfaces in Britain some time later.

3.141 A claimant may invoke the Convention in these circumstances notwithstanding the fact that it was not in force in Ireland at the time of the theft, but only if he or she proceeds before a British court since the object was

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<sup>87</sup> For some, including Ireland, it could create significant constitutional problems, interfering with guarantees of property rights or with general principles of non-retroactivity of legislation. For others, it was contrary to the fundamental provisions of the civil law from which they were unwilling to depart.

stolen after the coming into force of the Convention in Britain.<sup>88</sup> Such a proceeding could not be brought before an Irish court because the object was stolen before the coming into effect of the Convention in this jurisdiction. The effect of Article 10(1) standing alone is that our claimant may proceed only if the object was either stolen from a Contracting State after the Convention came into force in that State, (which in the above case it was not) or is located in a Contracting State after the Convention came into force in that State (as in the above case). The effect of sub-paragraph b in conjunction with paragraph (1) is that the fact that a stolen cultural object is located in a Contracting State after the coming into effect of the Convention in that State does not in itself allow a potential claimant to avail of the Convention: the object must also have been stolen after the date on which the Convention came into effect in the State in which the claim is sought to be brought.

3.142 Unlike Article 10(3) which applies to illegal export, Article 10(1) does not require that the Convention must have entered into force in the State where the theft occurred, but only that it has done so in the State where the claim is brought. That the Convention has not entered into force at the time of the theft in the State in which the theft occurred is not, therefore, an obstacle to the claimant in availing of the Convention, but merely limits his or her choice of forum.

3.143 Given that the Convention has not yet come into force in any State and that any proceeding brought under the Convention must involve an object stolen after the coming into effect of the Convention, the Convention will only affect claims arising out of thefts at some date in the future.

3.144 Where illegally exported cultural objects are concerned, the Convention shall apply in respect of those objects which are both removed from the requesting State in which the Convention is in force at the time of removal and introduced into a Contracting State in which the Convention is likewise in force.

3.145 Article 10(3), however, makes clear that this assertion of non-retroactivity does not in any way legitimise any illegal transaction which is excluded by the inclusion of Article 10(3) in the Convention. Thus, although the Convention recognised the moral force of the arguments on behalf of a retroactive application, it declines to give them legal force. It does, however, assert that States or other interested parties remain free to pursue actions for restitution or return by use of mechanisms outside the ambit of the Convention. In this regard, it should be noted that none of the other Conventions which deal with cultural protection provide for retroactive effect.

3.146 One final point worth noting is that the effect of Article 9 on the issue of non-retroactivity is to allow individual Contracting States to provide for retroactivity in their domestic law. This does not, however, impose any obligation

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<sup>88</sup> "The provisions of Chapter II shall apply only in respect of a cultural object that is stolen after this Convention enters into force in respect of the State where the claim is brought": Article 10(1).

on other States to enforce judgments made pursuant to retroactive application of the Convention. Given that many objects currently in public and private hands world-wide are of dubious provenance, it is unlikely that many States will invoke this power, although there is a possibility that those States which have suffered the greatest losses and which have not benefitted in any way from illicit trade may choose to do so.

3.147 Consultation with various experts in the field illustrated that there is considerable resistance to retroactivity. We therefore see no reason to deviate from the principle of non-retroactivity laid down in the Convention.

## **FINAL PROVISIONS**

### **1. *Entry Into Force***

3.148 Matters relating to the entry into force of the Convention are set out in Articles 11 and 12. The Convention was opened for signature at the concluding meeting of the Diplomatic Conference which met in order to adopt the draft Convention, which took place on June 24, 1995 and remained open for signature by those States represented at the Diplomatic Conference - negotiating States - until June 30, 1996.<sup>89</sup> Having signed the Convention, a State may then proceed to ratify, accept or approve it. All non-signatory States may accede to the Convention. This option has been open to them since June 24, 1995. Those who wish to ratify, accept, approve or accede to the Convention must deposit a formal instrument to that effect with the Italian Government, which will act as depositary for the purposes of the Convention.

3.149 The Convention shall enter into force on the first day of the sixth month after the deposit of the fifth instrument of ratification, acceptance, approval or accession. The Convention shall thereafter enter into force in an individual State on the first day of the sixth month following deposit of its instrument of ratification, acceptance, approval or accession.

### **2. *Relationship With Other International Agreements***

3.150 It is customary for international private law conventions to contain a provision safeguarding existing agreements dealing with the same or similar subject-matter. Adhering to this custom, the Convention states in Article 13(1) that it shall not affect any international instrument by which any Contracting State is legally bound which contains provisions on matters governed by the

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<sup>89</sup> A total of 22 States, of which Ireland is not one, have signed the Convention: Burkina Faso, Cambodia, Cote d'Ivoire, Croatia, France, Guinea, Hungary, Italy, Lithuania, Zambia, Georgia, Finland, Portugal, Paraguay, Switzerland, Romania, Pakistan, Netherlands, Peru, Bolivia, Senegal, Russian Federation. Lithuania and Paraguay have since ratified the Convention; China has acceded with declarations.



Convention, unless a contrary declaration is made by those States. It would appear that the guarantee not to affect those legally binding instruments to which at least one Contracting State is a party applies only to those international instruments already concluded and binding.

3.151 Article 13(2) endorses the entry by Contracting States into bilateral or multilateral agreements with other States with a view to improving the application of the Convention *inter se*. Copies of such agreements shall be transmitted by the States involved to the Italian Government in its capacity as depositary.

3.152 Article 13(3) was drafted with the special position of the Member States of the European Union in mind. It asserts that:

"In their relations with each other, Contracting States which are Members of organisations of economic integration or regional bodies may declare that they will apply the internal rules of these organisations or bodies and will not therefore apply as between these States the provisions of this Convention the scope of application of which coincides with that of those rules."

3.153 The Member States of the European Community are obliged to apply Community rules in preference to other rules, national or international. Thus, Member States are obliged to avail of the regime for the return of illegally exported cultural objects set out in *Directive 93/7* in those situations in which the object is, after its illicit removal, located in another Member State. On the other hand, the provisions of Chapter III shall be operative both where a Member State seeks the return from a non-Member State of a cultural object illegally removed from its own territory, and where an object falls outside the scope of *Directive 93/7* but inside the definition of objects protected under the Convention. That a claimant who fails to satisfy the criteria in the Directive may seek the protection of the Convention is apparent from the wording of Article 13(3) which provides that members of regional bodies may apply their own internal rules rather than those provisions of the Convention the scope of which "coincides with that of those rules". The application of Chapter II of the Convention is, of course, unaffected by the Directive, which applies only to illegally exported objects.

### 3. *Declarations*

3.154 Article 14(1) deals with a specific declaration which may be deposited by Contracting States with the Italian Government at the time of ratification, acceptance, approval or accession. This provision is of interest to those Contracting States which have more than one territorial unit. It provides that in such circumstances, and notwithstanding the different systems of law applicable in the various territorial units, a Contracting State may at the time of ratification or other method of adoption, declare those territories to which the Convention

shall apply.<sup>90</sup> In the event that a Contracting State fails to issue a declaration in accordance with Article 4(1), the Convention shall be deemed to apply to all of its territorial units. Article 14(3) provides that, in the event that a Contracting State issues a declaration to the effect that the Convention shall apply in one or more, but not in all of its territorial units, the term "Contracting State" where utilised in the Convention shall be taken to read "territorial unit". Thus, when the Convention refers, for example, to the "court or competent authority of a Contracting State", it shall be read in the above situation to mean the court or competent authority of a territorial unit.

3.155 Article 15 details the procedures to which Contracting States must adhere when issuing declarations under the Convention and some of the consequences of such declarations. There are four provisions - Article 3(5), Article 13 (1) and (3) and Article 14(1) above - which enable Contracting States to enter declarations to the terms of the Convention. In addition, Article 16 provides that Contracting States shall, at the time of signature, ratification, acceptance, approval or accession, declare those bodies to which authority to hear the claims under the Convention shall be granted. In relation to all of the above, Article 15 establishes that declarations made at the time of signature shall be confirmed upon ratification, acceptance or approval. Declarations and confirmations of same shall be made in writing and deposited with the Italian government. They shall take effect upon the entry into force of the Convention in the individual Contracting State concerned. Those declarations, however, in respect of which the depositary receives notification after the entry into force of the Convention in the State concerned, shall take effect on the first day of the sixth month after its deposit with the depositary. Declarations may be withdrawn at any time by a Contracting State by means of formal notice to the depositary. As outlined above, such notices of intention shall take effect on the first day of the sixth month after the date of deposit thereof.

3.156 Finally, Article 17 requires Contracting States to provide to the depositary, within six months of ratification, acceptance, approval or accession, written information on their legislation regulating export of cultural objects. This information must be updated as domestic law changes.

#### **4. *Declarations necessitated by accession***

3.157 Should Ireland accede to the Convention, the declarations required to be deposited at the time of such accession relate to time limitation, under Article 3(5), the supremacy of other international or regional instruments, under Article 13(1) and (3) and the competent authority to which claims for restitution or return should be submitted, under Article 16.

3.158 If our recommendation<sup>91</sup> is adopted that no limitation period in respect

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<sup>90</sup> Article 14(2).  
<sup>91</sup> At para. 3.85.

of the special class of object covered by Article 3(4) should be imposed, no declaration is necessary. It is only if a period of 75 years or more is favoured that a declaration to that effect is required.

3.159 No declaration is required in respect of application of other international instruments dealing with subject matter covered by the Convention, as Ireland is not a party to any such instrument. *A declaration is required, however, to the effect that Ireland will apply European Community rules rather than those laid down in the Convention in respect of matters which are within the scope of both Directive 93/7 and of the Convention.*

3.160 A declaration is also required as to the competent authority to which claims for restitution and return are to be submitted.

3.161 *We recommend that Ireland make a declaration nominating the Minister for Arts, Heritage, the Gaeltacht and the Islands as the "central authority" to which claims should be directed under the Convention.* Given that the Minister<sup>92</sup> has been so nominated under the 1994 Regulations effecting Directive 93/7/EEC, the conferring of such powers on the Minister in respect of the Convention has the benefit of creating a central co-ordinating body which may develop a particular expertise in the area of international claims, whether under the Directive or the Convention. Another obvious advantage is that there may be instances in which a party attempting to pursue a claim under the Directive may find it necessary instead to so pursue under the Convention; similar procedures to those already in place for processing requests for return under the Directive may be used under the Convention. The 1994 Regulations vest jurisdiction in the High Court to make an order, on application by the Minister, allowing searches of premises where there are reasonable grounds for believing that a cultural object unlawfully removed from a Member State is located there. The Court must order the return of a cultural object where it is satisfied that it has been unlawfully removed from the territory of a Member State and may order the payment of compensation by the requesting State.

3.162 We are of the opinion that the filtering of claims through a "central authority" represents a more desirable option than submission of claims directly to the Courts. Such authority may negotiate with claimants and possibly avert the necessity of pursuing a claim by judicial means; while such negotiation is expressly encouraged in the Directive, there is no such reference in the Convention. This does not, of course, preclude national authorities from engaging in such negotiation where they see fit. The central authority may also advise claimants as to whether their claims are accompanied by the appropriate documentation, for example by "information of a factual or legal nature" sufficient to assist the Court in deciding whether one of the interests in Article 5(3) has been significantly impaired. Because of the discretion conferred on Courts under Article 5, such advice can only be given in light of standards developed by the

Courts in individual Contracting States. As jurisprudence develops as to what constitutes evidence sufficient to satisfy a Court, claimants who do not meet these *prima facie* standards may be advised that more detailed evidence is required to be adduced before proceeding further, thus saving court time as well as expense on the part of the claimant.

3.163 Such a structure is envisaged in Article 16(1)b, which allows States to designate an authority to receive requests or claims which may then forward them to the courts or other competent authorities in that State. The need for the courts to be involved at all is related to the demands of Irish constitutional law, which do not permit of interference with property rights except in due course of law.<sup>93</sup> The adjudication of competing claims as to title in property is therefore a matter peculiarly within the competence of the courts. This may not be the case in other Contracting States, where nomination of non-judicial bodies is permitted under their domestic law.

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93 In *Re Haughey*, O'Dalaigh CJ stated that "in proceedings before any tribunal where a party to the proceedings is on risk of having his good name, or his person or property, or any of his personal rights jeopardised, the proceedings may be correctly classed as proceedings which may affect his rights, and in compliance with the Constitution the State, either through its enactments or through the courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights": [1971] IR 217 at 264. The guarantee of due process in Article 38.1 has been extended through a number of judicial decisions to cases other than those of a purely criminal nature: Kelly, JM *The Irish Constitution* (3rd edition, 1994), p.814 *et seq.*

**CHAPTER 4: THE LAW OF LARCENY IN IRELAND AND  
CHAPTER II OF THE CONVENTION**

**Introduction**

4.1 In considering whether it would be beneficial for Ireland to accede to the Convention, the ease with which a claimant may rely on its provisions is a key factor. The fact that claims by private individuals may be brought only under Chapter II makes it particularly important to assess the scope of application of that part of the Convention.

4.2 Article 3 provides for reliance on Chapter II both where there has been a theft and where there has been unlawful excavation or lawful excavation coupled with unlawful retention. Theft is not defined in the Convention, the drafters having been of the view that the concept had broadly similar characteristics in all jurisdictions. Thus, whether a cultural object may become the subject of a claim under Chapter II of the Convention will depend on the law of theft in the State in which the object originated.<sup>1</sup>

4.3 Furthermore, the committee of experts considered that the increasing incidence of clandestine excavations from archaeological sites called for special treatment. Article 3(2) was added, so that objects which are unlawfully excavated or lawfully excavated but unlawfully retained may be "considered stolen". The treatment of such objects as stolen objects was, however, made subject at a late stage in the drafting process to a condition that to so consider must be consistent with the law of the State where excavation took place. Therefore, in order to avail of Chapter II of the Convention to retrieve excavated material, national law must provide that excavations and the subsequent retention of the products of such excavations constitutes theft. In addition to the law of larceny, therefore, domestic provisions regulating or proscribing certain kinds of excavation and retention are relevant to the scope of Chapter II.<sup>2</sup>

4.4 It is important to note that the Convention does not place any obligation on States to so equate; for those which do not do so, the extent to which

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1 Article 3(1) of the Convention provides that "[T]he possessor of a stolen cultural object shall return it".

2 "For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained, shall be considered stolen where consistent with the law of the State where the excavation took place"; Convention, Article 3(2).

claimants in those jurisdictions may rely on the Convention will be diminished.

4.5 In this Chapter, we will consider the extent to which Irish law, both in relation to larceny and to control of excavation, constitutes a satisfactory framework within which to proceed under Chapter II of the Convention. We will first consider the various elements of larceny which require to be proved in order to proceed under the Convention; we will then consider the interplay between Article 3(2) and our larceny and heritage protection laws. Finally, we will deal with larceny in the specific context of archaeological material found in land; rules of ownership at common law and under statute affect the question of whether Chapter II may be invoked where such objects are taken from the land.

#### A. Larceny in Irish law

4.6 The *Larceny Act, 1916 as amended* (the "1916 Act") consolidated the common law of larceny and carries over many provisions which are inconsistent with what one might intuitively regard as theft. At common law, limitations on the scope of the crime were imposed by judicial decision, motivated by the desire to avoid capital punishment and later in order to limit the number of offences in respect of which the accused could be denied access to counsel and witnesses.<sup>3</sup>

4.7 In order to prove larceny, both the physical act and the mental state of the accused actor must be established and proved to have coincided in point of time. In the context of the Convention, the person against whom the claim is brought is unlikely to be the thief himself, but rather the person who acquired the object from the thief or from some other person in the chain between thief and possessor. Therefore, the mental disposition of the original taker at the time of the taking will not be at issue at this juncture, since it will not be possible to adduce evidence of *mens rea* in the absence of the alleged wrongdoer. Only those elements of the crime of larceny which are capable of being proved or which are ascertainable from the circumstances will be required to be established by the claimant in order to proceed under Chapter II.

4.8 Section 1 of the 1916 Act provides in relevant part that;

(1) A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof...

(2) (i) the expression "takes" includes obtaining the possession  
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<sup>3</sup> *Kenny's Outlines of the Criminal Law* (19th ed.), edited by JCW Turner (Cambridge University Press, 1966), paras. 221, 74.

- (d) by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps;
- (ii) the expression "carries away" includes any removal of anything from the place which it occupies, but in the case of a thing attached, only if it has been completely detached;
- (iii) the expression "owner" includes any part owner, or person having possession or control of, or a special property in, anything capable of being stolen.

#### 1. **"Ownership" under the Larceny Act, 1916**

4.9 The first issue is whether the claimant is, in fact, the owner of the goods for the purposes of the 1916 Act. It has been observed that the question of what ownership means has long been a source of philosophical debate, but as a matter of practice the matter rarely arises because the ways in which ownership may be acquired, and therefore proved, are few and well-defined.<sup>4</sup> Ownership is the "greatest right or bundle of rights than can exist in relation to property", and most commonly is acquired by the transfer of the thing, either gratuitously or for value, from a person who already owns it, or by taking possession of things which have no owner. Possession, on the other hand, refers to a state of affairs rather than to an interest.<sup>5</sup> It may be a) actual, which requires both an intention to control and *de facto* control; b) constructive, where a person is entitled to, but is not in actual possession, for example, the property is in the hands of a bailee; or c) symbolic.

4.10 When goods are unlawfully taken, title remains in the owner, who has the right to possession of them against the world. Until he recovers the goods, however, their possession is in the taker or the person who acquires the goods from the taker. That person has a right to possession of the thing which is good against all the world except the owner, or a prior possessor if the object was taken from such a person. This is of central importance since larceny is an offence against possession, not ownership, of goods: the definition of "owner" in section 1 of the *Larceny Act, 1916* includes the person having possession or control of the object. Situations may arise, therefore, where a claim for return is brought under the Convention by a person who is not the original owner, but a subsequent possessor from whom it has been stolen. In that case, the dispossessed owner would have to establish title superior to that of the claimant

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<sup>4</sup> Bell, A P *Modern Law of Personal Property in England and Ireland* (Butterworths, 1989) p.66.  
<sup>5</sup> *Ibid.*, p.33.

in order to secure its return to him rather than to the claimant.<sup>6</sup>

## 2. *Mens rea and actus reus for larceny*

4.11 *The Larceny Act, 1916* requires that the taking be fraudulent and without a claim of right made in good faith. It has long been held by the Irish courts that a “claim of right made in good faith” existed where the accused “honestly believed that he was entitled” to take the object “even though his claim ... was not well founded in law or in fact”.<sup>7</sup> Given that this element requires evidence of the subjective belief of the taker which will not be capable of being proved in the taker’s absence, this element must necessarily be excluded from an evaluation of whether the object was “stolen”. It is sufficient that the claimant establishes that he was in possession of the object at the time of the taking and that he did not consent to the taking, the dishonesty or otherwise of the taker being impossible to establish. It is immaterial to the question of whether a theft has occurred whether that person is the rightful owner or a taker or transferee of a taker, since as we have seen, larceny is an offence against possession.

## 3. *Object must be “capable of being stolen”*

4.12 It must also be established that the object in question is of a kind which is “capable of being stolen”. The 1916 Act places restrictions on the types of objects which may become the subject of a charge of larceny. Section 1(3) states that:

“Everything which has value and is the property of any person, and if adhering to the realty then after severance therefrom, shall be capable of being stolen [p]rovided that (a) ... anything attached to or forming part of the realty shall not be capable of being stolen by the person who severs the same from the realty, unless after severance he has abandoned possession thereof.

4.13 The source of the exclusion lies in the common law, which held that land was not capable of being stolen; anything which “savoured of the realty” was also excluded.<sup>8</sup> This exclusion is of particular relevance in the context of heritage protection, since much of the threat to cultural property stems from looting of objects from historic sites and from land. It is important to ensure that our law of larceny does not present any obstacles to reliance on the Convention in the particular case of objects yielded in this way.

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<sup>6</sup> The Convention text itself does not specify the person to whom the object is to be returned, but Unidroit in its Explanatory Memorandum observes that it will be “for the court to determine to whom the object is to be returned in accordance with the applicable rules of law”: *Acts and Proceedings of the Diplomatic Conference*, p.27, para. 43.

<sup>7</sup> *People (Attorney General) v. Grey* [1944] IR 331 at 334-5.

<sup>8</sup> In the United Kingdom, the *Theft Act 1968* dispensed with the requirement of taking and carrying away so that the technical obstacle to land being capable of being stolen has disappeared. The drafters chose, however, to limit the circumstances in which this could occur: see section 4(2) of the Act.



#### 4. *Larceny of objects from land*

4.14 The precise distinction between objects which fall within the proviso to section 1(3) and those which, despite their association with the realty do not so fall, has not been made clear by the courts. In the case of *Billing v. Pill*,<sup>9</sup> which involved the taking of a hut which was attached to a concrete base, it was argued by the prosecution that the hut did not attach to or form part of the realty, being a temporary structure which could easily be removed. Lord Goddard CJ interpreted the proviso as meaning "attached so as to form part of", which requires a greater degree of annexation, perhaps, than was intended in the Act. He referred to a test laid down by du Parcq LJ:

"If the object and purpose was for the permanent and substantial improvement of the land or building, the article will be deemed to be a fixture, but if it was attached to the premises merely for a temporary purpose or for the more complete enjoyment and use of it as a chattel, then it will not lose its chattel character and it does not become part of the realty."<sup>10</sup>

4.15 The decision has been criticised<sup>11</sup> on the basis that the purpose of the section was to exclude both objects attached to *and* objects forming part of the realty from the scope of the crime of larceny. Even on this interpretation, however, it is doubtful whether objects such as archaeological objects which have become embedded in the soil can be said to attach to or form part of the land, within the meaning intended by the drafters of the Act. The uncertainty surrounding this issue is illustrated by the observation that

"The following acts, which would not (*or may not*) have been larceny ... [prior to the *Theft Act 1968*] are theft under the new [Act]: D enters upon land in the possession of P and ... (i) removes a stone statue fixed in the land; ... (v) takes away P's farm gate".<sup>12</sup> (emphasis supplied)

4.16 As legislation similar to the *Theft Act, 1968* has not been enacted in Ireland, this uncertainty continues to be a feature of Irish law.

4.17 The House of Lords addressed the question of annexation to land in the recent case of *Elitestone Ltd. v. Morris*.<sup>13</sup> The plaintiffs, freehold owners of a piece of land in 27 lots, wished to redevelop the land and brought proceedings for possession against the occupiers of the 27 lots. The defendants occupied a chalet on one of the lots as their residence under an annual licence, for which they paid a fee. They resisted the proceedings on the basis that they were tenants from year to year and so were protected by the *Rent Act 1977*. The plaintiffs contended, on the other hand, that the bungalow was not a fixture but a chattel

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9 [1954] 1 QB 70.

10 *Laws of England*, Hailsham ed., vol. 20, para. 107.

11 Smith, JC, *The Law of Theft* (5th ed., Butterworths, 1984), para. 93.

12 *Ibid.*, para 90.

13 [1997] 2 All ER 513.

and that the demised premises consisted only of the site, so that the defendants could not claim the protection of the Rent Act. Lord Lloyd, in finding for the defendants, said that

"If a structure can only be enjoyed *in situ*, and is such that it cannot be removed in whole or in sections to another site, there is at least a strong inference that the purpose of placing the structure on the original site was that it should form part of the realty at that site, and therefore cease to be a chattel".<sup>14</sup>

4.18 The intention with which the object was placed in or on the land is, therefore, central to the question of whether the object has become part of the realty. The example given in the case of *Holland v. Hodgson* and cited by Lord Lloyd involved blocks of stone placed on top of each other to make a dry stone wall; these would become part of the land, whereas the same stones in a builder's yard stacked on top of each other for convenience would not lose their chattel character. The absence of any instrument of attachment was not dispositive, gravity being as effective a means of attachment as clamps or cement. Lord Lloyd pointed out that the tests commonly employed in this regard, including that which has regard to the degree and purpose of annexation, are useful when considering objects such as tapestries affixed to the walls of a home, as in the case of *Ward v. Taylor*,<sup>15</sup> but are less so in the case of a house, where "the answer is as much a matter of common sense as precise analysis".<sup>16</sup>

4.19 It was emphasised that intention must be assessed objectively, Lord Clyde remarking that use of that term is somewhat misleading as it is the purpose actually served by the object in its existing location which is used to infer such intention.

4.20 Applying the findings in *Elitestone* to the question under review, it would seem that objects which have been buried in the land for safe keeping or which have been abandoned and have become embedded over time in the soil do not form part of the realty. The intention apparent from the circumstances existing at the time of the find will not, in such cases, indicate a wish for the objects to become permanently affixed in the land, nor will they in fact have become so affixed. One test which is frequently applied, that of whether the purpose of placing the object in its location was for the better enjoyment of the object as a chattel or to effect a permanent improvement of the freehold, is not strictly speaking applicable to the situations at issue. It is clear, however, that objects deliberately buried in the land or which have become buried over time were not so buried for the purpose of permanently improving the freehold.

4.21 The test is, however, relevant in the context of objects which are set in the land for decorative or ritual purposes. We are familiar in this jurisdiction with

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14 *Elitestone Ltd. v. Morris* [1997] 2 All ER 513 at 522.

15 [1901] 1 Ch. 523.

16 *Elitestone Ltd v. Morris* [1997] 2 All ER 513 at 519.

the removal of celtic crosses. It is arguable that these crosses are attached to or form part of the realty, so that those who engage in their removal cannot be convicted of larceny unless, having disconnected the object, they temporarily abandon possession thereof. In that event, the object is deemed to revert to the possession of the person entitled thereto and only if the would-be thief then retrieves the disjointed cross may he or she be deemed to be removing the object afresh from the owner.<sup>17</sup> This question is also relevant where objects are buried in the land.

4.22 It is true to say that a celtic cross is "annexed" to the land in a way which an object which has, over time, simply become embedded in the soil is not. Such an object has a purpose in its location, whereas the objects referred to above are deprived of their purpose by virtue of being hidden in the soil. The difficulty in removing a cross from the ground also suggests a degree of annexation not present in the case of buried objects. It remains difficult to establish, however, whether such a cross effects a more convenient use of the land - for example, land around such crosses may have religious significance to which the object contributes - or of the cross itself. As the law currently stands, it is impossible to anticipate whether the taking of such a cross without the consent of the owner would be treated as larceny, the issue not having been considered by an Irish court. In the event that a charge of larceny were brought, there does not appear to us to be any valid basis for treating differently the person who removed the cross from land and the person who took it from a museum.

4.23 Should this issue arise, the judiciary is likely to take a pragmatic view and regard objects retrieved from under the land as capable of being stolen. Thus, we are of the view that the existing restriction on the larcenability of land is unlikely to extend to such objects and, therefore, does not present an obstacle to the application of the Convention. However, given the threat posed by clandestine excavation, it is imperative that the products of such excavations are brought clearly within the sphere of both domestic larceny law and of the Convention. We consider it advisable, therefore, to remove the restriction.

4.24 In our *Report on the Law Relating to Dishonesty*,<sup>18</sup> we recommended introduction of legislation similar to section 4(2) of the Theft Act 1968, excluding the provision in section 4(2)(a) relating to trustees. The section provides that

"A person cannot steal land, or things forming part of land and severed from it by him or by his directions, except in the following cases, that is to say-

(b) when he is not in possession of the land and appropriates anything forming part of the land by severing it or causing it to be severed, or after it has been severed; or

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17 See *R. v. Foley*, 26 L.R.Ir. 299.

18 LRC 43-1992, para. 20.18.

(c) when, being in possession of the land under a tenancy, he appropriates the whole or part of any fixture or structure let to be used with the land."

*We now reiterate that recommendation.*

## **B. Unlawful excavation and unlawful retention**

### **1. *The rationale behind Article 3(2)***

4.25 In addition to objects which are stolen under the domestic law, the Convention provides that certain objects procured in ways which may not constitute theft *per se* may also be included within the remit of Chapter II. Article 3(2) of the Convention states that

For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen *when consistent with the law of the State where the excavation took place.* [emphasis supplied]

4.26 This provision was supported by those countries in which clandestine excavation is the principal way in which objects are lost. Their concern was that archaeological objects located under the ground were particularly vulnerable to clandestine excavation and, therefore, required special protection.

4.27 There was considerable opposition to the provision, however, on a number of grounds. Firstly, it was argued that the aim of the Convention was to assist in the return of objects, and not to fill gaps in the internal laws of Contracting States. If a State's law treated an unlawful excavation as theft, then Chapter II of the Convention would apply. Otherwise, Chapter III would apply provided that the State had laws prohibiting the export of objects from such excavations. Article 3(2) was superfluous in either case.<sup>19</sup> Observers from the International Bar Association pointed out that the majority of those supporting the provision represented States in which cultural objects located in the ground were State property and therefore fell automatically within the scope of Article 3(1).<sup>20</sup> UNESCO observers considered that the difficulty in recovering clandestinely excavated objects was not so much that of proving ownership, but rather that of proving from which country the objects came and when.<sup>21</sup> If these facts can be proved, then clandestinely excavated objects can be retrieved either under Chapter II or Chapter III.

4.28 On the other hand, those countries which supported the provision tended to be those in which illegal excavation is a particularly serious problem; according

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19 Mr Renold (Switzerland), *Acts and Proceedings of the Diplomatic Conference*, p.170.

20 *Ibid.*, p.281.

21 *Acts and Proceedings of the Diplomatic Conference*, p.94.

to the Peruvian delegation, for example, more than 90 per cent of the country's archaeological objects are located underground, making it a regular target of clandestine excavation.

4.29 It appears that States supporting the inclusion of Article 3(2) may have been under a misapprehension as to its effect. Whatever about its potential impact in its original form, the addition of the proviso regarding consistency with national law makes the provision somewhat otiose. The effect of the proviso is to require either the existence, or necessitate the enactment in domestic law, of special provisions equating certain activities with theft for the purposes of the Convention. In its original form, certain objects were to be considered stolen for the purposes of the Convention regardless of whether domestic law so provided.

4.30 The provision may, however, prove beneficial in some respects. Because it represents a departure from the assumption underpinning Article 3(1) that theft has a similar meaning in all jurisdictions, it permits States which do not equate unlawful excavation or lawful excavation and unlawful retention with theft to introduce provisions to that effect. States which do not so equate will then be required to treat as stolen an object procured in this way when a request is made for its return to the jurisdiction which has enacted such provisions.

## **2. *Article 3(2) and Irish law***

4.31 Under Irish National Monuments legislation, excavation or retention of archaeological objects is unlawful in a broad range of circumstances. The Acts prohibit excavation of archaeological material save in accordance with the Acts, and require reporting of new finds as well as of material retained from finds which occurred prior to the *National Monuments Act, 1994*. In addition, outright ownership is conferred on the State of material found in the land after a certain date, so that the avoidance of a charge of larceny on the basis of abandonment of the objects by their original owners is no longer open to a finder.

4.32 The combined effect of National Monuments legislation, the law of trespass and our larceny laws is to make it possible to establish a case of larceny where archaeological objects are unlawfully excavated and unlawfully retained. We conclude below that existing provisions in Irish law obviate the need to enact further legislation dealing specifically with excavated material.

### **(a) *Definition of archaeological object***

4.33 When considering whether there is a need to provide further protection in Irish law specifically for objects retrieved from land, it is necessary to consider whether "archaeological objects" as defined in Irish law is sufficiently extensive to include all types of cultural material likely to be borne up by excavations.

An archaeological object is

"any chattel, whether in a manufactured or partly manufactured or an unmanufactured state which by reason of the archaeological interest attaching thereto or of its association with any Irish historical event or person has a value substantially greater than its intrinsic (including artistic) value, and the said expression includes ancient human, animal or plant remains."<sup>22</sup>

4.34 As we have seen, "cultural objects" are those which "on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science" and belong to a list of objects set out in the Annex to the Convention. The Annex includes "property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance", "products of archaeological excavations (including regular and clandestine) or of archaeological discoveries", and "elements of artistic or historical monuments or archaeological sites which have been dismembered".

4.35 In practice, "cultural objects" which are lost specifically through excavation and which are sufficiently important to warrant an international claim for return, are likely to constitute "archaeological objects" under Irish law. In the specific context of excavation, therefore, Irish law mirrors the Convention sufficiently to obviate the need to provide additional protection for those cultural objects which are not "archaeological objects".

4.36 It is important to note, however, that despite a statutory definition of archaeological material, the scope of the term has not yet been delineated by the courts. Disputes have arisen on numerous occasions as to whether particular objects which have been retained by their finders constitute archaeological objects. Comprehensive treatment of this issue by the judiciary is necessary in order to clarify the types of object in respect of which rights have been statutorily modified. If Ireland accedes to the Convention, this discussion is made more urgent, as it directly impacts on the applicability of the Convention. The more widely the definition is interpreted, the greater is the extent to which the Convention may be relied on.

**(b) *Unlawful excavation***

4.37 An excavation may be unlawful under the National Monuments Acts or at common law. The *National Monuments Act, 1930* (the "1930 Act") makes it unlawful to "excavate, dig, plough or otherwise disturb the ground within, around or in proximity to any ... national monument [as defined in the Act as amended by section 16 of the 1994 Act] without or otherwise than in accordance with the consent" of the Commissioner for Public Works and, in certain circumstances, the relevant local authority. The *National Monuments Act, 1987* (the "1987 Act")

prohibits the use of detection devices<sup>23</sup> in certain designated areas.<sup>24</sup> There is also a blanket prohibition on the use of such devices for the purpose of searching for archaeological objects. Thus, if one uses such a device in a non-designated area with the purpose of finding an archaeological object, or so uses in a designated area for a licit purpose, the excavation is unlawful in both instances for breaching the provisions of section 2(1) of the 1987 Act. Significantly, section 2(6) places the burden of proving that the use of a detection device was not for an illicit purpose on the defendant; given that metal detectors are used almost exclusively<sup>25</sup> to search for treasure, it is likely to prove difficult to establish that such a motive was not in fact present in a particular case.<sup>26</sup>

4.38 A person who excavates, in a non-designated area, whether or not for the purpose of searching for archaeological objects, using tools such as shovels or mechanical diggers and who finds such an object, commits an offence under section 19 of the *National Monuments Act, 1994* (the "1994 Act") if he or she removes or otherwise interferes with it, "unless he [or she] has reasonable cause to believe that it is necessary to remove it so as to preserve it or keep it safe."<sup>27</sup> The excavation *per se* is not unlawful under the section; it is the removal of the object, rather than the initial act of digging, which is punishable.<sup>28</sup> Such a person would, however, fall foul of the reporting provisions in the 1994 Act should he or she fail to report a subsequent find within the requisite time as provided in section 19 of that Act. The offence can in these circumstances properly be described as an "unlawful retention" and falls within the remit of Article 3(2) of the Convention. Unlawful retention is dealt with below.

4.39 In addition to the provisions of the National Monuments Acts, unlawful excavation may occur at common law. An excavation which occurs on the land of another without the owner's consent is unlawful by reason of trespass. If the purpose for which a detection device is used in these circumstances is one other than that of searching for archaeological objects,<sup>29</sup> or the area is not one which is designated under section 2(1) of the 1987 Act, the excavation is not unlawful either under the 1987 Act or at common law. The subsequent behaviour of the finder may, however, amount to unlawful retention.

4.40 While unlawful excavation is punishable in Irish law, it is doubtful whether this in itself is sufficient to allow objects procured on foot of an unlawful excavation to be "considered stolen" in accordance with Article 3(2). The

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23 "Detection device" is defined in section 2(8) of the National Monuments Act, 1987 as a device "designed or adapted for detecting or locating any metal or mineral on or in the ground, on, in or under the sea bed or on or in land covered by water, but does not include a camera".

24 *National Monuments Act, 1987*, section 2(1).

25 The exception, according to the National Museum, is construction companies and local authorities, who use them to locate buried cable and piping.

26 Section 5 of the 1994 Act provides for the forfeiture of such devices in certain circumstances.

27 Section 19 of the 1994 Act, substituting section 23(1) of the 1930 Act.

28 It is submitted that the proscription in section 14 of the 1930 Act on digging etc. in the vicinity of a national monument should be extended to prohibit a person from continuing to dig on any land where he or she has reasonable grounds to believe that an archaeological object is in the soil.

29 Some experts are of the view that the 1987 Act should be amended to prohibit the use of detection devices except under licence.

question is whether it would be advisable to introduce a legislative provision which would permit this for the purposes of the Convention. We are of the view that it should not be possible to treat as stolen the products of an unlawful excavation *per se*. While an excavation in circumstances which are prohibited by the National Monuments Acts may provide compelling evidence of *mens rea*, it does not, in itself, demonstrate any of the elements of the *actus reus* for larceny. Only when some further action is taken in respect of the objects yielded by the excavation is the *actus reus* completed.

(c) *Unlawful retention*

4.41 As we have seen, there are a limited number of situations in which an excavation may be lawful; where this is so, the actor may nonetheless fall foul of the 1994 Act if he or she retains material which constitutes an "archaeological object" and fails to declare it to the State within the requisite time.<sup>30</sup> It is consistent with the National Monuments Acts, therefore, to regard objects which have not been reported as "unlawfully retained".

4.42 Section 2 of the 1994 Act confers on the State ownership of all archaeological objects found within the State which have no known owner, thereby creating a category of objects which are, for the first time, clearly larcenable. Prior to the 1994 Act, such objects arguably would have been beyond the remit of the 1916 Act because they had no "owner".<sup>31</sup>

4.43 "Taking" under the 1916 Act includes the taking of possession by finding, where the taker believes that an owner can be found by taking reasonable steps.<sup>32</sup> This covers situations in which an object is either lying on the land or where an item is found concealed in the soil; as we shall see, the outcome of claims to ownership may differ depending on where the object is found.

4.44 Since the 1994 Act, one who fails to report a finding of such an object fulfils that part of the *actus reus* of the crime of larceny which requires the taking and carrying away of something capable of being stolen.<sup>33</sup> If the taker is also the owner of the land, however, the issue arises whether that person can properly be said to have stolen something found on his or her own land. If the 1994 Act has successfully vested ownership in the State of such objects, retention of such objects by the landowner would constitute taking without consent of the owner and therefore satisfy the second limb of the *actus reus*. Ownership rights as between landowners and the State are considered below.

4.45 Section 1 of the 1916 Act makes clear that whether or not the case is

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30 Section 4, 1994 Act.

31 In *Webb v. Ireland*, the defendants submitted before the Supreme Court that the plaintiffs may have committed larceny. This was not pleaded however; Finlay CJ found that such a claim was not "substantiated or proved by any evidence in the action" and rejected such an allegation "unreservedly": [1988] IR 353 at 377.

32 Section 1(2)(f)(d) of the 1916 Act.

33 1916 Act, section 1(1).



one of larceny by finding, the intent permanently to deprive the owner at the time of the taking must be present in all cases. For the purposes of the Convention, however, the mere retention of the object, regardless of intent, together with the existence of an owner whose consent was not given to the taking, are the only relevant factors in deciding whether they constitute stolen objects.

### C. Ownership as between landowners, finders and the State

4.46 The extent to which landowners "own" objects on or in their land is central to the question of whether such objects are capable of being stolen. If the correct interpretation of the 1994 Act is that a landowner *prima facie* has no rights as against the State in any archaeological objects found in or on his land, his retention of them in the absence of a waiver by the State of its rights may constitute larceny. In the case of objects found in land which do not constitute archaeological objects, the question arises whether a landowner may assert ownership of such objects as against the finder, or whether they constitute abandoned - and therefore ownerless - objects, in respect of which a finder may legitimately assume ownership. In the event that the finder does not have a valid claim to the objects and subsequently exports them, it may be that such objects would constitute stolen objects and thus be retrieved under Chapter II of the Convention.

#### 1. *Ownership at Common Law*

4.47 Ownership of objects under the surface of the land was addressed in the case of *Elwes v. Brigg*,<sup>34</sup> where a boat, the existence of which was unknown to the lessor, was nevertheless found to belong to him. Chitty J held that the common law principle that a landowner owned everything above and below the surface of the ground was an

"absolute rule of law, not depending on intention; for instance, if a man digs in the land of another, and permanently fixes in the soil stones or bricks, or the like, as the foundation of a house, the stones or bricks become the property of the owner of the soil, whatever may have been the intention of the person who so placed them there, and even against his declared intention that they should remain his property. Nor does it appear to me to be material that the things should have been placed there by the hand of man; it would seem to be sufficient if they have become permanently fixed in the soil by the operation of natural causes".<sup>35</sup>

4.48 The principle of absolute ownership is qualified, however, by the Constitution, by judicial decision and by statute: the *Air Navigation and Transport*

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34 [1886] 33 Ch 562.  
35 *Ibid.* at 567.

*Act, 1936*, for example, provides that no action in nuisance or trespass shall lie where aircraft fly over property at a height which is reasonable in light of wind, weather and other circumstances; Article 10 of the Constitution vests in the State "all natural resources, including the air and all forms of potential energy".

4.49 One test for ownership, as between owners or occupiers of land and finders, and one which was quoted by Finlay CJ in *Webb*, was that "legal possession rests on a real *de facto* possession constituted by the occupier's general power and intent to exclude unauthorised interference".<sup>36</sup> Finlay CJ went on to distinguish, with regard to the question of the level of control required to be manifested, objects found on and those attached to or under the land:

"The extent to which, where objects are attached to or under the land, an absence of control may deprive the owner against a finder is probably limited to cases such as *Hannah v. Peel* [1945] KB 509, where the owner of a house had never entered into possession of it though title had devolved upon him."<sup>37</sup>

4.50 Such intention may be express or implied from the circumstances. The fact that only a minimum degree of control is necessary to satisfy this test means that in practice it does not present a significant obstacle to a landowner's claim to ownership as against a finder. Moreover, those who find objects on foot of a trespass should not, according to Finlay CJ, "acquire any rights of ownership to the land or things found in it" as a matter of public policy. As between landowners and finders, therefore, an act of trespass on the finder's part will defeat his or her claim to ownership as against the landowner, regardless of the extent of the trespass.<sup>38</sup>

4.51 Where a finder has the landowner's consent to enter on and dig on the land and the landowner waives his right in any objects found, the finder steps into the landowner's shoes and assumes rights co-extensive with those of the landowner. In this case, the finder would be treated as the landowner for the purposes of evaluating his rights in the objects as against any other person. If the landowner does not waive his or her rights, however, the issue of abandonment may become relevant.

4.52 A landowner's rights in private property were also qualified at common law by the royal prerogative in treasure trove. This right applied only to valuable chattels, made substantially of gold or silver, which had been concealed for the purpose of protecting them and with the intention of retrieving them. In the leading case on the issue of intent to recover, *Attorney General v. Trustees of the British Museum*,<sup>39</sup> detailed archaeological evidence was adduced to establish

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36 Pollock and Wright, *Possession in the Common Law*, p.41; *Webb v. Ireland* [1988] IR 353 at 378.

37 *Webb v. Ireland* [1988] IR 353 at 378.

38 *Ibid.*, per Finlay CJ at 379.

39 [1903] 2 Ch 598.

whether the objects constituted an offering to a god - in which case there would have been no intention to retrieve - or had been hidden, in which case they constituted treasure trove. The court found that once it was established that the objects found buried were of gold or silver, there was a presumption that they were treasure trove, and it was for the party denying this to rebut the presumption.

4.53 Where the presumption was rebutted by evidence that the objects had been abandoned by their original owners, they were deemed to be the property of the finder. It was, therefore, the hiding which entitled the Crown to the treasure. In *Webb*, Walsh J distinguished between objects which were lost and those which were secreted in the land for safe keeping, and held that the owner of the land on or in which objects which had been intentionally hidden are found could not claim to be the owner simply by virtue of being the owner of the land. To so hold would be to

"fail to vindicate the rights of property of the true owners of the chattels so placed and would permit the type of injustice which Article 40.3 of the Constitution is designed to prevent."<sup>40</sup>

4.54 The objects at issue in that case were found not to have been abandoned by their true owners. Significantly, Walsh J added that he was not "concerned to offer any view on what might be the situation if the chattels were truly lost or abandoned."

### ***Webb v. Ireland***

4.55 The status of the royal prerogative in treasure trove was considered at length by the Supreme Court in *Webb v. Ireland*,<sup>41</sup> as were a number of other complex questions of law and policy: the extent of ownership of archaeological objects as between individuals and the State, treatment of the trespassory finder, the right to compensation. While the Supreme Court explored these issues at length, its decision to allow the State to retain the hoard rested on the particular facts of the case, where the landowners had conveyed their interest to the State in return for an award.

4.56 The case involved the finding of the "Derrynaflan Hoard", which consisted of an ancient chalice and other religious artefacts, on the site of a national monument. The finders came upon the hoard using metal detectors and dug in the land without the landowners' consent. The hoard was delivered up to the National Museum, which promised the finders that they would be honourably treated. Having failed to negotiate an award acceptable to both parties, the finders instituted proceedings for the return of the hoard. Meanwhile the landowners accepted an award from the State and signed documents conveying

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40 [1988] IR 353 at 389-390.  
41 [1988] IR 353.

their interest in the objects to the State.

4.57 The High Court found that, following *Byrne v. Ireland*,<sup>42</sup> no royal prerogatives had survived enactment of the 1922 Constitution, so that the State's claim on this ground failed.<sup>43</sup> The Court went on to find for the plaintiffs on the basis that their surrender of the objects to the National Museum constituted a bailment and the State as bailee was estopped from denying the bailors' title. It was not a valid defence for the bailee to prove a title in himself to the goods, where the alleged title had arisen after the date of the bailment.<sup>44</sup> Blayney J found that the outcome might have been different if the State had been entitled to the hoard as treasure trove, in which case the State's right to it would have arisen at the moment when it was found. Its delivery to the Museum would then have constituted delivery to the party entitled to ownership and no bailment would have been created.<sup>45</sup> The absence of a prerogative to treasure trove defeated such a claim. Blayney J also commented that it was not necessary for him to consider "the difficult legal issue [of] the respective rights to the hoard of the plaintiffs as finders and [the landowners]" nor the effect of the conveyances by the landowners of their interests to the State.<sup>46</sup>

4.58 On appeal to the Supreme Court, the State asserted title to the goods as derived from the landowners. It was argued that firstly, landowners had title in any chattels found in their land against any finder in any circumstances and secondly, that the finders did not acquire title in the goods as they had been found by an act of trespass and/or in the course of the commission of an offence under section 14 of the 1930 Act.<sup>47</sup>

4.59 In respect of the first ground, Finlay CJ approved of the findings of Donaldson LJ in *Parker v. British Airways*<sup>48</sup> that "an occupier of land has rights superior to those of a finder over chattels in or attached to that land [and] the finder of a chattel acquires very limited rights over it if he takes it into his care and control in the course of trespassing".<sup>49</sup> The owners of the land on which the Derrynaflan Hoard was found had a right to possession superior to that of the finders; that title had become vested in the State under the conveyances executed by the parties. Finlay CJ added that while he was not required to offer any view on whether the plaintiffs lost any right to possession that they might have had but for the trespass, he was willing to do so given that the issue had been argued at length. He found that "the general principle of public policy seems clearly to be that [the trespassers] should not, because of that trespass, acquire any rights of ownership to the land or things found in it."<sup>50</sup> The law resisted acquisition of property rights by trespass, save in cases of prescription, on the basis that the

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42 [1972] IR 241.  
43 [1988] IR 353 at 362 (Blayney J).  
44 *Ibid.* at 364.  
45 *Ibid.* at 364-5.  
46 *Ibid.*, at 364.  
47 *Ibid.* at 379.  
48 [1982] 1 All ER 834.  
49 [1988] IR 353 at 378.  
50 *Ibid.*, at 379.

common good must be protected from unlawful invasions of that right.<sup>51</sup>

4.60 Finlay CJ was satisfied that the conveyances had been effective in transferring ownership in the hoard to the State; he went on to point out that the State's right was subject only to the claims of the "true owner" or his successor in title, the true owner being the person who owned and was entitled to possession of the objects *at the time they were concealed in the ground*.

4.61 The plaintiffs submitted that the State could not assert ownership on the basis of any prerogative in treasure trove, as this was not a part of the law of Ireland; in the alternative, they argued that they were entitled to a reward as finders of treasure trove and on the basis of a legitimate expectation arising out of the assurance that they would be honourably treated. The State argued that the prerogative in treasure trove was a royalty or franchise and as such had been vested in the Irish Free State by Article 2 of the Free State Constitution. That being so, it had become vested in the People under Article 49.1 of the 1937 Constitution. The alternative ground asserted by the State was that the prerogative, as part of a general right of *bona vacantia*, was an inherent attribute of a sovereign State. Since the State is declared to be a sovereign State under Article 5 of the Constitution, it followed that it was entitled to the prerogative of treasure trove.

4.62 Finlay CJ agreed with the trial judge that no royal prerogative had survived enactment of the 1922 Constitution,<sup>52</sup> rejecting the argument that it was possible to distinguish between the prerogative of immunity from suit, on which the *Byrne* decision was based and which related to the royal dignity of the King, and that to treasure trove, which related to his position as sovereign or ruler.

4.63 Article 10.1 of the Constitution, which confers on the State ownership of "all royalties and franchises" subject to all estates and interests therein lawfully vested in any person or body, was construed by Finlay CJ as including antiquities of importance which had no known owner. It would now be generally accepted in most modern States that such objects were "one of the most important national assets belonging to the people" and that it would be inconsistent with the interests sought to be protected by the Constitution that such objects should become the exclusive property of those who happened upon them.<sup>53</sup> The State's rights in treasure trove could therefore be upheld as part of a larger bundle of

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51 While Finlay CJ was of the view that it was immaterial to the question of acquisition of rights of ownership that the trespass was only minimal, the extent of the trespass was relevant on the issue of whether a reward would be paid: 'I do not consider that the extent and the nature of the trespass in this case, having regard in particular to the subsequent conduct of the plaintiffs with regard to the hoard, could or should, as a matter of public policy, disentitle them to a reasonable reward': [1988] IR 353 at 385-6.

52 The Court's wisdom in so finding has been questioned; its "unrealistically literal interpretation" of *Byrne v. Ireland* in relation to the fate of prerogative powers has been criticised as leaving future courts "... with an unwelcome choice. They are forced to decide whether to reject a socially-useful right (as the High Court did in *Webb*) or to devise some ad hoc basis on which to rehabilitate a former prerogative. The outcome of such a choice is unlikely to afford a consistent, predictable legal framework": D Gwynn Morgan, *Constitutional Interpretation: Three Cautionary Tales* (1988) 10 DULJ 24 at 34. See also JM Kelly, *Hidden Treasure and the Constitution* (1988) 10 DULJ 5.

53 [1988] IR 353 at 383.

rights incident upon State sovereignty.

4.64 The views of the majority as expressed by the Chief Justice do not go so far as to establish that this right in treasure trove may, as a result of the Court's interpretation of Articles 5 and 10, now be applied outward to all objects of archaeological significance. It is submitted that even if the Chief Justice had purported to extend such a right, this would have constituted *obiter dicta*, not being relevant on the facts of the case. Indeed it is unclear whether the objects at issue were in fact treasure trove, this not being the basis on which ownership was found to vest in the State nor applied to the question of entitlement to a reward.<sup>54</sup> Thus, while the right to treasure trove was asserted by the State and while the Chief Justice found that such a right - albeit having a different basis to that argued by the State - did exist, this was not material to the outcome nor was any view given as to whether these particular objects so constituted. He did comment that nothing in his judgment relating to the right of the State to treasure trove should be interpreted as precluding the enlargement of such right by legislation.<sup>55</sup> It would appear beyond dispute, therefore, that pending such legislation and despite the reference to a broad Constitutional basis for State ownership, such claims by the State remained, following the judgment, dependent upon the enactment of appropriate legislation.

4.65 By contrast, Walsh J, who dissented on a number of points, was of the opinion that while the Court could not indicate to the Oireachtas how rights over such objects should be *exercised*, it was, nevertheless, the duty of the Court to state that "pending any such legislation the State is entitled to possession of all such objects unless and until the true successors in title of those who hid them for safe keeping can be ascertained".<sup>56</sup> This view of legislation as being required to regulate the *exercise* of a right already in existence rather than to bring it into existence differs markedly from that of Finlay CJ. By urging the Oireachtas to enact legislation which would dispense with distinctions between treasure trove and other objects and between those which had been abandoned and those which were concealed for safe keeping, the Chief Justice appears to have been of the view that abolishing such distinctions would constitute the coming into being of new rights, the creation of which required legislation.

4.66 It would appear, then, that the interpretation of the Constitution given by the majority in this case was merely aspirational and was intended as a guide for future legislative action. The *dicta* of Finlay CJ and Walsh J have been cited with approval in subsequent cases,<sup>57</sup> but a case has yet to arise in which the precise ambit of the decision is considered in detail. A narrow interpretation of its scope leads one to the view that it merely places the prerogative in treasure trove on a Constitutional base, but does not, without more, extend the range of

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54 It was emphasised that it was unnecessary, in deciding the issue of entitlement to a reward, to look any further than the assurances that the plaintiffs would be honourably treated: per Finlay CJ at 385.

55 *Ibid.*, at 386.

56 *Ibid.*, at 393.

57 See, for example, *In the Matter of the Sailing Vessels "La Lavia", "Julliana" and "Santa Maria de la Vision"*, High Court, July 26, 1994, pp.102-3 (Barr J).

objects to which the right attaches. The alternative view, that it is declaratory of a Constitutional right in the State to all objects of archaeological interest found in the State whose original owner or that person's successor in title can not be found, is not supported by the particular circumstances in which that interpretation was given, nor does it appear to have been the view of those later involved in drafting the 1994 legislation.

4.67 We are of the view that State ownership of archaeological material is an acceptable intrusion into the rights of individuals both as a matter of principle and under the terms of the Constitution;<sup>58</sup> however, we believe that the *Webb* decision admits only of a narrow interpretation. Any intrusion which goes beyond the narrow range of treasure trove objects covered by the common law<sup>59</sup> must be based in either a legislative provision or a conclusive judicial interpretation of the Constitution. The question then arises whether the Oireachtas, in purporting to implement the Supreme Court's views, successfully vested ownership in the State of archaeological objects as against all but the original owners or their successors in title; if so, those common law rules on which a landowner might formerly have relied have been rendered inapplicable.

## 2. *Implementation of the Webb decision - the National Monuments Act, 1994*

4.68 Section 2 of the *National Monuments Act, 1994* vests in the State ownership of all archaeological objects found in the State after the coming into effect of the Act which have *no known owner*, owner being defined as "the person for the time being having such estate or interest in the archaeological object as entitles him to actual possession thereof".<sup>60</sup>

4.69 Section 9 obliges the Director of the National Museum, to whom the finding has been reported, to take possession of the object; he may then retain it on behalf of the State. The section does not apply where the Director is satisfied that the object is not of sufficient archaeological or historical interest to justify its retention.<sup>61</sup> If the object is retained, the Director *may*, after consultation with the Minister for Arts, Culture and the Gaeltacht and the Minister for Finance and with their consent, pay a reward to each or any of the following: the finder, the owner or the occupier of the land on or under which the object was found.<sup>62</sup>

4.70 Objects found after the coming into effect of the 1930 Act and before the 1994 Act are subject to less far-reaching claims by the State; there is a duty

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58 Article 43.2 permits the State to delimit the exercise of such rights 'with a view to reconciling their exercise with the exigencies of the common good'.

59 '[T]here does exist in the State a right or prerogative of treasure trove, the characteristics of which are the characteristics of the prerogative of treasure trove at common law ... [which] included the practice or rewarding a diligent and honest finder who revealed his find...'; [1988] IR 353 at 383-4, per Finlay CJ (emphasis supplied).

60 1994 Act, section 4(2).

61 *National Monuments Act, 1994*, section 9(2).

62 1994 Act, section 10(1).

to report them, and penalties for failing to do so, but the State makes no claim to ownership of them under the Act. The penalties do not include forfeiture, which may have been omitted because it was thought to be overly disruptive of long standing possession and would constitute retroactive application of the legislation. In the case of objects found after commencement of the 1994 Act, forfeiture provisions are also omitted, presumably because they were thought to be unnecessary given that the objects are deemed under the Act to be the property of the State. In the event, however, that a landowner in a future case is successful in challenging the 1994 Act and asserts title superior to that of the State, compulsory purchase provisions together with an entitlement to compensation (as distinct from a reward) would represent an alternative means of achieving State ownership.

4.71 It is significant that "owner" in the Act is defined in terms of a right to possession. If we understand possession as an intention to control together with *de facto* control, a landowner may constitute a "known owner", thereby defeating the purpose of the Act and leaving in place the common law on this point. The clear intention of the legislature in enacting the 1994 Act was to

"give statutory expression to the central call of the Supreme Court to legislate for the ownership of treasure trove to take greater cognisance of the State's continuing obligation to protect and preserve the heritage of the people, as represented by all antiquities of importance and not just treasure trove, and to take on board the court's suggestions, in the interest of common justice, to expressly provide for the payment of a reward to persons reporting the finding of such objects."<sup>63</sup>

4.72 Common law rules as to ownership of objects found in land also continue to be relevant in resolving disputes where found objects constitute "cultural objects" but not "archaeological objects", as these are beyond the remit of the 1994 Act.<sup>64</sup> Questions of ownership may arise in such cases between landowners and finders.

### 3. *Ownership as between landowners and the State: the impact of the National Monuments Act, 1994*

4.73 In view of the form of words used in section 2 of the 1994 Act, there is some confusion as to whether the Act has succeeded in vesting outright ownership in the State against all but the original owner, or whether the State's right continues to be exercisable only within pre-existing common law limits. On one interpretation, the 1994 Act merely extends the existing right of the State in treasure trove to all archaeological objects, as defined in the Act; on another it confers a new right on the State to which common law limits do not apply. The

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63 Minister for Arts, Culture and the Gaeltacht, Mr M Higgins, *Dail Debates*, 24 March 1994, Vol 440, Col 1337.  
64 It has already been pointed out that the likelihood that cultural objects recovered from underneath the land would not also constitute archaeological objects is remote.



fact that the issue of a landowner's ownership rights in chattels found in or on his land was not expressly addressed in the Act would appear to leave the way open for a claim by a landowner that in the absence of a clearly worded statutory provision to the contrary, he or she, and not the State, is the owner of such objects provided that he or she satisfies the common law criteria for ownership.

4.74 The distinction at common law between objects which have been hidden for safe-keeping and those which have been abandoned by their owners would, if this were accepted, still apply. This would necessitate the adducing of archaeological evidence to establish the circumstances in which the objects came to be in their present location. Whether the objects are made substantially of gold or silver may continue to be of relevance where the objects in question were found prior to the 1994 Act. Despite the commonly held view that confining treasure trove to objects of gold and silver is anachronistic in an age where the historical and archaeological, rather than the intrinsic value is of significance, the Supreme Court in *Webb* did not so redefine but urged the Oireachtas<sup>65</sup> to do so.<sup>66</sup> Kelly comments that the Court could legitimately have done so, given that "judicial law-shaping no less bold is no rarity" in Ireland.<sup>67</sup>

4.75 There is a presumption, when interpreting statutes, against unclear changes in the law, the effect of which is that a change must be achieved unambiguously, either expressly or by clear implication. Where there is an ambiguity, the courts must lean against an interpretation which finds that the provision at issue changes the law.<sup>68</sup> Given that the definition of "owner" in the 1994 Act is framed in terms of a right to possession, the common law criteria as to ownership are not expressly overridden. It would appear, therefore, that a *lacuna* exists in the 1994 Act.<sup>69</sup>

4.76 Thus, while the Constitution permits the State to limit property rights "with a view to reconciling their exercise with the exigencies of the common good" in Article 43.2.2, it is arguable that such limitation, whether or not it was intended to be permissible, was not achieved in the 1994 Act. The liberal definition of "owner" in the Act does not, it is submitted, make sufficiently clear that those who come into possession of such objects, simply by virtue of owning land on which such objects happen to be found, are not "owners" for the purposes of the Act.

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65 The 1994 Act redefines archaeological objects, omitting the exclusion of treasure trove which was contained in the definition of such objects in the 1930 Act.

66 See, for example, Kelly, JM *Hidden Treasure and the Constitution*, (1988) 10 DULJ 5.

67 *Ibid.*, p. 16.

68 Byrne, R and McCutcheon, P, *The Irish Legal System* (3rd ed., 1996), para. 14.56.

69 Lyall points out that "in the common law a better right to possession is ownership as against those with a lesser right": Lyall, A *Land Law in Ireland* (Oak Tree Press, 1996), pp.21-22, n.2..

#### 4. *Conclusion*

4.77 In the early part of this Chapter, we set out the elements of larceny which must be satisfied in order to invoke Chapter II. An object must, first of all, have an owner as defined in the *Larceny Act, 1916*; it must be something which the Act regards as capable of being stolen; and it must have been taken without the owner's consent. In the case of a typical theft, such absence of consent will generally be easy to prove as the theft will have been accompanied by a breaking and entering or similar indication that the taking was without consent.

4.78 In the specific case of excavations, we first had to establish that objects yielded by them were not excluded from the scope of larceny by virtue of their association with the land. Secondly, the fact that such excavations are unlikely to have been witnessed makes it difficult to determine the identity of the owner whose consent is required, and therefore whether or not consent was secured. Given that in Ireland the owner is the State, this difficulty is avoided.

4.79 Should a question arise as to whether the State does in fact own particular objects, resort may be had to the fact that such objects are usually the product of trespassory excavations so that some degree of illegality will attach to their excavation and retention; this would allow them to be dealt with as stolen regardless of the final determination of claims as between the landowner, the finder and the State.

4.80 The views expressed in the *Webb* case *vis à vis* State ownership of archaeological material represent a broadly accepted view that individual property rights in material of national importance may be intruded upon in certain instances in order to vindicate a "common good". There is no Constitutional obstacle in the way of the legislature in conferring a power on the State to so intrude, given the provisions of Article 43. The law as to the precise extent to which such intrusion may currently take place remains unclear because firstly, that part of the *Webb* decision dealing with this question is aspirational, and secondly, the legislation which sought to implement those aspirations may have been only partially effective in doing so.

4.81 *It is recommended that the lack of clarity as to the precise balance between State and private ownership, which exists as a result of the combined effect of the Webb decision and the 1994 Act, should be rectified. We recommend that a provision be enacted which states that a landowner on whose land archaeological objects are found does not constitute an "owner" for the purposes of the 1994 Act unless he is the original owner of the object or that person's successor in title.*

## CHAPTER 5: EXPORT RESTRICTIONS ON CULTURAL PROPERTY IN IRISH LAW

5.1 The operation and usefulness of Part III of the Convention depends upon export regulation in the domestic law of Contracting States. The Convention does not purport to direct States as to the classes of cultural object to which restrictions should apply. Rather, it allows States to invoke the return procedures provided in the Convention when domestic provisions protecting certain classes of object have been violated. Unlike Chapter II of the Convention, proceedings under Chapter III may be brought only by Contracting States.

### *The National Cultural Institutions Act, 1997*

5.2 Irish law has been significantly modified in this regard by the enactment of the *National Cultural Institutions Act, 1997* (the "1997 Act") which imposes export restrictions upon archaeological objects, cultural objects and certain kinds of paintings and documents. The Act significantly extends the regime which existed heretofore, enumerating for the first time in Irish law a class of objects which are "cultural objects". Section 49 of the Act provides that certain types of documents and paintings,<sup>1</sup> cultural objects entered on the register established under the Act,<sup>2</sup> archaeological objects<sup>3</sup> and objects specified in the Third Schedule<sup>4</sup> which are worth not less than £35,000 and are not less than 70 years old require a licence.

5.3 The precise scope of the export requirement will be laid down in secondary legislation, under the power conferred on the Minister to declare by order any object which is, in his or her opinion, either a document of natural, historical, genealogical or literary interest, or an archaeological object, to be an object to which the licence requirement applies.<sup>5</sup> Any cultural objects which belong to a class of cultural objects designated by the Minister may also be

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1 The *Documents and Pictures (Regulation of Export) Act, 1945* is repealed by section 6 of the 1997 Act.

2 Section 48 requires the Minister to "establish and maintain a register of cultural objects of a class or classes denoted in such manner (including by reference to monetary value) as may be determined by the Minister whose export from the State would constitute a serious loss to the heritage of Ireland".

3 Regulation of export of archaeological objects was formerly provided in section 24 of the *National Monuments Act, 1930* which is repealed by section 6 of the 1997 Act.

4 The list includes toys, games, furniture, glassware, musical instruments, tapestries, carpets and pottery.

5 Section 49(2) and (3). The Minister may also "declassify" objects, so that while they fall within the scope of the section they may be exempted from the licence requirement: section 49(4).

subjected to the licence requirement.<sup>6</sup> According to the *Department of Arts, Heritage, the Gaeltacht and the Islands* such orders will be made prior to commencement of these sections of the Act so that the range of objects in respect of which a licence must be procured will be ascertainable from the outset. Failure to secure a licence is punishable by a maximum of 2 years imprisonment and/or a fine of £50,000. The severity of these penalties indicates an acknowledgement of the seriousness of the offences, and is in sharp contrast to those provided in earlier legislation.<sup>7</sup>

#### 5.4 Cultural objects also comprise

"museum heritage objects, library material<sup>8</sup> and any other object or thing considered appropriate to be exhibited or kept by an institution specified in the *Second Schedule*.<sup>10</sup>

5.5 Museum heritage objects consist of objects in the collection of the National Museum of Ireland at a date appointed by the Minister ("establishment day"), any object (including archaeological objects, decorative art objects, objects relating to natural science, history, industry or folklife) over 25 years old and considered appropriate for inclusion in the National Museum's collection relating to Irish life, history and international relations, and any "other similar object".<sup>10</sup> Procedures for consultation with the appropriate cultural institutions will be specified in secondary legislation.

5.6 The range of objects now requiring an export licence in Irish law is in some respects more extensive than those defined as "cultural objects" in the Convention, for example the Convention definition includes furniture over 100 years old, while the Act requires a minimum age of only 70 years; on the other hand the Convention applies no age limit to "artistic material" while the Act requires licences only for those paintings which are over 25 years above a value to be decided by the Minister. The objects most likely to become the subject of a claim for return may be divided into two groups - those of national importance

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6 Section 49(1)(g).  
7 The *Documents and Pictures (Regulation of Export) Act, 1945* made it unlawful to export certain objects without a licence, but did not provide any penalties for breach, while the *National Monuments Act, 1930* provided a maximum fine of £50 and/or 6 months imprisonment for breach of its provisions requiring export licences for archaeological objects.  
8 Library material is defined in section 2 of the Act as (a) any material in the collection of the National Library of Ireland on establishment day, (b) any manuscript, book (within the meaning of section 56(6) of the *Copyright Act, 1963*), or material (defined in section 65 of the 1997 Act as including any engraving, photograph, play script, record etc.) concerning human life in Ireland, the natural history of Ireland and of the relations of Ireland with other countries, considered appropriate for inclusion in the National Library's collection, (c) any library material passed from the care of the Ulster Office-in-Arms to that of the Genealogical Office on April 1, 1943, and (d) any similar material.  
9 The institutions designated in the *Second Schedule* are: the Chester Beatty Library, Crawford Library, Hugh Lane Municipal Gallery, Irish Museum of Modern Art, National Museum of Ireland, National Library of Ireland, National Gallery of Ireland, Hunt Museum, Limerick and the Royal Irish Academy. Institutions which satisfy the criteria laid down in section 45(2) of the Act may be designated as cultural institutions by order of the Minister; among the criteria are that one of its principal functions is the preservation of cultural objects for the benefit of the public, it is owned or funded wholly or substantially by the State or by a public or local authority and maintains and controls a collection of national or international significance.  
10 *National Cultural Institutions Act, 1997*, section 2.

for archaeology and history, or those antiquities which are of significant monetary value on the international art market. The former are likely to qualify as "archaeological objects" for which an export licence is required regardless of age or monetary value. Export of antiquities, on the other hand, which would include, for example, objects of furniture and silverware procured through thefts from public or private collections, may not be satisfactorily regulated. While they are included within the list of decorative art objects in the Third Schedule provided they are not less than 70 years old and worth not less than £35,000, section 49(1)(f) also requires that such objects are "made in Ireland". Given our colonial history it is likely that many such objects were in fact imported into the country by wealthy landowners in the centuries prior to independence. It may have been more logical to include an alternative provision to the effect that objects which have been in the country for a given period of time would also qualify. It is somewhat curious that this alternative has been omitted in the case of decorative art objects but included in the case of paintings.

5.7 If an object fails to meet the criteria laid down in section 49(1)(f) it may, nevertheless, constitute an object "similar to" those considered appropriate for inclusion in the collection of the National Museum - "museum heritage objects", which fall within the definition of cultural objects. Much of the scope of this part of the Act will depend on the extent to which the ministerial power to declare classes of cultural object to be subject to the licence requirement is exercised, since cultural objects *per se* are not automatically included; they must either be entered on the register or be part of a class designated by the Minister.

5.8 The Minister has varying degrees of discretion to grant or refuse a licence, depending on the nature of the object; if it is an archaeological object,<sup>11</sup> for example, he or she has unlimited discretion. If it is a cultural object,<sup>12</sup> on the other hand, the Minister is compelled to grant a licence unless the object has been in the care of a cultural institution for a specified period of time, in which case the Minister may grant or refuse a licence.

5.9 While the 1997 Act repeals that part of the 1930 Act which regulated export of archaeological objects, it leaves unchanged the provisions of section 14 of that Act, which contains an absolute prohibition upon the export of national monuments of which the Commissioners of Public Works or a local authority are the owners or guardians or in respect of which a preservation order is in force. A national monument is defined therein as a:

"monument or the remains of a monument the preservation of which is a matter of national importance by reason of the historical, architectural, traditional, artistic or archaeological interest attaching thereto ...".

5.10 A monument is described as:

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11 Section 49(3).  
12 Section 49(2).

"any artificial or partly artificial building, structure, or erection whether above or below the surface of the ground and whether affixed or not affixed to the ground and any cave, stone, or other natural product whether forming part of or attached to or not attached to the ground which has been artificially carved, sculptured or worked upon or which (where it does not form part of the ground) appears to have been purposely put or arranged in position and any prehistoric or ancient tomb, grave or burial deposit, but does not include any building which is for the time being habitually used for ecclesiastical purposes."

5.11 The penalties for breach of this provision are negligible by today's standards<sup>13</sup> and given the fact that the penalties for illicitly dealing with archaeological objects have been increased substantially under the 1994 Act<sup>14</sup> it is anomalous that similar increases have not been provided for national monuments also.

#### **Return of objects illegally exported from Ireland to another EU Member State**

5.12 Articles 30-35 of the Treaty of Rome enshrine the fundamental principle of the free movement of goods; central to this freedom of movement is the prohibition of quantitative restrictions on exports and imports originating in the Member States and all measures having equivalent effect. Article 36, however, reserves to Member States the authority to apply reasonable non-tariff trade barriers between Member States in derogation of the requirements of Articles 30-35 when justified on the grounds of, among several other non-economic grounds, protecting "national treasures possessing artistic, historic or archaeological value".

5.13 The legislative scheme for the establishment of the internal market contained in the Single European Act did not interfere with the rights of Member States as set out in Article 36 to adopt measures for the protection of national treasures. The very establishment of the internal market did, however, fundamentally affect the powers of the Member States to *enforce* their domestic export measures on cultural objects within the territorial confines of the European Communities: as of 1st January 1993, customs checks at the internal frontiers were abolished and replaced only by a system of checks at the external frontiers of the Community. Consequently, customs administrations at the internal frontiers no longer play any role in ensuring that cultural goods which qualify as national treasures under the relevant export regulations do not leave a Member State in violation of that Member State's export control laws.

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13 A fine of £50 and/or imprisonment for up to six months: 1930 Act, section 14(4).

14 For example, archaeological objects found in the State after the coming into operation of the 1930 Act must be reported to the Director of the National Museum within three months of the coming into operation of section 5 of the 1994 Act. The maximum penalty for breach is £50,000 and/or 5 years imprisonment: 1994 Act, section 13.

### ***Council Regulation 3911/92 and Directive 93/7***

5.14 The Council of the European Communities, recognising the vulnerable position in which Member States were placed in the light of the completion of the internal market, responded with the enactment of *Regulation 3911/92 on the Export of Cultural Goods* and *Directive 7/93 on the Return of Cultural Objects unlawfully removed from the Territory of a Member State*.

5.15 In the Preamble to *Regulation 3911/92*, the Council of the EC states that "in view of the completion of the internal market, rules on trade with third countries are needed for the protection of cultural goods" and adverts to the need to "ensure that exports of cultural goods are subject to uniform controls at the Community's external borders". Although all of the Member States have introduced legal measures by virtue of which the export of cultural objects is regulated, the stringency of those measures varies greatly from one Member State to another. Consequently, the Council proposed to raise the level of protection afforded in the event of export from all Member States to a third country to a common minimum level. It proposed to achieve this end by the introduction of an export licence requirement at the external frontiers of the EC.<sup>15</sup>

5.16 An object falling within one of the categories set out in the Annex to

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15 The following goods require an export licence under Regulation 3911/92:

- A.
1. Archaeological objects more than 100 years old which are the products of:
    - excavations and finds on land or under water
    - archaeological sites
    - archaeological collections
  2. Elements forming an integral part of artistic, historical or religious monuments which have been dismembered, of an age exceeding 100 years.
  3. Pictures and paintings executed entirely by hand, on any medium and in any material, which are more than 50 years old and do not belong to their originators.
  4. Mosaics other than those in categories 1 or 2 and drawings executed entirely by hand, on any medium and in any material, which are more than 50 years old and do not belong to their originators.
  5. Original engravings, prints, serigraphs and lithographs with their respective plates and original posters which are more than 50 years old and do not belong to their originators.
  6. Original sculptures or statuary and copies produced by the same process as the original, which are more than 50 years old and do not belong to their originators, other than those in category 1.
  7. Photographs, films and negative thereof.
  8. Incunabula and manuscripts, including maps and musical scores, singly or in collection which are more than 50 years old and do not belong to their originators.
  9. Books more than 100 years old, singly or in collections.
  10. Printed maps more than 200 years old.
  11. Archives and any elements thereof of any kind, on any medium, which are more than 50 years old.
  12. (a) Collections and specimens from zoological, botanical, mineralogical or anatomical collections; (b) Collections of historical, palaeontological, ethnographic or numismatic interest.
  13. Means of transport more than 75 years old.
  14. Any other antique item not included in categories A1 to A13, more than 50 years old.
- B. **Financial thresholds applicable to certain categories under A (in ecus)**
- VALUE: 0 (Zero) 1 (Archaeological objects), 2 (Dismembered monuments) 8 (Incunabula and manuscripts) 11 (Archives)
- 15,000 4 (Mosaics and drawings) 5 (Engravings) 7 (Photographs) 10 (Printed maps)

*Regulation 3911/92* and consequently representing a "cultural good" for such purposes must be accompanied, upon its export outside of the territorial boundaries of the EC, by an export licence. The designated "competent authority" in each Member State may refuse to grant such an export licence if the cultural goods in question are the subject of legislation protecting national treasures of artistic, historical or archaeological value in the Member States concerned. The regulation does not specify the nature of the protection afforded by the legislation to which the national treasure is subject. Thus, if a liberal interpretation of the Regulation is adopted, it appears that legislation which deals *in any way* with the protection of cultural goods and not necessarily only that which deals with export control may form the basis of the authority's refusal to grant a licence.

5.17 Member States have competence to refuse to grant an export licence where the object is covered by domestic legislation relating to national treasures. The effect of this discretion in an Irish context is, for example, that the existing ban on export of national monuments under the 1930 Act may continue to be enforced notwithstanding the Regulation; similarly, ministerial discretion conferred under the 1997 Act to grant or refuse export licences for certain cultural objects will be unaffected by the provisions of the Regulation. The effect of Article 2 is to provide a community-wide standard regarding export regulation, regardless of whether Member States have regulated export under domestic law, while allowing Member States which have so regulated to rely on such domestic provisions to retain objects which have been identified in its law as national treasures.

5.18 Domestic law may enlarge or limit the level of control laid down in the Regulation. Objects possessing artistic, historic or archaeological value which do not fall within the definition of "cultural good" as listed in the Regulation shall, under Article 4, be exported only in accordance with the national export provisions of the Member State of export. Differences in the levels of protection afforded by individual Member States may, therefore, result in different outcomes. For example, archaeological objects less than 100 years old fall outside the Regulation but within a class requiring an export licence under Irish law.<sup>16</sup> If similar objects were exported from another Member State with a similar age threshold to that in the Regulation, however, their export beyond the territory of the EU could proceed without a licence. It is therefore up to the Member States themselves to decide the appropriate level of protection, whether greater or lesser than that in the Regulation, for those classes of object which fall outside its framework. Objects falling outside both the Regulation and the domestic law of the State in which they are located may be exported beyond the Community without restriction.

5.19 Finally, the Regulation confers discretion on Member States in respect of archaeological objects more than 100 years old which are the product of

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16 National Cultural Institutions Act, 1997, section 48(e) imposes no age requirement on archaeological objects.



excavations and finds on land or under water or from archaeological sites. A Member State may decide not to require a licence for such objects where they are of "limited archaeological or scientific interest" *and* are not the "direct product of excavations, finds and archaeological sites within a Member State". The converse of this provision is that archaeological objects of limited interest must have a licence where they derive directly from an excavation, find or site. While archaeological objects are not defined in the Regulation, they are, of course, defined in Irish law which bases protection on archaeological or historic significance. Arguably, under Irish law objects which are "of limited interest" do not constitute "archaeological objects" making this part of Article 2 irrelevant for Irish purposes.

5.20 In summary, the nature of the interplay between Irish law, the Regulation and Directive and the Convention varies according to the extent to which the respective supra-national regimes defer to domestic law in particular instances. While the Convention relies wholly on domestic export law, the Regulation does so only in respect of limited categories of object. The Regulation sets out a Community norm from which Member States may depart only in the case of national treasures - by refusing to grant a licence - and certain archaeological objects - by not requiring a licence. The Directive does not confer a general right to *return* in respect of all of the objects covered by the Regulation, but only of those cultural objects which are a) exported contrary to either the Regulation or domestic law or which are not returned at the end of a period of lawful removal and b) classified as national treasures under national law and c) belong to one of the categories listed in the Annex to the Directive (some of which are included only if their monetary value satisfies the financial threshold in the Directive<sup>17</sup>) or derive from public collections or the inventories of ecclesiastical institutions.

5.21 The precise nature of the "classification" required under domestic law to place objects within the scope of Article 1(1) of the Directive is unclear. The 1994 Regulations implementing the Directive are silent on this point, merely stating that unless the contrary intention appears, words and expressions have the same meaning as in the Directive. While no specific reference is made to which body of domestic legislation is guiding on the question of whether objects are "national treasures", the 1997 Act comprehensively deals with cultural material and serves to conform the categories of object protected in Irish law with those in the Directive and Regulation. The broad scope of the Act means that objects which attract export regulation under Irish law do not necessarily come within the scope of the EU regime. For example, the age limits for documents and paintings in the Act are lower than under the Directive, while the ministerial power to designate certain classes of object as cultural objects may further broaden the scope of the Act.

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17 The Irish currency equivalent to the financial thresholds applicable to the various categories of cultural object in the Directive are set out in the 1994 implementing Regulations (SI 182/94). Only those pictures worth over €111,251 and books, statuary and means of transport worth over €37,083 are covered. These thresholds are the same as those which trigger the licence requirement under Regulation 3911/92.

5.22 The relevance of these differences in practice is that the retrieval, for example, of a painting aged 30 years and valued at £40,000 from another Member State would not be pursuable under the Directive since the threshold therein in respect of paintings is 50 years. The illegal exporter would, however, be subject to a penalty under the 1997 Act since the painting is over 25 years old, the threshold prescribed under the 1997 Act.<sup>18</sup> On the other hand, decorative art objects under the Act (which comprise the same range of objects as are classified as "antique items" under the Regulation) are required to be licensed under the Act only if they are more than 70 years old, while under the Regulation the threshold is 50 years. Thus, in the event that the return of furniture aged 60 years were sought, it would qualify under the Annex to the Regulation but would fall foul of the requirement in Article 1 of the Directive that the object be classified as a national treasure under national law. Since a licence is not required for furniture less than 70 years old under section 49(1)(b) of the 1997 Act, it cannot be regarded as "classified". It is possible, however, that such material might qualify under one of the other heads in the 1997 Act, for example as a cultural object entered on the register, or one which is part of a class designated as cultural objects by the Minister. In this regard it should be noted that the Directive expressly permits of classification before *or after* unlawful removal.

5.23 Irish export restrictions serve only to deter illicit dealings in cultural objects by imposing harsh penalties: in the event that objects not covered by the Directive are taken out of the country contrary to national law, there is no legal mechanism by which to pursue their return. If the Convention were in force, however, cultural objects regardless of monetary value would qualify under the return procedure therein. Age thresholds are imposed, but only to a limited extent; for example on certain objects such as furniture and certain antiquities (100 years) but not on property of artistic interest such as statuary and paintings or on manuscripts or documents of "special interest". The standard to be satisfied by the requesting State in each case under the Convention is that the removal of the object significantly impairs any one of a number of specific interests *or* the object is of significant cultural importance to that State.

#### **Return of objects illegally exported from Ireland to a non-member State**

5.24 Securing the return of an object from a non-EC Member State is a more difficult task. In the absence of any pertinent binding international or bilateral agreements to which Ireland is a party, the matter turns upon the approach taken by the domestic law of the State from which return is requested to the foreign export provisions which have been breached i.e., does it regard such objects as illegally *imported* into its own jurisdiction or, if not, will it recognise and thus give effect to the export controls which have been breached? If either of these questions is answered in the affirmative, the object can be returned to the country of export.

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18 Section 49(1)(b).

5.25 Unfortunately, an object illegally exported from one country is not necessarily illegally imported into the country of its destination. While the UNESCO Convention appears to<sup>19</sup> impose an obligation upon the States Parties thereto to treat illicit foreign exports as illegal imports in their own jurisdiction, relatively few countries adopt this approach. O'Keefe and Protz comment that:

"[t]he contemporary near-universal imposition of export controls on cultural property has not so far been matched by the same acceptance of import regulation, although States, as a matter of international law, have an equal competence [to legislate in this sphere]."<sup>20</sup>

5.26 A State which does not contain such import regulations may nonetheless be prepared to enforce in its courts the export regulations of the dispossessed State. The likelihood of this has traditionally been hampered by an old rule of the English common law that a court:

"has no jurisdiction at common law to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue or [public] law of a foreign State."<sup>21</sup>

5.27 A similar rule in civil law jurisdictions results in the non-enforcement of "*les lois de la police et du surete*".

5.28 In recent years, some judicial pronouncements in foreign courts have not been quite as emphatic. In *Attorney-General of New Zealand v. Ortiz*,<sup>22</sup> the New Zealand government sought to secure, via the English courts, the return from Ortiz of a number of carved Maori panels which they claimed were government property on the basis of a provision in the New Zealand *Historic Articles Act*. Section 12(2) of the Act provided that objects exported in breach of export regulations set out in the Act were forfeited to the State. Export thereof was also an offence in respect of which a fine was payable. Staughton J., at first instance, could not find any conclusive precedents in English law against the enforcement of what was, in his opinion, a public law:

"I can ... detect no support in the English cases for a category of foreign public law, but equally nothing of great weight against it."<sup>23</sup>

5.29 On appeal, however, Lord Denning asserted that there was clearly a rule of non-enforcement which represented one aspect of the exercise of sovereign

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19 See Article 7, *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970*. This article has been interpreted in a number of ways, not all of which impose an obligation upon the receiving State Party to view illicit foreign exports as illicit imports in their own territories. In any event, the US, the only major art-exporting state which became party to the 1970 Convention made clear that it would not regard illicit foreign exports as illicit imports.

20 O'Keefe, P and Protz, L *Law and the Cultural Heritage, Volume III: Movement*, p.588, para. 1120.

21 Dicey and Morris, Rule 22(1).

22 *Attorney General of New Zealand v. Ortiz* [1982] 1 QB 349, [1982] 3 WLR 571 (CA), [1983] 2 WLR 809 (HL).

23 [1982] 1 QB 349 at 371.

authority. Ackner LJ categorised section 12(2) as a penal provision and, consequently, concluded that it was unenforceable in the English courts. O'Connor LJ and all of the judges in the House of Lords decided the issue without reference to this matter. In the wake of this decision, the enforcement question remains:

"in as much confusion as it ever was, the three judges who did address the issue holding radically different views, and the preceding case-law being inconclusive."<sup>24</sup>

5.30 The International Law Association's International Committee on Transnational Recognition and Enforcement of Foreign Public Laws referred to tentative emergence of a "more liberal approach" towards recognition and enforcement of foreign laws. The ILA did not, however, deny that non-enforcement remains, as yet, the dominant practice. As far as the protection of cultural objects is concerned, it is a dangerous practice which, in the words of the *Institut de Droit International*, is "inappropriate for modern conditions of international collaboration". Droz adds that:

"Regulations relating to ... prohibitions on export ... are found again and again. A mutual refusal to take account of foreign rules for protection because they are matters of public law ... can only serve to encourage the illicit international transfer of cultural property since, in such cases, immunity would be guaranteed simply by crossing a frontier."<sup>25</sup>

### **The Unidroit Convention and recognition of foreign public law**

5.31 The European Community has dealt with the issue of recognition of a foreign public law by obliging the competent authority in the requested State to order return of an object once it is established that it is a "cultural object" as defined in Directive 93/7 and has been unlawfully removed from the territory of the requesting State in breach of its laws protecting national treasures or of Regulation 3911/92. Similarly, the Convention obliges States which become parties to it to recognise foreign rules concerning illegal export; this obligation is limited, however; earlier drafts contained a provision that the illegality in question was required to derive from rules enacted with the specific purpose of protecting cultural property.<sup>26</sup> This clause was subsequently removed, but Article 1(a) achieves the same effect by limiting the application of Part III of the Convention to return of objects which have been exported contrary to export laws which have the "purpose of protecting [a State's] cultural heritage".

5.32 Irish case-law contains only scant reference to the non-enforceability of

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24 O'Keefe and Prot, *op. cit.*, p.654, para. 1260.

25 Droz, G., *The International Protection of Cultural Property from the Stand-point of Private International Law*, in *International Legal Protection of Cultural Property* (Council of Europe, 1984) p.114 at 115.

26 Unidroit Explanatory Report in *Acts and Proceedings of the Diplomatic Conference*, p.24 para. 26.

foreign public law. It appears, however, that the prevailing rule of non-recognition has the force of law in this jurisdiction also; in *Buchanan Ltd. v. McVey*,<sup>27</sup> Maguire CJ, in an *obiter* reference, asserted that it represented "a recognised rule". Accession to the Convention would, therefore, represent a departure from existing practice. No substantive changes to our existing law would be necessitated by such a change, however; implementing legislation would simply oblige the Irish court to order return on proof of a breach of the requesting State's export laws and of the criteria laid down in Articles 1(a) and 5(3).

**CHAPTER 6: THE PRESENT LAW REGARDING THE RETURN TO IRELAND OF OBJECTS STOLEN IN OR ILLEGALLY EXPORTED FROM IRELAND**

6.1 In this Chapter, we consider the procedures available in Irish law for securing return of stolen or illegally exported objects. The practical ease with which potential claimants may rely on the Convention is an important factor in evaluating the extent of its utility.

**A. Stolen Objects: Civil Actions by the Dispossessed Owner Against the Possessor**

**1. Introduction**

6.2 A plaintiff's civil action must be founded in a civil wrong for which the appropriate remedy is the return of the object. Traditionally, in Ireland and other common law jurisdictions,<sup>1</sup> recourse is had to the torts of conversion and detinue in these circumstances. Conversion consists of any act relating to another's goods which constitutes an unjustifiable denial of his or her title to them. It may be committed by the wrongful taking of possession of the goods, abusing possession already acquired or otherwise denying the other person's title. Larceny is essentially an offence against possession; the possession of a person who acquires from a thief - although he or she takes without knowledge of the illicit provenance thereof - may nonetheless be wrongful.<sup>2</sup> The only available remedy where the tort of conversion is established, however, is damages. Consequently, plaintiffs should found their action in the tort of detinue which involves a wrongful refusal by the defendant to deliver up to the plaintiff an object after the plaintiff has so demanded. The plaintiff must therefore have sought its return from the party in possession of the object prior to commencing the action. A court may order both the return of the object and damages in an action founded in detinue.

6.3 Similarly, as the plaintiff's aim is to retrieve the displaced object, he or

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1 In England and Wales, section 2(1) of the *Tort (Interference with Goods) Act, 1977*, abolished the tort of detinue. An action in conversion now lies in England and Wales in every case in which an action in detinue lay before its abolition; *per* section 1(a).

2 "An honest but mistaken belief of the defendant that he has the right to deal with the goods generally does not excuse him"; *per* McMahon, B. and Binchy, W., *The Irish Law of Torts* (Butterworths, 2nd ed., 1990), p.537.

she must join as defendant to the action the party from whom return can be secured. Thus, as thieves of cultural objects tend to pass the stolen object on to third parties as soon as they possibly can, the plaintiff must pursue that third party - whether or not *bona fide* and without knowledge of its illicit history - in the courts.

6.4 A person who wishes to secure the return to Ireland of a stolen cultural object must, as a preliminary step, address a number of matters of private international law. It does not follow from the fact that the object is located in a particular jurisdiction that the courts of that jurisdiction will necessarily deal with the issue of title in the object, nor that the laws of that jurisdiction will be applied. Thus, it must be determined initially whether authority to decide the issue is vested in Irish or in foreign courts. Having addressed that question, the court to which competence to hear the issue has been assigned must then decide, in accordance with its own rules of private international law, whether its internal laws or those of another State will govern the decision to return the object. It should be noted that the fact that the epithet "cultural" attaches to the object in question does not in any way affect the rules governing its restitution or return.

## 2. *Jurisdiction*

6.5 In providing that a claim for restitution or return may be brought in the State where the object is located, the Convention provides a novel ground of jurisdiction not provided in any of the existing codifications of jurisdictional rules such as the Brussels Convention. The committee of experts responsible for Article 8(1) believed that it represented the most effective means of securing the return of objects. As we shall see, existing rules of jurisdiction rely generally on the domicile of the defendant or on the place where the offence giving rise to the claim occurred. Article 8(1) does not preclude reliance on these traditional grounds, by providing that access to the courts of the jurisdiction in which the object is located is "*in addition to* the courts of other competent authorities otherwise having jurisdiction under the rules in force in Contracting States". On the face of it, a claimant has a wide choice of forum; this choice must be exercised, however, within the parameters of the particular jurisdictional rules in force in the Contracting State in which it is sought to bring the claim.

6.6 In Ireland, persons domiciled outside of the State may be made amenable to the jurisdiction of Irish courts in the circumstances laid down in Order 11 of the *Rules of Superior Courts*. Additional grounds of jurisdiction are provided in the *Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988* (the "1988 Act"), which brought the *Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, 1968* into force in Ireland. The Convention extends to civil - of which restitution of stolen property is clearly an example - and commercial matters.<sup>3</sup>

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3 See Article 1.

The *Lugano EC-EFTA Judgments Convention, 1988* is a parallel Convention in force between Member States of the EC and those of the European Free Trade Association. In the case of a person seeking return of a cultural object, the provisions of these Conventions will determine jurisdiction in those cases in which the person from whom the return of the object is sought is domiciled in the EC/EFTA territories.

6.7 The 1988 Act makes provision for reciprocal recognition and enforcement of judgments in civil and commercial matters as between Ireland and certain Member States of the European Community.<sup>4</sup> A defendant domiciled in a State other than Ireland may be made amenable to the jurisdiction of the Irish courts in circumstances additional to those provided in Order 11. Order 11A<sup>5</sup> of the Rules of Superior Courts applies to service in proceedings which are governed by the 1968 Convention and the 1988 Act.<sup>6</sup> Rule 2 provides that service outside the jurisdiction is permissible without leave of the Court where

(1) The claim made by the summons is one which by virtue of the 1988 Act the Court has power to hear and determine; and

(2) No proceedings between the parties concerning the same cause of action is pending between the parties in another contracting State; and

(3) Either:

(a) The defendant is domiciled in any contracting State, or

(b) the proceedings commenced by the originating summons are proceedings to which the provisions of Article 16 of the 1968 Convention concerning exclusive jurisdiction apply, or

(c) The defendant is a party to an agreement conferring jurisdiction to which the provisions of Article 17 of the 1968 Convention concerning prorogation of jurisdiction apply.

6.8 The Court will exercise its power to hear and determine any civil or commercial matter involving a person domiciled in a Contracting State which falls within one of the categories listed in Articles 5 to 15 of the Convention. If the defendant is not domiciled in a Contracting State, jurisdiction is, in general,

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4 The Contracting States are listed in section 1 of the 1988 Act as Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands, Ireland, Denmark, the United Kingdom and Greece; Spain and Portugal were added by section 3 of the Jurisdiction of Courts and Enforcement of Judgments Act, 1993. The Lugano Convention, referred to in the 1993 Act, parallels the 1968 Convention in respect of the then EFTA States: Austria, Finland, Iceland, Norway, Sweden and Switzerland.

5 Inserted by SI/14 of 1989.

6 Article 1 of the Convention states that it does not apply to '1. the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; 2. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; 3. social security; 4. arbitration.'. The full text of the Convention is reproduced as the First Schedule to the 1988 Act.



governed by the national law of the Contracting State in which the plaintiff is domiciled. The only exceptions are where the matter is one in respect of which exclusive jurisdiction is provided regardless of domicile under Article 16, or the defendant is an insurer, in which case special rules apply under Article 8.

6.9 Articles 2 and 5(3) of the 1968 Convention are of interest to a plaintiff seeking return of a cultural object. Article 2 provides that;

"Subject to the provisions of this Convention, persons domiciled<sup>7</sup> in a Contracting State shall, whatever their nationality, be sued in the courts of that State."

6.10 Article 5(3) adds that a person domiciled in a Contracting State may be sued

"in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred",

if the other court is in a Contracting State. The Article raises a number of points of interpretation. The terms "tort, delict or quasi-delict" are not found in the jurisprudence of all of the Contracting States of the Convention<sup>8</sup>, although the civil wrongs which these terms describe are, as a general rule, justiciable throughout its territories. The European Court of Justice has concluded that the

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7 The Drafting Committee of the Brussels Convention found it difficult to arrive at a harmonised meaning of the term "domicile". The inclusion of a definition in the Convention was rejected as falling outside its scope and more properly belonging to a uniform law. Article 52 of the Brussels Convention sets out the applicable law as far as domicile is concerned;

- \*1. In order to determine whether a party is domiciled in the Contracting State whose courts are seized of the matter, the court shall apply its internal law.
2. If a party is not domiciled in the State whose courts are seized of the matter, then, in order to determine whether the party is domiciled in another Contracting State, the court shall apply the law of that State."

Although the meaning of the term "domicile" is not defined in the Convention, its Drafting Committee made it clear from the outset that the word did not convey the meaning attributed to it in common law countries; it veered, rather, towards the "habitual residence" criterion which prevails in civil law jurisdictions. See Byrne, P., *The EEC Convention on Jurisdiction and the Enforcement of Judgments* (Round Hall Press, 1990), p.150. Thus, section 13 of *The Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988* states that:

- \*1. An individual is domiciled within the State, or in a state other than a Contracting State if, but only if, he is ordinarily resident in the State or in that other state.
2. An individual is domiciled in the State if but only if, he is domiciled in the State and is ordinarily resident or carries on any profession, business or occupation in that place."

The Commission in its Report on *Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws* (LRC 7-1983) has made recommendations for changes in the Irish law of domicile which have been implemented only in part.

8 In Case 814/79: *Netherlands v. Ruffer*, [1980] ECR 3807, [1981] 3 C.M.L.R. 293, Advocate General Warner, when considering the question of whether these terms had their 'own independent meaning and as thus being common to all the Member States or as referring to substantive rules of the law applicable in each case under the rules of conflict of laws of the court before which the matter is first brought['] noted that:

"to treat the phrase 'matters relating to tort, delict or quasi-delict' as a reference to national legal concepts would only be possible if the corresponding phrase in the authentic text of the Convention in the official language or languages of each Member State connoted a concept known to the law of that State. In fact that is not so." [1980] E.C.R. 3807 at 3833.

terms should, for the purpose of the interpretation of the Convention, be given a meaning independent of that attributed to them in the various Contracting States in which they are used. In so concluding, the Court did not, however, identify the exact parameters of this Convention concept, but added that,

"a comparison of the different language versions [of the 1968 Convention] shows that the concept of "tort, delict, or quasi-delict" must be interpreted in a broad sense and not limited to a few types of unlawful acts. The concept consists at any rate of a culpable or intentional act or omission, contrary to the law or to unwritten standards of care, which causes injury to a third party."<sup>9</sup>

6.11 Actions based upon the wrongful interference with the possession and title of the owner of cultural objects clearly constitute actions derived from an intentional act, which is contrary to the law and causes injury to the dispossessed owner.

6.12 Another question of interpretation arising from Article 5(3) relates to the place of occurrence of the "harmful event". Should the harmful event be deemed to occur at the location at which the harm or injury is sustained or the place of the event which caused the harm? Expressed in the context of the tort of detinue, is it the place where the owner is deprived of his or her object or the location at which the defendant refused to return the object upon a request by the dispossessed plaintiff? The European Court of Justice concluded in *Handelswekerij G.J. Bier B.V.*, that the phrase must be deemed to encompass both possibilities:

"The result is that the defendant may be sued, at the option of the plaintiff, either in the courts of the place where the damage occurred or in the courts of the place of the event which gives rise to and is at the origin of that damage".<sup>10</sup>

6.13 We must now consider whether this test, which was laid down in a case involving negligence, may be applied equally to the tort of detinue, given that negligence is more readily amenable to dissection into its component parts. It is worth noting that the language of the Court in *Handelswekerij* suggested that it was intended to set out a rule of general application.

Detinue consists of

"the wrongful refusal by the defendant to deliver up to the plaintiff a chattel *after demand has been made by the plaintiff to do so*".<sup>11</sup>

On the question of whether the request for return, being made in Ireland, can

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9 *Ibid.*, at 3814.

10 Case 21/76 *Handelswekerij G.J. Bier B.V. v. Mines de Potasse d'Alsace S.A.* [1976] ECR 1735 at 1748.

11 McMahon, B and Binchy, W *op. cit.*, p.528 (emphasis added).

be regarded as one element which "gives rise to and is at the origin of the damage", it is significant that it is the refusal to return on foot of a request to do so which constitutes commission of the tort. The importance of the demand is to give notice to the defendant that a claim is being made,<sup>12</sup> and indeed an action will fail if no such knowledge exists. While the request *per se* is a prerequisite to the arising of a cause of action, it can hardly be regarded as giving rise to the damage. Even if it could be so regarded, it must be borne in mind that while the request originates with a possessor in Ireland, it does not become effective until its ultimate communication, which occurs outside Ireland, and so fails to satisfy the test on two grounds.

Detinue is a continuing tort,<sup>13</sup> with damage to the putative plaintiff - the denial of enjoyment of his chattel - being sustained in Ireland. While the tort, the refusal to return, is committed in another jurisdiction, it is arguable that Ireland is the "place where the damage occur[s]", and that a claimant in Ireland should have a right of access to the Irish courts in order to avail of a remedy. We see no objection in principle to Irish courts having the option of accepting jurisdiction to hear such a claim.

6.14 Thus, applying the *Handelswerkerij* approach, a defendant with French domicile (in the sense in which that term is understood under the Brussels Convention) who, whilst in Germany refuses to accede to a request for the return of a cultural object stolen in Ireland and then brought to Germany, may, it appears, be sued for its return in France - by virtue of Article 2 - or in Germany, the place where a significant element of the tort took place, or possibly in Ireland, the place where the damage is sustained. It rests with the dispossessed plaintiff to choose from amongst the three jurisdictions.

6.15 The situation is not, however, as straightforward if the defendant is not domiciled in a Contracting State. Irish law in this regard is essentially procedural in nature. The fundamental rule relating to actions *in personam* - of which an action in detinue is one<sup>14</sup> - asserts that any person may be subjected to the jurisdiction of the Irish courts provided that personal service of an originating summons has been served upon him or her. As a general rule, this means that a defendant must be personally present in the jurisdiction. A defendant who is

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12 In *King v. Walsh*, a claim in detinue failed because a demand for return had not been brought to the knowledge of the person of whom it was made. A letter was sent to his home which he did not receive because he was in another part of the country; [1932] IR 178.

13 Detinue is "a continuing cause of action which accrues at the date of the wrongful refusal to deliver up the goods and continues until delivery up of the goods or judgment in the action..."; *per* Diplock LJ in *General and Finance Facilities Ltd. v. Cooks Cars Ltd.* [1963] 2 All ER 314 at 317.

14 See the dictum of Holmes J. in *Tyler v. Judges of Court of Registration*, 175 Mass. 71 at 76, 55 N.E. 812 at 814 (1900): "If the technical object of the suit is to establish a claim against some particular person, with a judgment which generally in theory, at least, binds his body, or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defence, the action is in personam, although it may concern the right to, or possession of, a tangible thing. ... If, on the other hand, the object is to bar indifferently all who might be minded to make an objection of any sort against the right sought to be established, and if any one in the world has a right to be heard on the strength of alleging facts which, if true, show an inconsistent interest, the proceeding is in rem. ... All proceedings, like all rights, are really against persons. ... Personification and naming the *res* as defendant are mere symbols, not the essential matter. They are fictions, conveniently expressing the nature of the process and the result; nothing more": see Binchy, W., *Irish Conflict of Laws* (Butterworths, 1988) p.124.

abroad may, however, submit to the jurisdiction of the Irish courts of his or her own volition. Likewise the general rule requiring the defendant's presence within the jurisdiction is modified by *Order 11 of the Rules of the Superior Courts 1986* which permits service outside of the jurisdiction in certain enumerated circumstances. Of concern in this regard are Orders 11(1)(c) and (f):

*Rule 11(1)*

Service out of the jurisdiction of an originating summons or notice of an originating summons may be allowed by the Court whenever -

(c) any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or

(f) the action is founded on a tort committed within the jurisdiction.

6.16 Under the Order, the plaintiff may apply to the Court for an order permitting service outside the jurisdiction. Such an application is not necessary, however, where the Court exercises jurisdiction extra-territorially under the *Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988* and the criteria laid down in Order 11A, Rule 2 cited above are satisfied.

6.17 The location of the commission of a tort will in many circumstances be quite clear; this clarity diminishes, however, when there is a foreign element involved in the case. As we saw when considering Article 5(3) of the 1968 Brussels Convention, the injury caused by the tort may be sustained in one jurisdiction although the tortfeasor's act which gave rise to the action was committed elsewhere. The interpretation of the phrase "tort committed within the jurisdiction" adopted by the Irish Supreme Court in *Grehan v. Medical Inc.* mirrors that adopted by the European Court of Justice in *Handelswerkerij G.J. Bier B.V.*, considered above. The following *dictum* of Walsh J. delivering judgment for the Supreme Court, sets out the current legal criteria in this jurisdiction:

"As to jurisdiction, if it appears that any significant element in the commission of the tort occurs within this jurisdiction then the plaintiff will have at least fulfilled the threshold requirements set out in O.11, r. 1(f). But that is not sufficient to raise a presumption or an inference that the Court should exercise discretion in favour of making an order for service out of the jurisdiction. Any approach which insists on any one constituent element of the commission of the tort occurring within the jurisdiction can only give rise to difficulty. In any case before the court which clearly calls for the hearing of the proceedings in Ireland ... an order for service outside the jurisdiction should not be denied merely because of the fact that some significant element or elements in its commission occurred outside the jurisdiction. For example, in many cases it would be quite inappropriate that the invocation either of "the place of injury" or "the last event rule" should deny to a plaintiff the right

of service out of the jurisdiction. It seems to me sufficient if *any* significant element has occurred within the jurisdiction. To require that the element should be *the most* significant one could render a plaintiff's task more uncertain and the outcome more arbitrary."<sup>15</sup>

6.18 The comments made earlier about the amenability of the tort of detinue to division into its component parts apply equally at this juncture. However, it must once again be conceded that although *Grehan* itself involved a negligence action, the language of the Supreme Court was sufficiently general to encompass all actions in tort. In the event, thus, that a significant element of the tort of detinue is committed within this jurisdiction, the Irish courts *may* exercise jurisdiction. Satisfaction of this prerequisite does not, however, conclude the matter; it remains at the discretion of the Court whether or not to accept jurisdiction.

6.19 If the Irish courts may not exercise jurisdiction, the party dispossessed of his or her cultural object must pursue the action elsewhere; he or she must look to rules on jurisdiction in the location where the tort was committed, where the defendant is domiciled or resident, where the object is located, whether the defendant is in the same jurisdiction as the object etc. and decide accordingly.

6.20 A plaintiff seeking the return of a stolen object must, therefore, establish at the outset whether his or her claim falls within the regime provided by the 1968 Convention and the 1988 Act. Furthermore, special provisions regarding the mechanism by which service is to be effected are provided by the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial matters, 1965* (the "Hague Convention") which entered into force in Ireland on June 4, 1994. Order 11B of the Rules of Superior Courts<sup>16</sup> regulates the practice and procedure of the Superior Courts under that Convention and applies to the service or "any summons, notice, document, citation, petition, affidavit, pleading, order or any form" issued under the Rules or lodged for service under the Order. The Convention is the only international instrument ratified by Ireland which relates to the service of documents abroad. While it provides the appropriate method of service in States which are a party to it, alternative methods may be acceptable under Irish law. It is important to note, however, that "care should be exercised to ensure that the use of such methods does not compromise the enforcement of any judgment ultimately obtained".<sup>17</sup>

6.21 In order to ensure that a claimant may rely on the location of the object as a basis of jurisdiction, we recommend that a provision be enacted to this effect. Such a provision exists under the *European Communities (Return of Cultural Objects) Regulations, 1994*, where the requesting State may retrieve an object located in the requested State on foot of a claim against the possessor or

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15 [1988] IR 528 at 541-2.

16 Inserted by SI No. 101 of 1994.

17 O'Flóinn, B and Gannon, S *Practice and Procedure in the Superior Courts* (Butterworths, 1996) p.74.

holder of such an object. In our opinion the location of the object at the time the claim is initiated should be the preferred jurisdiction. The benefit in so providing lies in the fact that if a successful claim is brought for return, that judgment will be directly enforceable without the need to rely on the courts of a second State; by contrast, if the claim is brought against the possessor domiciled in State A for the return of an object located in State B, the courts of State B would have to enforce a judgment of a foreign jurisdiction, giving rise to difficulties associated with the reluctance of States to so enforce.

### 3. *Applicable law*

6.22 Having determined the preliminary issue of jurisdiction, the court to which competence is assigned must determine, in accordance with its own principles of private international law, which laws shall govern the plaintiff's claim for restitution. Is this issue of the right to possession to be governed by the law of the State in which the object is located, or by those of another country?

6.23 Unfortunately, there is no reported Irish case on this issue. The case law from other jurisdictions invariably categorises this situation as one involving title in movables in the event of the transfer of such movables from one jurisdiction to another.<sup>18</sup> In the absence of any Irish judicial precedent, attention is focused upon the position pertaining in legal systems similar to our own. The statements from other common law jurisdictions appear quite emphatic on the applicable rule; the issue shall be governed by the law in operation in the jurisdiction in which the transfer of the object to the defendant - whether by theft, sale or otherwise - took place. As Cheshire and North note:

"[I]t is now established that the proprietary effect of a particular assignment of movables is governed exclusively by the law of the country where they are situated at the time of the assignment. An owner will be divested of his title to movables if they are taken to a foreign country and there assigned in circumstances sufficient by the local law to pass a valid title to the assignee. The title recognised by the foreign *lex situs* overrides earlier and inconsistent titles no matter by what law they may have been created."<sup>19</sup>

6.24 Indeed, this rule appears to have found acceptance in common and civil law jurisdictions alike; O'Keefe and Prott refer to:

"[a] general rule of Private International Law worked out by the courts of European legal systems in the nineteenth century [which applied] to property is the *lex rei sitae*. The *lex rei sitae* rule now seems to have

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18 For Private International Law purposes, property is divided into movables and immovables; see for example, Binchy W., *Irish Conflict of Laws*, (Butterworths, 1988) Chapter 19: Movable and Immovable Property.

19 Quoted in *Winkworth v. Christie, Manson & Woods Ltd.*, [1980] 1 All ER 1121. The quote was taken from the tenth edition of Cheshire & North's *Private International Law* (1979, Butterworths), p.527.

been applied by virtually all systems of law."<sup>20</sup>

Likewise, Reichelt refers to it as "the applicable rule".<sup>21</sup>

6.25 Consider the application of the *lex rei sitae* rule in the following circumstances: a cultural object is stolen from its owner in jurisdiction A. It is brought to jurisdiction B where it is sold to a purchaser. The domestic law of jurisdiction A governs the transfer from owner to thief as that transfer took place within that jurisdiction. The laws of jurisdiction B, however, govern the transfer from thief to purchaser. Thus, in the relatively unlikely event that a person who stole a cultural object abroad has retained possession of it and introduced it into Ireland, the laws of the jurisdiction in which the criminal act occurred will govern the plaintiff's claim for restitution. Equally, if an object which ultimately reaches Ireland, falls, whilst outside of this jurisdiction, into the hands of a *bona fide* purchaser, foreign laws will apply. If, however, a person makes a good faith purchase in Ireland, the laws of this jurisdiction will govern the claim.

6.26 The decision of the English courts in *Winkworth v. Christie, Manson and Woods Ltd*,<sup>22</sup> the facts of which are set out in Chapter 3, provides a pertinent illustration of the *lex rei sitae* rule. The transfer in question - the *bona fide* purchase by virtue of which the second defendant claimed to have acquired title - occurred in Italy. The judge thus concluded that Italian law - according to which title passes to a *bona fide* purchaser<sup>23</sup> - governed the issue. Accordingly, the plaintiff could not obtain restitution of the works of art.

6.27 This decision highlights the difficulties facing a person or body attempting to retrieve a cultural object taken abroad; the ability to recover is intrinsically linked with the destination of the object and the laws concerning title in movable property in operation there. Had Mr Winkworth had the dubious good fortune to have his collection of works of art stolen and subsequently transferred to a purchaser in good faith in Ireland or another common law country in which the laws of transfer of title do not, as a rule, recognise the validity of a transfer to a *bona fide* purchaser, application of the *lex rei sitae* would have facilitated their return.

6.28 The fact that the laws of a particular jurisdiction protect an owner's title against a claim by other parties such as *bona fide* purchasers does not guarantee the return to the dispossessed owner of an object stolen from that jurisdiction or introduced there following a theft. The matter turns on those preliminary private international law issues, yet its rules were not devised:

"with the special problems of cultural heritage protection in mind ... [T]he development of this field, as well as the increasing amount of

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20 O'Keefe, P and Prott, L. *Law and the Cultural Heritage, Volume III: Movement* (Butterworths, 1989), pp.638-639, para. 1238.

21 Reichelt, G., *International Protection of Cultural Property*, 1985 *Uniform Law Review*, 42. [1980] 1 All ER 1121.

22 The relevant provisions of Italian law are considered below at para. 6.39 *et seq.*

travel and trade between States, is testing these rules to the utmost. Until quite recently there were very few cases specifically raising these sorts of issues in relation to the cultural heritage: the last 15 years have seen [a significant number of cases]. Clearly this area is expanding dramatically. Nevertheless it is evident that the rules of Private International Law, as they currently operate, often defeat the aim of preserving the cultural heritage."<sup>24</sup>

#### 4. *Substantive Rules of Law*

6.29 When the role of private international law in the plaintiff's claim has been resolved, the task becomes one of identifying the internal law governing competing claims to the object in question in order that the dispossessed plaintiff may secure its return. The plaintiff's claim for restitution is based upon his or her alleged ownership of the stolen objects. That claim will be defeated if another party to the action can show a title superior to that of the dispossessed owner. Thus, the ultimate question for the court is one of relativity of title: in whom does the strongest title to the stolen cultural object rest? Inevitably, different jurisdictions afford different weights to the claims to title of different parties.

##### (a) *Retrieving the object from a thief or other party who acquired the object with knowledge of the theft*

6.30 All jurisdictions contain in their law some reference to the principle that parties tainted by knowledge of the theft cannot obtain title to the objects they have stolen or received. A number of jurisdictions - traditionally, civil law jurisdictions - provide, however, that the passage of a period of time deprives the dispossessed owner of his or her right to retrieve the object and thereby permits title to vest in the person in whose hands the object has been for the requisite period, whether he or she is a *bona fide* purchaser, a thief or another party implicated in the theft.

6.31 German law, for example, permits an acquisition of title after ten years regardless of good faith on the part of the acquirer. French law applies a thirty year limitation period where such good faith is lacking. Most civil law jurisdictions, however, confine the acquisition of title to *bona fide* parties.

6.32 In many Common Law systems, on the other hand, statutes of limitation operate to bar the owner's right of action for recovery after a specified period of time, without thereby quieting his or her title. In theory, therefore, ownership does not pass to the thief nor to the receiver. In Ireland, the relevant statutory provision provides that;



"where any cause of action in respect of the ... wrongful detention of a chattel has accrued to any person ... and the period fixed for bringing that action and for bringing any action in respect of ... a further ... wrongful detention ... has expired, and he has not during that period recovered possession of the chattel, then ... the title of that person to the chattel shall be extinguished."<sup>25</sup>

6.33 The appropriate limitation period is six years from the accrual of the cause of action, i.e., from the date of the wrongful refusal to accede to the request for return.<sup>26</sup>

6.34 After the passage of the appropriate period of time, therefore, the owner's right of action and his or her title to the object in question are extinguished. The practical effect of the Statute of Limitations therefore appears to be that the possessor's ownership of the object is placed beyond challenge, regardless of his or her *fides*.<sup>27</sup> We must agree with the sentiment that:

"although th[is] situation ... may not often arise in practice ... it is wrong for the law to extend the protection of limitation to the thief or receiver at the expense of the true owner."<sup>28</sup>

**(b) Retrieving the object from a bona fide purchaser**

6.35 The matter is much more complex if the defendant is a *bona fide* purchaser or possessor of the stolen object. *The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, states that Contracting States shall, at the request of another Contracting State, ensure the return of designated objects stolen from a museum or similar institution in the requesting State whether or not the object

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25 Section 12(2) *Statute of Limitations, 1957*. Section 12(1) states that "where any cause of action in respect of the ... wrongful detention of a chattel has accrued to any person, and before he recovers possession of the chattel, a further ... wrongful detention takes place then... no action shall be brought in respect of the further ... wrongful detention after the expiration of six years from the accrual of the cause of action in respect of the original ... wrongful detention".

26 Section 11(2)(a) of the *Statute of Limitations, 1957*, provides that "an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued".

27 We have recommended at para. 3.64 that alternative limitation periods to those provided in the *Statute of Limitations, 1957* should apply to claims under the Convention.

28 *Per* the Law Reform Committee of England and Wales, Twenty-first Report: Final report on the limitations of actions (1974), p.33, para. 3.5. At the time, English Law offered similar protection to a thief or receiver as that currently afforded under Irish law; see section 3(1) and (2) of the *Limitation Act, 1939*. The Committee added that "In Scots law time will never run in favour of a thief or person 'privity to the stealing', an expression which, we are advised, includes a receiver. This appears to us to be a precedent which English law could well follow and we have accordingly examined the possible consequence of making theft and allied offences 'imprescriptible'."

*The Limitation Act, 1980* dealt with this situation in England and Wales. The complex provisions of section 4 thereof provide that a purchase in good faith starts time running on behalf of the party in good faith and against the owner, as distinct from the thief and others criminally tainted by the theft: time will never run in favour of the latter pursuant to this new statutory regime. The same rule applies in the U.S. In Ireland, however, no such amendment has been introduced.

is in the hands of a *bona fide* purchaser. Ireland, however, has not adopted this Convention and therefore Irish Courts have never had to construe it.

6.36 A large portion of the cultural objects stolen in Ireland are transported to other Member States of the European Community. Nonetheless, the principles of European Community law do not play any role in determining the title of objects so removed. Indeed, any attempt by the Community to determine the primacy of one claim over another would, it appears, be beyond its remit;

"In claims for return based on ownership [i.e., in the case of theft], the issue is the choice of substantive law governing the validity of [transfers] of moveable property. The EC under Article 222 Treaty of Rome is not "competent to prejudice the rules in Member States governing the system of property ownership."<sup>29</sup>

6.37 Thus, when a stolen cultural object is removed from the jurisdiction, recourse must be had exclusively to domestic principles in order to determine the dispute between an owner and a *bona fide* purchaser. As we have seen, the principles applied shall be those of the jurisdiction in which the transfer of the object to the *bona fide* purchaser took place.

**(i) Common law jurisdictions**

The balance which is struck by the Common Law between the rights of the *bona fide* purchaser and the dispossessed owner has already been discussed<sup>30</sup> and, as we have seen, the dispossessed owner is in the more favourable position.<sup>31</sup>

**(ii) Civil law jurisdictions**

6.38 In civil law systems, on the other hand, the general rule is that possession equates with title, so that a person in possession of an object is *presumed* to be the owner thereof. It is, however, at best a loose equation, as most jurisdictions modify this rule with a number of exceptions. It should be noted that it is not accurate to treat all civil law systems as identical as far as these rules are concerned; some offer almost immediate and absolute protection to a *bona fide* purchaser, whilst others veer towards an interim route, protecting purchaser and dispossessed owner in different circumstances. It is now proposed to examine the law on this matter in a number of such jurisdictions; the analysis is, essentially, confined to European systems, although the legacy of colonialism is

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29 Nicholas, T.J., EEC Measures on the Treatment of National Treasures, *Comparative Law Journal*, Nov. 1993, p. 127.

30 See above, para. 3.21 *et seq.*

31 As we have pointed out, however, the effect of the Statute of Limitations seems to be to limit the advantage conferred on the dispossessed owner to the duration of the limitation period, after which time his or her title is extinguished.

such that the principles contained therein are embodied in the laws of many non-European countries.

*Italy*

6.39 There is unanimous agreement amongst all commentators that Italian law - once modelled on the French Civil Code but substantially redrafted in 1942 - provides the most complete form of protection for *bona fide* purchasers.<sup>32</sup> Articles 1153 and 1154 of the Italian Civil Code read as follows:

1153: **Effects of acquisition of possession.** He to whom movable property (812) is conveyed by one who is not the owner acquires ownership of it through possession, provided that he be in good faith at the moment of consignment and there be an instrument or transaction capable of transferring ownership.

Ownership is acquired free of rights of others in the thing, if they do not appear in the instrument or transaction and the acquirer is in good faith.

1154: **Knowledge of illegitimate provenance of thing.** The erroneous belief that his transferor or a prior possessor had become owner does not justify one who acquires knowing the illegitimate provenance of the thing.

6.40 The possessor immediately enjoys a privileged position but he or she is also subject to a number of strict preconditions. He or she must be in actual possession of the object and must pass the *bona fide* test, which is strictly defined under Italian law.

"A purchaser who, having regard to the circumstances of the purchase (place, price, etc.), may have acted with false innocence by failing to seek fuller information about a dubious offer would be guilty of gross negligence (as distinct from penal complicity) and might therefore be ordered to restore the goods."<sup>33</sup>

6.41 In addition, public domain property is inalienable and the purchaser cannot, therefore, oppose any claim for the recovery thereof.

6.42 Unlike Italy, most civil law jurisdictions do not offer immediate protection to a *bona fide* purchaser but insist upon the lapse of a fixed period of time.

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32 O'Keefe and Prot, *op. cit.*, p.408, para. 761. Chatelain, *Means of Combatting The Theft of and Illegal Traffic in Works of Art in the Nine Countries of the E.E.C. (European Commission, XII/757/76-E, 1976)*, p.95. Reichelt, *op. cit.*, p.104. Byrne-Sutton, *Aspects Juridiques du Commerce et International de l'Art*, (Geneva, 1985).

33 Chatelain, *op. cit.*, p.95.

### *Spain*

6.43 Spanish law permits an owner to recover possession from a good faith possessor within 3 years of acquisition.<sup>34</sup> As in France, imprescriptibility of certain cultural objects in public hands represents an important exception to the above.

### *Switzerland*

6.44 Under Swiss law, possession raises a presumption of title. An owner deprived of possession through theft or loss may reclaim from a possessor within 5 years from the relevant date. If, however, the object came into the possessor's hands at a public auction or at market overt<sup>35</sup> and the possessor acquired in good faith, the owner may not recover unless he or she forwards compensation to the possessor, provided the latter acted in good faith.

### *France*

6.45 The law in France adopts an intermediate stance in which the "*bona fide* possessor and the theft victim are protected in turn."<sup>36</sup> The fundamental principle is one of protection of the *bona fide* possessor. Article 2279 of the Civil Code proclaims that "in respect of movables, possession represents title." The article continues:

"Nevertheless, a person who has lost or been robbed of an article may take an action for its recovery for a period of three years from the date of the loss or theft against a person in whose hands he finds it; the latter may proceed against the person from whom he obtained it."

6.46 The requirement of *bona fides* on the part of the possessor has been deemed to be a prerequisite for the application of Article 2779: "[i]ndeed, it was so obvious that the drafter of the Civil Code, normally a model of precision, forgot to mention it."<sup>37</sup> (In the absence of such *bona fides*, as we have seen<sup>38</sup> a 30 year limitation period applies).

6.47 Article 2280 does offer limited protection to the possessor who makes his or her purchase at a fair or market, at a public sale or from a merchant who sells similar articles, against an owner whose article was lost or stolen and who seeks to recover within the 3 year period: in these circumstances, "the original owner may only cause it to be returned to him by paying the possessor the price which it cost him." No limitation period operates, however, if the good faith purchaser acquires the goods as a result of acts not amounting to theft or loss i.e., in those circumstances the purchaser acquires immediate protection. To claim such immediate protection, the possession by the purchaser must be "continuous, uninterrupted, peaceful, public, unambiguous and as owner."<sup>39</sup>

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34 Article 1956 Civil Code.

35 The market overt exception is considered above, at para. 3.21 *et seq.*

36 Chatelain, *op. cit.*, p.93.

37 *Ibid.*, p.94.

38 *Supra*, para. 6.31.

39 O'Keefe and Prot, *op. cit.*, p.406.

6.48 In France, a most important exception to the rule which equates possession with title concerns goods with "public domain status" i.e., those belonging to a public authority and directly dedicated to the use of the public. These goods are both inalienable and imprescriptible; consequently, Articles 2279 and 2280 do not apply in these circumstances and such goods may form the subject of an action for recovery, at any time, and against whomsoever is in possession thereof. No compensation shall be payable in these circumstances.

6.49 Some other civil law jurisdictions offer the dispossessed owner a level of protection traditionally associated with common law systems:

#### *Germany*

6.50 West Germany, for example, was aligned with the common law countries by Chatelain in his 1976 study of theft and illegal traffic in works of art in the then EEC. Here, the principle of acquisition of property by a good faith possessor is non-applicable in the case of stolen or lost goods.<sup>40</sup> An exception to this rule applies in the case of a sale at public auction to a person in good faith. However, German law recognises a ten year prescription period, after which all parties, including the thief, are immune from action to retrieve the dispossessed goods.<sup>41</sup>

#### *Portugal*

6.51 Portugal is the only civil law country which O'Keefe and Prott align with those countries deriving from the English legal system.<sup>42</sup> Although the *nemo dat* principle does not underpin this system, Portuguese law appears to achieve a similar result. As we have seen, in jurisdictions applying the *nemo dat* principle the question of *bona fides* is irrelevant, except as far as acquisitions at market overt are concerned. In Portugal, however, the presence of good faith can impact upon the purchaser's rights. Paragraph 2 of Article 1260 of the Portuguese Civil Code provides that:

"Possession by the holder of the legal title is presumed to be in good faith; possession by one who does not have legal title to it is presumed to be in bad faith."

6.52 The law does not afford any protection to possession in bad faith. Hence the view expressed by O'Keefe and Prott that, in practice, the Portuguese rule always protects the true owner, since any other possessor is deemed to be in bad faith. If, however, a possessor can overcome this presumption by establishing that he or she bought the object in good faith from a dealer of objects of that kind, then Article 1310 provides that the owner must compensate the purchaser for the price paid.

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40 §935I Bürgerliches Gesetzbuch (German Civil Code).

41 §937 BGB.

42 O'Keefe and Prott, *op. cit.*, p.405.

## 5. *Enforcing a Foreign Judgment*

6.53 A plaintiff who succeeds in obtaining judgment against a defendant for the return of a stolen cultural object taken from this jurisdiction may, nonetheless, find it difficult to secure enforcement of this judgment. If judgment is handed down in the jurisdiction in which the object is located, and the defendant fails to comply with it, enforcement may be a relatively simple procedure. If, however, the court of jurisdiction A, to which competence to hear the claim was allocated under the rules of private international law, orders the return of a stolen cultural object removed from Ireland and brought - immediately or otherwise - to jurisdiction B, the plaintiff may encounter difficulties in enforcing Court A's order for return in jurisdiction B.

### (a) *Enforcement in States Parties to the Brussels Convention on Jurisdiction in Civil and Commercial Matters, 1968*

6.54 A judgment handed down in a State which is a party to the *Brussels Convention on Jurisdiction in Civil and Commercial Matters, 1968* which is enforceable in that State shall, as a general rule, be enforced in another Member State pursuant to Article 31 of the Convention upon the application of any interested party. A limited number of exceptions are provided in Articles 27 and 28.<sup>43</sup> The same position pertains in EFTA countries under the Lugano Convention. Enforcement shall not be obtained where, *inter alia*, it would be contrary to public policy in the State in which it is sought.<sup>44</sup> It is arguable that, for example, a court in a common law jurisdiction could, on the basis of public policy, refuse to enforce a foreign judgment giving title to a *bona fide* purchaser to whom the market overt concept did not apply. *Frias v. Pickon*,<sup>45</sup> an 1880 decision of the French Courts, concerned the enforcement of a Spanish rule on the inalienability of certain publicly-owned cultural objects. The court refused to accede to the request for enforcement of the rule on the grounds that, at the

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43 According to Article 34 of the Brussels Convention, the court applied to shall give its decision without delay and may refuse the application only for one of the reasons specified in Articles 27 and 28.

44 Article 27 provides that a judgment shall likewise not be recognised:

- where the judgment sought to be enforced was given in default of appearance, if the defendant was not duly served with the document which constituted the proceedings or within an equivalent document in sufficient time to enable him or her to arrange a defence,
- if the court of the State in which the judgment was given, in order to arrive at its judgment, has decided a preliminary question concerning the status of legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession in a way that conflicts with a rule of the private international law of the State in which the recognition is sought, unless the same result would have been reached by the application of the rules of private international law of that State,
- if the judgment is irreconcilable with an earlier judgment given in a non-Contracting State involving the same cause of action and between the same parties, provided that this latter judgment fulfils the conditions necessary for its recognition in the State addressed.

Article 28 provides further grounds for refusal, for example if the judgment conflicts with the provisions of sections 3, 4 or 5 of the Convention which relate to jurisdiction in insurance matters, jurisdiction over consumer contracts and exclusive jurisdiction as provided in Article 16.

45 1886 Clunet, 593. The facts of the case are set out in O'Keefe and Prot, *op. cit.* at para. 1239.

time, public policy in France protected the free circulation of goods and required that the interests of a *bona fide* purchaser of those objects be protected. The argument seems, however, to stretch unduly the appropriate bounds of the doctrine of public policy; logically, its application could result in the refusal by the Irish courts to enforce any foreign judgment based on laws which conflict with the comparable Irish rules. It should also be borne in mind that the Drafting Committee of the Brussels Convention envisaged that refusal to enforce a judgment on the basis that it was contrary to public policy would arise only in very limited circumstances.<sup>46</sup>

**(b) Enforcement in non-Brussels Convention States**

6.55 Judgments for restitution obtained in a non-Contracting State, however, will not be enforced in this jurisdiction. Underlying this refusal is an anomalous rule that only foreign judgments which require a defendant to pay to a plaintiff a definite sum of money may be enforced and even then only in limited circumstances.<sup>47</sup> Accession to the Unidroit Convention would modify this position somewhat; for example, the obligation on a "possessor of a cultural object which has been stolen [to] return it" assumes a concomitant willingness on the part of States to ensure such return. The Convention itself is silent on the extent to which Contracting States are obliged to enforce foreign judgments, it having been the view of the drafters that the issue of recognition and enforcement was best dealt with by multilateral or bilateral treaties specifically addressed to that issue. Accession would, therefore, necessitate conclusion of such agreements with other States Parties to the Convention.

6.56 While in general, it is to be expected that actions for return will be taken in the jurisdiction where the object is located, it may be advisable to pursue a claim in the jurisdiction of the possessor's domicile where the object is amenable to being moved rapidly across borders, as would be the case in continental Europe. In this regard, it is significant that States may, under Article 8(3), take steps to protect the object even where the claim for return is proceeding in another jurisdiction if such measures are available under its laws. *We recommend that a regime similar to that available under Regulations 4(4) and 5 of the European Communities (Return of Cultural Objects) Regulations, 1994 be instituted allowing the State to take possession of the object or take any other steps it considers necessary to prevent action to evade return until such time as a determination - whether by an Irish or a foreign court - is made as to whether the object is, in fact, to be returned.*

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46 See Byrne, P., *op. cit.*, p.104 *et seq.*

47 See Binchy, W., *op. cit.*, n.14, pp.802-803.

## **B. Restitution as a Consequence of Criminal Law Enforcement**

6.57 The criminal process is of relevance for the purpose of this Chapter solely to the extent to which it facilitates the restitution of the stolen object, whether as a by-product of the conviction of the thief or handler or as a result of discrete provisions in the Irish criminal law designed to secure the return to the owner of the stolen object.

6.58 If the offence of larceny occurs within this jurisdiction, the thief may, at least in theory, be prosecuted in the Irish criminal courts. The factual situation may, however, hamper the ability to so prosecute; the location in another jurisdiction of the cultural object or the defendant raise considerable difficulties. We now turn to the provisions of Irish law which enable the return to this jurisdiction of cultural objects. Once the object is within this jurisdiction, and the Irish courts have proceeded to conviction of the accused, the owner may retrieve the stolen object pursuant to Section 45(1) of the *Larceny Act, 1916, as amended*. This provision states that

" [i]f any person guilty of any such felony or misdemeanour as is mentioned in the Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving, any property, is prosecuted to conviction by or on behalf of the owner of such property, the property shall be restored to the owner or his representative."

6.59 Restoration of the object to the owner follows automatically upon conviction, and irrespective of the person in whose hands the object is at the time.

### **1. Extradition**

6.60 If the Irish authorities seek the extradition from a jurisdiction with which Ireland has an extradition arrangement of a person suspected of the larceny of a cultural object, the object in question may likewise be returned to this jurisdiction. Thus, for example, Article 20(1) of the Council of Europe *Convention on Extradition, 1957*, reads;

"The requested Party shall, in so far as its laws permits and at the request of the requesting Party, seize and hand over property:

- (a) which may be required as evidence or
- (b) which has been acquired as a result of the offence and which, at the time of the arrest, is found in the possession of the person claimed or is discovered subsequently."



Ireland ratified this Convention in 1966.<sup>48</sup>

6.61 Article 20(4) adds that any rights which the requested Party or third parties may have acquired in the said property shall be preserved. Where those rights do exist, the property shall be returned to the requested party as soon as possible after the trial. If, for example, a *bona fide* purchaser has acquired the property in a civil law system which protects the primacy of his or her interests over that of the dispossessed owner, the property must be returned to that purchaser after it has served its evidential purpose at trial. If, however, that purchaser, although now located in a civil law jurisdiction, acquired the object in a country in which the owner's rights withstand the *bona fide* purchase, he or she would not, pursuant to the *lex rei sitae* rule, be deemed to acquire any rights in it. Where the third party is a receiver, then he or she, and regardless of the jurisdiction in which he or she acquired the object, does not obtain any right to secure the return of the object following trial. At the successful conclusion of the criminal trial in Ireland, an order pursuant to section 45(1) of the *Larceny Act, 1916* for the restitution of the stolen cultural object shall then be granted.

6.62 The above route is, of course, only open where the defendant is in another jurisdiction with which Ireland has an extradition arrangement and the law of that jurisdiction contains a provision akin to Article 20 above. Some States may also confine the offences in respect of which extradition shall be ordered to offences which attract a certain minimum sentence upon conviction.<sup>49</sup>

6.63 In reality, extradition plays a limited role in re-introducing stolen cultural objects into this jurisdiction. In their 1983 review of the law on the protection of cultural heritage, O'Keefe and Prott noted that no case had come to their notice of the use of extradition proceedings in this regard.<sup>50</sup>

## 2. *The Criminal Justice Act, 1994*

6.64 The 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime<sup>51</sup> entered into force in Ireland on March 1, 1997 and represents a measure which will enhance inter-state, including inter-police, co-operation. A number of its provisions should be of interest when attempting to retrieve objects stolen in this jurisdiction and brought to another. Article 8, for example, under the heading "Investigative Assistance" refers to the States Parties' "obligations to assist":

"The Parties shall afford each other, upon request, the widest possible measure of assistance in the identification and tracing of instruments,

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48 The Irish *Extradition Act, 1965* is considered below, at para. 7.14.

49 See, for example, Section 10 of the *Extradition Act, 1965*.

50 O'Keefe, P. and Prott, L., *National Legal Control of Illicit Traffic in Cultural Property* (UNESCO, Paris, 1983).

51 Ireland signed the Convention on October 15, 1996.

proceeds and other property liable to confiscation. Such assistance shall include any measure providing and securing evidence as to the existence, location or movement, nature, legal status or value of the aforementioned property."

6.65 Article 13 refers to the States Parties' "obligation to confiscate":

"A [State] party which has received a request made by another [State] party for confiscation concerning instrumentalities or proceeds, situated in its territories shall -

- (a) Enforce a confiscation order made by a court of a requesting party in relation to such instrumentalities or proceeds;
- (b) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation, and, if such order is granted, enforce it."

6.66 Our ability to benefit from the Convention turns upon the steps taken by other States to comply with it. Article 15 adds that the property confiscated by the requested Party shall be disposed of by that Party in accordance with its domestic law, unless otherwise agreed by the Parties concerned. Thus, if the Irish authorities issue a request to another State Party, the object may be retrieved if the above conditions are met.

6.67 We have in place the legislative machinery which will enable us to fulfil our obligations under this Convention. Only one of the provisions of Part VII of the *Criminal Justice Act, 1990*, however, is of any assistance when the return is sought of an object from abroad, and even its utility for our purposes is open to question. Section 52 states that:

"Where on an application made in accordance with [this section], it appears to a judge of any court that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed, and that proceedings in respect of the offence have been instituted or that the offence is being investigated, he may issue a letter ("a letter of request") requesting assistance in obtaining outside the State such evidence as is specified in the letter for use in the proceedings or investigation."

6.68 The stolen cultural object would clearly qualify as evidence. The ability to retain that "evidence" after the prosecution has terminated is, however, curtailed by section 52(6) which adds that;

"Evidence obtained by virtue of a letter of request shall not without the consent of [the authority in the requested State from whom return is sought] be used for any purpose other than specified in the letter; and when the evidence is no longer required for that purpose (or for any other purpose for which such consent has been obtained), it shall be

returned to such an authority unless that authority indicates that the document or article need not be returned."

6.69 It is arguable that the letter of request could state that the object in question would, following the criminal prosecution, be the subject of an adjudication in the Irish courts as to its ownership. To so argue might, however, be stretching unduly the bounds of the language of the subsection; deciding the ownership of the object may not constitute a purpose to which an object may be put as envisaged by the Act, where that object has been re-introduced into the State for an evidentiary purpose.<sup>52</sup>

6.70 If, however, the letter of request may legitimately list the determination of ownership as a use to which the evidence secured may be retained, the consent of the relevant authority of the requested State remains a prerequisite; it is foreseeable that the authorities of the requested State would not accede to such a request if the object was in the hands of a person whose title was protected under the laws of that jurisdiction, e.g., the *bona fide* purchaser in a civil law jurisdiction. If the requested authorities of, for example, a civil law jurisdiction did so accede in order to facilitate criminal law enforcement in this jurisdiction, it is not envisaged that they would waive any claim which section 52 grants them to secure the return of the object following the prosecution.

6.71 The above review indicates clearly the limited number of legal routes for restitution which Irish law offers a dispossessed owner whose object has been removed to another jurisdiction.

6.72 Recourse to foreign criminal law is an appropriate alternative in certain circumstances. Thus, for example, if an object which was stolen in Ireland is "received" or "handled" in another jurisdiction, restitution may follow conviction for such an offence.<sup>53</sup> Benefit may also be derived from the fact that rules of jurisdiction in criminal law matters are somewhat more generous in civil law jurisdictions. Thus, it may be possible for the criminal courts of a civil law country to try a person who allegedly stole in Ireland. Yet, conversely, the conditions under which the restitution of such objects following conviction may be secured are more restrictive than those found in common law jurisdictions, such as section 45(1) of the *Larceny Act, 1916* which facilitates the return to the person deemed by the Irish court to be the owner in all circumstances i.e., whether the object is, at the time, in the hands of a thief, receiver or *bona fide* purchaser.<sup>54</sup> In civil law jurisdictions, it is, as a rule, only possible to secure restitution from the hands of a thief or person who received knowing of the illegal provenance of the object.

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52 This view is reinforced by the fact that the *Criminal Justice Act, 1994* is a criminal law statute and must, accordingly, be strictly construed.

53 Or, indeed, if the object is in England, it may be possible to secure the return of the object prior to conviction: see Section (1) of the *Police (Property) Act, 1997*, para. 7.5 *infra*.

54 In England, the courts retain a residual discretion to refuse restitution to an owner. In other jurisdictions - traditionally, the civil law jurisdictions - restitution is only possible in the wake of a criminal conviction if the thief or person who knowingly received the stolen goods has retained possession.

**CHAPTER 7: THE PRESENT LAW REGARDING THE RETURN FROM IRELAND OF OBJECTS STOLEN IN OR ILLEGALLY EXPORTED FROM ANOTHER JURISDICTION**

**Introduction**

7.1 In this Chapter, we examine the means by which return may be secured of an object brought to Ireland following its theft in or illegal export from another jurisdiction. As we saw in Chapter 6, when considering the return to Ireland of a stolen cultural object taken from Ireland, it does not follow from the fact that an object is in a particular jurisdiction that the courts of that jurisdiction will determine the issue nor that the laws of that jurisdiction will apply. Thus, although Chapter 6 focuses upon objects located abroad and this Chapter upon objects in Ireland, it is possible that jurisdiction may be granted to the same court to determine title in respect of objects, wherever located.

7.2 It is equally possible that the applicable law governing the competing claims to the stolen objects could be the same in both circumstances. Thus, a claimant wishing to secure restitution through a civil action of a stolen object brought into this jurisdiction must direct his or her attention to the same legal considerations as a claimant seeking the return of objects which have travelled illicitly in the opposite direction. When one enters the domain of the criminal law, however, different considerations apply to objects introduced into this jurisdiction in consequence of a theft abroad than in the event of a similar act in this jurisdiction.

**A. Restitution Of Stolen Cultural Objects Through Criminal Law Enforcement**

7.3 As stated previously, the criminal process is of concern only to the extent to which it facilitates the restitution of the stolen cultural object, whether as a by-product of the conviction of the thief or receiver or as a result of discrete statutory provisions in the Irish criminal law designed to secure the return to the owner of the stolen object.

7.4 As a general rule, Irish criminal law applies only within this jurisdiction and in respect of offences committed within its territorial confines. Thus, as the

focus of concern is the cultural object introduced into Ireland in consequence of its theft abroad, the Irish courts are powerless to try someone who stole abroad. If, however, the object is "handled" in Ireland by someone who knows or believes that it was stolen abroad,<sup>1</sup> the Irish courts may exercise their criminal jurisdiction. Following conviction, they may grant an order for restitution to the dispossessed owner. This desired end is attained by virtue of the use of section 7(1) of *The Larceny Act, 1990* in conjunction with section 45(1) of *The Larceny Act, 1916* (the "1916 Act") which we have previously considered. Section 7 of the 1990 Act states that the offence of handling set out in Section 33 of the 1916 Act shall extend to property stolen outside the State. Upon conviction, the court shall grant an order for restitution pursuant to section 45(1) of the 1916 Act.

1. ***The Police (Property) Act, 1897 and the Criminal Justice Act, 1951***

7.5 The provisions of the *Police (Property) Act, 1897* and the *Criminal Justice Act, 1951*, may also be of assistance in the attempt to retrieve stolen cultural objects. Section 1 of the 1897 Act asserts that:

"[w]here any property has come into the possession of the police in connexion with any criminal charge or ... under section 103 of the *Larceny Act, 1861*..., a court of summary jurisdiction may, on application either by an officer of police or by a claimant of property, make an order for the delivery of the property to the person appearing to the magistrate or court to be the owner thereof, or if the owner cannot be ascertained, make such order with respect to the property as to the magistrate or court may seem fit".

7.6 The powers granted to the District Court by section 1 of the *Police (Property) Act, 1897*<sup>2</sup> were recently applied to restore to a dispossessed owner a Jack B. Yeats painting which was stolen in England, purchased by the defendant at an auction in London and then brought to Ireland.<sup>3</sup> The mechanism which it provides for securing the return of stolen cultural objects is a relatively straight-forward one; unlike a civil action in detinue, there is no need to have recourse to the intricacies of private international law.

7.7 Section 103 of the *Larceny Act, 1861* provides, *inter alia*, that if:

"any credible witness shall prove upon oath before a Justice of the Peace a reasonable cause to suspect that any person has in his possession or on his Premises any Property whatsoever on or with respect to which any Offence, punishable either upon Indictment or upon Summary

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1 The offence of "handling" was created by Section 3 of *The Larceny Act, 1990*, which inserted a new section 33 into the *Larceny Act, 1916*, thereby replacing the old offence of "receiving".

2 60 & 61 Vict. c.30.

3 *Irish Times*, September 26, 1995. The brief report did not contain any assessment of the financial value of the painting.

Conviction by virtue of this Act, shall have been committed, the Justice may grant a Warrant to search for such Property as in the case of stolen Goods."

7.8 A power to seize the specified property accompanies a search warrant.<sup>4</sup> The powers conferred under section 103 may be exercised whether or not a criminal charge is pending. Similarly, section 25 of the *Criminal Justice Act, 1951* adds that an order may be made for the disposal of property in the possession of the Gardai although no person has been charged in connection therewith.

7.9 The 1951 Act applies to property which has come into the possession of the Gardai in connection with *any* criminal charge; prior to the operation of Part VII of the *Criminal Justice Act, 1994*, and in the absence of extradition proceedings, the Gardai had authority only to seize objects in respect of which an offence had been committed in this jurisdiction. Nonetheless, if property which was stolen in another jurisdiction enters this jurisdiction and is under the control of someone who is handling the stolen property "knowing or believing it to be stolen"<sup>5</sup> the Gardai may exercise powers of seizure under the Larceny Acts in respect thereof.

## 2. *The Convention on Confiscation of the Proceeds of Crime*

7.10 With the entry into force of the *1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, Part VII of the *Criminal Justice Act, 1994* has become operative. Section 55(1), for example, enables the Irish authorities to search and seize materials relevant to investigations in States which are "designated" by the Government for that purpose:

"If, on an application made by the Director of Public Prosecutions or by a member of the Garda Síochána not below the rank of superintendent, a judge of the District Court is satisfied that there are reasonable grounds for believing that an offence under the law of a country in relation to which this section applies has been committed, and the conduct constituting that offence would, if it had occurred in the State, constitute an offence in respect of which the judge would have power under any enactment to issue a search warrant in relation to any place, then the judge shall have the same power to issue a search warrant authorising entry, search and seizure in relation to that place as he would have under the enactment in question in respect of an offence committed in the State.

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4 The search warrant may be granted *ex parte* (*State (Batchelor & Co. (Ireland) Limited) v. District Justice Cathal O'Flinn* [1958] IR 155), but the principle of *audi alterem partem* demands that, although no specific reference is made to this fact in section 1 itself, the Court must afford the person from whom the property was seized the opportunity to contest the making of the order, on the basis of his or her own alleged title in the goods.

5 Section 3 of the *Larceny Act, 1990*.

No application for a warrant shall be made under this section except in pursuance of a direction given by the Minister in response to a request received by him from the government of a country in relation to which this section applies and made on behalf of a court or tribunal exercising criminal jurisdiction in the country in question or a prosecuting authority in that country, or on behalf of any other authority in that country which appears to the Minister to be an appropriate authority for the purpose of this section, and any evidence seized by a member of the Garda Síochána by virtue of this section shall be furnished by him to the Minister for transmission to the government of the country concerned or, if that government so requests, to the court, tribunal or authority for which it has been obtained."

7.11 Section 47(1) of the *Criminal Justice Act, 1994* is of interest after the conviction of the accused in a foreign court;

"The Government may by order designate countries as countries in whose case orders (referred to in this section as 'forfeiture co-operation orders') may be made for the forfeiture, in accordance with the law of the State, of anything in respect of which an offence<sup>6</sup> ... has been committed ... and in respect of which an order (referred to in this section as an 'external forfeiture order') has been made by a court in the country in question."

7.12 Section 47(2) provides that the High Court may, with the consent of the Minister, grant such a forfeiture order if satisfied that a number of substantive provisions apply. Section 47(3) states, however,

"The Court shall not make ... an order ... if a person claiming to be the owner of the thing in question or otherwise interested in it applies to be heard by the court unless an opportunity has been given to him to show cause why the order should not be made."

7.13 The process of return which this section envisages is instigated by the issuing of an external forfeiture order; one wonders whether a civil law jurisdiction would issue such an order if the object were in the hands of a *bona fide* purchaser, albeit a *bona fide* purchaser in this jurisdiction. Civil law jurisdictions do not, as a rule, order the restitution of stolen objects following conviction in their criminal courts when the object is in the hands of a *bona fide* purchaser, a situation which is clearly analogous with that under consideration. Therefore, the usefulness of section 47 may be limited to those situations in which the cultural object is in the hands of a thief or a receiver in this jurisdiction.

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Section 47(5) of the Act applies to 'any offence which corresponds to (a) an offence under the *Misuse of Drugs Act, 1977* or (b) a drug trafficking offence or (c) an offence in respect of which a confiscation order could be made under section 9'. Section 9 of the Act sets out the circumstances in which the proceeds from an offence, other than a drug trafficking offence, may be confiscated.

### 3. *Extradition*

7.14 It is possible that a person who arrives in Ireland in possession of a cultural object stolen in a jurisdiction with which Ireland has an extradition agreement may be extradited to the first jurisdiction for trial. In Ireland, *The Extradition Act, 1965* provides that property apparently acquired by the commission of the offence for which the return of the accused is sought may also be returned to the authorities of the State requesting the return of the accused. Sections 36(1)(b) of the *Extradition Act, 1965* provides that

"A member of the Garda Síochána executing a warrant [for extradition] may seize and retain any property which appears to him to have been acquired as a result of the alleged offence and which is found at the time of arrest in the possession of the person arrested under the warrant, or is discovered subsequently."

Section 36(2) adds;

"Subject to the provisions of this section, any property seized under subsection (1) shall, if an order is issued by the Minister ... for the surrender of the person claimed, be handed over to any person who appears to the Minister to be duly authorised to receive it as soon as may be after the issue of the order and the said property shall be so handed over notwithstanding that the extradition in question cannot be carried out by reason of the death or the escape of the person claimed."

7.15 If the person extradited is subsequently convicted, restitution may be obtained pursuant to the jurisdiction's rules governing restitution following conviction. The fact that restitution will not be ordered following conviction in civil law jurisdictions if the object is in the hands of a *bona fide* purchaser is of no relevance in this regard, as we are essentially concerned with removing the object from the possession of extradited persons who are necessarily tainted by the criminal act.<sup>7</sup>

7.16 The utility of the extradition route as a means for securing the return of a stolen cultural object is clearly limited. Section 10(1) of the *Extradition Act, 1965* provides that:

"[E]xtradition shall be granted only in respect of an offence which is punishable under the laws of the requesting country and of the State by imprisonment for a maximum period of at least one year or by a more severe penalty and for which, if there has been a conviction and sentence in the requesting country, imprisonment for a period of at least four

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<sup>7</sup> In the event that it is not necessary to secure the extradition of the accused to the jurisdiction in which the offence was allegedly committed - because he or she is already present therein - if the object remains in another country, it may be possible to secure its return via inter-state police co-operation. Again police in the jurisdiction would surely only facilitate return if the object were not in the hands of a *bona fide* acquirer.



months or a more severe penalty has been imposed."

7.17 Thus, in some jurisdictions, the penalties imposed in other jurisdictions upon conviction for theft of cultural objects may not be sufficient to merit extradition from Ireland. As we have noted, however, it does not appear that the extradition option has ever been availed of to date.

## **B. The Return Of Illegally Exported Cultural Objects**

7.18 In Chapter 6, when considering the removal from this jurisdiction of objects in breach of Irish export regulations, we found it expedient to categorise the countries into which the object was brought as Member States and non-Member States of the European Union. It is expedient to adhere to this categorisation for the purposes of this Chapter also.

### ***The return of cultural objects brought to Ireland in breach of the export regulations of a Member State of the European Union***

7.19 The procedure adopted in this situation is identical with that discussed in Chapter 6 in respect of illegally exported objects travelling in the reverse direction.

### ***The return of cultural objects brought to Ireland in breach of the export regulations of a non-Member State***

7.20 The ability to secure the return of an object, introduced into this jurisdiction in breach of export regulations of a non-EC Member State, depends, as in the case of objects moving in the opposite direction, upon the existence of provisions in Irish law which render such imports illegal or alternatively or, in addition, afford recognition to the foreign export control regulations violated.

7.21 As we have seen, what is an illegal export from one jurisdiction is not necessarily an illegal import into another and Irish law accords with this position.<sup>8</sup> Under the Convention, however, the reluctance to enforce a foreign public law is dispensed with, recognition of particular categories of laws being required to be recognised by States acceding thereto.

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<sup>8</sup> One exception of sorts to this rule concerns those species which are the subject of the 1973 *Convention on the International Trade in Endangered Species*. Under that Convention, Contracting Parties are obliged to prohibit the export and import of designated categories of animals. Ireland has ratified this Convention.

## Conclusion

7.22 The examinations conducted in Chapters 6 and 7 expose the limitations of the legal mechanisms for securing restitution and return of objects stolen in or illegally exported from one jurisdiction and, subsequently, brought to another. A claimant wishing to secure the restitution of a stolen object must first grapple with the rules of private international law, rules which were not designed with the protection of cultural heritage in mind and which can, in fact, often bring about the opposite result.

7.23 The most significant obstacle, however, as the preliminary research for the Unidroit Convention itself indicated, is the set of rules in civil law systems which offer protection to a good faith purchaser of stolen cultural objects and thus facilitate the illicit trade in cultural objects to the detriment of the dispossessed owner. The fact that a claimant has no connection - by domicile, residence or other factor - with any civil law system is immaterial. As we have seen, the effect of the rules of private international law - in particular the application of the *lex rei sitae* rule - may be such that his or her claim is subjected to such unfavourable rules. At present, the criminal law appears to provide even less assistance to the dispossessed owner, although the *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 1990* should improve the situation.

## CHAPTER 8: CONCLUSION

8.1 With the foundation of the State, cultural heritage was recognised as a fundamental means of asserting an independent national identity. Together with promotion of the Irish language, heritage protection was seen as vital in the development of a "strong and healthy national spirit"<sup>1</sup> and an appreciation of the "heroism of our forefathers":<sup>2</sup>

"I do not know anything that stimulates more quickly a sense of nationality than a sight of one of these monuments. Nothing makes one more conscious of a national heritage than to see and examine one of these most beautiful objects which have been passed on to us by those who lived in the country formerly".<sup>3</sup>

8.2 On a number of occasions in recent years, the State has acted upon its obligation to provide "the necessary legislative tools with which to preserve, protect and foster the heritage of the people."<sup>4</sup>

8.3 The issue in approaching the Unidroit Convention is not simply whether it promotes protection of cultural heritage both nationally and internationally; it appears beyond doubt that it does this, by contributing to debate on the importance of such protection and encouraging States to be more vigilant in regulating and punishing certain activities. The question then is whether it constitutes a workable framework for claimants within which they may secure return of objects stolen from them or illegally exported from their jurisdictions.

8.4 Irish law is compatible with the principle on which the Convention is based, that of favouring the dispossessed owner by ensuring the return to him or her of stolen cultural objects. The extension of this principle to civil law jurisdictions, together with the imposition of the burden of showing good faith

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1 Parliamentary Debate on the National Monuments Bill, 1929 (Second Stage) 32 Parliamentary Debates col.242, per Mr. Bourke.

2 *Ibid.*, per Mr. Sheehy, col. 252.

3 *Ibid.*, per Professor Alton, col. 267.

4 Per Minister for Arts, Culture and the Gaeltacht, Mr. M. Higgins, speaking at the Second Stage of the *National Monuments (Amendment) Bill, 1963*, December 2, 1963, p.1069. To date, however, the State has not taken any comparable steps on an international level. Nonetheless, it has endorsed the concept of 'common heritage of mankind', albeit in the context of International Environmental Conventions. Thus, for example, Ireland has ratified the *Ramzar Convention on Wetlands of International Importance 1971 and Protocol 1972*, the *Berne Convention on the Conservation of European Wildlife and Natural Habitats*, concluded by EC decision 82/481/EEC, OJ L252, 5 September 1951.

upon the possessor, will undoubtedly have beneficial consequences. That the Convention locates the risk of loss firmly with the possessor will inevitably discourage the current tendency on the part of purchasers not to enquire into the provenance of objects at the time of purchase. This should impact negatively on the demand for stolen cultural objects and ultimately upon the rate of theft.

8.5 Cultural objects exported in breach of export regulations shall be returned if, but only if, their removal violates one of a number of stated interests in the object, a compromise situation designed to facilitate international access to culture to the benefit of foreign communities whilst at the same time curtailing the disadvantages of excessive international movement. Bearing in mind the competing interests which shape the Convention, this appears to represent a satisfactory solution. Not all, however, agree:

"[T]here should be no lingering hope that UNIDROIT is a balanced approach. Rather it overwhelmingly leans towards the interests of some countries and their policies of retention and isolation .... [T]he free market ... reflect[s] the appropriate fundamental approach to international culture and trade. The motion that we should accept the parochial view that there is something immoral or otherwise improper about these values, and endorse a policy where foreign countries can erect walls to cultural enlightenment and trade, is unthinkable ...."<sup>5</sup>

8.6 The author, a US lawyer, does not reflect his country's position on this issue. The US acceded to the UNESCO Convention and has over the last 70 years introduced increasingly draconian legislation to protect its archaeological heritage, particularly its Native American heritage. His statement defers to the principle of "maximum marketability", a concept which predominates in many Western systems. But even the most staunch defenders have imposed *some* modifications on the unfettered operation of the market, often in the guise of regulation of the international movement of State owned objects or those emanating from tribal or indigenous communities. The European Union has likewise recognised the need to deviate from the norms of free movement in this sphere. Thus, the guiding principle is not one of "maximum", but of "optimum" marketability, a concept which conveys the need for a desirable level of movement but no more. The Unidroit Convention endorses this approach as far as illegally exported objects are concerned while at the same time improving significantly the protection afforded to stolen cultural objects. The Convention is clearly conducive to the protection of cultural heritage in this and other jurisdictions.

8.7 Historically Ireland in recent centuries was primarily an "importing" country in that our great national and private collections contained a diverse range of cultural objects which originated in other countries and which came to Ireland in a wide range of methods - some of which would now be considered

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5 Fitzpatrick, J., *The Case Against the Unidroit Convention* (Paper presented at the Conference on Art Theft and its Control, London, 15 November 1995).

unacceptable.

8.8 In this century the wheel has turned and while institutions and individuals may continue, one hopes legitimately, to import various kinds of cultural objects, the theft and illegal export of such goods from Ireland has increased dramatically. This is particularly true of objects of archaeological interest and has been assisted by the technology of metal detection.

8.9 We believe that the advantages to Ireland, a country with a major cultural heritage which is in danger, in acceding to the Convention, greatly outweigh any concerns which arise as to its implementation. As we have seen, Common Law countries are in a more favourable position with regard to implementation than those governed by civil law; they are not required to institute measures which would run counter to long established legal principle, for example, the protection of dispossessed owners. Furthermore, concerns that the Convention poses a threat to those who have an existing title in cultural objects are misplaced, given that the Convention will not have retroactive effect.

8.10 The submissions we received on our Consultation Paper unanimously supported our provisional recommendation that Ireland should accede to the Convention. Any reservations therein related to its scope - some experts were of the view that it did not go far enough in terms of the objects covered - rather than to the desirability of accession.

8.11 *We recommend that Ireland should accede to the Unidroit Convention and that legislation be enacted which gives effect to its provisions.*

## CHAPTER 9: SUMMARY OF RECOMMENDATIONS

1. Ireland should accede to the *Unidroit Convention on Stolen or Illegally Exported Cultural Objects*.
2. Ireland should not avail itself of the option, in Article 3(5), of making a declaration that claims for return of objects forming an integral part of an identified monument or archaeological site, or belonging to a public collection shall be subject to a limitation period of 75 years or longer. Such claims should not be subject to time limitation. (para. 3.65)
3. We recommend introduction of a provision which states that the limitation periods provided under the Convention shall have effect in respect of claims arising under it in place of any other enactment governing the limitation of actions. (para. 3.64)
4. Ireland should make a declaration under Article 13(3) that in its relations with other European Community Member States, it will apply the rules of Community law rather than the Convention where the scope of these rules coincides with the scope of application of the Convention. (para. 3.159)
5. Ireland should make a declaration under Article 16(1) nominating the Minister for *Arts, Heritage, the Gaeltacht and the Islands* as the central authority to which claims for restitution or requests for return should be submitted. (para. 3.161)
6. We recommend that our current law, which does not require compensation of *bona fide* purchasers of stolen cultural objects by dispossessed owners should remain unchanged. (para. 3.86)
7. We recommend that compensation should be available to a *bona fide* possessor of an illegally exported cultural object. The Court hearing the claim for return should be entitled to order payment by the requesting State of such compensation as the Court deems "fair and reasonable" in all the circumstances of the case and provided that the possessor neither knew nor ought reasonably to have known at the time of the acquisition of the object that it had been illegally exported. (para. 3.117)

8. We recommend that where compensation is sought by a possessor of an illegally exported cultural object, he or she should bear the burden of proving an entitlement to it. We further recommend that this should be made explicit in implementing legislation. (para. 3.125)
9. We recommend that the standard of proof which should be applied in claims under the Convention should be the civil standard, that of proof on the balance of probabilities. We further recommend that a provision to that effect should be included in implementing legislation. (para. 3.123)
10. We reiterate our Recommendation, originally made in *The Law Relating to Dishonesty* (LRC 43-1992), that legislation should be introduced which would remove the restriction on larcenability of objects which form part of realty. (para. 4.24)
11. We recommend that a provision be enacted clarifying that a landowner on whose land archaeological objects are found does not constitute an "owner" for the purposes of the *National Monuments Act, 1994* unless he is the original owner of the object or that person's successor in title. (para. 4.81)
12. We recommend introduction of a provision allowing a claimant to rely on the location of the object as a basis of jurisdiction. (para. 6.21)
13. We recommend that a regime similar to that available under Regulation 4(4) and (5) of the *European Communities (Return of Cultural Objects) Regulations, 1994* be instituted allowing the State to take possession of an object the return of which is sought, or to take any other steps it considers necessary to prevent action to evade return until such time as a determination is made as to whether the object is to be returned. (para. 6.56)

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## **APPENDIX A**

### **UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS**

**THE STATES PARTIES TO THIS CONVENTION,**

**ASSEMBLED** in Rome at the invitation of the Government of the Italian Republic from 7 to 24 June 1995 for a Diplomatic Conference for the adoption of the draft Unidroit Convention on the International Return of Stolen or Illegally Cultural Objects,

**CONVINCED** of the fundamental importance of the protection of cultural heritage and of cultural exchanges for promoting understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilisation,

**DEEPLY CONCERNED** by the illicit trade in cultural objects and the irreparable damage frequently caused by it, both to these objects themselves and to the cultural heritage of national, tribal, indigenous or other communities, and also to the heritage of all peoples, and in particular by the pillage of archaeological sites and the resulting loss of irreplaceable archaeological, historical and scientific information,

**DETERMINED** to contribute effectively to the fight against illicit trade in cultural objects by taking the important step of establishing common, minimal legal rules for the restitution and return of cultural objects between Contracting States, with the objective of improving the preservation and protection of the cultural heritage in the interest of all,

**EMPHASISING** that this Convention is intended to facilitate the restitution and return of cultural objects, and that the provision of any remedies, such as compensation, needed to effect restitution and return in some States, does not imply that such remedies should be adopted in other States,

**AFFIRMING** that the adoption of the provisions of this Convention for the future in no way confers any approval or legitimacy upon illegal transactions of whatever kind which may have taken place before the entry into force of the Convention,

CONSCIOUS that this Convention will not by itself provide a solution to the problems raised by illicit trade, but that it initiates a process that will enhance international cultural co-operation and maintain a proper role for legal trading and inter-State agreements for cultural exchanges.

ACKNOWLEDGING that implementation of this Convention should be accompanied by other effective measures for protecting cultural objects, such as the development and use of registers, the physical protection of archaeological sites and technical co-operation,

RECOGNISING the work of various bodies to protect cultural property, particularly the 1970 UNESCO Convention on illicit traffic and the development of codes of conduct in the private sector,

HAVE AGREED as follows:

## CHAPTER I - SCOPE OF APPLICATION AND DEFINITION

### Article 1

This Convention applies to claims of an international character for:

- (a) the restitution of stolen cultural objects;
- (b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage (hereinafter "illegally exported cultural objects").

### Article 2

For the purposes of this Convention, cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention.

## CHAPTER II - RESTITUTION OF STOLEN CULTURAL OBJECTS

### Article 3

- (1) The possessor of a cultural object which has been stolen shall return it.
- (2) For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.
- (3) Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft.
- (4) However, a claim for restitution of a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor.
- (5) Notwithstanding the provisions of the preceding paragraph, any Contracting State may declare that a claim is subject to a time limitation of 75 years or such longer period as is provided in its law. A claim made in another Contracting State for restitution of a cultural object displaced from a monument, archaeological site or public collection in a Contracting State making such a declaration shall also be subject to that time limitation.
- (6) A declaration referred to in the preceding paragraph shall be made at the time of signature, ratification, acceptance, approval or accession.
- (7) For the purposes of this Convention, a "public collection" consists of a group of inventoried or otherwise identified cultural objects owned by:
  - (a) a Contracting State;
  - (b) a regional or local authority of a Contracting State;
  - (c) a religious institution in a Contracting State; or
  - (d) an institution that is established for an essentially cultural, educational or scientific purpose in a Contracting State and is recognised in that State as serving the public interest.

- (8) In addition, a claim for restitution of a sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community's traditional or ritual use, shall be subject to the time limitation applicable to public collections.

#### **Article 4**

- (1) The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.
- (2) Without prejudice to the right of the possessor to compensation referred to in the preceding paragraph, reasonable efforts shall be made to have the person who transferred the cultural object to the possessor, or any prior transferor, pay the compensation where to do so would be consistent with the law of the State in which the claim is brought.
- (3) Payment of compensation to the possessor by the claimant, when this is required, shall be without prejudice to the right of the claimant to recover it from any other person.
- (4) In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.
- (5) The possessor shall not be in a more favourable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously.

### **CHAPTER III - RETURN OF ILLEGALLY EXPORTED CULTURAL OBJECTS**

#### **Article 5**

- (1) A Contracting State may request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of the requesting State.

- (2) A cultural object which has been temporarily exported from the territory of the requesting State, for purposes such as exhibition, research or restoration, under a permit issued according to its law regulating its export for the purpose of protecting its cultural heritage and not returned in accordance with the terms of that permit shall be deemed to have been illegally exported.
- (3) The court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests:
  - (a) the physical preservation of the object or of its context;
  - (b) The integrity of a complex object;
  - (c) the preservation of information of, for example, a scientific or historical character;
  - (d) the traditional or ritual use of the object by a tribal or indigenous community,or establishes that the object is of significant cultural importance for the requesting State.
- (4) Any request made under paragraph 1 of this article shall contain or be accompanied by such information of a factual or legal nature as may assist the court or other competent authority of the State addressed in determining whether the requirements of paragraphs 1 to 3 have been met.
- (5) Any request for return shall be brought within a period of three years from the time when the requesting State knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the date of the export or from the date on which the object should have been returned under a permit referred to in paragraph 2 of this Article.

#### **Article 6**

- (1) The possessor of a cultural object who acquired the object after it was illegally exported shall be entitled, at the time of its return, to payment by the requesting State of fair and reasonable compensation, provided that the possessor neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported.

- (2) In determining whether the possessor knew or ought reasonably to have known that the cultural object had been illegally exported, regard shall be had to the circumstances of the acquisition, including the absence of an export certificate required under the law of the requesting State.
- (3) Instead of compensation, and in agreement with the requesting State, the possessor required to return the cultural object to that State, may decide:
  - (a) to retain ownership of the object; or
  - (b) to transfer ownership against payment or gratuitously to a person of its choice residing in the requesting State who provides the necessary guarantees.
- (4) The cost of returning the cultural object in accordance with this article shall be borne by the requesting State, without prejudice to the right of that State to recover costs from any other person.
- (5) The possessor shall not be in a more favourable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously.

#### **Article 7**

- (1) The provisions of this Chapter shall not apply where:
  - (a) the export of a cultural object is no longer illegal at the time at which the return is requested; or
  - (b) the object was exported during the lifetime of the person who created it or within a period of fifty years following the death of that person.
- (2) Notwithstanding the provisions of sub-paragraph (b) of the preceding paragraph, the provisions of this Chapter shall apply where a cultural object was made by a member or members of a tribal or indigenous community for traditional or ritual use by that community and the object will be returned to that community.

### **CHAPTER IV - GENERAL PROVISIONS**

#### **Article 8**

- (1) A claim under Chapter II and a request under Chapter III may be brought before the courts or other competent authorities of the

Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States.

- (2) The parties may agree to submit the dispute to any court or other competent authority or to arbitration.
- (3) Resort may be had to the provisional, including protective, measures available under the law of the Contracting State where the object is located even when the claim for restitution or request for return of the object is brought before the courts or other competent authorities of another Contracting State.

#### **Article 9**

- (1) Nothing in this Convention shall prevent a Contracting State from applying any rules more favourable to the restitution or the return of stolen or illegally exported cultural objects than provided for by this Convention.
- (2) This article shall not be interpreted as creating an obligation to recognise or enforce a decision of a court or other competent authority of another Contracting State that departs from the provisions of this Convention.

#### **Article 10**

- (1) The provisions of Chapter II shall apply only in respect of a cultural object that is stolen after this Convention enters into force in respect of the State where the claim is brought, provided that:
  - (a) the object was stolen from the territory of a Contracting State after the entry into force of this Convention for that State; or
  - (b) the object is located in a Contracting State after the entry into force of the Convention for that State.
- (2) The provisions of Chapter III shall apply only in respect of a cultural object that is illegally exported after this Convention enters into force for the requesting State as well as the State where the request is brought.
- (3) This Convention does not in any way legitimise any illegal transaction of whatever nature which has taken place before the entry into force of this Convention or which is excluded under paragraphs (1) or (2) of this article, nor limit any right of a State or other person to make a claim under remedies available outside the framework of this Convention for the restitution or return of a cultural object stolen or illegally exported before the entry into force of this Convention.



## **CHAPTER V - FINAL PROVISIONS**

### **Article 11**

- (1) This Convention is open for signature at the concluding meeting of the Diplomatic Conference for the adoption of the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and will remain open for signature by all States at Rome until 30 June 1996.
- (2) This Convention is subject to ratification, acceptance or approval by States which have signed it.
- (3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.
- (4) Ratification, acceptance, approval or accession is subject to the deposit of a formal instrument to that effect with the depositary.

### **Article 12**

- (1) This Convention shall enter into force on the first day of the sixth month following the date of deposit of the fifth instrument of ratification, acceptance, approval or accession.
- (2) For each State that ratifies, accepts, approves or accedes to this Convention after the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State on the first day of the sixth month following the date of deposit of its instrument of ratification, acceptance, approval or accession.

### **Article 13**

- (1) This Convention does not affect any international instrument by which any Contracting State is legally bound and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by the States bound by such instrument.
- (2) Any Contracting State may enter into agreements with one or more Contracting States, with a view to improving the application of this Convention in their mutual relations. The States which have concluded such an agreement shall transmit a copy to the depositary.

- (3) In their relations with each other, Contracting States which are Members of organisations of economic integration or regional bodies may declare that they will apply the internal rules of these organisations or bodies and will not therefore apply as between these States the provisions of this Convention the scope of application of which coincides with that of those rules.

#### **Article 14**

- (1) If a Contracting State has two or more territorial units, whether or not possessing different systems of law applicable in relation to the matters dealt with in this Convention, it may, at the time of signature or of the deposit of its instrument of ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may substitute for its declaration another declaration at any time.
- (2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.
- (3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, the reference to:
  - (a) the territory of a Contracting State in Article 1 shall be construed as referring to the territory of a territorial unit of that State;
  - (b) a court or other competent authority of the Contracting State or of the State addressed shall be construed as referring to the court or other competent authority of a territorial unit of that State;
  - (c) the Contracting State where the cultural object is located in Article 8 (1) shall be construed as referring to the territorial unit of that State where the object is located;
  - (d) the law of the Contracting State where the object is located in Article 8 (3) shall be construed as referring to the law of the territorial unit of that State where the object is located; and
  - (e) a Contracting State in Article 9 shall be construed as referring to a territorial unit of that State.
- (4) If a Contracting State makes no declaration under paragraph 1 of this article, this Convention is to extend to all territorial units of that State.

#### **Article 15**

- (1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.
- (2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.
- (3) A declaration shall take effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force shall take effect on the first day of the sixth month following the date of its deposit with the depositary.
- (4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal shall take effect on the first day of the sixth month following the date of the deposit of the notification.

#### **Article 16**

- (1) Each Contracting State shall at the time of signature, ratification, acceptance, approval or accession, declare that claims for the restitution, or requests for the return, of cultural objects brought by a State under Article 8 may be submitted to it under one or more of the following procedures:
  - (a) directly to the courts or other competent authorities of the declaring State;
  - (b) through an authority or authorities designated by that State to receive such claims or requests and to forward them to the courts or other competent authorities of that State;
  - (c) through diplomatic or consular channels.
- (2) Each Contracting State may also designate the courts or other authorities competent to order the restitution or return of cultural objects under the provisions of Chapters II and III.
- (3) Declarations made under paragraphs 1 and 2 of this article may be modified at any time by a new declaration.
- (4) The provisions of paragraphs 1 to 3 of this article do not affect bilateral or multilateral agreements on judicial assistance in respect of civil and commercial matters that may exist between Contracting States.

#### **Article 17**

Each Contracting State shall, no later than six months following the date of deposit of its instrument of ratification, acceptance, approval or accession, provide the depositary with written information in one of the official languages of the Convention concerning the legislation regulating the export of its cultural objects. This information shall be updated from time to time as appropriate.

#### **Article 18**

No reservations are permitted except those expressly authorised in this Convention.

#### **Article 19**

- (1) This Convention may be denounced by any State Party, at any time after the date on which it enters into force for that State, by the deposit of an instrument to that effect with the depositary.
- (2) A denunciation shall take effect on the first day of the sixth month following the deposit of the instrument of denunciation with the depositary. Where a longer period for the denunciation to take effect is specified in the instrument of denunciation it shall take effect upon the expiration of such longer period after its deposit with the depositary.
- (3) Notwithstanding such a denunciation, this Convention shall nevertheless apply to a claim for restitution or a request for return of a cultural object submitted prior to the date on which the denunciation takes effect.

#### **Article 20**

The President of the International Institute for the Unification of Private Law (Unidroit) may at regular intervals, or at any time at the request of five Contracting States, convene a special committee in order to review the practical operation of this Convention.

#### **Article 21**

- (1) This Convention shall be deposited with the Government of the Italian Republic.
- (2) The Government of the Italian Republic shall:

- (a) inform all States which have signed or acceded to this Convention and the President of the International Institute for the Unification of private Law (Unidroit) of:
  - (i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;
  - (ii) each declaration made in accordance with this Convention;
  - (iii) the withdrawal of any declaration;
  - (iv) the date of entry into force of this Convention;
  - (v) the agreements referred to in Article 13;
  - (vi) the deposit of an instrument of denunciation of this Convention together with the date of its deposit and the date on which it takes effect;
- (b) transmit certified true copies of this Convention to all signatory States, to all States acceding to this Convention and to the President of the International Institute for the Unification of Private Law (Unidroit);
- (c) perform such other functions customary for depositaries.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised, have signed this Convention.

DONE at Rome, this twenty-fourth day of June, one thousand nine hundred and ninety five, in a single original, in the English and French languages, both texts being equally authentic.

#### **Annex**

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) Property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;

- (c) Products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) Elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) Antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) Objects of ethnological interest;
- (g) Property of artistic interest, such as:
  - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
  - (ii) original works of statuary art and sculpture in any material;
  - (iii) original engravings, prints and lithographs;
  - (iv) original artistic assemblages and montages in any material;
- (h) Rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
- (i) Postage, revenue and similar stamps, singly or in collections,
- (j) Archives, including sound, photographic and cinematographic archives;
- (k) Articles of furniture more than one hundred years old and old musical instruments.

## APPENDIX B

### UNESCO CONVENTION ON THE MEANS OF PROHIBITING AND PREVENTING THE ILLICIT IMPORT, EXPORT AND TRANSFER OF OWNERSHIP OF CULTURAL PROPERTY

The General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 12 October to 14 November 1970, at its sixteenth session,

*Recalling* the importance of the provisions contained in the Declaration of the Principles of International Co-operation, adopted by the General Conference at its fourteenth session,

*Considering* that the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations,

*Considering* that cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting,

*Considering* that it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export,

*Considering* that, to avert these dangers, it is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations,

*Considering* that, as cultural institutions, museums, libraries and archives should ensure that their collections are built up in accordance with universally recognized moral principles,

*Considering* that the illicit import, export and transfer of ownership of cultural property is an obstacle to that understanding between nations which is part of Unesco's mission to promote by recommending to interested States, international conventions to this end,

*Considering* that the protection of cultural heritage can be effective only if organized both nationally and internationally among States working in close co-operation,

*Considering* that the Unesco Genreal Conference adopted a Recommendation to this effect in 1964,

*Having before it* further proposals on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property, a question which is on the agenda for the session as item 19,

*Having decided*, at its fifteenth session, that this question should be made the subject of an international convention,

*Adopts* this Convention on the fourteenth day of November 1970.

### ***Article 1***

For the purposes of this Convention, the term 'cultural property' means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

- (a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
  - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
  - (ii) original works of statuary art and sculpture in any material;
  - (iii) original engravings, prints and lithographs;
  - (iv) original artistic assemblages and montages in any material;



- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.;) singly or in collections;
- (i) postage, revenue and similar stamps, singly or in collections,
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments.

***Article 2***

1. The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting therefrom.
2. To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.

***Article 3***

The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit.

***Article 4***

The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State:

- (a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory;
- (b) cultural property found within the national territory;
- (c) cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property;
- (d) cultural property which has been the subject of a freely agreed exchange;

- (e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.

**Article 5**

To ensure the protection of their cultural property against illicit import, export and transfer of ownership, the States Parties to this Convention undertake, as appropriate for each country, to set up within their territories one or more national services, where such services do not already exist, for the protection of the cultural heritage, with a qualified staff sufficient in number for the effective carrying out of the following functions:

- (a) Contributing to the formation of draft laws and regulations designed to secure the protection of the cultural heritage and particularly prevention of the illicit import, export and transfer of ownership of important cultural property;
- (b) establishing and keeping up to date, on the basis of a national inventory of protected property, a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage;
- (c) promoting the development or the establishment of scientific and technical institutions (museums, libraries, archives, laboratories, workshops) required to ensure the preservation and presentation of cultural property;
- (d) organizing the supervision of archaeological excavations, ensuring the preservation 'in situ' of certain cultural property, and protecting certain areas reserved for future archaeological research;
- (e) establishing, for the benefit of those concerned (curators, collectors, antique dealers, etc.) rules in conformity with the ethical principles set forth in this Convention; and taking steps to ensure the observance of those rules;
- (f) taking educational measures to stimulate and develop respect for the cultural heritage of all States, and spreading knowledge of the provisions of this Convention;
- (g) seeing that appropriate publicity is given to the disappearance of any items of cultural property.

**Article 6**

The States Parties to this Convention undertake:

- (a) to introduce an appropriate certificate in which the exporting State

would specify that the export of the cultural property in question is authorized. The certificate should accompany all items of cultural property exported in accordance with the regulations;

- (b) to prohibit the exportation of cultural property from their territory unless accompanied by the above-mentioned export certificate;
- (c) to publicize this prohibition by appropriate means, particularly among persons likely to export or import cultural property.

**Article 7**

The States Parties to this Convention undertake:

- (a) To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this Convention in both States;
- (b)
  - (i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution;
  - (ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party.

**Article 8**

The States Parties to this Convention undertake to impose penalties or administrative sanctions on any person responsible for infringing the prohibitions referred to under Articles 6(b) and 7(b) above.

**Article 9**

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.

**Article 10**

The States Parties to this Convention undertake:

- (a) To restrict by education, information and vigilance, movement of cultural property illegally removed from any State Party to this Convention and, as appropriate for each country, oblige antique dealers, subject to penal or administrative sanctions, to maintain a register recording the origin of each item of cultural property, names and addresses of the supplier, description and price of each item sold and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject;
- (b) to endeavour by educational means to create and develop in the public mind a realization of the value of cultural property and the threat to the cultural heritage created by theft, clandestine excavations and illicit exports.

**Article 11**

The export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit.

**Article 12**

The States Parties to this Convention shall respect the cultural heritage within the territories for the international relations of which they are responsible, and shall take all appropriate measures to prohibit and prevent the illicit import, export and transfer of ownership of cultural property in such territories.

**Article 13**

The States Parties to this Convention also undertake, consistent with the laws of each State:

- (a) To prevent by all appropriate means transfers of ownership of cultural

- property likely to promote the illicit import or export of such property;
- (b) to ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner;
  - (c) to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners;
  - (d) to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore *ipso facto* not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported.

**Article 14**

In order to prevent illicit export and to meet the obligations arising from the implementation of this Convention, each State Party to the Convention should, as far as it is able, provide the national services responsible for the protection of its cultural heritage with an adequate budget and, if necessary, should set up a fund for this purpose.

**Article 15**

Nothing in this Convention shall prevent States Parties thereto from concluding special agreements among themselves or from continuing to implement agreements already concluded regarding the restitution of cultural property removed, whatever the reason, from its territory of origin, before the entry into force of this Convention for the States concerned.

**Article 16**

The States Parties to this Convention shall in their periodic reports submitted to the General Conference of the United Nations Educational, Scientific and Cultural Organization on dates and in a manner to be determined by it, give information on the legislative and administrative provisions which they have adopted and other action which they have taken for the application of this Convention, together with details of the experience acquired in this field.

**Article 17**

1. The States Parties to this Convention may call on the technical assistance of the United Nations Educational, Scientific and Cultural Organization, particularly as regards:
  - (a) information and education;
  - (b) consultation and expert advice;

- (c) co-ordination and good offices.
- 2. The United Nations Educational, Scientific and Cultural Organization may, on its own initiative, conduct research and publish studies on matters relevant to the illicit movement of cultural property.
- 3. To this end, the United Nations Educational, Scientific and Cultural Organization may also call on the co-operation of any competent non-governmental organization.
- 4. The United Nations Educational, Scientific and Cultural Organization may, on its own initiative, make proposals to States Parties to this Convention for its implementation.
- 5. At the request of at least two States Parties to this Convention which are engaged in a dispute over its implementation, Unesco may extend its good offices to reach a settlement between them.

***Article 18***

This Convention is drawn up in English, French, Russian and Spanish, the four texts being equally authoritative.

***Article 19***

- 1. This Convention shall be subject to ratification or acceptance by States members of the United Nations Educational, Scientific and Cultural Organization in accordance with their respective constitutional procedures.
- 2. The instruments of ratification or acceptance shall be deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

***Article 20***

- 1. This Convention shall be open to accession by all States not members of the United Nations Educational, Scientific and Cultural Organization which are invited to accede to it by the Executive Board of the Organization.
- 2. Accession shall be effected by the deposit of an instrument of accession with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

***Article 21***

This Convention shall enter into force three months after the date of the deposit

of the third instrument of ratification, acceptance or accession, but only with respect to those States which have deposited their respective instruments on or before that date. It shall enter into force with respect to any other State three months after the deposit of its instrument of ratification, acceptance or accession.

***Article 22***

The States Parties to this Convention recognize that the Convention is applicable not only to their metropolitan territories but also to all territories for the international relations of which they are responsible; they undertake to consult, if necessary, the governments or other competent authorities of these territories on or before ratification, acceptance or accession with a view to securing the application of the Convention to those territories, and to notify the Director-General of the United Nations Educational, Scientific and Cultural Organization of the territories to which it is applied, the notification to take effect three months after the date of its receipt.

***Article 23***

1. Each State Party to this Convention may denounce the Convention on its own behalf or on behalf of any territory for whose international relations it is responsible.
2. The denunciation shall be notified by an instrument in writing, deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.
3. The denunciation shall take effect twelve months after the receipt of the instrument of denunciation.

***Article 24***

The Director-General of the United Nations Educational, Scientific and Cultural Organization shall inform the States members of the Organization, the States not members of the Organization which are referred to in Article 20, as well as the United Nations, of the deposit of all the instruments of ratification, acceptance and accession provided for in Articles 19 and 20, and of the notifications and denunciations provided for in Articles 22 and 23 respectively.

***Article 25***

1. This Convention may be revised by the General Conference of the United Nations Educational, Scientific and Cultural Organization. Any such revision shall, however, bind only the States which shall become Parties to the revising convention.
2. If the General Conference should adopt a new convention revising this Convention in whole or in part, then, unless the new convention

otherwise provides, this Convention shall cease to be open to ratification, acceptance or accession, as from the date on which the new revising convention enters into force.

***Article 26***

In conformity with Article 102 of the Charter of the United Nations, this Convention shall be registered with the Secretariat of the United Nations at the request of the Director-General of the United Nations Educational, Scientific and Cultural Organization.

Done in Paris this seventeenth day of November 1970, in two authentic copies bearing the signature of the President of the sixteenth session of the General Conference and of the Director-General of the United Nations Educational, Scientific and Cultural Organization, and certified true copies of which shall be delivered to all the States referred to in Articles 19 and 20 as well as to the United Nations.

The foregoing is the authentic text of the Convention duly adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization during its sixteenth session, which was held in Paris and declared closed the fourteenth day of November 1970.



UNESCO

CONVENTION ON THE MEANS OF PROHIBITING AND PREVENTING  
THE ILLICIT IMPORT, EXPORT AND TRANSFER OF OWNERSHIP  
OF CULTURAL PROPERTY (PARIS, NOVEMBER 14, 1970)

LIST OF THE 88 STATES PARTIES  
AS AT AUGUST 31, 1997

<u>STATES</u>	<u>DATE OF DEPOSIT</u>	<u>DATE OF ENTRY INTO FORCE</u>
	RATIFICATION (R) ACCEPTANCE (Ac) ACCESSION (A) SUCCESSION (S)	
ALGERIA	24.06.1974 (R)	24.09.1974
ANGOLA	07.11.1991 (R)	07.02.1992
ARGENTINA	11.01.1973 (R)	11.04.1973
ARMENIA	05.09.1993 (S)	NOTE 1
AUSTRALIA	30.10.1989 (Ac)	30.01.1990
BANGLADESH	09.12.1987 (R)	09.03.1988
BELARUS	28.04.1988 (R)	28.07.1988
BELIZE	26.01.1990 (R)	26.04.1990
BOLIVIA	04.10.1976 (R)	04.01.1977
BOSNIA- HERZEGOVINA (Republic of) <sup>2</sup>	12.07.1993 (S)	NOTE 2
BRAZIL	16.02.1973 (R)	16.05.1973
BULGARIA <sup>5</sup>	15.09.1971 (R)	24.04.1972
BURKINA FASO	07.04.1987 (R)	07.07.1987
CAMBODIA	26.09.1972 (R)	26.12.1972

CAMEROON	24.05.1972 (R)	24.08.1972
CANADA	28.03.1978 (Ac)	28.06.1978
CENTRAL AFRICAN REPUBLIC	01.02.1972 (R)	01.05.1972
CHINA (People's Republic of)	28.11.1989 (Ac)	28.02.1990
COLOMBIA	24.05.1988 (Ac)	24.08.1988
COSTA RICA	06.03.1996 (R)	06.06.1996
COTE D'IVOIRE	30.10.1990 (R)	30.01.1991
CROATIA(Republi c of) <sup>2</sup>	06.07.1992 (S)	NOTE 2
CUBA	30.01.1980 (R)	30.04.1980
CYPRUS	19.10.1979 (R)	19.01.1980
CZECH REPUBLIC <sup>3</sup>	26.03.1993 (S)	NOTE 3
DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA	13.05.1983 (R)	13.08.1983
DOMINICAN REPUBLIC	07.03.1973 (R)	07.06.1973
ECUADOR	24.03.1971 (Ac)	24.04.1972
EGYPT	05.04.1973 (Ac)	05.07.1973
EL SALVADOR	20.02.1978 (R)	20.05.1978
ESTONIA	27.10.1995 (R)	27.01.1996
FEDERAL REPUBLIC OF YUGOSLAVIA	03.10.1972 (R)	03.01.1973

FRANCE	07.01.1997 (R)	07.04.1997
GEORGIA(Republic of) <sup>1</sup>	04.11.1992 (S)	NOTE 1
GREECE	05.06.1981 (R)	05.09.1981
GRENADA	10.09.1992 (Ac)	10.12.1992
GUATEMALA	14.01.1985 (R)	14.04.1985
GUINEA	18.03.1979 (R)	18.06.1979
HONDURAS	19.03.1979 (R)	19.06.1979
HUNGARY	23.10.1978 (R)	23.01.1979
INDIA	24.01.1977 (R)	24.04.1977
IRAN (Islamic Republic of)	27.01.1975 (Ac)	27.04.1975
IRAQ	12.02.1973 (Ac)	12.05.1973
ITALY	02.10.1978 (R)	02.01.1979
JORDAN	15.03.1974 (R)	15.06.1974
KAZAKSTAN	May 1997	
KUWAIT	22.06.1972 (Ac)	22.09.1972
KYRGHYZ REPUBLIC	03.07.1995 (A)	03.10.1995
LEBANON	25.08.1992 (R)	25.11.1992
LIBYA	09.01.1973 (R)	09.04.1973
MACEDONIA (The former Yugoslav <sup>2</sup> Republic of)	30.04.1997 (S)	NOTE 2
MADAGASCAR	21.06.1989 (R)	21.09.1989
MALI	06.04.1987 (R)	06.07.1987

MAURITANIA	27.04.1977 (R)	27.07.1977
MAURITIUS	27.02.1978 (A)	27.05.1978
MEXICO	04.10.1972 (Ac)	04.01.1973
MONGOLIA	23.05.1991 (Ac)	23.08.1991
NEPAL	23.06.1976 (R)	23.09.1976
NICARAGUA	19.04.1977 (R)	19.07.1977
NIGER	16.10.1972 (R)	16.01.1973
NIGERIA	24.01.1972 (R)	24.04.1972
OMAN	02.06.1978 (Ac)	02.09.1978
PAKISTAN	30.04.1981 (R)	30.07.1981
PANAMA	13.08.1973 (Ac)	13.11.1973
PERU	24.10.1979 (Ac)	24.01.1980
POLAND	31.01.1974 (R)	30.04.1974
PORTUGAL	09.12.1985 (R)	09.03.1986
QUATAR	20.04.1977 (Ac)	20.07.1977
REPUBLIC OF KOREA	14.02.1983 (Ac)	14.05.1983
ROMANIA	06.12.1993 (R)	06.03.1994
RUSSIAN FEDERATION <sup>4</sup>	28.04.1988 (R)	28.07.1988
SAUDI ARABIA	08.09.1976 (Ac)	08.12.1976
SENEGAL	09.12.1984 (R)	09.03.1985
SLOVAK REPUBLIC <sup>3</sup>	31.03.1993 (S)	NOTE 3
SLOVENIA(Republ ic of) <sup>2</sup>	05.11.1992 (S)	NOTE 2

SPAIN	10.01.1986 (R)	10.04.1986
SRI LANKA	07.04.1981 (Ac)	07.07.1981
SYRIAN ARAB REPUBLIC	21.02.1975 (Ac)	21.05.1975
TAJIKISTAN(Repu blic of) <sup>1</sup>	28.08.1992 (S)	NOTE 1
TANZANIA	02.08.1977 (R)	02.11.1977
TUNISIA	10.03.1975 (R)	10.06.1975
TURKEY	21.04.1981 (R)	21.07.1981
UKRAINE	28.04.1988 (R)	28.07.1988
UNITED STATES OF AMERICA	02.09.1983 (Ac)	02.12.1983
URUGUAY	09.08.1977 (R)	09.11.1977
UZBEKISTAN	15.03.1996 (R)	15.06.1996
ZAIRE	23.09.1974 (R)	23.12.1974
ZAMBIA	21.06.1985 (R)	21.09.1985

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1. This State lodged a notification of succession at the mentioned date, by which it stated that it was bound by the Convention that the USSR ratified on 28 April 1988.
  2. This State lodged a notification of succession at the mentioned date, by which it stated that it was bound by the Convention which Yugoslavia ratified on 3 October 1972.
  3. This State lodged a notification of succession at the mentioned date, by which it stated that it was bound by the Convention which Czechoslovakia accepted on 14 February 1977.
  4. The instrument of ratification was deposited by the USSR on 28 April 1988. The Director-General has been informed that the Russian Federation would continue the participation of the USSR in UNESCO conventions.
  5. In conformity with the procedure set forth in the Convention, this agreement entered into force, for the first States, three months after the deposit of ratification by the third State, Nigeria.

## APPENDIX C

### **COUNCIL DIRECTIVE 93/7/EEC of 15 March, 1993 on the return of cultural objects unlawfully removed from the territory of a Member State**

#### **THE COUNCIL OF THE EUROPEAN COMMUNITIES,**

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission<sup>1</sup>,

In co-operation with the European Parliament<sup>2</sup>

Having regard to the opinion of the Economic and Social Committee<sup>3</sup>,

Whereas, Article 8a of the Treaty provides for the establishment, not later than 1 January 1993, of the internal market, which is to comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty;

Whereas, under the terms and within the limits of Article 36 of the Treaty, Member States will, after 1992, retain the right to define their national treasures and to take the necessary measures to protect them in this area without internal frontiers;

Whereas arrangements should therefore be introduced enabling Member States to secure the return to their territory of cultural objects which are classified as national treasures within the meaning of the said Article 36 and have been removed from their territory in breach of the above mentioned national measures or of Council Regulation (EEC) No 3911/92 of 9 December 1992 on the export of cultural goods<sup>4</sup>; whereas the implementation of these arrangements should be as simple and efficient as possible; whereas, to facilitate co-operation with regard to return, the scope of the arrangements should be confined to items belonging to common categories of cultural objects; whereas the Annex to this Directive is consequently not intended to define objects which rank as 'national treasures' within the meaning of the said Article 36, but merely categories of object which

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1 OJ No C 53, 28.2.1992, p.11 and OJ No C 172, 8.7.1992, p.7.

2 OJ No C 176, 13.7.1992, p.129 and OJ No C 72, 15.3.1993.

3 OJ No C 223, 31.8.1992, p.10

4 OJ No L 395, 31.12.1992, p.1

may be classified as such and may accordingly be covered by the return procedure introduced by this Directive;

Whereas cultural objects classified as national treasures and forming an integral part of public collections or inventories of ecclesiastical institutions but which do not fall within these common categories should also be covered by this Directive;

Whereas administrative co-operation should be established between Member States as regards their co-operation in the field of stolen works of art and involving in particular the recording, with Interpol and other qualified bodies issuing similar lists of lost, stolen or illegally removed cultural objects forming part of their national treasures and their public collections;

Whereas the procedure introduced by this Directive is a first step in establishing co-operation between Member States in this field in the context of the internal market; whereas the aim is mutual recognition of the relevant national laws; whereas provision should therefore be made, in particular, for the Commission to be assisted by an advisory committee;

Whereas Regulation (EEC) No 3911/92 introduces, together with this Directive, a Community system to protect Member States' cultural goods; whereas the date by which Member States have to comply with this Directive has to be as close as possible to the date of entry into force of that Regulation; whereas, having regard to the nature of their legal systems and the scope of the changes to their legislation necessary to implement this Directive, some Member States will need a longer period.

#### **HAS ADOPTED THIS DIRECTIVE:**

##### ***Article 1***

For the purposes of this Directive:

1. 'Cultural object' shall mean an object which:

- is classified, before or after its unlawful removal from the territory of a Member State, among the 'national treasures possessing artistic, historic or archaeological value' under national legislation or administrative procedures within the meaning of Article 36 of the Treaty,

and

- belongs to one of the categories listed in the Annex or does not belong to one of these categories but forms an integral part of:

- public collections listed in the inventories of museums, archives or libraries' conservation collection.

For the purposes of this Directive, 'public collections' shall mean collections which are the property of a Member State, local or regional authority within a Member State or an institution situated in the territory of a Member State and defined as public in accordance with the legislation of that Member State, such institution being the property of, or significantly financed by, that Member State or a local or regional authority;

- the inventories of ecclesiastical institutions.

2. 'Unlawfully removed from the territory of a Member State' shall mean:

- removed from the territory of a Member State in breach of its rules on the protection of national treasures or in breach of Regulation (EEC) No 3911/92, or

- not returned at the end of a period of lawful temporary removal or any breach of another condition governing such temporary removal.

3. 'Requesting Member State' shall mean the Member State from whose territory the cultural object has been unlawfully removed.

4. 'Requested Member State' shall mean the Member State in whose territory a cultural object unlawfully removed from the territory of another Member State is located.

5. 'Return' shall mean the physical return of the cultural object to the territory of the requesting Member State.

6. 'Possessor' shall mean the person physically holding the cultural object on his own account.

7. 'Holder' shall mean the person physically holding the cultural object for third parties.

#### ***Article 2***

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

#### ***Article 3***

Each Member State shall appoint one or more central authorities to carry out the tasks provided for in this Directive.



Member States shall inform the Commission of all the central authorities they appoint pursuant to this Article.

The Commission shall publish a list of these central authorities and any changes concerning them in the C series of the *Official Journal of the European Communities*.

#### **Article 4**

Member States' central authorities shall co-operate and promote consultation between the Member States' competent national authorities. The latter shall in particular:

1. upon application by the requesting Member State, seek a specified cultural object which has been unlawfully removed from its territory, identifying the possessor and/or holder. The application must include all information needed to facilitate this search, with particular reference to the actual or presumed location of the object;
2. notify the Member States concerned, where a cultural object is found in their own territory and there are reasonable grounds for believing that it has been unlawfully removed from the territory of another Member State;
3. enable the competent authorities of the requesting Member State to check that the object in question is a cultural object, provided that the check is made within 2 months of the notification provided for in paragraph 2. If it is not made within the stipulated period, paragraphs 4 and 5 shall cease to apply;
4. take any necessary measures, in co-operation with the Member State concerned, for the physical preservation of the cultural object;
5. prevent, by the necessary interim measures, any action to evade the return procedure;
6. act as intermediary between the possessor and/or holder and the requesting Member State with regard to return. To this end, the competent authorities of the requested Member States may, without prejudice to Article 5, first facilitate the implementation of an arbitration procedure, in accordance with the national legislation of the requested State and provided that the requesting State and the possessor or holder give their formal approval.

#### **Article 5**

The requesting Member State may initiate, before the competent court in the requested Member State, proceedings against the possessor or, failing him, the

holder, with the aim of securing the return of a cultural object which has been unlawfully removed from its territory.

Proceedings may be brought only where the document initiating them is accompanied by:

- a document describing the object covered by the request and stating that it is a cultural object,
- a declaration by the competent authorities of the requesting Member State that the cultural object has been unlawfully removed from its territory.

**Article 6**

The central authority of the requesting Member State shall forthwith inform the central authority of the requested Member State that proceedings have been initiated with the aim of securing the return of the object in question.

The central authority of the requested Member State shall forthwith inform the central authorities of the other Member States.

**Article 7**

1. Member States shall lay down in their legislation that the return proceedings provided for in this Directive may not be brought more than one year after the requesting Member State became aware of the location of the cultural object and of the identity of its possessor or holder.

Such proceedings may, at all events, not be brought more than 30 years after the object was unlawfully removed from the territory of the requesting Member State. However, in the case of objects forming part of public collections, referred to in Article 1 (1), and ecclesiastical goods in the Member States where they are subject to special protection arrangements under national law, return proceedings shall be subject to a time-limit of 75 years, except in Member States where proceedings are not subject to a time-limit or in the case of bilateral agreements between Member States laying down a period exceeding 75 years.

2. Return proceedings may not be brought if removal from the national territory of the requesting Member State is no longer unlawful at the time when they are to be initiated.

**Article 8**

Save as otherwise provided in Articles 7 and 13, the competent court shall order

the return of the cultural object in question where it is found to be a cultural object within the meaning of Article 1 (1) and to have been removed unlawfully from national territory.

***Article 9***

Where return of the object is ordered, the competent court in the requested State shall award the possessor such compensation as it deems fair according to the circumstances of the case, provided that it is satisfied that the possessor exercised due care and attention in acquiring the object.

The burden of proof shall be governed by the legislation of the requested Member State.

In the case of a donation or succession, the possessor shall not be in a more favourable position than the person from whom he acquired the object by that means.

The requesting Member State shall pay such compensation upon return of the object.

***Article 10***

Expenses incurred in implementing a decision ordering the return of a cultural object shall be borne by the requesting Member State. The same applies to the costs of the measures referred to in Article 4 (4).

***Article 11***

Payment of the fair compensation and of the expenses referred to in Articles 9 and 10 respectively shall be without prejudice to the requesting Member State's right to take action with a view to recovering those amounts from the persons responsible for the unlawful removal of the cultural object from its territory.

***Article 12***

Ownership of the cultural object after return shall be governed by the law of the requesting Member State.

***Article 13***

This Directive shall apply only to cultural objects unlawfully removed from the territory of a Member State on or after 1 January 1993.

***Article 14***

1. Each Member State may extend its obligation to return cultural objects to cover categories of objects other than those listed in the Annex.

2. Each Member State may apply the arrangements provided for by this Directive to requests for the return of cultural objects unlawfully removed from the territory of other Member States prior to 1 January 1993.

***Article 15***

This Directive shall be without prejudice to any civil or criminal proceedings that may be brought, under the national laws of the Member States, by the requesting Member State and/or the owner of a cultural object that has been stolen.

***Article 16***

1. Member States shall send the Commission every three years, and for the first time in February 1996, a report on the application of this Directive.
2. The Commission shall send the European Parliament, the Council and the Economic and Social Committee, every three years, a report reviewing the application of this Directive.
3. The Council shall review the effectiveness of this Directive after a period of application of three years and, acting on a proposal from the Commission, make any necessary adaptations.
4. In any event, the Council acting on a proposal from the Commission, shall examine every three years and, where appropriate, update the amounts indicated in the Annex on the basis of economic and monetary indicators in the Community.

***Article 17***

The Commission shall be assisted by the Committee set up by Article 8 of Regulation ( EEC) No 3911/92. The Committee shall examine any question arising from the application of the Annex to this Directive which may be tabled by the chairman either on his own initiative or at the request of the representative of a Member State.

***Article 18***

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within nine months of its adoption, except as far as the Kingdom of Belgium, the Federal Republic of Germany and the Kingdom of the Netherlands are concerned, which must conform to this Directive at the latest twelve months from the date of its adoption. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their

official publication. The methods of making such a reference shall be laid down by the Member States.

***Article 19***

This Directive is addressed to the Member States.

## **APPENDIX D**

### **COUNCIL REGULATION (EEC) No 3911/92 of 9 December 1992 on the export of cultural goods**

#### **THE COUNCIL OF THE EUROPEAN COMMUNITIES,**

Having regard to the Treaty establishing the European Economic Community, and in particular Article 113 thereof,

Having regard to the proposal from the Commission,<sup>1</sup>

Having regard to the opinion of the European Parliament,<sup>2</sup>

Having regard to the opinion of the Economic and Social Committee,<sup>3</sup>

Whereas, in view of the completion of the internal market, rules on trade with third countries are needed for the protection of cultural goods;

Whereas, in the light of the conclusions of the Council ruling on 19 November 1990, it seems necessary to take measures in particular to ensure that exports of cultural goods are subject to uniform controls at the Community's external borders;

Whereas such a system should require the presentation of a licence issued by the competent Member State prior to the export of cultural goods covered by this Regulation; whereas this necessitates a clear definition of the scope of such measures and the procedures for their implementation; whereas the implementation of the system should be as simple and efficient as possible; whereas a Committee should be set up to assist the Commission in carrying out the responsibilities conferred on it by this Regulation;

Whereas, in view of the considerable experience of the Member States' authorities in the application of Council Regulation (EEC) No 1468/81 of 19 May 1981 on mutual assistance between the administrative authorities of the Member States and co-operation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters<sup>4</sup>, the said Regulation should be applied to this matter;

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1 OJ No C 53, 28.2.1992, p.8.

2 OJ No C 176, 13.7.1992, P.31.

3 OJ No C 223, 31.8.1992, p.10.

4 OJ No L 144, 2.6.1981, p.1. Regulation as amended by Regulation (EEC) No 945/87 (OJ No L 90, 2.4.1987, p.3).

Whereas the Annex to this Regulation is aimed at making clear the categories of cultural goods which should be given particular protection in trade with third countries, but is not intended to prejudice the definition, by Member States, of national treasures within the meaning of Article 36 of the Treaty,

**HAS ADOPTED THIS REGULATION:**

*Article 1*

Without prejudice to Member States' powers under Article 36 of the Treaty, the term 'cultural goods' shall refer, for the purposes of this Regulation, to the items listed in the Annex.

**TITLE 1**

**Export licence**

*Article 2*

1. The export of cultural goods outside the customs territory of the Community shall be subject to the presentation of an export licence.
2. The export licence shall be issued at the request of the person concerned:
  - by a competent authority of the Member State in whose territory the cultural object in question was lawfully and definitively located on 1 January 1993,
  - or, thereafter, by a competent authority of the Member State in whose territory it is located following either lawful and definitive dispatch from another Member State, or importation from a third country, or reimportation from a third country after lawful dispatch from a Member State to that country.

However, without prejudice to paragraph 4, the Member State which is competent in accordance with the two indents in the first subparagraph may not require export licences for the cultural goods specified in the first and second indents of category A1 of the Annex where they are of limited archaeological or scientific interest, and provided that they are not the direct product of excavations, finds and archaeological sites within a Member State, and that their presence on the market is lawful.

The export licence may be refused, for the purposes of this Regulation, where the cultural goods in question are covered by legislation protecting national treasures of artistic, historical or archaeological value in the Member State concerned.

Where necessary, the authority referred to in the second indent of the first subparagraph shall enter into contact with the competent authorities of the Member State from which the cultural object in question came, and in particular the competent authorities within the meaning of Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State.

3. The export licence shall be valid throughout the Community.
4. Without prejudice to the provisions of this Article, direct export from the customs territory of the Community of national treasures having artistic, historic or archaeological value which are not cultural goods within the meaning of this Regulation is subject to the national law of the Member State of export.

#### *Article 3*

1. Member States shall furnish the Commission with a list of the authorities empowered to issue export licences for cultural goods.
2. The Commission shall publish a list of these authorities and any amendment to that list in the 'C' series of the *Official Journal of the European Communities*.

#### *Article 4*

The export licence shall be presented, in support of the export declaration, when the customs export formalities are carried out, at the customs office which is competent to accept that declaration.

#### *Article 5*

1. Member States may restrict the number of customs offices empowered to handle formalities for the export of cultural goods.
2. Member States availing themselves of the option afforded by paragraph 1 shall inform the Commission of the customs offices duly empowered.

The Commission shall publish this information in the 'C' series of the *Official Journal of the European Communities*.



## TITLE 2

### Administrative co-operation

#### Article 6

For the purposes of implementing this Regulation, the provisions of Regulation (EEC) No 1468/81, and in particular the provisions on the confidentiality of information, shall apply *mutatis mutandis*.

In addition to the co-operation provided for under the first subparagraph, Member States shall take all necessary steps to establish, in the context of their mutual relations, co-operation between the customs authorities and the competent authorities referred to in Article 4 of Directive 93/7/EEC.

## TITLE 3

### General and final provisions

#### Article 7

The provisions necessary for the implementation of this Regulation, in particular those concerning the form to be used (for example, the model and technical properties) shall be adopted in accordance with the procedure laid down in Article 8 (2).

#### Article 8

1. The Commission shall be assisted by a committee composed of the representatives of the Member States and chaired by the representative of the Commission.

The committee shall examine any matter concerning the implementation of this Regulation raised by its chairman either on his own initiative or at the request of a representative of a Member State.

2. The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter, if necessary by taking a vote.

The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask to have its position recorded in the minutes.

The Commission shall take the utmost account of the opinion delivered

by the committee. It shall inform the committee of the manner in which its opinion has been taken into account.

*Article 9*

Each Member State shall determine the penalties to be applied for infringement of the provisions of this Regulation. The penalties shall be sufficient to promote compliance with those provisions.

*Article 10*

Each Member State shall inform the Commission of the measures taken pursuant to this Regulation.

The Commission shall pass on this information to the other Member States.

Every three years the Commission shall present a report to the European Parliament, the Council and the Economic and Social Committee on the implementation of this Regulation.

The Council shall review the effectiveness of the Regulation after a period of application of three years and, acting on a proposal from the Commission, make any necessary adaptations.

In any event, the Council, acting on a proposal from the Commission, shall examine every three years and, where appropriate, update the amounts indicated in the Annex, on the basis of economic and monetary indicators in the Community.

*Article 11*

This Regulation shall enter into force on the third day following that of publication in the *Official Journal of the European Communities* of Directive 93/7/EEC.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 9 December 1992.

**ANNEX**

**CATEGORIES OF CULTURAL OBJECTS COVERED BY ARTICLE 1**

A.	1.	Archaeological objects more than 100 years old which are the products of:	
		- excavations and finds on land or under water	9705 00 00
		- archaeological sites	9706 00 00
		- archaeological collections	
	2.	Elements forming an integral part of artistic, historical or religious monuments which have been dismembered, of an age exceeding 100 years	9705 00 00 9706 00 00
	3.	Pictures and paintings executed entirely by hand, on any medium and in any material <sup>1</sup>	9701
	4.	Mosaics other than those in categories 1 or 2 and drawings executed entirely by hand, on any medium and in any material <sup>1</sup>	6914 9701
	5.	Original engravings, prints, scigraphs and lithographs with their respective plates and original posters <sup>1</sup>	Chapter 49 9702 00 00 8442 50 99
	6.	Original sculptures or statuary and copies produced by the same process as the original <sup>1</sup> , other than those in category 1	9703 00 00
	7.	Photographs, films and negatives thereof <sup>1</sup>	3704 3705 3706 4911 91 80
	8.	Incunabula and manuscripts, including maps and musical scores, singly or in collections <sup>1</sup>	9702 00 00 9706 00 00 4901 10 00 4901 99 00 4904 00 00 4905 91 00 4905 99 00 4906 00 00

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(1) Which are more than 50 years old and do not belong to their originators.

9.	Books more than 100 years old, singly or in collections	9705 00 00 9706 00 00
10.	Printed maps more than 200 years old	9706 00 00
11.	Archives, and any elements thereof, of any kind or any medium which are more than 50 years old	3704 3705 3706 4901 4906 9705 00 00 9706 00 00
12.	(a) Collections <sup>2</sup> and specimens from zoological, botanical, mineralogical or anatomical collections;	9705 00 00
	(b) Collections <sup>2</sup> of historical, palaeontological, ethnographic or numismatic interest	9705 00 00
13.	Means of transport more than 75 years old	9705 00 00 Chapters 86-89
14.	Any other antique items not included in categories A.1 to A.13	
	(a) between 50 and 100 years old:	
	- toys, games	Chapter 95
	- glassware	7013
	- articles of goldsmiths' or silversmiths wares	7114
	- furniture	Chapter 94
	- optical, photographic or cinematographic apparatus	Chapter 90
	- musical instruments	Chapter 92
	- clocks and watches and parts thereof	Chapter 91
	- articles of wood	Chapter 44
	- pottery	Chapter 69
	- tapestries	5805 00 00
	- carpets	Chapter 57
	- wallpaper	4814
	- arms	Chapter 93
	(b) more than 100 years old	9706 00 00

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<sup>2</sup> As defined by the Court of Justice in its judgment in Case 252/84, as follows: 'Collectors' pieces within the meaning of heading No 97.05 of the Common Customs Tariff are articles which possess the requisite characteristics for inclusion in a collection, that is to say, articles which are relatively rare, are not normally used for their original purpose, are the subject of special transactions outside the normal trade in similar utility articles and are of high value.'

The cultural objects in categories A.1 to A.14 are covered by this Regulation only if their value corresponds to, or exceeds, the financial thresholds under B.

**B. Financial thresholds applicable to certain categories under A (in ecus)**

*Value: 0 (Zero)*

- 1 (Archaeological objects)
- 2 (Dismembered monuments)
- 8 (Incunabula and manuscripts)
- 11 (Archives)

*15 000*

- 4 (Mosaics and drawings)
- 5 (Engravings)
- 7 (Photographs)
- 10 (Printed maps)

*50 000*

- 6 (Statuary)
- 9 (Books)
- 12 (Collections)
- 13 (Means of transport)
- 14 (Any other object)

*150 000*

- 3 (Pictures)

The assessment of whether or not the conditions relating to financial value are fulfilled must be made when an application for an export licence is submitted. The financial value is that of the cultural object in the Member State referred to in Article 2 (2) of the Regulation.

The date for the conversion of values expressed in ecus in the Annex into national currencies shall be 1 January 1993.

## APPENDIX E

### SCHEME FOR THE PROTECTION OF CULTURAL HERITAGE WITHIN THE COMMONWEALTH

#### Objectives of the Scheme

1. (1) The provision of the Scheme govern the return by one Commonwealth country of an item of cultural heritage found within its jurisdiction following export from another Commonwealth country contrary to its laws.
- (2) The provisions of the Scheme will apply to the export and import of items which take place after the adoption and implementation of the Scheme. The Scheme adds to and in no way derogates from future and existing means of recovery of items of cultural heritage.
- (3) The Scheme is intended to be complementary to, and does not in any way exclude, full participation in other international arrangements such as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, the European Communities Directive on the return of cultural objects unlawfully removed from the territory of a member State and the Regulation on the export of cultural goods from member States of the European Community.

#### Definitions

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

#### **Items covered by the Scheme**

3. (1) The Scheme covers all items of cultural heritage so classified by, and subject to export control by, the country of export.
- (2) Items classified should be of national importance by virtue of one or more of the following criteria:
  - (a) the close association of the item with the history or life of the country;
  - (b) the aesthetic qualities of the item;
  - (c) the value of the item in the study of the arts or the sciences;
  - (d) the rarity of the item;
  - (e) the spiritual or emotional association of the item with the people of the country or any group or section thereof;
  - (f) the archaeological significance of the item.
- (3) Where a country is unable by reason of laws pursuant to other international obligations to extend protection to all such items it shall be open to other countries similarly to restrict the protection they afford to that country under this Scheme.

#### **Validation System**

4. (1) As part of the Scheme, a system of validation may be introduced whereby an intending purchaser of an item of cultural heritage or any other interested person is enabled to request of the central authority of the country of export a validation certificate to the effect that the item is not an unlawful export from that country.
- (2) Such a validation certificate would constitute a complete defence to any claim by the country of export that the item had been unlawfully exported.
- (3) Where an application is made for a validation certificate in respect of any item, the application should be granted or refused within six months of receipt of the application. If the application is not granted or refused within that period, the country of export should be precluded from claiming that the item has been unlawfully exported from that country.

#### **Operation of the Scheme**

5. (1) Each country will prohibit the export of items covered by the Scheme except in accordance with the terms of an export permit.
  - (2) Each country will take the measures necessary to ensure the return of items covered by the Scheme of the country of export.
6. (1) Each country will designate a central authority for the making and the receiving of requests for the return of items covered by the Scheme.

- (2) Each country will notify the Commonwealth Secretary-General of its central authority.
- 7.
- (1) When the country of export learns of the whereabouts of an item covered by the Scheme, it may request the country of location for assistance in the recovery and return of that item.
  - (2) Where two countries of export make a request for the return of the same item, the request of the country from which the item was last exported will be proceeded with; but that will not prejudice further requests for the item.
  - (3) The request will give sufficient detail to clearly identify the item and where possible its location and shall be accompanied by an official notification from the country of export to the effect that the item is covered by the Scheme and has been unlawfully exported.
  - (4) Such notification will be *prima facie* evidence of the matters stated therein.
8. Upon receipt of a request, the country of location will take appropriate steps in accordance with its laws to secure or safeguard the item.
- 9.
- (1) The authorities in the country of location may either:
    - (a) give notice to the holder of the item that unless court proceedings are commenced within a stipulated period, the item will be returned to the country of export, or
    - (b) institute proceedings or advise the country of export to institute proceedings with a view to securing an order for the return of the item to the country of export.
  - (2) In any proceeding instituted either by the holder of the item or by the authorities in the country of location or of export the court will determine whether the item is covered by:
    - (a) the Scheme;
    - (b) an export permit; or
    - (c) a validation certificate.

If the item is covered by the Scheme and such a permit or certificate has been issued, or if the item is not covered by the Scheme, the court may order that the item be returned to the holder. If the item is covered by the Scheme and such a permit or certificate has not been issued, the court will order that the item be returned to the country of export.
  - (3) Prior to ordering the return of the item the court will determine whether the holder of the item is an innocent purchaser for value having exercised due care and attention in acquiring the item and, if it is proved that the holder is such an innocent purchaser with valid title to the item, the court will order that fair and reasonable compensation be payable by the country of export to the holder as a condition for the return of the item to the country of export. All other questions of title and



compensation will be determined by proceedings in the country of export.

- (4) In any proceedings in the country of location, the holder of an item may, unless the contrary be proved, be presumed not to be an innocent purchaser for value if he has neglected or failed to utilise any relevant validation system under the Scheme.
10. The central authority in the country of export to which an item is returned will be required to hold the item for a period of twelve months. During this period it will be open for any person to take proceedings in the country of export to determine any question of title and compensation.
11. In the event that proceedings to establish title are not commenced within the twelve month period, the central authority will deal with the item in accordance with the law of the country of export.
12. In any proceedings in a country of location, the court will have due regard to the relevant laws of the country of export.
13. The person adjudged to have title in the item will not have any right to remove the item from the country of export otherwise than by the process of applying for and obtaining an export permit.

#### **Limitation Period**

14. No claim for the return of an item alleged to have been unlawfully exported may be made under the Scheme more than five years after the date the country of export had knowledge of the whereabouts of the item in the country of location.
15. Each country:
  - (a) will make it an offence to unlawfully export from its territory an item of its own cultural heritage covered by the Scheme; and
  - (b) may make it an offence to unlawfully import an item of cultural heritage covered by the Scheme unlawfully exported from another country.

#### **Costs**

16. (1) The country of location in implementing the Scheme may require the country of export to meet the expenses necessarily incurred in implementing the request of the country of export for the return of any item of cultural heritage.
- (2) If in the opinion of the country of location the expenses required in order to comply with the request are of an extraordinary nature, that country will consult with the country of export as to the terms and conditions under which

compliance with the request may continue, and in the absence of agreement the country of location may refuse to comply further with the request.

**Standard Forms**

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

## **APPENDIX F**

### **Written submissions on the Consultation Paper were received from:**

Malcolm Alexander, Alexander Antiques  
Alpha Connelly, Legal Adviser, Department of Foreign Affairs  
Brian Coyle, Chairman, James Adam & Sons  
Ronald W A Le Bas, Assay Master, Assay Office  
Dr F McCormick, School of Geosciences, Queen's University, Belfast  
Dr Edward McPartland, Department of the History of Art,  
Trinity College, Dublin  
Ted Murphy, Detective Superintendent, An Garda Síochána  
Nessa O'Connor, Assistant Keeper, Irish Antiquities Division, National Museum  
of Ireland  
Patricia Quinn, Director, The Arts Council  
Michael Ryan, Director and Librarian, The Chester Beatty Library  
Eithne Verling, Museums Officer, The Heritage Council

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