

“Cultural Vandalism akin to Ripping a Knife through a Rembrandt”?: A Critical Assessment of the Protections afforded to Irish Cultural Rights under Ireland’s Developing Heritage Laws

Dr. Thomas L. Muinzer*

In March 2012 Tralee Circuit Criminal Court, Ireland, indicated that it was seeking to benchmark an appropriate level of cultural heritage protection by fining a private citizen substantially for intentionally destroying a protected national monument. Against this backdrop, this article critically evaluates the contemporary evolution of Irish cultural heritage protections, focusing most particularly on two major case studies, the nationally high-profile motorway controversies that arose at Tara and Carrickmines. The analysis demonstrates that, while heritage legislation was strengthened in Ireland in the wake of a controversial development project at Wood Quay, Dublin, these protections have since been rolled back significantly. Pertinent aspects of Ireland’s legal position in the E.U. and the impact on Northern Ireland of damage to Irish heritage are also considered. In addition to exposing a gradual weakening of Ireland’s national heritage legislation, the findings throw into relief a disparity between the robust protective benchmark that has been crystallised with regard to a private citizen in 2012, and the ways in which public actors have utilised their space under national heritage law in a manner resulting in the irreparable destruction of precious elements of major national heritage landscapes.

I - Introduction

In March 2012 a farmer was fined €25,000 in County Kerry, the Republic of Ireland, for intentionally destroying a ringfort.¹ The ringfort was a protected national monument that had been located on his privately owned land. The facts of the case are highly uncommon, and in passing a relatively stringent sentence the court indicated that it intended the case to act as a marker benchmarking an appropriate level of national heritage protection.² The robustness of the protection afforded in the

* Department of Law, Queen’s University Belfast, Northern Ireland. Email: tmuinzer01@qub.ac.uk. The author would like to extend thanks to the following people for assistance over the course of the research: Dr. Brian Jack, Dr. Edel Bhreathnach, Dr. Peter Doran, Anna-Marie McAlinden, Professor Geraint Ellis, Professor Sharon Turner, Maria O’Loan, Dr. Fiona Marshall, and the sundry campaigners and other parties involved in the central heritage disputes at issue who engaged in various discussions with me. Thanks also to the management of *Maguires Café*, Hill of Tara, for assistance on site visits, and further thanks to those involved in the *I.J.L.S.* peer-review process for helpful comments. The author alone remains responsible for the contents. The quote appearing in the title is Emmet Stagg T.D. of the Irish Parliament’s description of the decision to pass the M3 motorway through the Tara Valley.

¹ *D.P.P. v. O’Mahony* (unreported, Tralee Circuit Criminal Court, 2 February 2012) [hereinafter the Kerry ringfort case].

² See further *infra* Part II.A.

Kerry ringfort case contrasts starkly with the lack of protection given to one of Europe's important heritage landscapes, Tara, when the Irish government took the decision to lay the M3 Motorway through the site (completed 2010). Tara was prefigured in turn by the laying of the M50 Motorway through the weakly protected Carrickmines Castle archaeological site (completed 2005). This critical evaluation of fundamental aspects of Irish cultural heritage law considers the contemporary evolution of national heritage law in Ireland, devoting particular attention to the two major national case studies embodied by the Tara and Carrickmines motorway controversies. The analysis exposes both the process by which the protective elements of Ireland's national monuments framework have been structurally enfeebled over recent decades and the weak manner in which officials have applied the extant framework's safeguards in certain key instances. It is concluded that the outcome of the Kerry ringfort case is to be welcomed, therefore, for although its reach in strictly legal terms is limited, its signal that a robust protective approach must be adopted in the interest of adequately safeguarding national cultural heritage is both timely and, if unwarranted future damage to Ireland's national heritage is to be averted, necessary.

II – Tara and the Kerry Ringfort Case

A. The Kerry Ringfort Case

A farmer was fined €25,000 on 2 March 2012 for destroying a ringfort at Clashmealcon, County Kerry, in the Republic of Ireland.³ The defendant farmed around 40 acres at Clashmealcon, and the fort was located on his own privately owned land.⁴ The ringfort was a heritage site dating back to approximately 100 – 500 AD, and included a raised earthwork fort and a system of souterrains running beneath. It had been listed as a national monument, bringing it under the auspices of the State. Damage to such monuments is prohibited under section 14 of the *National Monuments Act 1930 (N.M.A. 1930)*.⁵ The farmer had hired workers to take most of the ringfort apart so that its material could be used to infill a pond, also located on his land. Proceedings were brought by the State at Tralee Circuit Criminal Court, and the

³ R.T.E. News, "Farmer Fined E25,000 for Destroying Ringfort" (2 March 2012), available <<http://www.rte.ie/news/2012/0302/omahonyj.html>>.

⁴ B.B.C. News, "County Kerry Farmer who Destroyed Ring Fort Fined" (2 March 2012), available <<http://www.bbc.co.uk/news/world-europe-17237631>>.

⁵ As Murray J. has stressed, "the most fundamental principle and policy of the Act of 1930 ... is the protection and preservation of national monuments"; *Casey v. Minister for Arts, etc.* [2004] 1 I.R. 402 at 423.

defendant pleaded guilty; it transpired that the farmer had been aware that the fort was both historically significant and protected under law. Prior to the sentencing stage Judge Carroll Moran acknowledged the uncommon facts of the case,⁶ and signalled that the matter would require the court to set down a sentence that could function as a “marker” for future application of the law in such instances.⁷ At the sentencing stage he crystallised this marker by imposing upon the defendant a stringent €25,000 fine. In the wider context of cultural heritage law the sentence is a relatively extreme one, this being an area where persons engaged in illegality tend to successfully evade the imposition of robust legal sentences.⁸ The *Irish Independent* newspaper captured the national significance of the Kerry ringfort case in describing it as “the first case of its kind in Irish courts”.⁹

⁶ It might be noted that the facts of the Kerry ringfort case bear some (limited) resemblance to those of *O’Callaghan v. Commissioners of Public Works in Ireland* [1985] I.L.R.M. 364, which concerned a national monument preservation order that was applied quickly to an ancient fort located on land owned by a private citizen, in order to protect the monument after it became known that the landowner was intending to plough the fort. In that case, however, the preservation of the national monument was achieved, and the facts of *O’Callaghan* and the Kerry ringfort case cannot accurately be construed as analogous.

⁷ A. Lucey, “Judge Warns over Ring Fort Destruction” *Irish Times* (17 January 2012).

⁸ The online legal resource *Cultural Property and Archaeology Law* contains a good deal of general information on this matter: <<https://culturalpropertylaw.wordpress.com>>. For further discussion see: M. Frulli, “The Criminalization of Offences against Cultural Heritage in times of Armed Conflict: the Quest for Consistency” [2011] 22(1) *European Journal of International Law* 203; A. Parkhouse, “The Illicit Trade in Cultural Objects: Recent Developments in the United Kingdom” in B. T. Hoffman editor, *Art and Cultural Heritage: Law, Policy and Practice* (New York: C.U.P., 2006) 178 at 178-185. On the enforcement of cultural heritage law in the international arena, see F. Francioni and J. Gordley, *Enforcing International Cultural Heritage Law* (Oxford: O.U.P., 2013).

⁹ M. O’Sullivan, “Farmer faces hefty fine for destroying ring fort” *Irish Independent* (17 January 2012), available <<http://www.independent.ie/irish-news/farmer-faces-hefty-fine-for-destroying-ring-fort-26811917.html>>. The author has found only one similar case that has arisen since the Kerry ringfort case. Transcripts could not be obtained, however the case has been reported in the *Irish Independent* newspaper: R. Riegel, “Farmer must pay €20,000 after destroying ring forts” *Irish Independent* (9 November 2012), available <<http://www.independent.ie/irish-news/farmer-must-pay-20000-after-destroying-ring-forts-28894211.html>>.

The facts as reported involve a farmer who “demolished two ancient ring forts”, both recorded national monuments, on newly purchased farmland in Macroom, Co. Cork. This included the destruction of a “circle of boulders, some 2m high and 30m in diameter”, that is, the case involved significant damage to heritage. The defendant claimed he had not known that the structures were ring forts, and that they were protected. Judge Donagh McDonagh at Cork Circuit Criminal Court, who had the capacity to fine the defendant up to €50,000, imposed fines and penalties amounting to €20,000. Clearly, this sentence is similar in quantum to the Kerry ringfort “marker”. That said, one can juxtapose the broader circumstances of this case with those of the Kerry ringfort case in order to draw telling comparisons. This case involved a farmer who: destroyed two ringforts; pleaded not guilty; was affluent, farming 485 acres and having just purchased this farm for €1.3 million. The Kerry ringfort case involved a farmer who: destroyed one ringfort; pleaded guilty; was in difficult financial circumstances. The defendant in the former case received a €20,000 fine, and the defendant in the latter case received a €25,000 fine. Taking this broad range of issues into account, it must be concluded that the fines in the former case are lenient and do not live up to the Kerry ringfort “marker” adequately.

B. Tara and the M3 Project

The establishment of a marker geared to benchmark a robust level of heritage protection under Irish law appears to contrast somewhat sharply with the events surrounding one of the most significant but understudied cultural heritage controversies that has yet occurred within the E.U., the laying of a major national motorway, the M3, through one of Ireland's major heritage landscapes, the Tara-Skryne Valley in County Meath.¹⁰

(i) *Tara the Landscape*

Tara was one of ancient Ireland's major landscapes¹¹; it was here that the court of the High Kings was located. The Hill of Tara provided a 300ft raised vantage point from where the central plains of Ireland could be surveyed, and it was at this raised area where many of the court's buildings were positioned. The populated Tara landscape stretched outward from this hill to include the environs surrounding it.¹² It is at Tara that many of the great mythological tales of Ireland are set, which are preserved today in ancient manuscripts, with legendary Irish figures Fionn mac Cumhaill and Cuchulainn being amongst some of the most renowned names to have had adventures at the court.¹³ Today Tara remains as an expansive grassland area marked by various important archaeological formations and features. The Hill of Tara and the neighbouring Hill of Skryne form a valley, the Tara-Skryne Valley, and it is

¹⁰ Whilst the Tara-Skryne Valley is certainly one of the major heritage landscapes of Ireland, it also constitutes a landscape of notable importance in the wider context of the E.U.: the Tara Complex has been submitted by the Irish government (since the M3 dispute) for inclusion on the "Tentative List" of sites that the State intends to consider nominating for inclusion on the U.N.E.S.C.O. World Heritage List; World Heritage Sites listed under the 1972 World Heritage Convention are understood to have "outstanding universal value". On Tara's inclusion on the Tentative List, see further <<http://whc.unesco.org/en/tentativelists/5528/>>.

¹¹ A great deal is known about the archaeological aspects of Tara thanks to a legacy of erudite research conducted at the site over many years. The major archaeological researchers include: Sir George Petrie (1790-1866), who began pioneering work in the 1830s; Professor R.A.S. Macalister (1870-1950), whose system of naming the earthworks is followed on the official plaques displayed at the site today; Professor Seán P Ó Ríordáin (1905-1957), who led excavations in the 1950s; in current day, the *Discovery Programme* initiative, which spent over ten years exploring Tara with the assistance of state of the art investigative technology.

¹² E. Bhreathnach, *The Kingship and Landscape of Tara* (Dublin: Four Courts Press, 2005); C. Newman, *Tara: An Archaeological Survey* (Dublin: Royal Irish Academy for the Discovery Programme, 1997). In *Tormey v. Commissioners of Public Works* (unreported, High Court, 20 December 1968) the High Court interpreted over 50 acres of the Tara site as constituting the scope of Tara's overall national monument designation.

¹³ The popular Tara mythological stories are retold in E. Hickey, *The Legend of Tara* (Dundalk: Dundalgan Press, 1969) [hereinafter Hickey].

through this valley that the M3 motorway was laid. The road occasioned an enormous amount of archaeological damage and also affected the aesthetic of the valley.¹⁴

(ii) Historical Tara

In addition to being the seat of the old High Kings, Tara occupies a poignant place in more recent affairs. One of the key battles of Ireland's 1798 Rebellion took place there, upward of four thousand United Irishmen making an unsuccessful stand against a militia of British yeomanry at the Battle of Tara Hill.¹⁵ Over three hundred and fifty rebels were killed in the one-sided victory¹⁶; Steen notes that "[t]here are two memorials on Tara ... [that] are supposed to mark the spot of the mass grave that the fallen rebels were buried in."¹⁷ These memorials consist of a grave headstone and a Celtic cross, and an ancient ceremonial stone named the Lia Fail (the "Stone of Destiny") has also been moved a short distance in order to mark the burial site.¹⁸ Further, in 1843 Daniel O'Connell chose Tara Hill as the venue for a "monster rally" calling for Repeal of Ireland's Union with Britain; it is estimated that one million people attended.¹⁹ It was also at Tara, according to tradition, that Ireland's patron Saint, Patrick, first met with King Laoghaire, the pagan High King, as a crucial part

¹⁴ Detail of the extent of the archaeological damage (and also the visual/aesthetic impact) caused by the M3's chosen route is set out in the M3 Environmental Impact Statement (this report is discussed below; see section V.B, 'Environmental Impact Assessment'). See further *infra* Part II.B.(iv), where it is noted that the M3's chosen route "impact[ed] directly on 3 recorded archaeological sites or their immediate environs and 71 previously unrecorded sites of potential archaeological interest" (quoting the Environmental Impact Statement); and see also the discussion of the Lismullen Henge in that section, a national monument destroyed by the road that was unknown at the time of the impact statement. For comment from leading Tara archaeologists (prior to the laying of the M3) engaging the extent to which the "M3 will cut right through [the Tara-Skryne] landscape" and "the sites destroyed in its path", see: E. Bhreathnach, C. Newman & J. Fenwick, "Driving a Stake through the Heart of Tara" (April 2004) 12 (2) *History Ireland* 5 [hereinafter Bhreathnach *et al*, "Driving a Stake through the Heart of Tara"]. For a more detailed archaeological discussion from these experts of "the motorway[s]... unacceptable impact, direct and indirect, on the archaeological complex of Tara", see: E. Bhreathnach, C. Newman & J. Fenwick, "The Impact of the Proposed M3 Motorway on Tara and its Cultural Landscape" Archaeological Institute of America (1 April 2004) 1 at 1 [hereinafter Bhreathnach *et al*, "Tara and its Cultural Landscape"].

¹⁵ The authoritative account of the United Irishmen rebellion at Tara appears in L.J. Steen, *The Battle of the Hill of Tara, 26th May 1798* (Meath: Trymme Press, 1991). Steen notes that, "[a]s to the actual size of the rebel army, accounts vary from four to seven thousand. The real number was probably between four and five thousand." *Ibid.* at 22.

¹⁶ "Next day [after the battle] 350 rebels were found dead [on the battle field. No doubt many more died elsewhere from their wounds. Bodies were also removed during the night and the true figure for casualties could have been much higher"; *ibid.* at 27.

¹⁷ *Ibid.* at 35.

¹⁸ *Ibid.* at 35-37.

¹⁹ R.R. Callary, *The Hill of Tara* (Dublin: James Duffy and Co., 1955) at 41 [hereinafter Callary].

of his campaign to bring Christianity to the pagan populace.²⁰ It is for these reasons that Irish antiquarian Robert R. Callary in *The Hill of Tara* describes Tara as: “[t]he fount of our Nationhood, the cradle of our Faith, the seat of kings and the home of saints, it is truly a hallowed spot.”²¹

(iii) *The M3 Road Project*

Prior to the M3 development the chief route linking Dublin to the North West of Ireland was the N3.²² This large road comes out of Dublin and runs upwards in a north-westerly direction to Donegal. The N3 had been accommodating large quantities of traffic relatively sufficiently, however there remained considerable room for improvement. A series of key policy documents, listed in the following quotation from Ireland’s National Roads Authority (N.R.A.), recognised that congestion was arising at certain points along this route, bringing with it concentrated bouts of air and noise pollution. Imperfect road alignment and passing difficulties created a further inconvenience:

[t]he proposed M3... Motorway is a much-needed scheme. The N3 is identified as a Strategic Radial Corridor in the National Spatial Strategy and its upgrading is:

- an objective of the National Development Plan, 2000-2006
- an objective of the Meath County Council Development Plan
- referenced in the Dublin Transportation Office ‘A Platform for Change’ Strategy 2000-2016,
- referenced in the Strategic Planning Guidelines for the Greater Dublin Area.²³

²⁰ On Saint Patrick’s adventures at Tara, see the retelling of his popular stories in Hickey, *supra* note 13 at 24-27.

²¹ Callary, *supra* note 19 at 44.

²² In relation to ‘M’ roads and ‘N’ roads in Ireland, the Department of Transport, Tourism and Sport has summarised Ireland’s ‘Road Classification’ system as follows:

[r]oads in the Ireland [*sic.*] are classified as National roads (shown by the letter *N* followed by a route number, e.g. N25), Regional roads (shown by the letter *R* followed by a route number, e.g. R611) and Local roads (shown by the letter *L* followed by a route number, e.g. L4202). There are two types of National roads: National Primary routes and National Secondary routes. Some National roads are designated as motorways (shown by the letter *M* followed by a route number, e.g. M7).

Guidelines for Classification and Scheduling of Roads in Ireland (Department of Transport, Tourism and Sport, September 2013) at 3. ‘M’ roads in Ireland, therefore, designate motorways. Motorways often take the form of large dual carriageways comprised of two lanes, though they may also contain more lanes.

²³ This text has been posted online for several years within the N.R.A.’s online materials under the title “M3 Background” (at the address <<http://www.m3motorway.ie/M3Background/>>); however, it has been withdrawn from the internet at the start of this year since the drafting of this study as part of the launch of Transport Infrastructure Ireland. A website used by activists during the height of the M3

As noted in this quotation, the N.R.A. held that the laying of an additional motorway, the M3, was a “much needed scheme”, and it was decided that significant construction costs could be recouped by the inclusion on the M3 of two toll gates, where vehicles would pay a small surcharge to use the road.

A four-year planning process commenced, and route selection reports were published in 2000 and 2001. The N.R.A., which had statutory responsibility for the national roads programme,²⁴ decided in conjunction with the pertinent local authority, Meath County Council, to run the M3 through the Tara-Skryne Valley immediately alongside the Hill of Tara.²⁵ At the time of this proposal, anyone who was affected by strategic infrastructure development of this nature had the facility to appeal first instance planning decisions made by a planning authority to An Bord Pleanála, the Irish planning appeals board. A twenty-eight day Oral Hearing was convened in 2002 so that An Bord Pleanála could consider objections, however general approval for the scheme was ultimately confirmed in August 2003. The new motorway opened on 4 June 2010, some two months ahead of schedule.

(iv) Archaeological Destruction

Over the course of its conception and development several strong arguments were advanced against the laying of the M3 through its particular path in the Tara-Skryne Valley.²⁶ The most forceful and persuasive objections were founded upon the issue of archaeological heritage.²⁷ Regardless of whether one was in favour of the

dispute is still “live” online and preserves certain key N.R.A. documents. The broader N.R.A. statement from which the precise “M3 Background” text quoted above was taken can be accessed here: <http://www.tarataratara.net/resources/Reports/NRA/NRA_planning_background.htm>.

²⁴ Amongst other obligations, the N.R.A. had “overall responsibility for the planning and supervision of works for the construction and maintenance of national roads”; *Roads Act 1993*, s.17(1)(a). In late 2015 the N.R.A. merged with the State agency responsible for railway development, to become Transport Infrastructure Ireland.

²⁵ The requisite funding for the development was achieved through a Public Private Partnership, or “P.P.P.”, scheme, with the N.R.A. and Meath County Council ultimately awarding the P.P.P. concession contract to the Eurolink Motorway Operations consortium.

²⁶ For example, the level of aesthetic damage that the M3 would inflict upon the Tara landscape was a common complaint. Father Pat Raleigh, spokesman for an influential Catholic community of Priests and missionaries based nearby, said of the road that “I think it's selling our soul. It will just ruin the whole peace, tranquility and beauty of these surroundings. While we are stewards of this lovely property, I will fight tooth and nail to ensure that a concrete roadway doesn't go through”; see M. Lynas, “The Concrete Isle” *The Guardian* (4 December 2004) 16 [hereinafter Lynas].

²⁷ See, e.g. Bhreathnach *et al*, “Driving a Stake through the Heart of Tara”, *supra* note 14; J. Fenwick, “The geophysical survey of the M3 toll-motorway corridor: a prelude to Tara's destruction?” [2005] 16 *Riocht na Midhe*, Records of Meath Archaeological and Historical Society 8.

development or opposed to it, the fact that the M3 would subject the heritage landscape to significant, irreparable archaeological damage was irrefutable.²⁸

In accordance with Directive 85/337/E.E.C.²⁹ it was necessary for an Environmental Impact Assessment (E.I.A.) to be carried out. In order to inform this assessment process, the developer was required to produce an Environmental Impact Statement (E.I.S.). The E.I.S. constitutes evidence produced by a developer that will inform the E.I.A., with the assessment being carried out by the decision-maker in light of the E.I.S. and any other evidence that the decision-maker wishes to take into account. In this case, the E.I.S. was prepared by consultants on behalf of Meath County Council itself. Although a private company, Eurolink Motorway Operations, was engaged to develop the road, its construction occurred under a Public Private Partnership concession contract and as such the contract was awarded by the N.R.A. and Meath County Council in 2007 well after the E.I.A. process had been concluded. The findings published in the final E.I.S. recorded that the road was going to:

impact directly on 3 recorded archaeological sites or their immediate environs and 71 previously unrecorded sites of potential archaeological interest There are a further 68 recorded or potentially significant sites within 500m of the road alignment.³⁰

Hurried excavations were ongoing immediately prior to the M3's construction as a means of mitigating the archaeological damage. In an interview with the author, archaeological authority and Tara scholar Dr. Edel Bhreathnach stressed that "the road was gravely archaeologically damaging." "Much more time was needed," she said in reference to these hurried excavations, "to look at the archaeological elements, and what were needed were research excavations, rather than rescue excavations."

²⁸ See *supra* note 14.

²⁹ Council Directive 85/337/E.E.C. of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1985] O.J. L.175/40 [hereinafter E.I.A. Directive].

³⁰ *M3 Clonee – North of Kells Environmental Impact Statement* Vols I-VII; Vol I (Ireland: N.R.A., 2002) at 27 [hereinafter *M3 Clonee – North of Kells E.I.S.*].

The Tara-M3 development generated extensive levels of public protest,³¹ and substantial preservationist groups came together to resist its construction.³² The development also attracted significant international criticism.³³ Outspoken condemnation from various Irish and international celebrities drew additional negative attention to the project.³⁴ These tensions were heightened further when archaeologists unexpectedly discovered the remnants of a large Iron Age henge – an ancient form of ceremonial enclosure – directly in the road’s path. The Lismullin Henge spanned approximately 80 metres in diameter and dated between 1000BC–400AD. A discovery of such significance located directly in the M3’s path had been unanticipated, and the Henge was classified as a national monument.³⁵

Despite calls from the European Commission to carry out a fresh E.I.A. in light of these altered circumstances, Dick Roche, then Irish Minister for the Environment, decided instead to preserve the Lismullin Henge “by record”, as opposed to “in situ,” and authorised the destruction of the site so that the road could be laid through it.³⁶

³¹ For example: in October 2004 the *Save Tara* campaign delivered 10,000 protest signatures to the Environment Minister; in August 2005 a national survey conducted by *Red C Research* found that seven in ten people desired the M3 to be rerouted away from Tara; in November 2006 1,000 protestors marched through Navan, County Meath; in July 2007 a further 1,000 marched in Dublin in a month where a protest petition containing 50,000 signatures was submitted to the Irish government; in July 2007 1,500 people assembled at Tara in protest; and as late as May 2008 Taoiseach Bertie Ahern received a petition containing almost 40,000 signatures urging him to reconsider the M3 route. For an unsuccessful challenge to the selected routeway mounted in the courts, see *Salafia v. The Minister for the Environment, Heritage and Local Government* (unreported, High Court, 1 March 2006).

³² Prominent examples include the *TaraWatch* and *Save Tara* campaign groups.

³³ Criticism was particularly strong in Great Britain. On *Petitionsite*, a website facilitating the development of petitions, a petition to “Save the Hill of Tara from the M3 Motorway” directed at the U.N. accrued several thousand international respondents (see <<http://www.thepetitionsite.com/1/UN-Must-Save-Tara/>>. Internationally popular publications such as *Smithsonian Magazine* and *National Geographic* articulated the protestors’ arguments to a worldwide audience, see e.g.: A. Fiegl, “Ireland’s Endangered Cultural Site” *Smithsonian Magazine* (March 2009), available <<http://www.smithsonianmag.com/travel/Endangered-Cultural-Treasures-The-Hill-of-Tara-Ireland.html>>; J. Owen, “Ancient Tomb Art found in Path of Irish Highway” *National Geographic News* (January 14 2008), available <<http://news.nationalgeographic.com/news/2008/01/080114-tara-ireland.html>>.

³⁴ Well-known figures engaged in active protest or articulating strong opposition included Jonathan Rhys Meyers and Stuart Townsend (actors), Seamus Heaney (poet, Nobel Laureate), Bono of U2 and Cait O’ Riordan of The Pogues (musicians), Colm Tóibín (novelist), Louis Le Brocqy (artist), Paul Muldoon (writer), The Chieftains (musicians).

³⁵ For the Henge’s National Monument classification, see: An Bord Pleanála, *Inspector’s Report (Lismullin Henge)*, Board Reference 17.EN3001; released to the author on request by the National Monuments Service.

³⁶ Dick Roche became Minister for the Environment in 2004 as a member of Ireland’s Fianna Fáil party, and was replaced by successor John Gormley, of the Green Party, in June 2007. As such, the Ministerial transition occurred shortly after Roche’s decision on Lismullin had been taken. Gormley might have reversed that decision, although by this stage it seems that rain and the natural elements had been causing the disintegration of the site such that certain expert advisors saw little point on archaeological grounds in preventing the demolition from proceeding as planned; see further (e.g.), the account of

The manner in which the government Minister felt justified in authorising the destruction of a national monument against the advice of many of the country's leading archaeological and historical experts, contrary to the European Commission's call for a second E.I.A., and in the face of levels of public resistance never before witnessed in the history of Irish roadbuilding,³⁷ contrasts significantly with the manner in which the Kerry ringfort farmer has been stringently penalised for instructing his workers to destroy a national monument on his privately owned land.

III – Ireland's Broader Supranational and National Setting

Before proceeding to develop these matters in the context of the Carrickmines M50 controversy, it will be useful to better clarify the extent to which Irish cultural heritage protection is both informed and moderated by Ireland's broader supranational and national legal setting.

A. Cultural Heritage and European Union (E.U.) Law

As an E.U. Member State Ireland is subject to E.U. law; therefore, this circumstance duly extends to the remit of cultural heritage law.³⁸ The central element of the *Treaty on the Functioning of the European Union* (T.F.E.U.) engaging this matter is located at Article 167, entitled "Culture".³⁹ As de Vires notes, drawing on a survey of cultural requirements in the context of the T.F.E.U. by Psychogiopoulou,⁴⁰ this Article "has been the *explicit* legal basis for [E.U.] action in the cultural field since the

Gormley's role as reported in the *Irish Times*; Anon., "Protesters blocking Lismullin moved on by Gardai" *Irish Times* (8 August 2007).

³⁷ The level of resistance characterised above at *supra* note 31 was unprecedented in the history of modern Irish road-building; see e.g., ch. 13, "Roads: Glen of the Downs, Carrickmines and Tara" in L. Leonard, *The Environmental Movement in Ireland* (Galway: National University of Ireland, 2007) at 199 [hereinafter Leonard].

³⁸ It is notable that the precise meanings and parameters of the term "cultural heritage" are often contested: see, e.g., M. Vecco, "A Definition of Cultural Heritage: From the Tangible to the Intangible" [2010] 11 (3) *Journal of Cultural Heritage* 321. Concerning definitional perspectives in the specific context of law, Blake has provided an overview of the compound term's conceptual fluidity: J. Blake, "On Defining the Cultural Heritage" (January 2000) 49 *International and Comparative Law Quarterly* 61 (see particularly Section II, "The Problem with 'Cultural Heritage'" at 62-65); see further J. Blake, *International Cultural Heritage Law* (Oxford: O.U.P., 2015), "Some Terminological Questions" at 6-12. For a targeted exploration of supranational approaches to cultural heritage law, see R. Craufurd-Smith ed., *Culture and European Union Law* (Oxford: O.U.P., 2004) [hereinafter Craufurd-Smith].

³⁹ T.F.E.U., Art.167.

⁴⁰ E. Psychogiopoulou, *The Integration of Cultural Considerations in EU Law and Policies* (Leiden/Boston: Martinus Nijhoff, 2008) [hereinafter Psychogiopoulou].

Treaty of Maastricht.”⁴¹ Article 167(1) asserts that the E.U.: “shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.”⁴² Tunney has observed that this posits a clear commitment to “two senses” of culture, both an individual sense of culture native to a given Member State and a semi-transcendent shared culture belonging to the E.U. as a whole.⁴³ Article 167(2) “encourages” co-operation between Member States in the interest of culture, and where necessary this is to be “supplement[ed]” by means that include the “improvement of the knowledge and dissemination of the culture and history of the European peoples” and the “conservation and safeguarding of cultural heritage of European significance”.⁴⁴ Both of these elements build upon a sense of a common European heritage that emerges from the Treaty.⁴⁵

The soft language employed by Article 167 suggests that E.U. constitutional law may not accord cultural heritage a particularly strong position in the Union’s supranational legal nexus. It will be clarified below that E.I.A. does afford a significant degree of protection, however E.I.A. is arguably best understood as providing *procedural* rather than substantive protection, given that the E.I.A. Directive does not dictate the outcome of a given decision in light of the assessment. Where one juxtaposes supranational cultural heritage protections with protections engaged by other standard environmental problems one tends to find that more rigorous protective attitudes are adopted by the E.U. in these alternative spheres, such as where substantive protection for certain species, habitats and areas of land is provided for.⁴⁶ Cast in this broader setting, the degree of E.U. protection afforded to cultural heritage appears to be rather soft.⁴⁷ Yet, nonetheless, while addressing the “E.U.” in this

⁴¹ S. de Vries, “Publication Review: The Integration of Cultural Considerations in E.U. Law and Policies” [2009] 34 (3) *European Law Review* 515 at 516 [emphasis in original].

⁴² T.F.E.U., Art. 167(1).

⁴³ J. Tunney, “Is the Emerging Legal Concept of Culture the Cuckoo’s Egg in the E.U. Competition Law Nest?” [2001] 22 (5) *European Competition Law Review* 173 at 175.

⁴⁴ TFEU, Art.167(2).

⁴⁵ For discussion of the “elevation of culture to the EU pantheon” and the ingrained national/pan-E.U. dichotomy that this creates, see R. Craufurd-Smith, “From heritage conservation to European identity: Art. 151 EC and the multi-faceted nature of Community cultural policy” [2007] 32 (1) *European Law Review* 48 at 53–57.

⁴⁶ See most particularly: Council Directive 92/43/E.E.C. of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive); Directive 2009/147/E.C. of 30 November 2009 on the conservation of wild birds (Birds Directive).

⁴⁷ See further Craufurd-Smith, *supra* note 38. As noted above at *supra* note 38, “cultural heritage” is a rather abstract term; for treatment of this area in the context of “tangible” cultural heritage (namely,

fashion, it should also be remembered that supranational cultural heritage protections have been conditioned by the E.U. legislature as a whole, including the European Commission, the Council of the E.U., and the European Parliament. In other words, through these institutions “E.U.” decisions in respect of cultural heritage protection are necessarily decisions to which the Member States themselves have been fully party.

E.U. competence with regard to cultural heritage was first introduced by the Maastricht Treaty in 1993 (when the Treaty took legal effect). Lane emphasised at this time that: “Article 128 of the EC Treaty will mark the first express conferment upon the Community of direct and active, as opposed to indirect and reactive, competence in this field.”⁴⁸ It is notable that the 1985 E.I.A. Directive predated the Maastricht Treaty, and it also predated the period where the E.U. gained a specific Treaty base for making environmental legislation.⁴⁹ As such, the E.I.A. Directive was made under (then) Articles 100 and 235 of the E.E.C. Treaty, with Article 100 operating as a market harmonisation provision and Article 235 operating as a general provision authorising E.U. legislation that furthered the objectives of the E.E.C. and promoted the operation of the common market. The (then) European Court of Justice (E.C.J.) upheld the use of these provisions to introduce environmental legislation on the basis both that disparate environmental laws would hinder the operation of the common market, and that environmental protection was an implicit objective of the E.E.C., in spite of this not being explicitly stated in the Treaty.⁵⁰ Here, cultural heritage was incorporated in the E.I.A. Directive prior to the period where the E.U. had explicit competence for making environmental legislation⁵¹; this suggests that cultural heritage protection has long been given some significant degree of priority in

cultural “property”, in the form of objects/goods), see I.A. Stamatoudi, “European Union Law” in *Cultural Property Law and Restitution* (Cheltenham: Edward Elgar, 2011) at 112-157.

⁴⁸ R. Lane, “New Community Competences under the Maastricht Treaty” [1993] 30 *Common Market Law Review* 939 at 952.

⁴⁹ In 1987, under Art. 25 of the Single European Act, which added Title VII (“Environment”) to the E.E.C. Treaty.

⁵⁰ In *Case 91/79 Commission v. Italy* [1980] E.C.R. 1099 and *Case 240/83 Procureur de la Republique v. Association de Defense des Bruhleurs d’Huiles Usagee* [1985] E.C.R. 532 respectively. As Hildebrand has put it, “until the SEA [Single European Act], the evolution of Community environmental policy took place in the absence of an evolution of its formal legal basis.” P.M. Hildebrand, “The European Community’s Environmental Policy, 1957 to 1992: From Incidental Measures to an International Regime?” in D. Judge, ed., *A Green Dimension for the European Community* (London: Routledge, 2013) at 23.

⁵¹ The extent to which “cultural heritage” was incorporated within the Directive at this time is discussed below.

the E.U. legal order. Nonetheless, it has been noted above, and remains the case, that cultural heritage protections appear to lack a strong substantive dimension at the E.U. level where those protections are juxtaposed with the more rigorous protective attitudes adopted by the E.U. in relation to many other standard environmental problems.

As noted, these circumstances are complicated by the extent to which the E.U.'s supranational approach to cultural heritage tends to evoke a faultline inherent in the tension between the notion of general harmonization across Member States and, for all that there is undeniably a shared European culture of sorts within the E.U., a will to preserve the distinct (*i.e.*, culturally *unharmonised*) traditions and identities of member nations.⁵² As the European Commission has emphasised, "heritage is always both local and European. It has been forged over time, but also across borders and communities."⁵³ "Absent shared traditions, symbols, even a common history," Craufurd Smith suggests, "there will be little on which to forge a sense of *European* community."⁵⁴ To take an example of a manifestation of these sorts of tensions in a technical legal context, Collins (writing in the mid-1990s) has highlighted how dissimilarities between Member States concerning rules of contract, tort and property entitlement seem to point the way toward the development of a uniform common law if the E.U. single market project is to be developed most fruitfully.⁵⁵ This becomes a template that allows him to draw out some of the legal tensions brought about by the E.U. vision of single market harmonisation in juxtaposition with the preservation of a distinct sense of cultural tradition within Member States.⁵⁶

Other commentators have identified effectively the same species of concern in differing contexts. Burri-Nenova, for instance, has flagged a potentially problematic tension in the area of broadcasting occasioned by both a momentum towards a sort of monofarm pan-E.U. regulation of competition and the role played by national

⁵² G. Delanty, "Reinterpreting the European Heritage since 1989: Culture as a Conflict of Interpretations" in L.K Bruun, K.C Lammers & G. Sorensen, eds., *European Self-Reflection between Politics and Religion: The Crisis of Europe* (Basingstoke: Palgrave Macmillan, 2013) at 227 (Delanty addresses the E.U., but also considers Europe more broadly).

⁵³ European Commission (Communication), "Towards an Integrated Approach to Cultural Heritage for Europe" C.O.M./2014/0477 final at 1.1.

⁵⁴ Craufurd-Smith *supra* note 38 at 278.

⁵⁵ H. Collins, "European Private Law and the Cultural Identity of States" (1995) 3 *European Review of Private Law* 353.

⁵⁶ *Ibid.*

broadcast media in perpetuating a contrary sense of cultural diversity.⁵⁷ As a general rule E.U. law will predominate over national law,⁵⁸ however if cultural heritage is to come increasingly to the fore in the E.U.'s legislative evolution – as it possibly must if heritage protection is to be more adequately incorporated into the EU's governance safeguards – it is possible that the tension inherent in this “monoform European”/“distinct Member State” cultural binary will become more prevalent. This evolving circumstance will be likely to bring with it challenges that the E.U. will be required to address with care.

The E.U., then, looks in part upon the notion of cultural heritage with a two-tiered vision that recognises a need to safeguard cultural heritage within both the national and the supranational arenas. However, given that the cultural protective agents emanating from the supranational level remain somewhat underdeveloped, this means, as a consequence, that a particularly significant onus of responsibility for the development of protective cultural frameworks falls to the individual Member States themselves.⁵⁹ The “marker” invoked in the Kerry ringfort case carries with it the implication that national safeguards ought to be robust if they are to achieve success in practice, yet the destructive consequences of Ireland's governance regime for Tara seem to suggest that Ireland's national framework appears to be lacking.

E.I.A. is amongst the most crucial mechanisms to have been set in place by the E.U. in the interest of assessing and, where necessary, facilitating the mitigation of negative environmental effects likely to be occasioned by development projects undertaken in Member States. As a consequence of E.I.A.'s key position in the E.U.'s environmental governance regime, E.I.A. continues to play a vital role in safeguarding cultural heritage through the manner in which it facilitates the assessment of a proposed development's cultural heritage impact. E.I.A. procedure was applied to both the M3 and the M50.⁶⁰

⁵⁷ M. Burri-Nenova, “The new Audiovisual Media Services Directive: Television without Frontiers, Television without Cultural Diversity” [2007] 44 (6) Common Market Law Review 1689.

⁵⁸ *Case 6/64 Costa v. E.N.E.L.* [1964] E.C.R. 585 at 594; Constitution of Ireland, Art. 29.4.6°.

⁵⁹ Psychogiopoulou, *supra* note 40, (“The usual quest for unity-in-diversity”) 51, 48–50.

⁶⁰ E.I.A. at Tara and Carrickmines is examined in detail *infra* Part V.

E.I.A. is established by the E.I.A. Directive, which was adopted in June 1985.⁶¹ The original E.I.A. Directive included three Annexes, the first of which contained ten subsections that listed projects automatically subject to E.I.A., including “Construction of motorways”.⁶² Article 3 of the original Directive also asserted that E.I.A. assessment was to be based on both the “direct and indirect” implications of a project for the following:

human beings, fauna and flora,
soil, water, air, climate and the landscape,
the inter-action between the factors mentioned in the first and second indents,
material assets and the cultural heritage.⁶³

This Article was subsequently amended by Directive 97/11/E.C.⁶⁴ The amending Directive at Article 1(5)⁶⁵ adjusted the sequence of the Article 3 indents so that the closing indent now included the interaction of the three previous indents in its remit, as follows:

human beings, fauna and flora;
soil, water, air, climate and the landscape;
material assets and the cultural heritage;
the interaction between the factors mentioned in the first, second and third indents.

This phrasing remained the basis of Article 3 across the Tara and Carrickmines process.⁶⁶ Clearly, it elevates cultural heritage to a place of greater significance

⁶¹ Council Directive 85/337/E.E.C., *supra* note 29. The E.I.A. Directive has been amended several times: in 1997 (Directive 97/11/E.C., aligning the framework with the Espoo Convention); in 2003 (Directive 2003/35/E.C., incorporating aspects of the Aarhus Convention pertaining to public participation and access to justice); and in 2009 (Directive 2009/31/E.C., increasing the range of projects incorporated within Annexes I and II of the Directive). The E.I.A. Directive was codified in 2011 (Directive 2011/92/E.U.), and further amendments were applied in 2014 (Directive 2014/52/E.U.). Particular aspects of the amendments are discussed at various stages below.

⁶² *Ibid.* Annex I 1.7 of the original, unamended Directive.

⁶³ *Ibid.* Art. 3.

⁶⁴ Council Directive 97/11/E.C. of 3 March 1997 amending Directive 85/337/E.E.C. on the assessment of the effects of certain public and private projects on the environment [1997] O.J. L.073/5.

⁶⁵ *Ibid.* at Art. 1(5).

⁶⁶ However, in the post-Tara period the E.I.A. Directive has been amended (most recently by Directive 2014/52/E.U. of 16 April 2014 amending Directive 2011/92/E.U. on the assessment of the effects of certain public and private projects on the environment [2014] O.J.L.124/1), and Art. 3 now appears as follows:

[t]he environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project on the following factors:

- (a) population and human health;
- (b) biodiversity, with particular attention to species and habitats protected under

because it is now to be considered in terms of its interaction with the full listing of factors rather than in comparative isolation with material assets.

Annex III of the E.I.A. Directive under “Location of projects” asserts that:

[t]he environmental sensitivity of geographical areas likely to be affected by projects must be considered, having regard, in particular to... the absorption capacity of the natural environment, paying particular attention to... landscapes of historical, cultural or archaeological significance.⁶⁷

Under Annex IV developers are obligated to supply information on the following matters as part of the assessment process:

[a] description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the *architectural and archaeological heritage, landscape and the inter-relationship between the above factors*.⁶⁸

One observes that E.U. E.I.A. law is not meticulously prescriptive on the subject of cultural heritage; rather, it sets out generalised standards, and these in turn place an onus of responsibility upon Member States to implement the system at the national level in an appropriate manner. Further, the Court of Justice of the European Union (C.J.E.U.) has affirmed that national courts are imbued with a notable level of responsibility in overseeing the adequate application of these standards within Member States.⁶⁹ Ryall observes that the Irish courts “were slow to accept that competent authorities had obligations under the E.I.A. Directive and that the directive

-
- Directive 92/43/EEC and Directive 2009/147/EC;
 - (c) land, soil, water, air and climate;
 - (d) material assets, cultural heritage and the landscape;
 - (e) the interaction between the factors referred to in points (a) to (d).

⁶⁷ This assertion remains at present at Annex III.2(c)(viii), subject to some minor semantic adjustments occasioned by Directive 2014/52/E.U.; see further *ibid*.

⁶⁸ Directive 85/337/E.E.C. Annex IV.3, as amended by Council Directive 97/11/E.C. [emphasis added]. In the post-Tara period, amendments to E.I.A. have since positioned these factors at Annex IV.4 to the E.I.A. Directive, and with the elements distinguished above appearing as “material assets, cultural heritage, including architectural and archaeological aspects, and landscape.”

⁶⁹ As Ryall notes in her extensive analysis of E.I.A. in Ireland, “[e]ver since its ground-breaking *Van Gend en Loos* ruling, the European Court of Justice [now the C.J.E.U.]... has vigorously promoted the role of the national courts in supervising the application of Community law at local level”; Á. Ryall, *Effective Judicial Protection and the Environmental Impact Assessment Directive in Ireland*, (Oregon: Hart, 2009) at 1 [hereinafter *Ryall*].

could be invoked to challenge decisions taken by those authorities”.⁷⁰ This situation has improved over time, however.⁷¹

In *Case C-392/96 Commission v. Ireland*,⁷² the European Commission argued that Ireland had inadequately transposed the E.I.A. Directive due to the fact that it had set absolute thresholds for certain projects that needed to be met in order to trigger E.I.A. A negative consequence of this system, it was argued, was that “sites which are particularly sensitive or valuable may be damaged by projects which do not exceed the thresholds set.”⁷³ In particular, it was submitted that this “is the case with... areas of particular archaeological or geomorphological interest.”⁷⁴ Further, the Commission argued that “the [transposing] legislation fails to take account of the cumulative effect of projects.”⁷⁵ Finding against Ireland, the E.C.J. affirmed that “[a] number of separate projects, which individually do not exceed the threshold set and therefore do not require an impact assessment may, taken together, have significant environmental effects.”⁷⁶ In particular the E.C.J. noted that as an apparent consequence of these thresholds cumulatively extensive “land clearance has taken place in the Burren without a single impact assessment being carried out, although it is an area of unquestionable interest.”⁷⁷ The Burren, characterised in the judgment as a precious limestone landscape of “exceptional interest” that is “rich in archaeological remains”, had been subjected to extensive damaging reclamation resulting in reclamation sites totalling 256 hectares, including 31 sites in proposed Natural Heritage Areas.⁷⁸ The court noted “the loss of numerous archaeological and historical remains, such as holy wells and ancient field systems” over the course of its judgment.⁷⁹ The application of E.I.A. and associated procedures will be considered further below in the express context of the Tara and Carrickmines case studies.

⁷⁰ *Ryall, ibid.* at 239. See too 239–242, “Appraisal”, for an assessment of developing Irish E.I.A. jurisprudence.

⁷¹ *Ibid.* For further consideration of Irish E.I.A. jurisprudence (in the context of the Aarhus Convention) from Ryall, see Á. Ryall, “Beyond Aarhus Ratification: What Lies Ahead for Irish Environmental Law” (2013) 20 *Irish Planning and Environmental Law Journal* 19. Ireland’s application of the E.I.A. Directive is also treated in detail in ch.10 by J. Gore-Grimes in *Planning and Environmental Law in Ireland* (Dublin: Bloomsbury Professional, 2011).

⁷² *Case C-392/96 Commission v. Ireland* (1999) P.L.R. 107.

⁷³ *Ibid.* at para 21.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.* at para 22.

⁷⁶ *Ibid.* at para 22.

⁷⁷ *Ibid.* at para 80.

⁷⁸ *Ibid.* at para 33.

⁷⁹ *Ibid.* at para 33. See further the consideration of *Case C-50/09, Commission v. Ireland*, *infra* Part V.B. Here the C.J.E.U. ruled that Ireland’s exclusion of demolition works from E.I.A. constituted inadequate

B. National Law

At the national level, certain national monuments had for the first time been placed under State guardianship in Ireland in the late 1800s under the terms of the *Ancient Monuments Protection Act 1882*.⁸⁰ The Act listed eighteen protected sites that were to be overseen by the Commissioners of Public Works in Ireland, one of which was Tara.⁸¹ After the Commissioners' powers were strengthened under amendments set in place in 1892 and 1910 the *1882 Act* was repealed by the *N.M.A. 1930*⁸²; the *N.M.A. 1930* was created in the years immediately following the partition of Ireland into the Republic of Ireland and Northern Ireland in order to restrict potential damage to national monuments and heritage objects. The *National Monuments (Amendment) Act 1954 (1954 Act)* adjusted the law so that the Commissioners now had the facility to place preservation orders on national monuments deemed at risk of degradation or injury. The Commissioners were also obliged to produce continually updated national monument listings, and were advised in this duty by an official Advisory Council.⁸³ In the 1980s this list was adapted into a formal Register of Historic Monuments under s.5 of the *National Monuments (Amendment) Act 1987 (1987 Act)*. The 1987 amendments also widened the definition of "monument",⁸⁴ increased penalties for violation of the *N.M.A. 1930*,⁸⁵ and supplanted the duties of the Advisory Council with the establishment of a Historic Monuments Council.⁸⁶

A further notable set of amendments was introduced under the *National Monuments (Amendment) Act 1994 (1994 Act)*. Aspects of these changes were significantly influenced by a major cultural heritage controversy centered at Wood Quay, an area of Dublin city immediately adjacent to the River Liffey.⁸⁷ Whilst Dublin

transposition of the E.I.A. Directive, finding in particular that the infringement was operating to the detriment of acceptable standards of national heritage protection.

⁸⁰ 45 & 46 VICT. CH. 73 [hereinafter *1882 Act*].

⁸¹ *Ibid.*, Schedule.

⁸² It is notable that s.2 of the *N.M.A. 1930* includes within the purview of national monuments "every monument... to which the Ancient Monuments Protection Act, 1882, applied immediately before the passing of this Act", thereby automatically incorporating Tara, which, as noted, was included in the Schedule to the *1882 Act*.

⁸³ *1954 Act*, s.8.

⁸⁴ *1987 Act*, s.1

⁸⁵ *Ibid.* s.23.

⁸⁶ *Ibid.* s.4.

⁸⁷ For the full account of these events see T. F. Heffernan, *Wood Quay: The Clash over Dublin's Viking Past* (Austin: University of Texas, 2011) [hereinafter Heffernan]. See also J. Bradley, *Viking Dublin Exposed: The Wood Quay Saga* (Dublin: O'Brien Press, 1984). A new work has also just been published

is presently the thriving capital city of Ireland, in the Tenth Century it had been a major Viking settlement,⁸⁸ and archaeological research conducted over many years at various locations across modern Dublin had been gradually enriching the contemporary understanding of Dublin's medieval history. Excavations at Wood Quay in the early 1970s revealed that a major portion of Viking Dublin had been concentrated at that particular location; however, city authorities had also signaled their intention to build offices at the site. Planning permission for the development had been granted in 1970, and since it had now become clear that Wood Quay was also a highly important archaeological site this situation moved incrementally towards a crisis point.

Resistance to the development began to manifest in increasingly physical terms as public protestors took occupation of the site and engaged in protest marches and demonstrations. The facility to consent to the destruction of a national monument existed under section 14 of the *N.M.A. 1930*. Although it had never been used before, authorities decided to force the Wood Quay development through by issuing a section 14 development consent. Heffernan has observed that:

[e]veryone involved in the case knew ... that, in spite of Section 14 of the National Monuments Act, no authorization had ever been given to destroy a national monument in Ireland. So there was a kind of moral injunction, it was bravely argued, against destroying this one.⁸⁹

Under section 14(2) of the *N.M.A. 1930* destruction required the joint consent of the Commissioners of Public Works and the relevant local authority. The Commissioners of Public Works were part of the pro-development cohort,⁹⁰ and in this particular instance the local authority was the Dublin Corporation, the very body seeking to erect its offices on the site.⁹¹ Thus the development was approved, ongoing

at the time of writing: P.E. Wallace *Viking Dublin: The Wood Quay Excavations* (Dublin: Irish Academic Press, 2016).

⁸⁸ S. Kilfeather, *Dublin: A Cultural History* (Oxford: Oxford University Press, 2005), ch. 1. See too Viking Network Ireland's education portal, *A History of Viking Dublin*, available <<http://www.ncte.ie/viking/dubhist.htm>>.

⁸⁹ Heffernan *supra* note 87 at 80.

⁹⁰ See, e.g. F.X. Martin's discussion of the Commissioners' role in "Politics, Public Protest and the Law", in J. Bradley Ed., *Viking Dublin Exposed: The Wood Quay Saga* (Dublin: O'Brien Press, 1984) 38 at 54-55.

⁹¹ "Dublin Corporation" was the former name of what is now Dublin City Council.

archaeological exploration at the site was terminated, and much of Wood Quay was consumed by the new offices.

When the *National Monuments (Amendment) Act 1994* was conceived it was generally understood as a consequence of Wood Quay that the legal protections acting upon national monuments needed to be strengthened. The 1994 adjustments were publicly popular, as evoked in this opinion piece in the *Irish Times*: “the National Monuments (Amendment) Act, 1994, was universally applauded. This amendment was meant to assure citizens that Wood Quay would never happen again.”⁹² The *1994 Act* amended section 14 of the *N.M.A. 1930* so that the consent required to destroy a national monument was now more difficult to obtain. Interference with a national monument still required the joint consent of the Commissioners and the relevant local authority, but this consent was only sufficient where such interference was undertaken in the interest of archaeology; and if the interference was not to be undertaken in the interest of archaeology then the further approval of the Minister for Arts, Culture and the Gaeltacht was required.⁹³ The Arts Minister’s consent was only sufficient if it had been issued in the interest of public health or safety; if it was issued for an alternative reason then the order granting consent had to be laid before each House of the Oireachtas (Irish Parliament), whereupon the Houses had a 21 day timeframe to annul the order if so desired.⁹⁴ A further set of major amendments was enacted in 2004. These changes were largely galvanised by the Carrickmines controversy and will be addressed in the following section.⁹⁵

⁹² V. Salafia, “An act designed to facilitate roads and real estate” *Irish Times* (17 August 2004), available <<http://www.irishtimes.com/newspaper/opinion/2004/0817/1091051878237.html>>.

⁹³ *1994 Act*, s.15.

⁹⁴ *Ibid.* s.15(3D).

⁹⁵ In terms of the substance of “national monument” designations in their own right, it is notable that the High Court has recently addressed this matter in some detail over the time of writing in the context of a “battlefield site” pertaining to Ireland’s 1916 Easter Rising rebellion: see *Moore v. Minister for Arts, Heritage and the Gaeltacht* [2016] I.E.H.C. 150 (judgment delivered on 18/03/2016). Here the Minister for Arts had classified part of the site as a national monument and placed it under a preservation order; however, Barrett J. held that the Minister’s national monument designation was limited to too narrow a portion of what was in fact a cumulatively broader heritage landscape (on the court’s specific national monument designations, see paras 365 – 368). The judgment – running to some 400 pages – is instructive for the detailed scrutiny it affords to the meaning and implications of “national monument” designations under the *N.M.A. 1930*. The court stressed that where parties are disputing whether a given monument is a national monument or not in the context of legal proceedings, courts are imbued with the facility to declare the monument a “national monument” or to decide otherwise. Courts are to make such determinations “by virtue of the operation of statute and the presence of certain objective factors” (at para 131): “whether or not a monument or the remains of a monument is a “national monument” is a question of fact. Provided the facts identified in [N.M.A. 1930, s.2] present in any one circumstance, the monument or remains of a monument being looked at constitute a “national monument”” (at para 112).

IV – Carrickmines and the M50 Road Project

Carrickmines is a suburb of Dublin city in the Dun Laoghaire-Rathdown area of Ireland. By the late Fifteenth Century, Parliament had established a boundary around Dublin known as The Pale. The Pale's function was to demarcate the area around Dublin loyal to the Crown, and in 1494 the Irish Parliament at Drogheda ordered that a rampart was to be built around its perimeter in order to fortify the interior against the raids of Irish clansmen. Parts of this earthwork boundary can still be seen today. Carrickmines Castle sat at this perimeter and assisted with the Pale's defence, and in modern times a minor set of ruins has remained at the site.⁹⁶ In the late 1980s construction of the M50 commenced, a motorway designed, in part, to encircle a vast portion of Dublin in a sweeping arc on the city's western side. The road was officially opened on 30 June 2005.⁹⁷

In the late 1990s the N.R.A. signalled its intention to run the M50 through a portion of the Carrickmines Castle site. During the development process, Dún Laoghaire-Rathdown County Council and the N.R.A. were required to set excavations underway in order to mitigate the road's archaeological effects. The excavations commenced in August 2000 and were conducted over an agreed timeframe of two years. As the archaeologists progressed in their fieldwork an archaeological landscape that was considerably more expansive and rich in archaeological materials than had at first been anticipated was gradually revealed. Here, Mark Lynas, writing in *The Guardian* newspaper, summarises some of the findings: “[s]ome of the 100,000 artefacts uncovered include money, pottery, clothing, weaponry and even a perfectly preserved 17th-century dress with coins sewed into its hem.”⁹⁸ The finds also included musket and cannon balls, human skeletons, medieval textiles, and a medieval

Given that these determinations are a “question of fact” for the courts, this means that “no ministerial designation is required for a monument or the remains of a monument to become a “national monument”” (at para 112). It was stressed that “under the National Monuments Acts neither any minister nor any administrative body has been specifically assigned the function of determining (whether or not in the context of a dispute) what is or is not a national monument” (at para 167). Consequently, there is “no reason for the court or anyone else to defer to the opinion” of government Ministers “as to what is or is not a “national monument”” (thus including the Arts Minister designation in the present case) (at para 133).

⁹⁶ T. O’Keeffe, “Heritage, Rhetoric, Identity: Critical Reflections on the Carrickmines Castle Controversy” in M. McCarthy, ed, *Ireland’s Heritages* (Aldershot: Ashgate, 2005) 140 [hereinafter O’Keeffe].

⁹⁷ Department of Transport, Tourism and Sport, *Press Release, 30 June 2005: “Cullen opens Final Section of M50”*.

⁹⁸ Lynas, *supra* note 26.

fosse (defensive ditch) that formed part of the Castle's fortifications.⁹⁹ A European Commission report noted that "the results of the excavation were spectacular and far exceeded any expectations of what might survive at Carrickmines".¹⁰⁰ Much more excavatory work remained to be done at the point where the allotted two-year excavation period reached its expiration, but the N.R.A. signalled its intention to proceed with running the M50 through the site. This resulted in a (nationally) high-profile period of public protest,¹⁰¹ with the remonstrations of "The Carrickminders" receiving a good deal of coverage in the Irish press in particular.¹⁰²

In *Dunne v. Dun Laoghaire-Rathdown County Council*¹⁰³ two members of the public brought proceedings as co-plaintiffs against Dun Laoghaire-Rathdown County Council. In his lead judgment, Hardiman J. summarised the plaintiffs' position as follows:

[s]pecifically, and without limiting their contentions in any way they say that the defendants are admittedly about to remove the revetments of a medieval fosse. They say that this, together with the other remains of Carrickmines Castle, is a 'national monument' and that interference with it is a criminal offence under s.14 of the [N.M.A.] 1930 They seek the relief claimed to prevent this unlawful Act.¹⁰⁴

The submission therefore compelled the Supreme Court to address whether the Carrickmines site could be interpreted as constituting a "national monument" within the meaning of section 2 of the *N.M.A. 1930*. It was held that the Court must operate on the assumption that Carrickmines did fall within the Act's national monument provisions, largely due to the fact that expert evidence provided by distinguished archaeological scholar Dr. (now Professor) Seán Duffy to the effect that the

⁹⁹ J.C. Pettygrove, "Canyons, Castles & Controversies: A Comparison of Preservation laws in the United States & Ireland" [2006] 4 Regent Journal of International Law 47 at 75, note 184 [hereinafter Pettygrove].

¹⁰⁰ This quotation is taken from *The Kampsax Report* at 15. On both the report in general and issues concerning its citation details, see further *infra* note 133 and text accompanying note.

¹⁰¹ Another important example of the type of large-scale public protest over road development in Ireland witnessed at Tara and Carrickmines concerns the Glen of the Downs road controversy, which has not been treated in this study due to the fact that the destruction of cultural heritage was not at issue: see further Leonard, *supra* note 37.

¹⁰² See e.g. R.T.E. News, "Carrickminders agree to talks with N.R.A. and Council" (13 January 2003), available <<http://www.rte.ie/news/2003/0113/33997-carrickmines/>>; P. Cullen, "Council seeks order to remove 'Carrickminders'" *Irish Times* (1 February 2003), available <<http://www.irishtimes.com/news/council-seeks-order-to-remove-carrickminders-1.347356>>.

¹⁰³ *Dunne v. Dun Laoghaire-Rathdown County Council* [2003] 1 I.R. 567 [hereinafter *Dunne (2003)*].

¹⁰⁴ *Ibid.* at para 7.

Carrickmines site fell within the meaning of “national monument” was uncontroverted by any other evidence brought before the court.¹⁰⁵

The defendants argued that they were justified in interfering with the national monument because they had been granted a licence to excavate the site under section 26 of the *N.M.A. 1930* by the Environment Minister (at that time Martin Cullen), who was the Minister responsible for issuing s.14 consents in his own right. This, they maintained, ought to negate any requirement for a formal section 14 consent: “the Minister has already exercised an independent function under the Acts by granting a licence under s.26 of the National Monument Act, 1930, for excavation and by doing so has evidenced his consent in writing.”¹⁰⁶ The necessity of a section 14 consent was further diminished, it was argued, by the fact that the Environment Minister had also authorised the actual M50 road development itself.

The Supreme Court rejected this reasoning, holding instead that a section 14 consent was the necessary consent and that a section 26 consent (which extended only to archaeological digging) could not be substituted for it.¹⁰⁷ Thus it was held that “the existence of a s.26 licence was a neutral factor and did not dispense one from obtaining a s.14 consent if one wanted to remove or alter wholly or in part a national monument. ... [T]he requirement of s.14 is a freestanding one.”¹⁰⁸ The court found in favour of the plaintiffs, and placed an injunction on the Carrickmines development.

The litigation experience at Carrickmines has been considered by O’Keeffe.¹⁰⁹ In discussing the “National Monument status claimed for the castle (and upheld by the courts in the narrow context of an action-seeking injunction)”, he characterises these developments as negatively “jar[ring] against the contract originally entered into by the consultant archaeologists to complete the excavation by a certain date.”¹¹⁰ O’Keeffe’s appraisal does not adequately reflect the significance of the manner in which the two-year research contract that the archaeologists had entered into at the site was

¹⁰⁵ “[I]t is essential to the resolution of the present case to note that the strongly expressed and closely argued conclusion of Dr. Duffy, to the effect that it is a national monument, is uncontradicted by any expert evidence. It must therefore be accepted”; *ibid.* at 15.

¹⁰⁶ *Dunne (2003)*, *supra* note 103 at para 8.

¹⁰⁷ *Ibid.* at para 30.

¹⁰⁸ *Ibid.* at paras 12–13.

¹⁰⁹ O’Keeffe, *supra* note 96.

¹¹⁰ *Ibid.* at 143–144.

an arrangement that was acted upon *subsequently*. The arrangement was acted upon by both the discovery of important, unanticipated archaeological finds, and the associated manner in which the unfolding archaeological surroundings were directly incorporated within the purview of a heritage site of confirmed high importance - a national monument. These revelations consequently adjusted the legal dynamic and the altered circumstances triggered specific legal protections geared to safeguard cultural heritage as the new understandings became available.

Dunne (2003) illustrates the broad extent to which the Minister for the Environment held in his hands a powerful capacity to preside over key aspects of both Ireland's infrastructural development *and* its national heritage protections, as Hardiman J. noted:

it is a somewhat odd position that a Minister with an interest in the road building programme is the person who requires to give consent under the National Monuments Act, even in relation to a monument whose removal or alteration, in whole or in part, is proposed for road building purposes.¹¹¹

These questionable circumstances had largely arisen as a by-product of a realignment of Ministerial portfolio responsibilities. It has been seen above that the *1994 Act* created a new consent system pertaining to interference with national monuments, and that the issuing of a necessary consent involved the approval of the Commissioners of Public Works, the relevant local authority, and, when such interference was not in the interest of archaeology, the Arts Minister. Subsequently, the *Heritage (Transfer of Functions of Commissioners of Public Works in Ireland) Order 1996*¹¹² had transferred the "powers, duties and jurisdictions" of the Commissioners of Public Works¹¹³ to the Minister for Arts, Culture and the Gaeltacht.¹¹⁴ Some years later the Arts Minister's duties had been transferred to the Department of Environment by the *Heritage (Transfer of Departmental Administration and Ministerial Functions) Order 2002*.¹¹⁵ The consequences of these changes concentrated a great deal of power in the Minister for the Environment's hands, and ultimately led to an apparent conflict of interest between infrastructure and the national heritage that

¹¹¹ *Dunne* (2003), *supra* note 103 at para 32.

¹¹² *Heritage (Transfer of Functions of Commissioners of Public Works) Order 1996* (S.I. 61 of 1996).

¹¹³ *Ibid.*, Art. 2.

¹¹⁴ *Ibid.*, Art. 3(1).

¹¹⁵ (S.I. 356 of 2002), Art. 4(1).

permitted the Minister to use ministerial powers to privilege the former to the detriment of the latter as the M50 controversy culminated.

Thus, in the wake of the *Dunne* (2003) ruling, the Environment Minister simply used his powers to issue an immediate section 14 statement of consent.¹¹⁶ As a consequence the matter was laid before the Oireachtas in accordance with consent procedure and, although the government met with some resistance from the opposition, the 21 day consideration period lapsed and a successful application for the termination of the *Dunne* (2003) injunction was processed through the High Court. The development therefore had a green light to proceed once again. An application for judicial review was then lodged against the Minister's decision. In *Mulcreavy v. Minister for Environment*, the applicant, a private citizen, argued before the Supreme Court that the Minister's consent to his own proposal was unconstitutional.¹¹⁷ Most particularly, it was argued that the *Heritage (Transfer of Functions of Commissioners of Public Works) Order 1996* (the 1996 Order) amounted to delegated legislation that had been used in an invalid way to replace elements of a statutory regime that had been set in place by Parliament.¹¹⁸

As set out above, the *1994 Act* had established a sophisticated consent scheme whereby interference with a national monument was made considerably more difficult. In considering the 1996 Order in this context the court asserted that:

the effect of [the 1996 Order] was beyond argument to substitute for the statutory regime... where three entirely distinct and independent statutory bodies with different remits had to give their consent or approval to the interference with the national monument before it could be lawfully effected, a different statutory scheme under which the approval or consent of two bodies only, the local authority and the Arts Minister (now the [Environment Minister]), was required.¹¹⁹

Thus the Supreme Court held that delegated legislation had unconstitutionally altered a statutory regime, and work was halted at the site once again.

¹¹⁶ Via the *National Monuments (Approval of Joint Consent) Order 2003*.

¹¹⁷ *Mulcreavy v. Minister for Environment, Heritage and Local Government and Dun Laoghaire-Rathdown County Council* [2004] 1 I.R. 72.

¹¹⁸ *Ibid.* at 87.

¹¹⁹ *Ibid.* at 88.

The Environment Minister reacted by endeavouring to amend the *1994 Act* in order to drive through the M50 development. As noted in the *Irish Times*, at the bill stage the then Minister for Environment Martin Cullen said “[the National Monuments (Amendment) Bill] was being introduced specifically to address the situation at Carrickmines where the construction of the M50 motorway there has been halted[.]”¹²⁰ The proposed changes constituted a significant effort to further dismantle the legal safeguards established in the wake of the Wood Quay experience.¹²¹ Broadly, they would grant the Minister the power to “demolish or remove” a given national monument, and to “disfigure, deface, alter... injure or interfere with” it,¹²² “excavate, dig, plough or otherwise disturb the ground within, around, or in proximity to it”,¹²³ and “sell it or any part of it for exportation”.¹²⁴ These provisions were to be reinforced by what would become section 8 of the amending instrument, which granted the Minister powers tailored to push the M50 through:

[t]he consent of the Minister under section 14 and any further consent or licence under any other provision of the National Monuments Acts 1930 to 2004 shall not be required in relation to the carrying out of works affecting any national monument in connection with the completion of the South Eastern route... but any such works shall be carried out on the directions of the Minister.¹²⁵

The government drove these amendments through the Oireachtas, setting them in place in July 2004 under the *National Monuments (Amendment) Act 2004 (2004 Act)*, and in doing so regressed Irish heritage law to a condition analogous to the Wood Quay era. In *Dunne v. Minister for the Environment, Heritage and Local Government & Ors* (hereinafter “*Dunne (2004)*”),¹²⁶ it was argued unsuccessfully at the High Court that section 8 of the *2004 Act* was unconstitutional.¹²⁷

¹²⁰ K. Holland, “Proposed Monuments Bill is “reprehensible” and “primitive”” *Irish Times* (22 June 2004) 3, available <<http://www.irishtimes.com/news/proposed-monuments-bill-is-reprehensible-and-primitive-1.1145829>>.

¹²¹ Distinguished archaeologist Dr. Mark Clinton observed in the *Irish Times* that it is “ironic [that] the 1994 National Monuments (Amendment) Act was drawn up with the specific intent of preventing another Wood Quay-type scenario - and here we are again.” M. Clinton, “Castle retention, motorway are still possible” *Irish Times* (19 January 2004), available <<http://www.irishtimes.com/newspaper/opinion/2004/0119/1074295277292.html>> (date accessed: 1 May 2016).

¹²² *National Monuments (Amendment) Act 2004*, s.5(14)(2)(a); s.5(14)(1)(a).

¹²³ *Ibid.* s.5(14)(2)(a); s.5(14)(1)(b).

¹²⁴ *Ibid.* s.5(14)(2)(a); s.5(14)(1)(d).

¹²⁵ *Ibid.* s.8(1).

¹²⁶ [2004] I.E.H.C. 304 [hereinafter *Dunne (2004)*].

¹²⁷ Specifically in relation to Arts. 15(2), 5, 10 and 40 of the Constitution of Ireland.

Consequently, the legislation set in place by the Oireachtas permitted the Minister to authorise the laying of the M50 through Carrickmines in spite of the significant archaeological damage that resulted. Such outcomes appear to contrast diametrically with the trajectory of the robust protections afforded to national heritage in the Kerry ringfort case: one appears to witness a contentious example of double-standards where Irish heritage law can facilitate Ministerial destruction of national heritage held on behalf of the nation, whilst at the same time penalising a farmer – in a ruling geared towards engaging a benchmark pertaining to private citizens – for destroying national heritage on his own private lands.

Events at Wood Quay, which had been largely held to indicate that substantial power concentrated in the hands of the governing few is apparently anathema to the adequate governance of cultural heritage, appear to cast the 2004 changes as an undesirable governance regression. Pettygrove observes that the enactment of the 2004 amendments had the effect of bringing Irish and American cultural heritage law closer together:

[w]ith passage of the 2004 amendments, the National Monuments Act looks more like [America's] Antiquities Act, in that both the President [of America] and the [Irish Environment] Minister enjoy virtually unlimited discretion to prevent or allow the destruction of certain national monuments.¹²⁸

Given that sophisticated legislative safeguards were developed in the area of consent in order to shift power away from one major pair of hands in the wake of Wood Quay, the return to a state resembling the former condition appears to be an undesirable retrograde step when viewed from the perspective of heritage protection.

V – Environmental Impact Assessment at Tara and Carrickmines

It is clear that the Kerry ringfort case differs from the Tara and Carrickmines case studies in a number of ways. Most broadly, Tara and Carrickmines involve the government's development of major motorway infrastructure through nationally important heritage landscapes, whereas the Kerry ringfort case centres upon a private citizen's destruction of a national monument on his own land, for which he was successfully prosecuted by the State in the criminal courts. More narrowly, while

¹²⁸ Pettygrove, *supra* note 99 at 81.

E.I.A. procedure was not relevant to the circumstances of the Kerry ringfort case,¹²⁹ the M3 and M50 constituted major motorways, and therefore the environmental impact of each proposed development had to be formally assessed as part of the decision making process before approval for the developments could be granted.¹³⁰ In accordance with the legal requirements that have been elaborated above, an E.I.S. was produced for both the M3 and the M50 in order to inform the E.I.A. decision-making process in each case. Examination of these aspects of the M3 and M50 experience will serve to further enrich the unfolding understanding of the extent to which Ireland has adhered to requisite standards of state-level cultural heritage protection. Consideration of these matters will also permit the developing analysis to more sharply expose an emergent disparity between the “marker” applied to a private citizen with regard to cultural heritage on his privately owned land in the Kerry ringfort case, and the extent to which public bodies have apparently fallen short of such equivalent standards at Tara and Carrickmines.

A. M50 Environmental Impact Assessment

As the M50 was completed some years prior to the M3 it will be useful to address the M50 E.I.A. before proceeding to consider the M3. The E.I.A. is implemented in Ireland by the *Planning and Development Act 2000* and a body of supporting law and Regulations.¹³¹ The E.I.S. produced for Carrickmines appeared in September 1997 under the title *Environmental Impact Statement, South Eastern Motorway*.¹³² As the Carrickmines controversy intensified due to the extensive and unanticipated archaeological finds uncovered over 2000–2002, the Carrickmines E.I.S., which was relied upon significantly by the decision-maker over the course of the E.I.A. process, was criticised from many quarters as being insufficient. In order to clarify the adequacy of the E.I.S. the European Commission funded an official review, commonly referred to as the *Kampsax Report*.¹³³

¹²⁹ This is due to the fact that E.I.A. is a process applied in order to evaluate the potential environmental impacts of proposed development projects, as per the specific sorts of projects set out in the Annexes to the Directive; in the Kerry ringfort case, such development projects were not at issue.

¹³⁰ For discussion of E.I.A., see *supra* Part III.A.

¹³¹ *Planning and Development Act 2000* (as amended).

¹³² *Environmental Impact Statement, South Eastern Motorway* (Ireland: N.R.A., 2007). Chapter 17 deals expressly with Cultural Heritage.

¹³³ *South Eastern Motorway, Dublin, Review of EIA: Final Report* (European Commission, Directorate-General Regional Policy, July 2003). The report can be accessed at the *Friends of the Irish Environment* website, under the title *Friends of the Irish Environment: Kampsax Report*, available

At its outset the *Kampsax Report* declares that it is centrally concerned with the M50 E.I.A. process and states that it is “restricted to EIA aspects that fall within the [European] Commission's powers of inquiry.”¹³⁴ Within these parameters it is stated that:

[t]he narrower issue, with which this report is concerned, is the nature and quality of the archaeological information that fed into the public process of consultation, inquiry and decision-making around the motorway project. Essentially this centres on the production of the Environmental Impact Statement... and therefore has a narrower timespan of 1992-1997. The Environmental Impact Assessment... process has clearly contributed to the eventual outcome as have subsequent events, and this report seeks to examine that contribution.¹³⁵

Cumulatively the review finds the M50 E.I.A. process highly unsatisfactory. The E.I.S. is characterised as “careless”,¹³⁶ and amongst a range of identified concerns the chosen use and layout of maps is described as a “shortcoming”,¹³⁷ the statement’s proposed impact mitigation measures are “quite confusing”,¹³⁸ and the consideration of route alternatives is found to be inadequate:

[b]y showing how the process of selecting an alternative [route] could be done appropriately in the case of the Leopardstown Racecourse, we find it hard to understand why the developer did not apply [the] same diligence in the case of Carrickmines Castle.¹³⁹

Further, the Report concludes that the treatment of archaeological elements faltered both on grounds of the technical approach adopted and the perceived need to offset the risk of future negative archaeological impacts:

[i]t remains the case that, for a site that was potentially one of the most difficult in a list of 27 sites, and after five years’ study, the fundamental historical and topographical study of the castle had not been undertaken, and the question of where the castle actually was had not explicitly been addressed. A risk-reduction approach to the archaeology of the project had not been taken,

<<http://www.friendsoftheirishenvironment.org/attachments/article/16390/carrickmines.pdf>>. All *Kampsax Report* references refer to this source, and therefore employ its pagination.

¹³⁴ *Kampsax Report*, *ibid.* at 3.

¹³⁵ *Ibid.* at 3.

¹³⁶ *Ibid.* at 22.

¹³⁷ *Ibid.* at 16.

¹³⁸ *Ibid.* at 16.

¹³⁹ *Ibid.* at 17.

and even if the castle site had been half the size it eventually proved to be there could have been a substantial archaeological problem.¹⁴⁰

The Report's most condemnatory criticism is reserved for the E.I.S.'s Non-Technical Summary, which is deemed to be insufficient:

[i]t can be questioned whether the summary comprehends all the issues that would be expected. Local knowledge is required in order to locate the information because of the lack of maps and figures. With regard to the archaeology the non-technical summary does not in any way mention the significance of conflict between the archaeology and the Carrickmines interchange even though the EIS actually recommends that the design of the scheme should be reconsidered because of the potential of the area. This is a serious shortcoming.¹⁴¹

The Report concludes that the summary's inadequacies are of "high significance",¹⁴² and captures the spirit of the practical repercussions of these shortcomings in the following terms:

[w]ith regard to understanding why the situation at Carrickmines has developed the way it has, we find the defective non-technical summary is the most significant shortcoming for the EIS in general, since it is the basis on which the public will react. Underestimations or omissions of the impacts, and the lack of thematic maps are confusing for an understanding of the overall impact the road scheme has on the environment.¹⁴³

Given that an apparent lack of an adequate Non-Technical Summary deprives non-specialist readers – that is, the public at large – of key data needed to understand the proposed scheme's impact on cultural heritage, it must be concluded that a duty to adequately inform the public and integrate public opinion into the M50 process was significantly breached as a consequence.¹⁴⁴

¹⁴⁰ *Ibid.* at 20.

¹⁴¹ *Ibid.* at 17.

¹⁴² *Ibid.* at 21.

¹⁴³ *Ibid.* at 37 (this N.R.A./County Council response is included in the *Kampsax Report* document bundle cited at *supra* note 133).

¹⁴⁴ The version of the E.I.A. Directive in force when these aspects of the M50 dispute were at their height made significant provision for public input and the dissemination of public information: see Directive 83/337/E.E.C., as amended by Directive 97/11/E.C., at Art. 6. It is also noteworthy that these "public input" dimensions were further expanded in the *Kampsax Report* era (2003); this occurred under Directive 2003/35/E.C., which, *inter alia*, affected Art. 6. See further the consolidated E.I.A. Directive as amended recently by Directive 2014/52/E.U. of 16 April 2014 amending Directive 2011/92/E.U. on the assessment of the effects of certain public and private projects on the environment [2014] O.J. L.124/1, Art. 6.

In its formal response to the *Kampsax Report's* criticisms the N.R.A. and County Council held that the public information element of their duties had been adequately discharged. It was asserted that the County Council had “provided a public display of the proposed [M50] for some months” and that the “display was in the public atrium of the County Hall adjoining where the public inquiry took place”.¹⁴⁵ The response thus concluded that “the maps and other material available including the scale model were more than adequate to assess possible alternatives for the road alignment.”¹⁴⁶ Similarly, on the subject of archaeological omissions in the E.I.S. it was asserted that:

a 13m long scale model prepared specifically but not exclusively for the purposes of the public inquiry proved to be the focus of interest and the one to one exchanges between members of the public and County Council staff served to explain the project in whatever level of detail or interest the citizen required.¹⁴⁷

These arguments will not do. While they may reflect an apparently admirable consultation process between some members of the public and the County Council at the stage of the actual public inquiry meetings, they have no real bearing on the E.I.S.: E.I.A. procedure requires public information to be adequately included and presented in the E.I.S., and a well-represented set of depictions of the development at these particular meetings cannot provide an acceptable defence against the *Kampsax Report* criticisms regarding inadequate representation and omission of key archaeological information in the actual E.I.S. itself.

B. M3 Environmental Impact Assessment

In the case of the M3, the European Commission's reaction to the E.I.A. process was somewhat different. Published in seven volumes, the M3 E.I.S. is a long, detailed document.¹⁴⁸ Consideration of the routeway is subdivided into five sections to allow for close examination. The “Dunshauglin to Navan” section is the division that is pertinent to Tara. Information on the section is interleaved throughout

¹⁴⁵ *Kampsax Report* document bundle, *supra* note 133 at 38.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.* at 41.

¹⁴⁸ *M3 Clonee – North of Kells E.I.S.*, *supra* note 30; prepared by Arup, Halcrow-Barry and M.C.O.S. Consulting Engineers and their Environmental Sub-Consultants.

Volumes 1 and 2, and Volume 4 deals with it exclusively.¹⁴⁹ A keynote of discontent had been sounded in December 2004 when an environmental studies lecturer at Liberties College in Dublin and seven of his students filed complaints with the Commission arguing that the E.I.S. was flawed, complaining in particular that in their view it undermined the thrust of the E.I.A. Directive in failing to recommend that the M3 should be laid on a particular path that would have occasioned less environmental damage.¹⁵⁰ Unlike the *Kampsax Report* findings concerning the M50 E.I.S., however, the Commission did not appear to be convinced that discernible imperfections in the M3 E.I.S. rendered the statement as being flawed after its initial publication; rather, the Commission's notable objections to the E.I.A. process were galvanized by the discovery of the Lismullin Henge in the projected path of the M3 by archaeologists after the E.I.S. had been completed.¹⁵¹ The discovery of a national monument in the road's direct path coupled with the many other finds being revealed along the road's projected routeway led the Commission to argue that a second E.I.A. ought to be carried out.¹⁵²

The Irish government received a Reasoned Opinion to this end from the Commission but was not amenable to its arguments. A Commission spokeswoman summarised the subsequent impasse that arose between both parties: “[t]he problem with the Hill of Tara case is that the Government do not want to do a second impact assessment before restarting work.”¹⁵³ By late 2007 the Commission had made arrangements to visit the site on a “fact finding” mission. Marcin Libicki, chairman of the European Parliament's Petitions Committee, had written to Ireland's Minister for Environment John Gormley, who had recently succeeded Dick Roche (in July 2007), urging him to halt existing works at Tara.¹⁵⁴ However, Minister Gormley did not suspend the works as advised, and in particular sustained the preceding Minister's decision to preserve the Lismullin Henge “by record”, permitting its demolition under

¹⁴⁹ The complete E.I.S. has never been made available on the internet. In order to view the documents in full the author made two journeys to Meath County Council's Planning Department at Navan, Co. Meath, where the full E.I.S. may be accessed by the public upon request.

¹⁵⁰ F. McDonald, “Attempt to stop motorway going through Tara goes to Brussels” *Irish Times* (20 December 2004) 4.

¹⁵¹ On the Lismullin Henge, see *supra* Part II.B.(iv).

¹⁵² See J. Smyth, “E.U. says action against state over Tara Motorway only at first stage” *Irish Times* (31 August 2007) 2.

¹⁵³ J. Smyth, “Brussels seeks court order to stop Polish road” *Irish Times* (31 July 2007) 10.

¹⁵⁴ Anon., “Call to halt Tara work” *Irish News* (7 July 2007) 12.

the *N.M.A. 1930* powers.¹⁵⁵ In October 2007 the Commission commenced infringement proceedings against Ireland in relation to E.I.A. transposition in a decision endorsed by all 27 E.U. Commissioners.¹⁵⁶

The matter came before the C.J.E.U. in *Case C-50/09 Commission v. Ireland*, with the Commission arguing that Ireland had inadequately transposed the E.I.A. Directive.¹⁵⁷ The Commission's third complaint was most directly linked to the M3, where it was submitted that Ireland had contravened its E.I.A. obligations by excluding demolition works from the scope of national E.I.A. procedure:

[t]he Commission claims that Ireland's interpretation that demolition works fall outside the scope of the directive is reflected in the [*N.M.A. 1930*], and refers in that regard to sections 14, 14A and 14B of that Act which relate to the demolition of a national monument.¹⁵⁸

The Commission "took as an example the carrying-out of the M3 motorway project"¹⁵⁹ and used the destruction of the Lismullin Henge to characterise its arguments:

[b]y way of illustration of how, in contravention of Directive 85/337, the exclusion of demolition works allowed, by virtue of section 14A of the NMA, a national monument to be demolished without an environmental impact assessment being undertaken, the Commission cites the ministerial decision of 13 June 2007 ordering the destruction of a national monument in order to permit the M3 motorway project to proceed.¹⁶⁰

The C.J.E.U. held that Ireland had unacceptably situated requisite aspects of demolition practice outside the remit of E.I.A. under domestic law. The Court's judgement stressed in particular the negative impact of this action upon national standards of cultural heritage protection:

if demolition works were excluded from the scope of that directive, the references to 'the cultural heritage' in Article 3 thereof, to 'landscapes of historical, cultural or archaeological significance' in point 2(h) of Annex III to

¹⁵⁵ On Dick Roche's decision as Minister for Environment to demolish the Lismullin Henge, see *supra* note 36 above, and text accompanying note.

¹⁵⁶ J. Smyth, "Gormley defends Ireland's record on heritage sites" *Irish Times* (18 October 2007) 9.

¹⁵⁷ *Case C-50/09, Commission v. Ireland* [2011] E.C.R. I-0000.

¹⁵⁸ *Ibid.* at para 87.

¹⁵⁹ *Ibid.* at para 94.

¹⁶⁰ *Ibid.* at para 88.

that directive and to ‘the architectural and archaeological heritage’ in point 3 of Annex IV thereto would have no purpose.¹⁶¹

... It follows that demolition works come within the scope of Directive 85/337 and, in that respect, may constitute a ‘project’ within the meaning of Article 1(2) thereof.¹⁶²

In terms of the actual consequences of the national legislation for Tara, the C.J.E.U. stated that:

since the insufficiency of [the E.I.A.] directive’s transposition into the Irish legal order has been established, there is no need to consider what that legislation’s actual effects are in the light of the carrying-out of specific projects, such as that of the M3 motorway[.]¹⁶³

In other words, it was unnecessary for the C.J.E.U. to consider factual outcome effects at Tara due to the fact that the Commission had framed the essential issue as one of mis-transposition, citing Tara as an example of the consequences of mis-transposition. The C.J.E.U. determined that the Irish legislation on its face mis-transposed the Directive, and so it was not necessary to delve further into the specific circumstances of Tara in order to determine the point.

Preceding sections have clarified that over the Tara-Carrickmines period key elements of Ireland’s national monument protections have been regressed to a condition resembling their form in the Wood Quay era. It has also been clarified that Ireland retains a significant degree of responsibility for developing and implementing state-level heritage protections, notwithstanding the country’s position within the wider E.U. Nonetheless, the present section has demonstrated that where Ireland *has* been subject to supranational E.I.A. requirements in the context of the Tara and Carrickmines case studies, it has in certain key respects inadequately adhered to its obligations. In the instance of Carrickmines, the E.I.S. was particularly unsatisfactory; and in the case of Tara the broader procedural application of E.I.A., driven in part by inadequate national transposition of the E.I.A. Directive, was insufficient. These insights serve in turn to throw into relief a sense of disparity between the “marker” articulated in the Kerry ringfort case, involving a private citizen and his privately

¹⁶¹ *Ibid.* at para 98.

¹⁶² *Ibid.* at para 101.

¹⁶³ *Ibid.* at para 104.

owned land, and the failure on the part of public bodies to live up to equivalent protective thresholds over the course of their public activities.

C. ‘Cultural’ Transboundary Damage?

While E.I.A. functions as a crucial internal environmental protection process applied by States within their borders, Bell, McGillivray and Pedersen point out that the procedure can also be contextualised within a transboundary setting: “EIA obligations (however vague) have stemmed in part from general duties of good neighbourliness between states”, and “there are provisions giving potentially affected Member States... the right to be involved in decision-making when projects have transboundary effects.”¹⁶⁴ In a pan-E.U. context E.I.A. helps to provide a means of assessing and potentially redressing or mitigating the transboundary effects a proposed development taking place within one Member State is likely to exert upon another Member State.¹⁶⁵ Conventional transboundary “environmental” effects are normally understood to be physical, traditionally concerning, for example, tangible phenomena such as “air pollution, water degradation, and species endangerment.”¹⁶⁶ This subsection builds on the consideration of E.I.A. in the preceding two subsections by positing that in the case of Tara in particular the lack of a physical transboundary presence such as an air pollutant appears to have masked the latent presence of a degree of *cultural* transboundary damage that has arguably been inflicted upon the Northern Irish by the laying of the M3 in the Republic of Ireland.¹⁶⁷

In 1921 Ireland was partitioned.¹⁶⁸ Whilst the Republic of Ireland retained an Irish Parliament, partition also resulted in the creation of a Parliament for Northern Ireland, which operated as a devolved legislature within the overarching governance

¹⁶⁴ S. Bell, D. McGillivray & O. Pedersen, *Environmental Law*, 8th ed. (Oxford: O.U.P., 2013) at 459.

¹⁶⁵ P. Stookes, “Getting to the Real EIA” [2003] 15 (2) *Journal of Environmental Law* 141; W. Tabb, “Environmental Impact Assessment in the European Community: Shaping International Norms” [1999] *Tulane Law Review* 953.

¹⁶⁶ K.R. Gray, “International Environmental Impact Assessment” [2000] 11 *Colorado Journal of International Environmental Law and Policy* 83 at 86; “Part 4: Sectoral Experience” of J. Petts, ed., *Handbook of Environmental Impact Assessment: Volume 2: Impact and Limitations* (Oxford: Blackwell, 1999).

¹⁶⁷ This section foregrounds Tara rather than Carrickmines due to Tara’s wider-reaching significance for the island of Ireland as a whole (as the seat of the High Kings).

¹⁶⁸ See further B. Dickson, *The Legal System of Northern Ireland*, 5th ed. (Northern Ireland: SLS (NI), 2005) at 3-5.

structure of the United Kingdom.¹⁶⁹ Prior to the partition of Ireland the island was one single national and political entity.¹⁷⁰ Therefore, and despite the various socio-political perspectives that existed prior to partition, there was nonetheless some relatively clear sense of a shared national heritage on the island of Ireland. Due not least to the fact that Tara was characterised as the ancient seat of the High King of “Ireland”, as opposed to the “South of Ireland” or the “North of Ireland”, it is reasonable to conclude that the site occupies some form of place in a cultural heritage that is common to the history of those both north and south of the present Irish-British border.

In the following passage Bhreathnach *et al* elaborate the historical significance of Tara:

[t]he Hill of Tara emerges around the beginning of the 7th century AD, depicted in historical sources as the pre-eminent prehistoric sanctuary of kingship in Ireland, its kings claiming national authority. This elevated status was strengthened by four thousand years of continuous use of the hill as a ceremonial complex which consisted of a necropolis, a sanctuary and a temple complex. This manifold use is evident in the archaeological record.¹⁷¹

Again, and considering matters from a Northern Irish position, one notes that the ancestry of Tara means that the site can in some sense be said to occupy a place in the cultural consciousness of the entire island, and one further notes that this is a cultural consciousness stretching back many centuries prior to the island’s relatively recent partition. Given these circumstances, it is perhaps unsurprising that a high level of concern was expressed in Northern Ireland with regard to the events taking place in the Republic of Ireland throughout the Tara-M3 controversy. Indeed, the Northern Irish protest group *Tara-Belfast* was one of the main participants in active anti-M3 campaigning, and the Social Democratic and Labour Party, one of Northern Ireland’s larger political parties, endeavoured to pass a “Save Tara Motion” in the Northern Ireland Assembly.¹⁷²

¹⁶⁹ Northern Ireland’s Parliament was suspended in 1972, and direct rule from Westminster was re-established. Devolution was restored in the 1990s under the *Northern Ireland Act 1998*, which established the present Northern Ireland Assembly.

¹⁷⁰ Under the terms of the *Act of Union (Ireland) 1800*, Ireland was also part of the British Empire. In 1948 the Republic of Ireland broke its remaining constitutional connections with Britain through the passage of the *Republic of Ireland Act 1948*.

¹⁷¹ Bhreathnach *et al*, “Tara and its Cultural Landscape”, *supra* note 14 at 1.

¹⁷² Press Release, C. Hanna, S.D.L.P., M.L.A., “S.D.L.P. Save Tara Private Members Motion in Northern Ireland Assembly” (8 January 2008).

Situating these observations in the context of legal discourse, a central contention that can be seen to arise pertains to an arguable degree of transboundary impact occasioned in Northern Ireland by the M3 development: the discernible features of this sort of impact are *cultural* in nature, and therefore differ from more conventional forms of transboundary impact, which, as noted above, traditionally involve tangible phenomena such as cross-border smoke, water pollution, *etc.*¹⁷³ In sum, and setting these observations against the backdrop of the critique of E.I.A. procedure above, these circumstances appear to beg the following question: where in the E.I.A. Directive do the Northern Irish find protection for the elements of *their* cultural heritage that Tara can be said to embody?

It remains the case that E.U. legal instruments, and indeed international legal instruments more generally, do not typically take account of changing national boundaries in a manner that would usefully accommodate the shifting territorial arrangements on the island of Ireland in this sort of context, where transboundary impact on cultural heritage is expressly at issue. Put another way, it is not conventional practice to impose legal obligations on one State to consult a public whose former territory is now under the jurisdiction of another State.¹⁷⁴ However, simply because such things may not be common practice does not necessarily mean that they *ought* not to be practiced in some circumstances, albeit that the limits of such practices would likely require careful consideration, and tricky “cultural” issues, such as how far back in history one might be compelled to go where transboundary cultural impacts are under consideration, would no doubt require careful attention.

Indeed, the validity of according overt recognition to transboundary cultural impact is in some respects implicit in the extent to which States at the international level have decided to involve one another in decision-making in relation to assets considered to be shared global heritage, under the terms of the World Heritage Convention.¹⁷⁵ Bearing this in mind, it is notable that decisions and outcomes at Tara might have been considerably different if Tara had been listed as a World Heritage

¹⁷³ See *supra* note 166 and accompanying text. For further general consideration of the nature of international transboundary impact assessment, see T. Koivurova, “Transboundary Environmental Impact Assessment in International Law” in S. Marsden & T. Koivurova, eds., *Transboundary Environmental Impact Assessment in the European Union* (Oxfordshire: Earthscan, 2011) 15.

¹⁷⁴ Nor where the external public at issue may now have formed an independent State in its own right.

¹⁷⁵ U.N.E.S.C.O.’s 1972 World Heritage Convention, *supra* note 10.

Site and its protection thus fell to be considered at the international level in this way.¹⁷⁶ More narrowly, in terms of the E.I.A. Directive itself, the amendments applied in 1997¹⁷⁷ to the original E.I.A. Directive of 1985 included significant amendment to Article 7; these changes were applied in order to harmonise the E.I.A. Directive with obligations under the Espoo Convention (1991), providing for greater transboundary E.I.A. cooperation between Member States. Given that these amendments were (and remain) in place at the time of the M3 controversy, it might have been the case under Article 7 that Northern Ireland could have argued from its position within the U.K. that it constituted part of “a Member State likely to be significantly affected” by the M3 project,¹⁷⁸ meaning that as a constituent of a neighbouring Member State, Northern Ireland could have utilised a right to engage in participatory input into aspects of the E.I.A. process.¹⁷⁹ This would have included mandatory input from the Northern Irish public.¹⁸⁰

However, this type of intervention would have embodied an unconventional approach in the context of Irish E.I.A. procedure, and in the event this avenue was neither raised nor pursued. Given that Tara is an isolated cultural landscape lacking a close physical proximity to a neighbouring border, it appears that it largely slips through the net of an E.I.A. process that is most fundamentally geared toward inherently “physical” environmental transboundary manifestations and resultant physical damage. In sum, the transboundary tradition in which E.I.A. is rooted appears to be a tradition that struggles to serve isolated cultural landscapes like Tara that have no direct physical effect on neighbouring States but that may have a potentially profound cultural importance.¹⁸¹

¹⁷⁶ See further *supra* note 10.

¹⁷⁷ Council Directive 97/11/E.C. (*supra* note 64).

¹⁷⁸ E.I.A. Directive, Art. 7(1), as amended in 1997 (quoted words still in force).

¹⁷⁹ *Ibid.* Art. 7(1) and 7(2), as amended in 1997 (still in force).

¹⁸⁰ *Ibid.* Art. 7(3), as amended in 1997 (still in force).

¹⁸¹ Indeed, in considering the Carrickmines controversy, Pettygrove has noted that “[t]he Viking origin of Carrickmines suggested its value extended to other parts of the world”; Pettygrove, *supra* note 99 at 87, note 258. In other words, depending upon a given heritage site’s particular historico-archaeological composition, it may also be possible to discern a poignant sense of cultural value that extends well beyond the island of Ireland’s geographic parameters.

VI - Conclusions

The Kerry ringfort case has set down a marker intended to benchmark an acceptable level of heritage protection under Irish law in light of a farmer's intentional destruction of a national monument on his own land. In contrast to the comparatively weaker protections applied to Tara and Carrickmines in the sphere of public law, and in further contrast to the broader manner in which Ireland's national heritage framework has been incrementally weakened in the wake of the strengthening amendments enacted as a consequence of Wood Quay, this marker endeavours to afford cultural heritage a robust measure of protection.

Indeed, in reporting the Kerry ringfort case the *Irish Times* newspaper noted that the Court had asserted that whilst the farmer responsible for the destruction of the national monument did own the lands on which the ringfort had stood, this ownership right was "not unfettered" and it was "qualified by the fact that property was held in trust for the culture of the country".¹⁸² In this instance the courts effectively acted as the guardian of the public's cultural interests, robustly penalising an action that resulted in damage to an element of the heritage common to every national citizen. The Court itself, in a sense, was the public's spokesperson.

In contrast, and amongst other notable shortcomings, it has been demonstrated above that the public's right to information and consequent access to justice was partially undermined at Tara by the manner in which the (at that time undiscovered) Lismullin Henge was not addressed in the M3 E.I.S., meaning that the public could not have had fore-knowledge of the heritage site prior to the approval and construction of the road and thus responses could not reflect the public's views on this and associated matters. This situation might have been improved if a second E.I.A. had been conducted once the Henge had been discovered, as the European Commission requested. No such action was taken; rather, the Environment Minister used his concentrated powers under national law to demolish the monument, an action that the C.J.E.U. would, in effect, subsequently condemn as unacceptable under E.U. law. Thus the site, which the Archaeology Institute of America listed as one of the

¹⁸² A. Lucy, "Farmer Fined for Destroying Ring Fort" *Irish Times* (3 March 2012), available <<http://www.irishtimes.com/news/farmer-fined-for-destroying-ring-fort-1.474240>>.

Top 10 International Archaeological Discoveries of 2007,¹⁸³ no longer exists. The situation was little better at Carrickmines, where, as has been seen above, the E.I.S. inadequately addressed the M50's impact upon cultural heritage. Even if the main body of the E.I.S. *had* dealt adequately with the matter, the public voice would have been undermined by the fact that the Non-Technical Summary itself, designed to cater for regular / non-specialist readers, declined to address archaeological matters in a credible degree of detail. Thus the key information would have been effectively withheld from the public's comprehension.¹⁸⁴

More generally, Tara's exceptional landscape and legacy accord the site an undeniably valuable place within the rich national heritage of Ireland¹⁸⁵; the extensive damage flagged by the M3 E.I.S. on archaeological and cultural-aesthetic grounds did not provide decision makers with a sufficient incentive to reconsider the specific trajectory of the road, nor did an unprecedented degree of public protest, and the road also resulted in the wilful Ministerial destruction of a national monument, the Lismullin Henge, in questionable circumstances. It has been suggested above that these actions can conceivably be construed as having negatively impacted cultural heritage that meaningfully extends to both the Republic of Ireland *and* Northern Ireland. The relatively weak level of protection afforded to cultural heritage over the course of the M3 experience was facilitated by adjustments to the law geared to circumvent any potential for rerouting the M50 due to the substantial archaeological materials found at Carrickmines. This had the result of significantly weakening the robust national heritage safeguards that had been put in place as a consequence of the Wood Quay controversy.

The decision to proceed with the laying of the M3 through Tara culminated in leading Tara archaeologists asking rhetorically in protest how "any right thinking Irish person [could] sanction the construction of a four-lane toll motorway (the M3) right through the middle of it".¹⁸⁶ Converting this rhetorical question into the language of the lawyer, the question might be restated as follows: how could the construction of the M3 proceed in the manner that it did when the damage to cultural

¹⁸³ J.A. Lobell, "Lismullin Henge, Tara, Ireland" [2008] 61 *Archaeology* 1.

¹⁸⁴ Most clearly in the case of those who did not attend the public inquiry and hence had to rely upon written materials alone.

¹⁸⁵ E. Bhreathnach, ed., *The Kingship and Landscape of Tara* (Dublin: Four Courts Press, 2005).

¹⁸⁶ Bhreathnach *et al*, "Driving a Stake through the Heart of Tara", *supra* note 14.

heritage was to be so extensive, given that national law purports both to protect cultural heritage and to meaningfully factor public opinion into key decision-making processes?

The findings that emerge from this study's critique of the modern Irish heritage experience evoke a picture of an Irish legal structure that purports to protect cultural heritage robustly but that exhibits a capacity to fall significantly short of this protective intention in practice. Situating the Kerry ringfort case within this context, the marker that the Tralee Circuit Criminal Court has endeavoured to lay down in the post-M3 period seems to have a timely symbolic value that extends beyond the immediate parameters of private law and the particular facts of the case. If the law can build on the level of protection symbolised by this legal marker, future unwarranted and unnecessary instances of damage to Ireland's cultural property and heritage landscapes might well be averted. But it will take a good deal more than one admirable judgement from Tralee Circuit Criminal Court to set these matters right: it is the Irish government that must lead the way.