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Culture, Media and Sport
Committee

Draft Cultural Property (Armed Conflicts) Bill

Ninth Report of Session 2007–08

*Report, together with formal minutes, oral and
written evidence*

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The Culture, Media and Sport Committee

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Summary

The draft Cultural Property (Armed Conflicts) Bill is designed to enable the United Kingdom to ratify the 1954 Hague Convention for the protection of cultural property in the event of armed conflict and to accede to the Convention's two Protocols, drawn up in 1954 and 1999. The Bill has been published in draft, to allow pre-legislative scrutiny by Parliament and by others.

We welcome the draft Bill, which was strongly supported in evidence. We believe that it would, if enacted, strengthen the procedures used by the Ministry of Defence when training personnel in respect for cultural property and taking cultural sites into account when planning operations. It would also enable the UK to respond to criticisms that Coalition troops in Iraq did not always follow high standards of behaviour in treatment of cultural property; and it may encourage more Commonwealth states to sign up to the Convention and the two Protocols.

The fundamental issue in this inquiry was to establish whether or not the Bill would constrain military operations unduly, for instance by limiting troops' freedom to protect themselves when coming under fire from opposing forces based in a museum or in a mosque, or by enabling opposing forces to surround military objectives with protected cultural sites. The Ministry of Defence appears confident that passage of the Bill into law would not impose such a constraint; and the Minister provided similar assurances in writing. In fact the UK's armed forces already act in accordance with the principles of the Convention and its two Protocols. While we continue to harbour doubts about the practicality of the draft Bill, we admire the decision of the Ministry of Defence to formalise existing practice and accept commitments under domestic law in relation to respect for cultural property.

By and large, we believe that the draft Bill is drafted and structured in a way which will enable it to meet its aims. We draw the attention of the Department for Culture, Media and Sport to potential weaknesses in the drafting of clauses on ancillary offences and on the responsibility of commanders for actions by their forces. There also appears to be a loophole which could allow any object undergoing transportation—even a shipment of arms—to be designated as protected cultural property, without any need for that designation to be confirmed by a higher authority. This would clearly invite abuse, and the draft Bill should be duly amended.

The draft Bill would make it an offence to deal in cultural property unlawfully exported from an occupied territory. However, there is to be no authoritative list of territories deemed to have been occupied at any stage since 1954, when the Convention was adopted. Nor will it always be easy for a potential vendor to prove that export had been legal. This would not necessarily matter, except that by "acquiring" an item, a dealer would be deemed to be "dealing"; so a dealer who accepts an item in order to carry out due diligence inquiries into its provenance risks committing an offence. We believe that dealers would, in both cases, be unfairly exposed to prosecution. A definitive list of occupied territories should be drawn up by the Government, with periods of occupation defined; and either the offence of dealing in unlawfully exported cultural property should require an element of

dishonesty to have been displayed by the dealer, or the definition of “acquire” should clearly exclude acceptance for the purposes of carrying out due diligence inquiries.

No decision has yet been taken on which forms of cultural property would be subject to protection under the Convention in the UK. Even though the provisions in the draft Bill are expected to be brought before Parliament early in the 2008–09 Session, it appears that no decision on protection is imminent, as the Government is awaiting the publication of guidelines by UNESCO, which are not due to be issued until “2009–10”. Considerable effort has already been expended on trying to establish where the line should be drawn and which buildings and sites should be included on any list of protected cultural property. Even though there is no requirement under the Convention to hold such a list, we believe that to do so would clearly signal the UK’s commitment to the Convention. It may, in any case, be difficult for military forces to observe the Convention unless lists of protected cultural property have been prepared. Lists should be tightly drawn, and we believe that to include all Grade 2* listed buildings and historic city centres on the list, as some have suggested, would risk significantly diluting its credibility.

Until the Government decides whether there should be a list of cultural property and sites deemed to be protected under the Convention and, if so, what should be on that list, it is difficult to know what the implications will be for staff in the Department for Culture, Media and Sport and at English Heritage. The Government should make up its mind. Parliament should not be asked to agree to legislation to give effect to the 1954 Hague Convention and its Protocols without it being informed of the implications for publicly funded bodies.

1 Introduction

Why we are publishing this Report

1. At the opening of the 2007–08 Session of Parliament, the Government announced an intention to publish in draft a Bill to enable the United Kingdom to accede to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols. On 7 January 2008, the Department for Culture, Media and Sport duly published a Draft Cultural Property (Armed Conflicts) Bill, together with Explanatory Notes and a Regulatory Impact Assessment.¹ Although the Department did not announce a formal consultation exercise on the draft Bill,² the Foreword by the Minister with responsibility for culture and heritage said that the Government would welcome any comments on it during the pre-legislative period. The Government's Draft Legislative Programme for 2008–09, published on 14 May 2008, confirmed that the provisions of the draft Bill would be brought before Parliament in the 2008–09 Session, as part of a bill whose main purpose will be to reform the heritage protection system in England and Wales.³

2. We welcome the principle of publishing bills in draft and inviting pre-legislative scrutiny by Parliament; and we therefore announced an inquiry into the Draft Cultural Property (Armed Conflicts) Bill on 31 January 2008. We have undertaken a similar inquiry into the Draft Heritage Protection Bill, published in April 2008, on which we expect to report shortly.

3. The terms of reference for our inquiry were simple: we sought views on the overall aims of the draft Bill and on whether the Bill was structured and drafted in a way which enabled those aims to be met. The Report is aimed primarily at the Department for Culture, Media and Sport, which will sponsor the Bill when it is introduced into Parliament and which may decide to amend the draft Bill before introduction in the light of this Report. However, we believe that our recommendations and the evidence which we are publishing with the Report will also inform debate on the Bill as it proceeds through the two Houses.

4. We held a single oral evidence session, on 10 June 2008, at which we examined individuals and bodies with specialist knowledge of cultural property and its protection during armed conflict. We also sought the views of those who would be subject to new legal obligations if the Bill were to be enacted: HM Forces and representatives of the British art market; and we discussed the drafting of the draft Bill with a specialist in international law. We wish to record our thanks to those who submitted written evidence and who gave oral evidence before the Committee. Several witnesses provided valuable further information and advice informally, and we are particularly grateful to our Specialist Adviser on built heritage, Mr Bob Kindred, for his contribution.

¹ Cm 7298

² A consultation on implementation of the legislation to give effect to the Convention and its Protocols was held in 2005

³ See Cm 7372, pages 36 and 37

What the Bill is designed to do

5. In the words of the accompanying Explanatory Notes, the Bill “is designed to enable the United Kingdom to ratify the 1954 Hague Convention for the protection of cultural property in the event of armed conflict and to accede to the Convention’s two Protocols, drawn up in 1954 and 1999”. Parties to the Convention “are required to respect both cultural property situated within their own territory and cultural property within the territory of other Parties, by refraining from using it, or its immediate surroundings, for purposes which are likely to expose it to destruction or damage in the event of armed conflict, and by refraining from committing any hostile act against the property”. The 1954 Protocol sets out undertakings for the protection of cultural property in occupied territories; and the Second Protocol clarifies terms and obligations under the Convention and, amongst other things, identifies five offences as being “serious violations” of the Protocol.

6. The draft Bill extends to 31 clauses and five schedules, giving effect to the Convention and the two Protocols:

- Part 1 of the draft Bill defines the main terms used;
- Part 2 incorporates into UK law the offences set out in Article 15 of the Second Protocol, constituting “serious breaches” of that Protocol;
- Part 3 provides for controls over the use of an emblem to signify that any item of cultural property (whether moveable or immovable) deserves protection under the Convention;
- Part 4 establishes an offence of dealing in unlawfully exported cultural property; and
- Part 5 provides for immunity from seizure or forfeiture of cultural property removed for safekeeping.

The Convention and the Protocols themselves are reproduced in the Schedules to the Bill.

Why ratify the Convention now?

7. The original Convention was adopted to protect cultural property from armed conflict, in the light of “massive destruction” which had taken place during the Second World War.⁴ Yet the United Kingdom will not sign the Convention until 2009 at the earliest, 55 years after its adoption. In all, 118 other countries have currently signed the Convention, including Russia, India, China, Canada, Australia, almost all European countries, Israel, Iraq and Iran. Fewer have signed the two Protocols: current tallies are 97 and 48 respectively.

8. We queried the delay in signing the Convention. Mr Garraway, International Law Adviser for the British Red Cross, suggested that the Cold War had been a disincentive;⁵ but dissatisfaction with the terminology used in the Convention has also been a factor. The

⁴ Ministerial Foreword to the Draft Bill

⁵ Q 68

Government states in the Regulatory Impact Assessment which accompanies the draft Bill that the UK “decided not to ratify the Convention when it was first drafted because, along with a number of other countries, it considered that certain terms were too imprecise and that it did not provide an effective regime for the protection of cultural property”.⁶ The Government adds, however, that the adoption in 1999 of the Second Protocol (which defined offences as well as clarifying the concept of “imperative military necessity”) removed those concerns.

9. It may also be that the actions of certain elements of Coalition forces in Iraq during the 2003 invasion left the UK exposed—rightly or wrongly—to allegations that its armed forces were not demonstrably working to the same standards as others in respect for cultural property during operations. Professor Peter Stone supplied us with a copy of his book *The Destruction of Cultural Heritage in Iraq*, which includes chapters by Iraqi archaeological experts on damage to sites in Iraq before, during and after the invasion in 2003. A member of the Iraqi State Board of Antiquities describes in detail damage to the city of Babel caused by Coalition forces digging defensive trenches, scraping and levelling ground, covering flattened areas with sand and gravel, constructing earth barriers at entrances to and within the city, and erecting barbed wire emplacements. Similar destruction took place at Ur, where Coalition troops were described as frequently visiting the archaeological remains “without any restraint”, driving heavy military vehicles across the site, damaging the landscape and “almost certainly” destroying or damaging unexcavated artefacts and buildings.

2 The provisions of the draft Bill

The principles of the Bill

10. All those who submitted evidence supported the aims of the Bill.⁷ There was also general confidence that, once certain improvements had been made in the drafting, the Bill would do what it was designed to do. We discuss drafting issues in paragraph 19.

11. **We welcome the draft Bill, particularly given the weight of support shown in evidence. We believe that the draft Bill would, if it were to be enacted:**

- **strengthen the procedures used by the Ministry of Defence when training personnel in respect for cultural property and taking cultural sites into account when planning operations.** Brigadier Messenger, giving evidence on behalf of the Ministry of Defence, told us that because respect for cultural property during armed conflict was now to be a matter of law rather than policy, training would need to be deepened and reviewed “to ensure that we are being rigorous enough”;⁸

⁶ Cm 7298 page 84

⁷ Professor Peter Stone Ev 2, Dr Roger O’Keefe Q 1, British Art Market Federation Ev 13, English Heritage Ev 18, UNESCO (UK National Commission) Ev 20, British Red Cross Ev 21, National Council on Archives Ev 31, Museums Association Ev 32

⁸ Q 22 and 34

- **respond to criticisms that Coalition troops in Iraq did not always follow high standards of behaviour in treatment of cultural property.** Dr Gaimster, representing the UNESCO UK National Commission, pointed out that the UK Government was frequently involved in international conflict resolution and peacekeeping roles. He argued that the UK therefore needed “to come on board and be leading in the setting of standards and benchmarks for how we should behave and actually protect cultural property”;⁹ and
- **encourage more Commonwealth states to sign up to the Convention and the two Protocols.** Ms Cole, representing English Heritage, said that ratification of the Convention and Protocols by the UK could prompt not just existing and former Commonwealth countries to follow suit but also the United States, as the largest state not yet party.¹⁰

12. However, the draft Bill is not necessarily quite such a huge step forward as might be assumed, and it could be argued that the UK has managed perfectly well for over 50 years despite not having ratified the Convention or its two Protocols. Dr Roger O’Keefe, a specialist in international law and author of a book on the protection of cultural property during armed conflict, told us that the UK’s armed forces already acted in accordance with the principles of the Convention and its two Protocols.¹¹ This statement was confirmed by Brigadier Messenger,¹² who also noted that neither he nor anyone else in the Ministry of Defence had been made aware of any occasion on which UK forces had contravened the terms of the Convention or Protocols.¹³

13. Our principal concern has been that the Bill, by formalising in law requirements upon the armed forces to respect cultural property, could constrain military operations, particularly if opposing forces were to be unscrupulous in observing the terms of the Convention or the two Protocols (assuming that those forces were those of a State Party, or even those of a state at all). The main offences for which a military commander would be liable in future are those which constitute a “serious breach” of the Second Protocol:

- i. making cultural property under enhanced protection¹⁴ the object of attack;
- ii. using cultural property under enhanced protection or its immediate surroundings in support of military action;
- iii. extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
- iv. making cultural property protected under the Convention and this Protocol the object of attack;

⁹ Q 63

¹⁰ Q 63

¹¹ Q 1

¹² Q 22. See also Regulatory Impact Assessment for the draft Bill, Cm 7298, page 91

¹³ Q 25

¹⁴ Defined as cultural property “of the greatest importance for humanity” which is not used for military purposes. A full definition is given in Article 10 of the Second Protocol (see Schedule 4 to the draft Bill).

- v. theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

For the first three offences in the list, states party to the Second Protocol are required to establish jurisdiction enabling prosecution of offenders for offences committed anywhere by a person of any nationality.¹⁵

14. We therefore sought reassurance during the inquiry that the obligations placed by the draft Bill upon UK forces while on operations were practical. We had in mind circumstances in which UK troops come under attack from hostile forces using cultural sites for military purposes, or when military hardware is stored in or near sites of cultural significance. Mr Garraway, representing the British Red Cross, cited an example from his own experience, when a MiG fighter had been deliberately parked next to a ziggurat in Iraq during the first Gulf War in 1990–91.¹⁶ The National Council on Archives pointed out that buildings designed to hold archives were typically of a robust construction and built to high standards, making them attractive to local commanders for military use. The Council noted that several record offices had been commandeered by local forces during the conflict in Kosovo, to house gun batteries and other armaments.¹⁷

15. Brigadier Messenger, who had himself served in Kosovo, Afghanistan and Iraq, where he had commanded a force of Royal Marines leading the assault on the Al-Faw peninsula in 2003, acknowledged that “it can happen and indeed it has happened” that cultural sites were used in such a way, and he gave a similar example from Afghanistan, in which British soldiers had come under fire from forces in a mosque.¹⁸ He acknowledged that “it may be, for the safety of those forces or for the pursuit of the mission, that it would be necessary, if the enemy were using that particular guise, to then go on and do damage to that mosque”; but he observed that “all the safeguards and all the procedures would need to be in place before we did that and a decision would need to be made as to whether it was a military imperative or not”.¹⁹ Two important safeguards, in his view, were the need to prove (for an offence to have been committed) that a commander had shown both an intention to attack cultural property and the knowledge (or reason to suspect) that that property was cultural property as defined under Article 1 of the Convention. Brigadier Messenger also observed that the clearer the definition of what constituted cultural property, and the more widely that definition was agreed internationally, the better; and he believed that it was important to set the threshold for what was designated as deserving protection “at a sensible level”. In his view, setting the threshold too low, and designating too many sites as being of cultural significance, “could turn out to be a constraint for the military commander”.²⁰

16. The Minister of State at the Department for Culture, Media and Sport, the Rt Hon Margaret Hodge MP, told us that DCMS had been working closely with the Ministry of Defence to ensure that the obligations in the Bill were compatible with the requirements

¹⁵ See Mr Garraway Q 82

¹⁶ Q 59

¹⁷ Ev 31

¹⁸ Q 23 and 24

¹⁹ Q 23

²⁰ Q 22

and realities of military operations. She confirmed that the various safeguards described by Brigadier Messenger would indeed offer protection and she pointed out that the obligation to respect cultural property could be waived in the case of military necessity if the property had been used in a way which made it a military objective. She believed that it was “very unlikely that all the elements of the offence will be satisfied in such circumstances”. She added that, under common law, if a person acted reasonably and in good faith to defend himself or others, self-defence was available as a defence to crimes committed by the use of force.²¹

17. Conscious of a risk that UK forces could damage cultural property inadvertently, through confusion or uncertainty about its precise location, we asked Brigadier Messenger whether he had confidence that units would be able to identify cultural property or sites accurately when in combat. He replied that, as long as there was prior and accurate knowledge, there was “no difficulty with that at all” and that the geolocation tools used by troops were “pretty advanced”. When such knowledge was lacking, however, it would be “largely a case of interpretation on the ground”.²²

18. We were struck by the willingness of the Ministry of Defence to embrace the principles of the Convention and its two Protocols. It may well be that the Ministry of Defence harbours reservations about the practicality of observing those principles in time of war; but we note that UK forces already operate in conformity with the Convention and its Protocols. We admire the decision of the Ministry of Defence to formalise its practice and accept commitments under domestic law in relation to respect for cultural property.

Drafting issues

19. Dr O’Keefe described the draft Bill as “carefully considered” and “by and large, extremely well drafted”, and he admired the seriousness and professionalism with which the task had been approached.²³ However, he identified a number of inconsistencies within the text and between the text of the draft Bill and other statutes.

20. Chief among these inconsistencies is the failure in clause 4 (Ancillary offences) to designate aiding, abetting, counselling or procuring the commission of an offence as an ancillary offence. Article 15 of the Second Protocol to the Convention requires parties to comply with general principles of law and international law when establishing as criminal offences within domestic law the offences set out in the Article itself (constituting “serious violations”) and when extending individual criminal responsibility to persons other than those who directly commit the act. The general principles of international law in relation to criminal liability were recognised, during the negotiations on the Second Protocol, to have been authoritatively set out in the Statute of the International Criminal Court.²⁴ Dr O’Keefe argued that it would make sense, therefore, for the terminology used in the Statute, which specifically recognises aiding, abetting and assisting in a crime on the one hand and

²¹ Ev 32–3

²² Q 30

²³ Ev 3

²⁴ Cm 7298 pages 65–6

ordering, soliciting or inducing the commission of a crime on the other, to be reproduced in clause 4 of the draft Bill, which defines ancillary offences.²⁵ However, it is not. Dr O’Keefe found the reason for the divergence from the terminology used in the International Criminal Court Act 2001 to be “not at all clear”, and he concluded that the UK would not, as a result, satisfy its obligations under Article 15 of the Second Protocol to comply with general principles of international law.²⁶

21. Dr O’Keefe also observed that the penalties for a serious breach of the Second Protocol, set out in clause 7 of the draft Bill, applied to primary offences and to ancillary offences; but there was no provision in the draft Bill specifying that an action by a military commander or superior (or a failure to act or exercise control) which led to an offence being committed constituted an ancillary offence. He therefore doubted that penalties under the Bill as drafted could be applied to commanders or superiors who had aided, abetted, counselled or procured the commission of an offence of serious breach of the Second Protocol.²⁷

22. There may be scope for argument as to whether the definition of an ancillary offence in the Bill as drafted would enable the UK to satisfy its obligation under Article 15 of the Second Protocol to comply with general principles of law and international law when establishing criminal offences within domestic law. The Department should either satisfy itself that the present drafting is tight enough or it should draw up new wording corresponding to that used in the International Criminal Court Act 2001.

23. Dr O’Keefe also pointed out that Scots law does not recognise criminal liability for aiding, abetting, counselling or procuring an offence: rather, it recognised the concept of “being art and part” in the commission of an offence. However, although this distinction is recognised in clause 4 of the draft Bill, which deals with ancillary offences, it is not made in clause 5, which deals with the responsibility of commanders and other superiors. He believed that, as a result, a commander or superior who failed to exercise control over his forces would not be responsible for a criminal offence under Scots law.²⁸ **We believe that clause 5 of the draft Bill should recognise the concept of being “art and part” in the commission of an offence, so as to render it applicable under Scots law.**

24. One other significant drafting flaw was outlined by the British Red Cross. Part 3 of the Bill provides for a cultural emblem to be attached to cultural property protected under the Convention. Authority for use of the emblem would, in most cases, be granted by the Secretary of State in England or by a Minister from the relevant devolved assembly, depending on where it was proposed that the emblem be used. However, clause 12, which deals specifically with the use of the emblem to identify cultural property undergoing protected transportation, appears to require no authority for such use. The British Red Cross told us that the lack of any need for authority “would seem to open a Pandora’s Box, enabling anyone to argue that he or she is entitled to display the emblem”.²⁹ In theory at

²⁵ The terminology is also reproduced in section 55 of the International Criminal Court Act 2001, in relation to genocide, crimes against humanity and war crimes,

²⁶ Ev 3 and 4

²⁷ Ev 5

²⁸ Ev 4 and 5

²⁹ Ev 23

least, the Bill as drafted would appear to allow any object—even a shipment of arms—to receive the protection accorded by the cultural emblem from any act of hostility.³⁰ Dr O’Keefe believed that it was “absolutely essential” that there should be a system for authorising the use of the emblem for transport of cultural property, and we agree.³¹ **We believe that the omission of any requirement for authority to use the cultural emblem to identify cultural property undergoing protected transportation was an oversight of drafting which should be rectified. We recommend that the draft Bill should be duly amended.**

25. Both Dr O’Keefe and the British Red Cross listed other, minor ambiguities of drafting, which we have not analysed in this Report. **We draw the attention of the Department to ambiguities and minor inconsistencies in drafting identified by Dr O’Keefe and by the British Red Cross, and published in the evidence accompanying this Report.**

The implications for the British art market

26. Clause 18 of the draft Bill establishes a new offence of dealing in unlawfully exported cultural property. Export would be unlawful if it were to contravene the laws of the territory from which the object was exported, or if it were to contravene any rule of international law. Under clause 18(3) of the draft Bill, a person “deals” in unlawfully exported cultural property if he or she:

- acquires, disposes of, imports or exports it,
- agrees with another to do such an act , or
- makes arrangements under which another does such an act or under which another agrees with a third person to do such an act.

The reason for designating the offence is to satisfy Article 21 of the Second Protocol, which requires parties to adopt legislative or other measures to suppress illicit export, removal or transfer of ownership of cultural property from occupied territory in violation of the Convention or of the Second Protocol.

27. The British Art Market Federation, while welcoming the aims of the draft Bill, outlined a number of possible consequences for the British art market and two particular areas of difficulty: establishing whether or not a territory had been “occupied” at the time of export, and ascertaining whether export had been legal. We address these two points separately below.

Identification of occupied territories

28. Clause 17(3) of the draft Bill draws the definition of “occupied territory” from Article 42 of the 1907 Hague Regulations respecting the Laws and Customs of War on Land: “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation applies only to territory where such authority is established

³⁰ See Q 17–19

³¹ Q 17

and in a position to assert itself”.³² Under Clause 17(4), the Secretary of State may, in the event of any proceedings, issue a certificate determining whether or not a particular territory is occupied territory.

29. We can envisage various scenarios in which “occupancy” is disputed or where what is perceived by one state as “occupancy” is described by another as merely “peacekeeping”. We therefore asked Dr O’Keefe how the provisions in the draft Bill would apply in such circumstances. He accepted that the question of whether the definition of occupancy used in the Bill applied in a particular case was “a difficult question of factual appreciation”: in his opinion, in the case of disputed territory, the definition used in the draft Bill *would* generally apply. Likewise, in cases where there was a debate about whether a force was occupying or whether it was keeping the peace, he believed that it would be “fairly clear” that that force would be a belligerent occupant and said that “it may end up in the United Nations Security Council where a definitive statement to that effect is made”.³³

30. The British Art Market Federation argued that dealers would face uncertainty as to whether a territory is deemed to have been occupied or not, as there is no requirement in the draft Bill for the Government to set out in advance any list of occupied territories; nor has any undertaking to do so been made by the Government. Certificates would be issued by the Secretary of State only if and when proceedings arose. The uncertainty would therefore only be resolved once a prosecution had been brought and a dealer was facing a fine or even imprisonment. The Federation has therefore encouraged the Government to draw up a definitive list of territories deemed to have been occupied at any time since 1954.³⁴

31. The Regulatory Impact Assessment prepared by the Government and published with the draft Bill states that the number of occupied territories around the world is currently very small, with only the West Bank, East Jerusalem and the Golan Heights being regarded by the UK as being “unequivocally occupied”.³⁵ However, when we invited the Rt Hon Margaret Hodge MP, as the Minister with responsibility for cultural property, to tell us whether pressure was being applied on the Foreign and Commonwealth Office to draw up a list of occupied territories since 1954, she replied merely that “we are working with the Foreign Office” but that “we have not got that far yet”; and she referred repeatedly to the complexity of the legislation.³⁶ She subsequently wrote to the Committee to explain that DCMS officials were co-operating with their counterparts in the Foreign and Commonwealth Office “to determine how best to address the concerns raised” by the Federation and others. She suggested that the circumstances envisaged would be “extremely rare” and she was not aware that any of the other States Parties to the Convention had drawn up any such list”.³⁷

³² Cm 7298, page 69

³³ Q 10 and 11

³⁴ Ev 13

³⁵ Cm 7298, page 88

³⁶ Minutes of Evidence taken before the Committee on 2 July 2008, to be published as HC 821-ii, Session 2007-08

³⁷ Ev 33

32. We do not see why dealers should be exposed to the risk of prosecution for dealing in property exported unlawfully from an occupied territory when there is no certainty about which territories qualify as “occupied”. We recommend that the Bill should include a requirement upon the Secretary of State to draw up a list of territories occupied since 1954, with periods of occupation defined.

Ascertaining whether export was legal

33. The British Art Market Federation pointed out that dealers in the UK who are offered cultural objects exported from another country will not immediately know whether export control regulations were followed and whether export was lawful or not. To perform due diligence inquiries, a dealer may need to take custody of an object; but, by doing so, he or she could be deemed to have “acquired” it and thereby to have committed an offence if the object turns out to have been unlawfully exported.³⁸

34. The due diligence exercise may itself be problematic. The British Art Market Federation set out the hurdles which would need to be cleared if a person fleeing conflict in his or her home country were to arrive in the UK, as a refugee, and were to present to a dealer an item of cultural property which rightly belonged to him or her, with an intention to sell. In order to provide the necessary reassurance to a dealer performing due diligence inquiries, a potential vendor would need to know, at the time of leaving their home country:

- Whether the object he had taken with him fell within the definition of cultural property set out in the Convention;
- What the export regulations were at the time of departure;
- Whether the export might be in contravention of “any rule of international law” according to clause 17(2) of the draft Bill; and
- What proof was needed to establish legitimate export.³⁹

35. In written and oral evidence to us, the Federation proposed that dealers might be offered protection through the introduction of a requirement for an element of dishonesty in the dealing to have been demonstrated in order for an offence to have been committed, in the same way that section 1 of the Dealing in Cultural Objects (Offences) Act 2003 treats a person as guilty of an offence if he *dishonestly* deals in a cultural object that is tainted, knowing or believing that the object is tainted.⁴⁰ No such requirement is set out in the draft Bill, and a dealer who innocently handled illegally exported cultural property while undertaking due diligence inquiries would presumably need to rely upon the public interest test in the Code for Crown Prosecutors to avoid trial.

36. The Federation subsequently wrote to the Committee Chairman to explain that the Department saw difficulties in introducing a requirement for “dishonesty” in order for an

³⁸ Ev 15

³⁹ Ev 14

⁴⁰ Ev 13 and Q 45

offence to have been committed, as there was no such requirement in the Convention itself and because the domestic legislation needed to mirror the terms of the Convention and its Protocols. The Federation suggested that the difficulty arose partly because of the way that the remedy prescribed under the Convention and reflected in the draft Bill—*forfeiture of the item, allowing eventual restitution*—was linked to the offence of dealing in unlawfully exported cultural property rather than to the initial illegal export. The Federation argued that the provision for an offence of dealing in unlawfully exported cultural property “appears to go beyond the requirements of the Convention and the Protocols”, and it proposed that the liability to forfeiture, which was necessary in order to comply with the Convention and its Protocols, should be triggered by unlawful export, thereby removing the need for the dealing offence in the draft Bill to shadow the terminology used in the Convention and its Protocols.⁴¹

37. We believe that it would be wrong for dealers to run the risk of prosecution every time that they accepted an item of cultural property exported from an occupied territory, merely because it was unclear at the time of acceptance whether or not export had been legal. Our preferred solution would be for the draft Bill to be amended so as to adopt the wording used in the Dealing in Cultural Objects (Offences) Act 2003, which requires an element of dishonesty in the dealing if an offence is to have been committed. This would have the merit of consistency with domestic law. However, we acknowledge that the Department doubts whether this could be achieved by a simple amendment to the draft Bill as it stands. We recommend that the Department should make a definitive statement on whether there is any way that a requirement for a dealer to have shown dishonesty could be introduced into the offence of dealing in unlawfully exported cultural property set out in clause 18 of the draft Bill, whether through a simple amendment to the draft Bill as it stands or through the revision suggested by the British Art Market Federation.

38. Under clause 18(4) of the draft Bill, “acquires” means “buys, hires, borrows or accepts”. **If it proves impossible to introduce a requirement for dishonesty in dealing, for an offence to have been committed under clause 18 of the draft Bill, we recommend that the Department should examine whether the definition of “acquires” in the draft Bill could be tightened, to exclude acceptance of a cultural object for the purpose of performing due diligence.**

3 Implementing the Bill

39. Both the UNESCO UK National Commission and the Museums Association stressed that effective implementation of the Convention through the Bill would need an adequate level of resources.⁴² The main effort in implementing the provisions of the draft Bill, if enacted, would fall to the Ministry of Defence, in reviewing its training materials and ensuring that personnel are fully aware of the implications of any new legislation, and to either the Department for Culture, Media and Sport or English Heritage, in identifying any

⁴¹ Ev 17 and 18

⁴² Ev 20 and 32

cultural property to be entitled to protection under the Convention. We consider these two issues below.

Implications for the armed forces

40. We noted, in paragraph 12, that the UK's armed forces already act in accordance with the principles of the Convention and its two Protocols. In purely military terms, ratifying the Convention may turn out to have no effect on operations. Brigadier Messenger accepted, however, that there would be a need to review training for personnel "to ensure that we are being rigorous enough"; but it was a question of "deepening" rather than a change of direction. He also told us that "we could do a little bit more in heightening the awareness of our commanders".⁴³

41. Brigadier Messenger stated that there would be no resource implications arising from the review of training.⁴⁴ Mr Gaimster, speaking on behalf of the UNESCO UK National Commission, said that he would "like to look at that in more detail": he advocated that the UK should compare the training provided on respect for cultural property with that of other countries' forces, and he drew particular attention to measures taken by Austria, Germany and the Netherlands.⁴⁵ He implied that such a benchmarking exercise could lead to an extra demand on resources.⁴⁶

42. While the draft Bill may have only a limited effect upon operations involving direct engagement with opposing forces, there appears to be scope for reflecting its provisions by adjusting practice both before and after actual engagement. Professor Stone observed that the identification and protection of cultural heritage had not been a "formal structured component" of the planning for the 2003 invasion of Iraq. He told us that the process of identifying and protecting cultural sites in Iraq in advance of the invasion had been established following a discussion between himself and a Royal Navy officer who happened to live in the same village in Northumberland: he believed that, had it not been for that coincidental personal contact, UK forces would have been deployed in Iraq with no consideration for the archaeological cultural heritage of one of the most archaeologically rich areas of the world.⁴⁷ He described such an approach to the identification and protection of cultural heritage as "totally unacceptable", although he acknowledged that the Ministry of Defence was taking steps to improve the process. Brigadier Messenger maintained that the work which had taken place as a result of the conversation in Northumberland had not been quite as *ad hoc* as it might have appeared; he accepted, however, that more work could be done to establish whether a main database containing information on sites of cultural significance was "sufficiently rigorous".⁴⁸

43. Professor Stone also described the damage done to archaeological sites in Iraq in the months following the invasion in 2003, when sections of the local populace were openly

⁴³ Q 34

⁴⁴ Q 35

⁴⁵ Q 70 and 72. See also <http://unesdoc.unesco.org/images/0014/001407/140792E.pdf>

⁴⁶ Q 70

⁴⁷ Ev 1, also Q 4 and 5

⁴⁸ Q 25

excavating sites for cultural objects with the intention of selling them, sometimes because they had no other means of subsistence. He believed that the failure of the Coalition forces to protect the cultural heritage in such circumstances had had a huge impact on the ability to understand the development of human society in the region, and he noted reports that profits from the illicit sale of antiquities were funding the insurgency. He concluded that not enough troops had been deployed by Coalition forces to protect cultural heritage in Iraq.⁴⁹

44. We welcome the steps being taken by the Ministry of Defence to ensure that areas of cultural significance are taken account sooner when planning operations. We recommend that the Ministry of Defence should undertake a benchmarking exercise to take note of good practice by other states' armed forces in taking cultural property and sites into account. We also urge the Ministry of Defence, in the light of the continuing damage to Iraq's cultural heritage since the invasion, to bear in mind the need to provide adequate protection for cultural sites in the aftermath of any military operation, not least from the local population.

Identifying cultural property entitled to protection

45. There are three types of protection afforded by the Convention and its two Protocols: special protection, enhanced protection, and what has become known as “general” protection. The concept of special protection has, in effect, been superseded by that of enhanced protection.

46. Under Article 10 of the Second Protocol, cultural property may be placed under “enhanced protection” if it is “cultural heritage of the greatest importance for humanity”, if it is protected by domestic legal and administrative measures recognising its exceptional value, and if it is not being used (and will not be used) for military purposes. Parties to a conflict must refrain from attacking such property, even if it would otherwise be imperative militarily to do so. Only if the property itself is being used for military purposes by the opposing force do the obligations lapse. Each State Party to the Second Protocol is required to submit a list of cultural property proposed for “enhanced protection”; each list is then considered by the Committee for the Protection of Cultural Property in the Event of Armed Conflict, a body composed of twelve States Parties and assisted by a secretariat provided by UNESCO.⁵⁰ The policy of the UK Government is that the 22 cultural sites (as opposed to natural environmental sites) on the World Heritage List, museums and galleries which are non-Departmental Public Bodies or (in Wales) Assembly Sponsored Public Bodies, and the National Archives and each of the five legal deposit libraries, would be submitted for inclusion on the list of cultural property meriting enhanced protection, subject to the views of the Ministry of Defence.⁵¹

47. “General” protection applies to all cultural property which meets the definition in Article 1 of the Convention, which encompasses “moveable and immovable property of great importance to the cultural heritage of every people”, buildings whose main and

⁴⁹ Ev 2

⁵⁰ See Articles 24 to 28 of the Second Protocol

⁵¹ See Summary of Responses to the Consultation on the Convention and its Protocols, October 2006, pages 19 and 20.

effective purpose is to preserve or exhibit moveable cultural property, or centres containing a large amount of cultural property. Although parties to the Convention are required not to direct any act of hostility against such property, they may do so if justified by “imperative military necessity”.⁵²

48. In September 2005, the Department for Culture, Media and Sport issued a consultation paper on various aspects of the Convention and its implementation in the UK.⁵³ One of the questions posed in the paper was how far the list of cultural property meriting general protection should extend. The Department recognised that a balance would need to be struck and that to put forward an excessive number of sites for protection risked making the protection unworkable in practice. It noted that “an enemy confronted with a multitude of protected sites (particularly in an urban setting) would be unable to direct its operations via the least important obstacles and would probably have to resort to claiming military necessity to achieve its goals. Putting forward too many sites would, therefore, have the opposite effect to that desired in that it would actually jeopardise the level of protection that can be provided by the Convention”. Consultees were invited to comment on the proposal that general protection afforded by the Convention should be extended only to:

- listed buildings of Grade I status (category A in Scotland and Northern Ireland), totalling approximately 7,000 list entries in England and Wales⁵⁴ and around 3,650 Category A buildings in Scotland);
- in England, listed historic parks and gardens of Grade I status (126 list entries);
- all UK World Heritage Sites, excluding those sites which are inscribed as natural sites (22 sites);
- the collections of those Museums and Galleries that are directly sponsored or funded by Government;
- the museums, galleries and universities in England with designated collections and in Scotland with important collections; and
- the National Record Offices and the five legal deposit libraries.

49. A majority of respondents to the consultation agreed with the proposal but believed that further categories should be added, such as scheduled ancient monuments, important historic city centres, Grade 2* listed buildings, all parish churches and cathedrals, all conservation areas, designated library and archive collections, and all local authority record offices. The Department concluded that it would be impractical and counterproductive to extend the list so widely (inclusion of all cathedrals and parish churches alone would increase the amount of cultural property entitled to general protection by up to 16,000 entries), although it accepted the case for including designated libraries and archives.

⁵² See Articles 1 and 4 of the Convention, reproduced in Schedule 1 to the draft Bill. The meaning of “imperative military necessity” was clarified in Article 6 of the Second Protocol to the Convention.

⁵³ *The 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols of 1954 and 1999*: DCMS, September 2005

⁵⁴ This figure dates from 2005: Dr Thurley, Chief Executive of English Heritage, cited a figure of 9,000 for the number of Grade I listed buildings when he appeared before the Committee on 2 July 2008: see HC 821–ii, Session 2007–08

50. English Heritage urged us to recommend that the definition of cultural property deserving “enhanced protection” should be drawn so as to include Grade 2* listed buildings and certain private collections; and Mr Gaimster, representing the UNESCO UK National Commission, pressed for the inclusion of certain independent collections.⁵⁵ We note that to bring Grade 2* listed buildings within the general protection regime would add a further 20,000 buildings to the total.⁵⁶

51. We invited the Minister to explain the Department’s policy when she appeared before the Committee to give evidence on the Draft Heritage Protection Bill. In oral evidence, she told us that “we have not come to a view” on whether Grade 2* listed buildings or historic urban centres should be entitled to general protection, as she had yet to receive guidance from UNESCO. Dr Thurley, Chief Executive of English Heritage, told us that “English Heritage’s view would probably be that Grade 2* buildings should be included” but, like the Minister, he awaited the guidance from UNESCO before taking a firm view.⁵⁷ Mrs Hodge later wrote to the Committee to explain that the Government felt that it was unnecessary to specify historic city centres as a category considered to be under general protection, as such blanket protection would cover buildings which had only the lowest form of designation or even no designation at all, which she believed would be inconsistent with the aims of the Convention. She was also opposed to the inclusion of Grade 2* listed buildings, which would increase the number of protected buildings and monuments by some 75% and could provoke hostile forces to invoke the waiver of “imperative military necessity” provided for under Article 4.2 of the Convention.⁵⁸

52. Although at first glance it would appear sensible to await guidance from UNESCO, we note that those guidelines are not expected to be completed before 2009–10, with the first sites likely to be submitted for enhanced protection by States Party in 2010–11 at the earliest.⁵⁹ As Professor Stone pointed out, rather than simply waiting for guidance to emerge, the UK could be making an effort to take part in and influence the process.⁶⁰ The UNESCO UK National Commission also urged the UK to participate actively in preparation of the guidelines.⁶¹ **We query the ten-year delay in drawing up guidelines for implementation of a Protocol adopted in 1999, and we recommend that the UK Government and English Heritage should play a more active part in the preparation of those guidelines.**

53. We note that there is in fact no requirement under the Convention or its Protocols to draw up any list of properties in order for them to qualify for general protection: a list would be merely indicative and would signal to the general public and to foreign states the Government’s assessment of how far the regime of general protection might extend. In the event of conflict, decisions on whether any particular item or building qualified for general

⁵⁵ Q 77

⁵⁶ Dr Thurley, evidence given on 2 July 2008, HC 821–ii (Session 2007–08)

⁵⁷ Q 101 and 102, evidence taken before the Committee on 2 July 2008, to be published as HC 821–ii

⁵⁸ Ev 34

⁵⁹ English Heritage Ev 19

⁶⁰ Ev 2

⁶¹ Ev 20

protection under the Convention would, it appears, fall to a court.⁶² This brings into question the value of drawing up a list, which might mislead the public into believing that cultural property was protected when it was not, and *vice versa*. Such distinctions might, in any case, have no legal substance if a conflict were actually to take place on UK soil. On balance, however, although a list of cultural property entitled to “general” protection under the Convention may have limited practical value, it would be indicative of the UK’s commitment to the Convention, and it is difficult to see how the new regime could be made to work without one. **We believe that a list of cultural property worthy of “general” protection should be drawn up. However, we believe that to include all Grade 2* listed buildings and historic city centres, as some have suggested, would risk significantly diluting its credibility.**

54. Until decisions are taken on what cultural property will enjoy “general protection” under the Convention, or indeed whether any list will be drawn up, it is difficult to know whether any significant demands will be placed upon staff in the Department and at English Heritage in preparing and maintaining lists. According to the Regulatory Impact Assessment accompanying the draft Bill, the Government anticipates that the costs of producing and periodically updating the list of cultural property considered to be protected under the Convention “can be absorbed within current budgets”.⁶³

55. The written memorandum from English Heritage expressed concern that there was no indicative timetable or commitment to resourcing for the identification of cultural property meriting protection under the Convention and its Protocols.⁶⁴ However, we note that the witness representing English Heritage did not appear to be daunted by the task, although she said that “this is not something that is going to be introduced wholesale overnight”.⁶⁵ Much of the work may be undertaken in any case if the reform of the heritage protection system as proposed by the Draft Heritage Protection Bill is taken forward. Nonetheless, **we recommend that the Government should not bring before Parliament legislation to ratify the 1954 Hague Convention and its two Protocols until:**

(i) it is able to present a clear statement on whether it intends to draw up a list of cultural property deemed to be entitled to general protection and, if so, which cultural property will be included in that list; and

(ii) what the implications for publicly funded bodies are likely to be.

⁶² Ev 34

⁶³ Cm 7298, page 90

⁶⁴ Ev 19

⁶⁵ Q 83

Conclusions and recommendations

1. We welcome the draft Bill, which was strongly supported in evidence. We believe that it would, if enacted: strengthen the procedures used by the Ministry of Defence when training personnel in respect for cultural property and taking cultural sites into account when planning operations; respond to criticisms that Coalition troops in Iraq did not always follow high standards of behaviour in treatment of cultural property; and encourage more Commonwealth states to sign up to the Convention and the two Protocols. (Paragraph 11)
2. We were struck by the willingness of the Ministry of Defence to embrace the principles of the Convention and its two Protocols. It may well be that the Ministry of Defence harbours reservations about the practicality of observing those principles in time of war; but we note that UK forces already operate in conformity with the Convention and its Protocols. We admire the decision of the Ministry of Defence to formalise its practice and accept commitments under domestic law in relation to respect for cultural property. (Paragraph 18)
3. There may be scope for argument as to whether the definition of an ancillary offence in the Bill as drafted would enable the UK to satisfy its obligation under Article 15 of the Second Protocol to comply with general principles of law and international law when establishing criminal offences within domestic law. The Department should either satisfy itself that the present drafting is tight enough or it should draw up new wording corresponding to that used in the International Criminal Court Act 2001. (Paragraph 22)
4. We believe that clause 5 of the draft Bill should recognise the concept of being “art and part” in the commission of an offence, so as to render it applicable under Scots law. (Paragraph 23)
5. We believe that the omission of any requirement for authority to use the cultural emblem to identify cultural property undergoing protected transportation was an oversight of drafting which should be rectified. We recommend that the draft Bill should be duly amended. (Paragraph 24)
6. We draw the attention of the Department to ambiguities and minor inconsistencies in drafting identified by Dr O’Keefe and by the British Red Cross, and published in the evidence accompanying this Report. (Paragraph 25)
7. We do not see why dealers should be exposed to the risk of prosecution for dealing in property exported unlawfully from an occupied territory when there is no certainty about which territories qualify as “occupied”. We recommend that the Bill should include a requirement upon the Secretary of State to draw up a list of territories occupied since 1954, with periods of occupation defined. (Paragraph 32)
8. We believe that it would be wrong for dealers to run the risk of prosecution every time that they accepted an item of cultural property exported from an occupied territory, merely because it was unclear at the time of acceptance whether or not export had been legal. Our preferred solution would be for the draft Bill to be

amended so as to adopt the wording used in the Dealing in Cultural Objects (Offences) Act 2003, which requires an element of dishonesty in the dealing if an offence is to have been committed. This would have the merit of consistency with domestic law. However, we acknowledge that the Department doubts whether this could be achieved by a simple amendment to the draft Bill as it stands. We recommend that the Department should make a definitive statement on whether there is any way that a requirement for a dealer to have shown dishonesty could be introduced into the offence of dealing in unlawfully exported cultural property set out in clause 18 of the draft Bill, whether through a simple amendment to the draft Bill as it stands or through the revision suggested by the British Art Market Federation. (Paragraph 37)

9. If it proves impossible to introduce a requirement for dishonesty in dealing, for an offence to have been committed under clause 18 of the draft Bill, we recommend that the Department should examine whether the definition of “acquires” in the draft Bill could be tightened, to exclude acceptance of a cultural object for the purpose of performing due diligence. (Paragraph 38)
10. We welcome the steps being taken by the Ministry of Defence to ensure that areas of cultural significance are taken account sooner when planning operations. We recommend that the Ministry of Defence should undertake a benchmarking exercise to take note of good practice by other states’ armed forces in taking cultural property and sites into account. We also urge the Ministry of Defence, in the light of the continuing damage to Iraq’s cultural heritage since the invasion, to bear in mind the need to provide adequate protection for cultural sites in the aftermath of any military operation, not least from the local population. (Paragraph 44)
11. We query the ten-year delay in drawing up guidelines for implementation of a Protocol adopted in 1999, and we recommend that the UK Government and English Heritage should play a more active part in the preparation of those guidelines. (Paragraph 52)
12. We believe that a list of cultural property worthy of “general” protection should be drawn up. However, we believe that to include all Grade 2* listed buildings and historic city centres, as some have suggested, would risk significantly diluting its credibility. (Paragraph 53)
13. We recommend that the Government should not bring before Parliament legislation to ratify the 1954 Hague Convention and its two Protocols until:
 - (i) it is able to present a clear statement on whether it intends to draw up a list of cultural property deemed to be entitled to general protection and, if so, which cultural property will be included in that list; and
 - (ii) what the implications for publicly funded bodies are likely to be. (Paragraph 55)

Formal Minutes

Tuesday 15 July 2008

Members present:

John Whittingdale, in the Chair

Philip Davies
Nigel Evans
Paul Farrelly
Mr Mike Hall
Alan Keen

Rosemary McKenna
Adam Price
Mr Adrian Sanders
Helen Southworth

Draft Report (The Draft Cultural Property (Armed Conflicts) Bill), proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 55 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Ninth Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Written evidence was ordered to be reported to the House for printing with the Report.

[Adjourned till Thursday 17 July at 10.15 a.m.]

Witnesses

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Professor Peter Stone , Professor of Heritage Studies, Newcastle University, and Dr Roger O’Keefe , Lecturer in International Law, Cambridge University	Ev 6
Brigadier Gordon Messenger DSO OBE , Director, Joint Commitments, (Military), Ministry of Defence	Ev 9
Anthony Browne , Chairman, and Tom Christopherson , Member of the Executive Board, British Art Market Federation	Ev 15
Sue Cole , Senior Policy Officer (International), English Heritage, Dr David Gaimster , Chair, Culture Committee Working Group; UK National Commission, UNESCO: and Charles Garraway , International Law Adviser (External), British Red Cross	Ev 25

List of written evidence

1	Professor Peter Stone	Ev 1
2	Dr Roger O’Keefe	Ev 3
3	British Art Market Federation (BAMF)	Ev 12,14,17
4	English Heritage	Ev 18
5	United Kingdom National Commission for UNESCO (UKNC)	Ev 19
6	British Red Cross	Ev 21
7	National Council on Archives (NCA)	Ev 31
8	Museums Association (MA)	Ev 31
9	Department for Culture, Media and Sport (DCMS)	Ev 32

List of Reports from the Committee during the current Parliament

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First Special Report	Maritime Heritage and Historic Ships: Replies to the Committee's Fourth Report of Session 2004-05	HC 358
First Report	Broadcasting Rights for Cricket	HC 720
Second Report	Analogue Switch-off	HC 650 I, II
Third Report	Preserving and Protecting our Heritage	HC 912 I, II, III
Fourth Report	Women's Football	HC 1357
Second Special Report	Women's Football: Replies to the Committee's Fourth Report of Session 2005–06	HC 1646

Session 2006–07

First Report	Work of the Committee in 2006	HC 234
Second Report	London 2012 Olympic Games and Paralympic Games: funding and legacy	HC 69 I, II
Third Report	Call TV quiz shows	HC 72
Fourth Report	Call TV quiz shows: Joint response from Ofcom and ICSTIS to the Committee's Third Report of Session 2006-07	HC 428
Fifth Report	New Media and the creative industries	HC 509 I, II
Sixth Report	Caring for our collections	HC 176 I, II
Seventh Report	Self-regulation of the press	HC 375
First Special Report	Self-regulation of the press: Replies to the Committee's Seventh Report of Session 2006–07	HC 1041

Session 2007–08

First Report	Public service content	HC 36 I, II
First Special Report	Public service content: Response from Ofcom to the Committee's First Report of Session 2007–08	HC 275
Second Report	Ticket touting	HC 202
Third Report	Work of the Committee in 2007	HC 234
Fourth Report	BBC Annual Report and Accounts 2006–07	HC 235
Fifth Report	On-course horserace betting	HC 37
Sixth Report	London 2012 Games: the next lap	HC 104 I, II
Seventh Report	European Commission White Paper on Sport	HC 347
Eighth Report	Tourism	HC 133 I, II

Oral evidence

Taken before the Culture, Media and Sport Committee

on Tuesday 10 June 2008

Members present

Mr John Whittingdale, in the Chair

Janet Anderson
Philip Davies
Alan Keen

Mr Adrian Sanders
Helen Southworth

Memorandum submitted by Professor Peter Stone

1. EXECUTIVE SUMMARY AND RECOMMENDATIONS

1. The identification and protection of the cultural heritage was not a formal structured component of the planning for the 2003 invasion of Iraq. It should have been and UK forces must take protection of cultural heritage into consideration in all future deployments.

2. A trade in illicit antiquities has developed in Iraq that not only makes the transition to a stable society more difficult but also, according to parts of the US military, directly helps fund the so-called “insurgency”.

3. Implementation of this draft Bill will be impossible unless the UK military accepts the responsibilities suggested in the Bill including [a] the embedding of archaeological cultural heritage training at all levels and (b) the formal identification and protection of the cultural heritage in times of conflict.

4. It is essential that sufficient funds are made available to ensure that when UK forces are deployed they have the training and resources to deal competently with the protection of the cultural heritage.

2. BACKGROUND TO SUBMISSION

2.1 In the two months in the lead-up to the 2003 invasion of Iraq I was the only archaeologist to whom the Ministry of Defence was willing to speak. This was unusual in that I have no expertise in the archaeology of the country or region. My involvement was purely on the basis that I happened to be known by a serving officer in the Royal Navy who was at the time seconded to the MoD and who was involved in the detailed planning for the invasion. If it had not been for this personal contact it seems clear that UK forces would have been deployed in Iraq with no consideration for the archaeological cultural heritage of one of the most important areas in the world for understanding the development of human society.

2.2 In the two months before the invasion, and with the support of two colleagues, one with expertise in the archaeology of the region the other with expertise of the trade in illicit antiquities, I was able to do three things: (a) deliver a list of key sites to be avoided and protected at all costs; (b) stress especially the vulnerability of sites and museums immediately after any conflict and before either any stable external Interim or a new Iraqi authority was in place; and (c) remind my contacts of their responsibilities under International treaties—especially, as the UK had not signed the 1954 Hague Convention, with respect to their obligations under the Geneva Conventions. I understand that three further things happened: (a) these sites went onto military maps/into field orders to avoid if possible; (b) these sites went onto the Attorney General’s no-strike List; and (c) this information was shared with American and other coalition partners.

2.3 After the conflict began and during the initial stages of fighting these measures to protect the archaeological cultural heritage appeared to be working. Much of this was ascribed to the speed of the Coalition’s advance, the failure of the Iraqi military to affect any major defence, and the remoteness of many sites. Then it became clear that a number of museums had been ransacked and looted closely followed by the depressing news that many archaeological sites had been clandestinely excavated and looted. The archaeological world was in uproar and after concerns were raised at a meeting at the British Museum in April 2003 I was able to go back to the MoD and I believe, as a result of this additional intervention, three additional things happened. First, plans were developed to ensure all UK military personnel leaving Iraq were searched for antiquities; second, that UK troops with border responsibilities were briefed to be on the look-out for the smuggling of illicit antiquities; and third that all troops and other UK personnel going out to Iraq were provided with a short briefing note about the extent and importance of the archaeology of the area. I have no knowledge if these activities continue. Unfortunately, as we all know, little of this work had any long term impact given the extent of looting and destruction of the archaeological record that continues in Iraq.

2.4 By mid/late 2003 some sites had in excess of 100 men digging in broad daylight—essentially the whole male population of the local village. A colleague tried to take photographs from the same places she had taken shots in 1999 but could not find these places as the landscape had changed so much. In places four metre square holes two to three metres deep littered the landscape. This is a catastrophic loss to the common human heritage. We know (or will know once final cataloguing has been completed) what we have lost from the museums. We have photographs of most of the objects; we have inventories; much of the material has been studied already. We have no idea what we have lost, and are losing on a daily basis, from the sites: we have no photographs; we have no inventories; none of the material has been seen let alone studied. When my colleague asked the men why they were looting the sites their response was simple: since the collapse of the Saddam regime there had been no payment for their crops: they were looting to get the money to provide food for their families. I pleaded, to no avail, in 2003, in a presentation to civil servants from a number of UK Government Departments and military personnel, for DFID to purchase the crops. I emphasised that there was a real danger of a systematic trade in illicit antiquities developing. That trade has now developed and appears to be blossoming. This is destruction on an unprecedented scale. It continues today and is not only the result of looting and the trade in illicit antiquities but also of the insensitive use of major archaeological sites by Coalition Forces.

2.5 The failure of coalition forces to protect the cultural heritage has had a huge impact on our ability to further understand the development of human society in this region. More immediately however, is that there is increasing evidence that the failure to protect the cultural heritage is causing significant problems for Coalition forces and the new Iraqi security forces and Government as the general population become increasingly agitated by the lack of respect shown to this heritage. Even more pressing is that colleagues in the American military are now stating openly and in print that profits from the sale of illicit antiquities looted from the archaeological sites in Iraq are being used to fund the so-called “insurgency”.

2.6 In recent discussion with the American military it is clear that not enough troops were deployed to allow for the protection of the cultural heritage. This was also my understanding from conversations with members of the UK military in 2003. We cannot expect our armed forces to deliver with the necessary means at their disposal.

2.7 Further details of the events of 2003 and since can be found in P G Stone & J Farchakh Bajjaljy (eds) *The Destruction of Cultural Heritage in Iraq*, Boydell & Brewer, 2008)

3. COMMENTS ON THE DRAFT BILL

3.1 I am extremely pleased and grateful that this Bill is now being considered. I fully support its passage and hope that it can be passed into law as quickly as possible in order that the UK will be able to accede to the 1954 (Hague) UNESCO Convention on the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols of 1954 and 1999.

I have five concerns/comments regarding the Bill.

3.2 Implementation of any Act will be impossible unless the UK military accepts the responsibilities suggested in the Bill including (a) the embedding of archaeological cultural heritage training at all levels and (b) the formal identification and protection of the cultural heritage in times of conflict. There is much to learn from the military in other countries and tentative steps are being taken (meetings between military representatives from a number of countries and archaeologists have been arranged at the next World Archaeological Congress to be held in Dublin in July 2008 and plans are underway for a larger gathering next year). These, essentially informal, developments need to be formalised and a strategy for enhanced training needs to be developed as does a methodology for formalising identification and protection in times of conflict. I am aware that the UK military is actively considering these developments and that the UK National Commission for UNESCO is willing to help facilitate them.

3.3 Similar developments need to take place with respect to other affected agencies, for example the Crown Prosecution service, police, and customs staff.

3.4 UNESCO is currently preparing guidelines for how the Convention and in particular the second protocol might be implemented. The UK should be making every effort to be a part of and influence this process.

3.5 My evidence has focussed on the deployment of UK forces overseas. While critical, and while there is good justification for this aspect of the Bill to be prioritised, such emphasis should not be to the detriment of planning for natural and human created emergencies in the UK.

3.6 As ever, much of this will come down to funding. It is essential that sufficient funds are made available to ensure that when UK forces are deployed they have the training and resources to deal competently with the protection of the cultural heritage.

Memorandum submitted by Dr Roger O’Keefe

EXECUTIVE SUMMARY

1. When enacted into law, the Cultural Property (Armed Conflicts) Bill as currently drafted will—with two exceptions—admirably serve to acquit, to the extent that it aims to, the United Kingdom’s proposed treaty obligations under the 1954 Hague Convention and its two Protocols. The Government may wish to reconsider the drafting of clauses 4 and 5, which constitute the exceptions, and to make several other minor amendments.

ABOUT THE SUBMITTER

2. Dr Roger O’Keefe, BA, LLB (Sydney), LLM, PhD (Cantab), is a Lecturer in Law and the Deputy Director of the Lauterpacht Centre for International Law at the University of Cambridge, as well as a Fellow of Magdalene College. He lectures in international law, including international criminal law. In 2001 he was commissioned by UNESCO to write an expert report on national implementation of the penal provisions of the Second Protocol to the 1954 Hague Convention. His book *The Protection of Cultural Property in Armed Conflict* was published by Cambridge University Press in December 2006. He has also written several journal articles and chapters in edited volumes on the subject, and has lectured on the topic at the Hague Academy of International Law.

DETAILED COMMENTS ON THE BILL

General

3. The draft Cultural Property (Armed Conflicts) Bill is carefully considered and, by and large, extremely well drafted. The seriousness and professionalism with which the task has evidently been approached is impressive. There is no doubt that, subject to the reservations expressed below in relation to clauses 4 and 5, the Bill would, on enactment, achieve its stated aim of giving effect to the relevant provisions of the 1954 Hague Convention and its two Protocols.

Clause 4

The main issue

4. The first reservation relates to the drafting of clause 4. This clause is largely modelled on analogous provisions in the International Criminal Court Act 2001 (c.17) and the International Criminal Court (Scotland) Act 2001 (asp 13) respectively. But unlike section 55 (applicable to England & Wales) and section 62 (applicable to Northern Ireland) of the International Criminal Court Act, clause 4 of the Cultural Property (Armed Conflicts) Bill, which deals with offences ancillary to the offence of serious breach of the Second Protocol laid down in clause 3, makes no mention of aiding, abetting, counselling or procuring the commission of an offence. The drafting intention behind this divergence from the International Criminal Court Act is not revealed in the Explanatory Memorandum and is not at all clear.

5. Mention of aiding, abetting, counselling or procuring the commission of an offence is, however, found in subsection (1) of clause 5 of the Bill, which deals with the responsibility of commanders and other superiors for an offence under clause 3 or an offence ancillary to such an offence. Clause 5(1), a technical deeming provision analogous to section 65(4) of the International Criminal Court Act, states: “A person described in this section as responsible for an offence is to be treated as aiding, abetting, counselling or procuring the commission of the offence”.

6. Note that Scots law does not use the term “aiding, abetting, counselling or procuring the commission of an offence”, but rather “being art and part in the commission an offence”, which is included as an ancillary offence in clause 4(4)(a) of the Bill.

7. By virtue of the drafting of clause 4 of the Bill, the United Kingdom would not satisfy its obligation under article 15(2) of the Second Protocol to the 1954 Hague Convention to “comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act” when enacting into domestic criminal law the offences provided for in article 15(1) of that Protocol. Paragraph 24 of the Explanatory Memorandum states that the Statute of the International Criminal Court “was accepted during the negotiations on the Second Protocol as an authoritative restatement of the general principles of international law in relation to criminal liability”; and the ICC Statute includes aiding, abetting or otherwise assisting in the commission of a crime, on the one hand, and ordering, soliciting or inducing the commission of a crime (the international equivalent of counselling or procuring a crime), on the other, as forms of criminal liability (or criminal “responsibility”, in the language of international law). The mention of these forms of criminal liability in the deeming provision on command and other superior responsibility found in clause 5(1) does not make up for their omission from clause 4, since aiding, abetting or otherwise assisting in the commission of a crime and

ordering, soliciting or inducing the commission of a crime are forms of international criminal responsibility wholly distinct from command and other superior responsibility, the first two being found in article 25(3)(a) and (b) respectively of the ICC Statute, the last in article 28. The difference is also born out in the case-law of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. As currently drafted, therefore, clause 4 of the Bill does not fulfil the obligation imposed by section 15(2) of the Second Protocol to make domestic provision for the concepts of aiding, abetting or otherwise assisting in the commission of a crime and ordering, soliciting or inducing the commission of a crime, as known to international law. As independent legal concepts, these two forms of criminal responsibility are nowhere to be found in the provisions of the Bill relating to England & Wales and Northern Ireland—although they are, by way of contrast, reflected in clause 4(4)(a), which applies to Scotland. Moreover, even to the purely nominal extent that aiding, abetting or otherwise assisting in the commission of a crime and ordering, soliciting or inducing the commission of a crime, as known to international law, are included in clause 5, they apply in this context only to military commanders and other superiors, and not to all those capable of committing an offence under article 15 of the Second Protocol.

8. Just as significantly, the omission from clause 4 of aiding, abetting, counselling or procuring the commission of an offence has a knock-on effect for clause 5. As mentioned above, clause 5(1) of the Bill is analogous to section 65(4) of the International Criminal Court Act. The purpose of section 65(4) of the International Criminal Court Act is to criminalise command and other superior responsibility by deeming them to be forms of aiding, abetting, counselling or procuring the commission of an offence, which in turn constitutes an ancillary offence under section 52(1) (England & Wales) and section 59(1) (Northern Ireland) of the Act. In the process, section 65(4) clarifies, via subsections (2) to (4) of sections 52 and 59 respectively, the ambit of command and other superior responsibility for crimes under the Act—that is, in what circumstances such conduct is criminal if committed outside the United Kingdom; and provides, via sections 53 and 60 of the Act, for the trial and punishment of such conduct. Under the Bill, however, while command and other superior responsibility are deemed in clause 5(1) to be forms of aiding, abetting, counselling or procuring the commission of an offence, the latter is not itself an ancillary offence within the meaning of clause 4. A possible consequence of this is that command and other superior responsibility are not in fact criminal under the Bill as it now stands, although it is more likely that it is not strictly necessary for the Bill specifically to provide, as sections 52(1) and 59(1) of the International Criminal Court Act do, that aiding, abetting, counselling or procuring the commission of an offence under clause 3 is itself an offence. But the point is academic, since what is clear—and this is far from academic—is that unless aiding, abetting, counselling or procuring the commission of an offence is specifically cited in clause 4 as an ancillary offence, the Bill makes no provision for the ambit of command and other superior responsibility for serious breaches of the Protocol (since clause 4, which deals with this issue, applies only to the ancillary offences mentioned therein), and makes no provision for penalties in respect of command and other superior responsibility for serious breaches of the Protocol (since clause 7(2)(b) refers to ancillary offences, the meaning of which derives from clause 4). The upshot is that the Bill as currently drafted may not fulfil the United Kingdom’s obligation under article 15(2) of the Second Protocol to make domestic provision, as clause 5 is intended to do, for command and other superior responsibility; and certainly does not fulfil either the obligation contained in that section, to the extent that it is applicable to command and other superior responsibility for serious violations of the Protocol, to make such violations punishable by appropriate penalties or the jurisdictional obligations contained in article 16, to the extent that they apply to command and other superior responsibility. Note also that, for the same reasons *mutatis mutandis* as those just outlined, the omission of aiding, abetting, counselling or procuring the commission of an offence means that the Bill currently makes no provision in clause 8 for the Attorney-General’s consent to prosecutions in respect of command and other superior responsibility for serious breaches of the Protocol.

A secondary issue

9. For the purposes of the law of England & Wales and of Northern Ireland, inciting an offence under clause 3 does not constitute an ancillary offence. This is in contrast to the situation under Scots law, where inciting a person to commit an offence under clause 3 is characterised as an ancillary offence in clause 4(4)(b). This would not amount to a breach of article 15(2) of the Second Protocol, since international law recognises incitement as a form of criminal responsibility only in relation to genocide. But there is no good reason why incitement to commit an offence under clause 3 should be criminal if tried in Scotland but not if tried in England and Wales or Northern Ireland.

Clause 5

10. As mentioned, Scots law does not recognise criminal liability for aiding, abetting, counselling or procuring an offence, as specifically referred to in clause 5(1) of the Bill. It uses the equivalent but not identical concept of “being art and part” in the commission of an offence. This is not reflected in section 1 of clause 5 of the Bill, which deems command and other superior responsibility to be forms only of aiding, abetting, counselling or procuring the commission of an offence. (In contrast, section 5(4) of the

International Criminal Court (Scotland) Act states: “A person responsible under this section for an offence shall be regarded as being art and part in the commission of the offence”.) The result of the omission is that, as the Bill now stands, command and superior responsibility would not be criminal under Scots law.

11. Subsection 6 of clause 5 directs the court to take account of any relevant judgment or decision of the International Criminal Court. The analogous provisions of the International Criminal Court Act and of the International Criminal Court (Scotland) Act, namely sections 65(5) and 9(4)(b) respectively, add that account may also be taken of any other relevant international jurisprudence. It is unclear why this additional sentence has been omitted from clause 5(6). It is a useful sentence, since the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, the two major sources of this “other relevant international jurisprudence”, have generated a body of case-law on command and other superior responsibility for war crimes which would doubtless be of use to the criminal courts of the various jurisdictions of the United Kingdom.

Clause 17

12. Clause 17, subsections (1) and (4), on the definition of “unlawfully exported cultural property” for the purposes of Part 4 of the Bill, speak of territory “occupied by a party to the First or Second Protocol”. Part 4 of the Bill is referable to the United Kingdom’s obligations under Section I of the First Protocol to the 1954 Hague Convention and to article 9(1)(a) of the Second Protocol. In accordance with paragraph 9 of First Protocol,¹ however, a state may, on becoming party to the First Protocol, declare that it will not be bound by Section I of the Protocol. In practice, no state party to the Protocol has done so. But the theoretical possibility remains. As a consequence, not every state party to the First Protocol is necessarily bound by the obligations laid down in Section I, with the upshot that not every export of cultural property from territory occupied by a state party to the Protocol will be internationally unlawful.

Clause 21

13. On a point of pedantry, it should be noted that subsection (1) of clause 21 contains a grocer’s apostrophe (“Commissioner’s”, instead of “Commissioners”). See also Explanatory Memorandum, paragraph 8.

RECOMMENDATIONS

13. In the above light, the Government may wish to take the following action:

- To amend clause 4(2) of the Bill to read (emphasis added):

In the application of this Part to England and Wales, references to an offence that is ancillary to an offence under section 3 are to—

- (a) *aiding, abetting, counselling or procuring the commission of that offence,*
- (b) *inciting a person to commit that offence,*
- (c) attempting or conspiring to commit that offence, or
- (d) an offence under section 4(1) or 5(1) of the Criminal Law Act 1967 (c 58) (assisting an offender or concealing the commission of an offence) where the relevant offence mentioned there is an offence under section 3 of this Act.

- To amend clause 4(3) of the Bill to read (emphasis added):

In the application of this Part to Northern Ireland, references to an offence that is ancillary to an offence under section 3 are to—

- (a) *aiding, abetting, counselling or procuring the commission of that offence,*
- (b) *inciting a person to commit that offence,*
- (c) attempting or conspiring to commit that offence, or
- (d) an offence under section 4(1) or 5(1) of the Criminal Law Act (Northern Ireland) 1967 (c 18 (NI)) (assisting an offender or concealing the commission of an offence) where the relevant offence mentioned there is an offence under section 3 of this Act.

- To amend clause 5(1) of the Bill to read (emphasis added):

A person described in this section as responsible for an offence is to be treated as aiding, abetting, counselling or procuring the commission of the offence or *(as the case may be) as being art and part in the commission of the offence.*

¹ Although the provisions of binding international agreements are usually called “articles”, the First Protocol refers to its provisions as “paragraphs”.

- To amend clause 5(6) of the Bill to read (emphasis added):
In interpreting and applying the provisions of this section (which corresponds to article 28 of the Statute of the International Criminal Court done at Rome on 17th July 1998) a court must take account of any relevant judgment or decision of the International Criminal Court.
Account may also be taken of any other relevant international jurisprudence.
- To amend clause 17, subsections (1) and (4) to read (emphasis added):
For the purposes of this part property is “unlawfully exported cultural property” if it has, at any time, been unlawfully exported from territory that is occupied by a Party to the First Protocol *which is bound by Section I of that Protocol* or by a party to the Second Protocol.
- To correct the punctuation in clause 21(1) of the Bill and paragraph 8 of the Explanatory Memorandum.

June 2008

Witnesses: **Professor Peter Stone**, Professor of Heritage Studies, Newcastle University, and **Dr Roger O’Keefe**, Lecturer in International Law, Cambridge University, gave evidence.

Chairman: Good morning, everybody. This is a special session of the CMS Select Committee to carry out pre-legislative scrutiny of the Government’s draft Cultural Property (Armed Conflicts) Bill, and we have a number of witnesses this morning, so we are going to try and move fairly rapidly through each part of the session. Can I start off by welcoming Professor Peter Stone, Professor of Heritage Studies at Newcastle University, and Dr Roger O’Keefe, Lecturer in International Law at Cambridge University.

Q1 Philip Davies: Could you tell us what difference in practice this Bill would actually make if it were enacted?

Dr O’Keefe: Well, I think you have got to distinguish between two things. One thing is the difference that signing up to the Convention will make and the difference that the actual Bill will make. The Bill is actually targeted at quite a specific area and that is criminal offences in relation to dealing in stuff that has been taken in armed conflict and, to that extent, it will add to the 2003 Act which is the Dealing in Cultural Objects (Offences) Act, covering a whole range of more areas, and, simply, it will just enable the United Kingdom to fulfil its obligations under the 1999 Protocol. Signing up to the Convention and the Protocol, on the other hand, will not make too much of a difference to the extent that the military in this country already acts in accordance with the Convention and the Protocol since it has come in; it has just been part of its practice and all these instruments are now mentioned in the current UK manual on the laws of war. What it will do, which is only a good thing, is, I think, focus these efforts specifically through the setting up within the military reserve, I understand, of a special unit pursuant to Article 7 of the Convention, which is in charge of preparing the troops and educating them and so on and so forth, so I think it will bring all those efforts to bear and make it much easier to inculcate these rules in respect of cultural property in the Armed Forces.

Q2 Philip Davies: But is it realistic though? Is it not sort of like a Sergeant Wilson approach, you know, “Would you mind awfully not bombing this”? Is it

realistic to expect people to take any notice of these sorts of things when you are actually in that kind of situation?

Professor Stone: Yes, I think, is the answer. Firstly, the only thing I would add to Roger’s point before is that in 2003, whilst the UK adhered to the content of the Convention, actually in practice we did not have enough boots on the ground and we did not have enough training in place to actually fully embed that process, and I think that will be the change through the Bill to the Convention. Yes, we should be making a difference. By not having a Sergeant Wilson approach, you just say, “Okay, that’s fine. Bomb everything you want to”. There is an issue that says that cultural heritage is important, not only from a cultural heritage point of view and for the political uses that that cultural heritage is put to, but also from an overtly military point of view. Talking to colleagues in the American military, if they allow a mosque to be damaged on day one, attacks on their troops can go up exponentially on day two. There is also now good anecdotal evidence from both Interpol, Scotland Yard and actually in evidence now put in print by the American military that the trade in antiquities, which comes from this whole issue, is actually helping to fund the so-called insurgency in Iraq at the moment.

Q3 Philip Davies: It is all very well, but it is the practicalities. I am all for the principle. I have a World Heritage Site in my constituency and we are all going to be safe in Saltaire, but it is the practicalities that worry me and I just wonder what the sanctions are if anybody does not actually apply it. We are already at war with them, so I am not entirely sure what else you are going to do if somebody does not actually abide by these Conventions.

Dr O’Keefe: If I could mention the practicalities, I have studied this thing and actually we think of the Second World War as the archetype, but the Second World War was the exception because, first of all, the law was crucially different then: it did not have a rule which said, “If you can’t bomb this without accidentally bombing that, then you mustn’t bomb this”, but in the Second World War, it said, “Go ahead and bomb this”. It does not say that anymore.

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Secondly, we now have better technology, so in fact in the first Iraq war and in 2003 as well, the targeting was done extraordinarily well. I would also remind you that in the Second World War the United Kingdom had its own corps of Monuments, Fine Arts and Archives officers under a man called Sir Leonard Woolley who actually went with the troops all round the fronts and said, "Insofar as it's possible, we don't target this. When we are in occupation, we seal off this", and, interestingly enough, the first troops into Rome in the Second World War, in contrast to Baghdad in 2003, were American troops dedicated to sealing off the museums. In terms of sanctions, after the Second World War at least one of the Nazi High Command was convicted of war crimes and crimes against humanity and actually executed for his role in the massive plunder and destruction of cultural property in Europe. Currently, two men are behind bars in The Hague for their role in the shelling of Dubrovnik and another is on trial, so there is a range of sanctions, and in fact the Bill itself provides those sanctions. It provides for jurisdiction in the courts of this country over people, wherever they may be, who destroy certain types of cultural property. I think I would be a fool to let you think that there is no problem with enforcement, that there is no problem with sanctions. There is, but that is international law generally. Insofar as international law is capable of stopping behaviour, it can stop this, but, when you have someone dedicated to destroying something, they will and nothing will stop them.

Q4 Philip Davies: Professor Stone, you talked about Iraq and what has happened in Iraq and you were quite critical in your evidence about what may well have happened with the UK Forces. What have been the consequences of the Armed Forces failing to provide adequate protection?

Professor Stone: Well, I was critical of the fact that there was no formal process in place to embed the identification and protection of those sites into the UK military planning. It was purely because I happen to live in the same small village in Northumberland as somebody who was a serving officer in the Royal Navy at the time who was in the MoD who was talking about, within the MoD, part of his role as targeting. From a conversation in late January of 2003 around the table in the MoD, the conversation went something along the lines of, "Iraq, we are just about to invade. Isn't there a lot of archaeology there?" "Yes, I'll ask somebody at the weekend who will know about it". That is a totally unacceptable way of going about the identification and protection of cultural heritage. It needs to be formalised in a process that will take account of that whole package of issues related to cultural heritage, as I say, at both the political, military and social levels, so I was critical of the process in 2003 and, whilst I know the MoD are working towards creating a better process spurred on by the creation of this Bill and the probability, I hope, of accession to the Convention, that formal process is still not in place, so, if the UK were to, God forbid, invade

somewhere else tomorrow, there is still no formal process in place to identify, and protect, cultural heritage.

Q5 Chairman: But how does that square with Dr O'Keefe's comment that actually we have essentially been abiding by the provisions of the Hague Convention since it was signed, even if we have not ratified it, and yet we go to war in probably one of the most archaeologically rich areas across the globe, and the only reason that they take account of this is because you happened to bump into somebody in the pub in your village who was in the middle of planning the invasion? The two things do not seem to square exactly.

Professor Stone: I think rhetoric and practice sometimes do not square, and I cannot really comment further.

Q6 Chairman: But, if you had not had that conversation, you do not think anybody in the MoD would have stopped and thought, "Well, we had better take account of the archaeology before we start dropping bombs on it"?

Professor Stone: As far as I am aware, that is exactly the situation that was there in 2003.

Dr O'Keefe: In the United States, they do have a body of people who advised the military and the President on this and they drew up no-target lists and all that sort of thing, but, when it actually came to sealing off the museums on the ground, that was a different thing and that was simply the decision taken not to put enough people in there and not really to take control of the area when they occupied it.

Q7 Chairman: But you feel that the actual passage of this Act will change that position?

Professor Stone: It certainly should do because, as Roger says, there is a legal requirement, there is a criminal element that will go with the responsibility.

Q8 Mr Sanders: How does the draft Bill interrelate with the Dealing in Cultural Objects (Offences) Act 2003 and has the 2003 Act been effective in preventing illegal dealing in cultural property?

Dr O'Keefe: The 2003 Act deals with a wider range of things. It deals with the illicit taking of cultural property in peacetime as much as in wartime, so to a certain extent there is overlap between the two, but there is not interference between the two. Now, that is always very common, so, for example, some of the offences in this Act will already, if committed today, be an offence under the ICC Act 2001 and under the 1995 amendments to the Geneva Convention Act of 1957, so it is often the case that you have overlapping provisions in the criminal law. This is just more specifically geared towards the Convention, but it seems to me and, through reading the explanatory memorandum, it is fairly clear that the Department took great care to ensure that the two Acts mesh together. Now, whether the other Act has been effective, I think it is far too early to tell. I do not think it can have been ineffective, but I do not think

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I am really in a position at this stage to say whether it has been effective. You would have to speak to people who really analyse the art market and so on.

Q9 Mr Sanders: So, if there is still illegal dealing taking place, it may be nothing to do with the Act or, if dealing is not taking place, it is not to do with the Act, or you are aware that dealing is taking place, but the Act has not actually had any impact?

Dr O'Keefe: Well, I am sure the Act has had an impact. Anecdotal evidence suggests that some people have taken their dealings underground or are doing them through private sale or something like that, but I think it has certainly had some effect, although how specific I can be about it, I cannot at the moment; it is too early to tell.

Q10 Mr Sanders: Does the definition of "occupied territory" used in the Bill exclude territory where occupancy is disputed or where a power maintains that it is not a hostile army, but is merely maintaining the peace?

Dr O'Keefe: This is a question really to do with the laws of war. The definition we have here in the Convention is the accepted international definition. The International Court of Justice recently said this. It is what we call the customary definition of "occupation". Now, whether it applies in any instance is a difficult question of factual appreciation which always happens with law, so, for example, it took countless cases until the House of Lords recently said that the Human Rights Act applies in some circumstances, but not in other circumstances, in Iraq. That is something to be expected in the application of any law. In answer to your question about disputed territory, the answer would be yes. By comparison with the Geneva Convention, the fourth Geneva Convention, Israel has always disputed its *de jure* applicability to the occupied territories, but recently the International Court of Justice affirmed what the rest of the world has always said, that it does apply to these territories, and I think it would clarify that. It does not mean that there is an answer to every situation, so, for example, in peacekeeping situations, there are always going to be questions, but it is as good a definition as we can have and no national law is going to get a better one.

Q11 Mr Sanders: Where you have peacekeeping operations that have been sanctioned by the United Nations, there is little room for disagreement, but, when you have an army that is claiming to be peacekeeping, who adjudicates in that circumstance?

Dr O'Keefe: I think it is fairly clear in that circumstance that that army would be a belligerent occupant and I think it would be rare actually in law for a state to deny that, but, even if they did, as with international law, it is a decentralised system, but the states of the world generally would say that that person is an occupant and it may end up in the Security Council where a definitive statement to that effect is made.

Q12 Chairman: But there is some concern about lack of certainty, particularly amongst dealers, as to which parts of the world come under the definition of "occupied territories". Is there any objection or anything to stop the Government actually just publishing a list, saying, "These are territories which we consider to be occupied in terms of the meaning of the Act"?

Dr O'Keefe: To my knowledge, in the Act the Secretary of State can make a statement to that effect. In section 17(4), if any proceedings arise, a certificate by the Secretary of State is conclusive evidence. Now, whether that can be done in advance, I am not sure actually that the Secretary of State would want to legally prejudice questions on that, but that is something to ask, I think; I could not give you the answer.

Q13 Chairman: But you will understand that, if you are the dealer, it is rather important to you that you know in advance—

Dr O'Keefe: Sure.

Q14 Chairman:—rather than after a prosecution starts?

Dr O'Keefe: Just off the top of my head, it would make sense for someone to consult the Foreign Office lawyers and for some sort of list to be published. Now, whether in fact they do do that would be up to them, but I do not see any problem with that.

Q15 Helen Southworth: You have described the draft Bill as, by and large, extremely well drafted, but you have explained some reservations about clause 4, sorry clause 5.

Dr O'Keefe: Both, yes.

Q16 Helen Southworth: Could you describe to us what your reservations are and why you think they are important?

Dr O'Keefe: It is quite simple. Clause 4 omits reference to aiding, abetting and otherwise assisting in the commission of an act. It also omits inciting an act, but I will come back to that in a minute. In terms of aiding and assisting, Article 15(2) of the Second Protocol obliges the United Kingdom to give domestic effect to the various forms of international criminal responsibility that there are out there. The United Kingdom has accepted that Article 28 of the Statute of the International Criminal Court states these definitively and that Article talks about aiding, abetting and otherwise assisting, so, in other words, Article 4 does not give effect, as currently drafted, to one of the forms of criminal responsibility which the United Kingdom is obliged to give effect to. Now, I say that it does not give effect: it does not give effect in terms of England and Wales, but it does give effect in terms of Scotland, which goes to show that there has been some kind of drafting cock-up, I think, there. In terms of Article 5, it is the other way round. It says, "This is to be treated as X, Y, Z", but the term "X, Y, Z" is the English and Welsh term, not the Scottish term, so Article 5 does not work for Scotland, so I have set that out clearly there, but the

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bottom line is that, as currently drafted, those provisions, through what is probably just a technical oversight, do not give effect to the United Kingdom's obligations under Article 15(2) of the Second Protocol. It is a complicated, very technical drafting point.

Q17 Chairman: Regarding other drafting points, you will have seen the British Red Cross made a submission on a whole series of mostly small suggested amendments and I wonder if you have any particular observations on those and, in particular, their interesting concern around clause 12, the moving of cultural property and the ability of people moving it to put a blue shield at the top and claim that they have self-authorized to be covered by the provisions of the Act.

Dr O'Keefe: Sure, absolutely. I think most of what the British Red Cross says makes eminent sense. One or two of the points I had not considered problematic myself, but there is no harm in clarifying the issue. As for clause 12, I agree with them. I understand, just through recent discussion, that the Department itself thinks that this is an oversight as well. I think it is absolutely essential that there be authorisation less so of movable cultural property itself than the transport of cultural property for two simple reasons. The first is that the United Kingdom has specific obligations in that regard to make sure that the transport is done in a particular manner and, unless the Government can control the manner in which that transport is authorised, there is no way of knowing if the United Kingdom is in satisfaction or breach of its obligations. Far more simply, let us just say that someone puts a blue shield on a shipment of arms:

the first time that is discovered is the last time the cultural property is ever transported anywhere and next time it just gets blown away, so I think it is essential to have control.

Q18 Chairman: So clause 12 potentially creates that loophole?

Dr O'Keefe: At the moment, as drafted, clause 12, which lacks the Secretary of State's authorisation, plays up to that, yes.

Q19 Chairman: I, as an arms dealer, can go and put a blue shield on my next shipment of Kalashnikovs and be confident that it will be waved through?

Dr O'Keefe: Yes, although it is a very, very narrow area in which this takes place. This takes place during armed conflict in this territory, so it is a bit of a fantasy at the moment to expect that this is going to happen, but it could, God forbid.

Professor Stone: It does raise a slightly wider issue about the whole ability of the blue shield mechanism to actually deliver. The International Committee of the Blue Shield is very, very badly funded and very badly resourced and there is an issue in my mind certainly as to whether or not there should not be closer collaboration between the whole concept of the blue shield and the Red Cross who have an international profile in this whole area and could deliver in many more ways probably much more effectively than trying to effectively create a new international organisation which is the process at the moment. Now, that is embedded in the 1954 Convention, but I think there is certainly some area of discussion there to have.

Chairman: I think we need to move on to our next session, so can I thank you both very much.

Witness: **Brigadier Gordon Messenger DSO OBE**, Director, Joint Commitments, (Military), Ministry of Defence, gave evidence.

Chairman: Good morning. Could I welcome Brigadier Gordon Messenger from the Ministry of Defence. Brigadier Messenger served in Kosovo, Afghanistan and Iraq, so has plenty of practical experience at dealing with these questions.

Q20 Philip Davies: The UK will have waited 55 years to ratify this Convention. Is that because of reservations held by the Armed Forces?

Brigadier Messenger: Not to my knowledge. I know of no reason why the military would not be anything other than fully supportive of progress towards the Bill and ratification.

Q21 Philip Davies: So you think this Bill is a good thing from an Armed Forces point of view?

Brigadier Messenger: Yes, I think it clarifies something that we have known for a long time is part of our business and I think it is broadly welcomed.

Q22 Philip Davies: Are there any difficulties that you envisage in fulfilling the obligations in a sort of live military operation that actually it might be all well-meaning, but actually might cause practical difficulties?

Brigadier Messenger: I think there is nothing significant. As the previous speakers said, we already comply very much with the terms of the Convention and the Protocols. The difference is that, with the passing of the Bill, this becomes a matter of law, not a matter of policy and, therefore, we need essentially to fully understand the implications and review our processes accordingly, but the Department and I are content that there are sufficient safeguards in the drafting of the Bill to avoid putting a military commander, in the normal pursuit of his business, in an invidious position. The fact that he needs both knowledge and intent that this is identified as cultural property, I think, is an important safeguard that we were very keen to see in. I think there are two sort of pleas from a military commander's perspective. The first is that the clearer the definition of what constitutes cultural property and the more commonly agreed those definitions amongst the

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international community, the better. Secondly, I think it is important from a military perspective that we set the threshold at a sensible level. As was mentioned, I was commanding a commando invasion of Iraq and had on my map and in my knowledge a number of areas of cultural significance which required special attention and were on no-strike lists and the like. What, I think, would present a difficulty for a military commander is if the map were simply inundated with these. At the moment, I think it is a very manageable and accepted process to take account of and, if we set the threshold too low and had too many, I think that it could turn out to be a constraint for the military commander.

Q23 Philip Davies: And you would not worry about an enemy using this as a way of storing armaments and things like that in a way to put you in that invidious position where you either go for the target of what you need to take out or you are accused of damaging something culturally? You do not feel that that would be—

Brigadier Messenger: It can happen and indeed it has happened, but my point about there being sufficient safeguards in the Bill, an example would be, I do not know if you saw the Ross Kemp series where he went to Afghanistan and at a point in that he was with some soldiers who were being fired at and was asking the question of them, “Why aren’t you firing back?” Well, the reason was that they were being fired at from a mosque. Now, it may be, for the safety of those forces or for the pursuit of the mission, that it would be necessary, if the enemy were using that particular guise, to then go on and do damage to that mosque, but all the safeguards and all the procedures would need to be in place before we did that and a decision would need to be made as to whether it was a military imperative or not, and I think that is entirely how it should be phrased and we are content that those safeguards exist.

Q24 Chairman: You were in Kosovo. The National Council on Archives gave us an example of several record offices in Kosovo being commandeered by the military for gun batteries. In those circumstances, would you consider that the need to remove gun batteries outweighs the need to preserve records?

Brigadier Messenger: Again what I will not do and cannot do, frankly, is make those sorts of decisions here, but I know that that decision-making process happens. I know of specific targeting decisions where gun batteries were next to monuments and the decision was taken not to drop ordnance on them. I cannot make a decision on that particular case, but it is certainly something that is weighed up in the military commander’s mind.

Q25 Chairman: You are talking about decisions now in the course of a conflict, but can I just ask you to comment on what we heard from Professor Stone about the apparent lack of any real consideration prior to the invasion of Iraq other than his conversation with the naval commander in his village?

Brigadier Messenger: Yes. I think the first two points I would make up-front are, firstly, that there have been no examples given to me or to anyone in the Ministry of Defence where the UK military contravened the terms and conditions of the Convention and the Protocol. The second point I would make, which is the one I have already made, is that, as a commander on the ground at that time, I was aware of those areas of cultural significance that would have been in my area of operation, and on the previous speakers’ point, although I commend the work that certainly took place as a result of that conversation in the pub in Northumberland, I would contend that it was a little less ad hoc than that, but it is still, I think, something that we could improve upon and let me just develop that a little. In constructing target lists, and by target lists I include no-strike lists, ie, those things that we would not hit in the normal conduct of a campaign, the first thing we do is consult the MIDB, which is often thought to be the military intelligence database, but it is actually a modernised, integrated database, which is international and is actually owned by the US, but it is something to which the international community can contribute. In that are all issues of cultural significance across the board in a large number of countries, not just those that may be of military significance, and other things as well, infrastructure, airfields and the like, and that is the start point for identifying target lists, which, as I said, includes no-strike lists, and that happened in advance of the 2003 invasion of Iraq. Where I think we could strengthen our procedures, and intend to, and it goes back to the point that Peter made, is the next level of fidelity and, from a UK perspective, whether we are confident that everything that we would see that is on that list is sufficiently rigorous. We have heard how ad hoc that bit of the process was and I think that could be strengthened. We are meeting across government with colleagues to look at how that might happen. I do not think it is singularly an MoD issue, I think it is a cross-government issue, and this is not simply a military campaign, it is a national decision to engage in a country in the way that we did in 2003, but I hope that those procedures will make a little bit more formal the issue of what happens beyond the MIDB in the future.

Q26 Helen Southworth: Are you confident that you have got the capacity to follow through that process when there are a lot of demands on resources?

Brigadier Messenger: By “follow through the process”, do you mean the identification process?

Q27 Helen Southworth: Yes.

Brigadier Messenger: As I said, I do not think this is singularly a Ministry of Defence issue. I think we would lean upon both cross-government colleagues and actually cultural experts around the country, so, with that and with the additional focus that the Bill will bring, I am confident that that can be done reasonably simply.

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Q28 Helen Southworth: It is rather a side-step, but what you are describing sounds to be something that would be a significant opportunity for archaeologists if they had a two-way access to some parts of that in terms of the information that they might be able to get about ground workings from satellite pictures and that sort of thing, whether there is an inducement here to academic institutions to participate in the process because they might be able to get some data back themselves.

Brigadier Messenger: There is quite a lot on open source now which I think they would probably use anyway and, if capabilities were beyond open source, I do not think that is something that we would want to share with the broader community.

Q29 Helen Southworth: In terms of on the ground, do you have the technical capacity for whoever is the commander on the ground to be able to identify that they are in a specific site or a specific area?

Brigadier Messenger: I think there are two aspects to this. Firstly, there is the preparation and the identification in advance, and I think that is something that we have talked about and, as I said, it will be something that would be apparent to all in an area where items or locations of cultural significance are. I think there is an issue of where you encounter cultural property or issues of cultural significance that have not been included in your preparatory work and we are looking at how we might develop our capabilities in that. By dint of the fact that this Bill will be passed, I think that will heighten the awareness of the broader military community, which I think is an important thing, but we are looking to develop and strengthen that by producing a cadre of reservists, cultural experts, and we are reasonably well-advanced in that regard. These will be people who have a cultural interest in day-to-day life or may be involved professionally in the cultural industry, if that is the right word, and the plan is to sort of bring them into the reserves and use them as a cadre so that military commanders on the ground have access to that sort of level of expertise.

Q30 Helen Southworth: What sort of tools do you currently have, or are you going to need, in order to be able to identify? For example, will your GPS systems be able to access accurate data about where things are?

Brigadier Messenger: Yes. The things where we know where they are and we have accurate information, there is no difficulty with that at all, and our sort of geolocation tools are, as you know, pretty advanced. The question is where a commander or a military individual encounters these things without having preparatory knowledge and how he might react to that, and we hope to develop awareness of that, but that will be largely a case of interpretation on the ground.

Q31 Helen Southworth: What level of information will be available to them? Will they, for example, be able to identify the difference on a no-strike list between a hospital and a mosque?

Brigadier Messenger: Yes, and you may have seen them, but we have internationally recognised markings which we would have on our maps which would delineate between the various issues on the no-strike list, but yes, that is very easily achievable.

Q32 Alan Keen: It is good to see you here in uniform. My very undistinguished military service, most of which took place within three-quarters of a mile from here—

Brigadier Messenger: So is mine at the moment, which is not great!

Q33 Alan Keen: Mine ended 45 years ago and I think some of the infantry weapons that I was trained with would almost qualify as cultural artefacts! You mentioned having some people with a special interest in cultural artefacts. What sort of training is given to other people?

Brigadier Messenger: Well, as part of our pre-deployment training, everyone is made aware in quite a robust fashion of the details of the law of armed conflict. They have to understand what their responsibilities as an individual are in an armed conflict and their responsibility to cultural property is included in that training and everyone who deploys, be they civilians or military, go through that training. What that does not tell you is the whole story though. Although that responsibility is covered in a sort of lecture form with a video and the like, actually it goes deeper than that, and those soldiers that will find themselves out on the ground undertake quite rigorous training in scenario-based field exercises and in that the issue of cultural property will figure, so it is more a sort of pervasive thing. To my knowledge, I doubt, frankly, that there is a specific scenario about specifically cultural property, but there will be scenarios for trade, challenges placed in front of soldiers under training whereby the issue of cultural property will be a factor in their decision-making, so I could put my hand on my heart and say that everyone who deploys to theatre is aware of his or her responsibility to cultural property within the law of armed conflict.

Q34 Alan Keen: If this draft Bill becomes law, is there anything in addition to that required?

Brigadier Messenger: Because it is a matter of law and not policy, I think we do need to deepen it and review that training to ensure that we are being rigorous enough. I should have mentioned that we also cover it at length on the targeting courses that we do and for obvious reasons. I think we could do a little bit more in heightening the awareness of our commanders and we are looking at that, and indeed at the same meeting that I mentioned previously with cross-governmental colleagues we are looking at how we might best take forward our training, but I would reiterate that it is a review rather than an alteration and a sort of deepening rather than a change in direction.

Q35 Alan Keen: So it will not really require much greater resources?

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Brigadier Messenger: And, therefore, there will be no resource implication.

Q36 Alan Keen: Do you liaise with other forces from other nations on this aspect of the problems that we have to face?

Brigadier Messenger: Not so far, no. I think we have a lot in common with other nations in the way that we view the law of armed conflict and the significance of cultural property within that. I think the point that was made previously is an important point, that the protection of cultural property is militarily sensible as well as culturally sensible because of the positive effects or the non-negative effects that it has on consent, and I think that is an important point and that is something that will be shared by all our international allies. In terms of the specifics of taking this forward, no liaison as yet.

Q37 Alan Keen: In a way, it is good publicity for the military forces really, the fact that we do care for cultural artefacts in these lands that we have to be involved in. Is any of this training and awareness put into the public domain so that the public can actually see that this is something which is given a lot of care?

Brigadier Messenger: Yes, the training that people receive on the law of armed conflict is unclassified and the law of armed conflict, and the aide memoire that goes to commanders, which includes the section on cultural property, is open source and can be accessed via the Internet.

Q38 Chairman: There are two other particular provisions I would like to raise. First, there is a requirement that, if a territory is under occupation and if there are refugees seeking to flee who want to take with them their possessions, which they legally own, potentially to sell, then they need to have some kind of certification to show that they have done so

in a legal manner; and perhaps you, as the commander of forces, might have that responsibility to put in place a mechanism to allow authorisation or certification. Is that something which you would consider to be perfectly reasonable to take on?

Brigadier Messenger: I would not consider that reasonable, no. We are talking here about the export licence equivalent, I would guess. If we were in a situation where we were operating in occupied territory, there would be a civilian administration and that civilian administration may well be imposed by the international community, but there would be a civilian administration, and I would contend that it would be the business of the civilian administration to deal with export licences and the like. I would also say that this is probably most likely to happen at the early stages of a conflict when the military and civilian resources are at a premium and it would not be for me to spell where this sat in the priorities of any incoming civilian administration, but I suspect it would not be particularly high.

Q39 Chairman: Indeed. The other point is that you might have heard Dr O'Keefe's concern about the discrepancy between the provisions in the International Criminal Court Act and in this Bill about whether or not you, as a commander in the field, have effective authority. There seems to be some discrepancy as to the extent to which in the International Criminal Court Act you are responsible, as the overall commander, for actions that occur and are committed by forces under your control and the provisions in this Bill. Is that something which has been flagged up to you?

Brigadier Messenger: Not to me, and I am not clear whether the lawyers in the Ministry of Defence have that, but, if that is something that would interest you, I would be quite happy to ask the lawyers to look at that and write back in due course.

Chairman: That would be helpful. Thank you very much.

Memorandum submitted by the British Art Market Federation (BAMF)

The British Art Market Federation (BAMF) was formed in 1996 to represent the UK's art and antiques market. Its members are the British Antique Dealers' Association; The Society of London Art Dealers; LAPADA, The Association of Art and Antique Dealers; The Antiquity Dealers' Association; The Antiquarian Booksellers' Association; The Society of Fine Art Auctioneers and Valuers; The Royal Institution of Chartered Surveyors; Christie's; Sotheby's; and Bonhams.

The British art market is comprised altogether of 8,900 businesses, providing employment for 48,500. The UK accounts for 60% by value of the EU art market and has a global market share of 27%. In 2006, it achieved total sales of about £8 billion. (Source: Dr Clare McAndrew, *The International Art Market: A Survey of Europe in a Global Context*, 2008, published by The European Fine Art Foundation (TEFAF).)

The British art market is particularly active in cross-border trade and in this respect is significantly the largest global competitor to the US. In 2006, antiques and fine art to the value of £2,423.1 million were imported to the UK from outside the European Union. Exports totalled £3,092.8 million. (Source: UK overseas trade statistics, published in *The Antiques Trade Gazette*, 2007)

BAMF is grateful to have the opportunity to present its views on the Draft Cultural Property (Armed Conflicts) Bill to the House of Commons Culture, Media and Sports Select Committee.

BAMF is committed to supporting the legitimate and open art market and to defending the UK's position in the competitive global marketplace.

BAMF supports the aims of the Hague Convention and of the present draft legislation, but is concerned that the legislation should be clear and unambiguous in order to remove uncertainties that could damage the legitimate market by deterring *bona fide* owners from sending works of art for sale on the British art market.

The draft legislation shares with the Convention imprecise elements that will make it extremely difficult to perform the due diligence that the new legislation requires. A new criminal offence is being introduced which is uncertain in its scope and application. As currently drafted, there appears to be no requirement to demonstrate dishonesty; this gives rise to considerable concern. It would mean that, despite honest attempts at due diligence in this very difficult and ill-defined area, a British citizen could be guilty of a criminal offence. There is a need for greater clarity and definition if dealers and auctioneers are to make safe judgements as to whether or not an object may be illicit within the meaning of the law.

The draft legislation makes it an offence to deal in unlawfully exported cultural property, knowing or having reason to suspect that it has been unlawfully exported from territory that is occupied by a party to the First or Second Protocol. Such export would be deemed unlawful if it is in contradiction of the laws of the territory from which the property is exported or is in contravention of any rule of international law.

This affects any property, as described in Article 1(a) that is outside the UK when the legislation comes into force.

DUE DILIGENCE

Auction houses and dealers routinely conduct due diligence before handling an object, in order to determine to the best of their ability whether the owner has good title and, in the case of items being brought here from overseas, whether it has been exported legitimately. Such inquiries underpin the functioning of the legitimate art market.

The draft legislation introduces the following considerations when conducting due diligence:

1. Could the object have been in a territory that has been occupied at any time since 1954?
2. If so, was it exported during the time of occupation and was it exported legitimately?
3. Does the art object fall within the definition of cultural property contained in Article 1(a) of the Convention?

The principal areas of difficulty for the art market are therefore:

- How to know for certain which territories are defined as being, or having been, occupied and their dates of occupation.
- What were the export laws of the occupied territories at the time of occupation? How were they administered by the occupying power? What evidence is there of legitimate export at that time?
- Does the cultural object in question fall under the definition in Article 1(a)?

IDENTIFICATION OF OCCUPIED TERRITORIES

The legislation affects any object fulfilling the definition in Article 1(a) of the Convention, that may have been exported from any territory defined as being occupied since 1954. In order to carry out the due diligence needed to research the background history of an object and its possible connection with an occupied territory, it is first necessary to know precisely which territories are defined as being or having been occupied.

The legislation seeks to address this (Section 17(4)) by leaving it to the Secretary of State to certify whether or not a territory was occupied, once proceedings had been commenced. But this only provides an answer when an alleged offence has already taken place. This does not eliminate the uncertainty caused by the lack of information about which territories are or were occupied.

The clear remedy to this difficulty would be the publication of a definitive list of territories considered to have been occupied since 1954, with the dates of their occupation and the details of the occupying power. As the Secretary of State would presumably need such information in order to make a certification under Section 17(4), there seems to be no reason why it could not be made generally available when the legislation is introduced, with a requirement that the information is kept up to date.

PROOF OF LEGITIMATE EXPORT

Although the principal focus of the Hague Convention is on looting, damage and theft, refugees could well leave occupied territories with their own possessions. The Hague Convention of 1907 acknowledged the ownership of private property and mentioned the need to respect it (Article 46). But a refugee can only be confident of being able to sell his property in the legitimate market if he can demonstrate that he has complied with the export regulations applying at the time of occupation.

The Second Protocol to the Convention introduced the concept that an object could be deemed to be illicit solely because it was illegally exported. This creates a greater responsibility on occupying powers to ensure that refugees leaving with their own possessions are not deprived of their enjoyment of their property by being denied adequate means of demonstrating that they had exported it legitimately.

The Hague Convention and its protocols predate the European Convention on Human Rights, which in Article 1, Protocol 1, protects the property rights of an individual. We are concerned that the imprecision of some of the definitions in the Convention, which are shared by the Draft Cultural Property (Armed Conflicts) Bill, provide inadequate protection for a refugee leaving an occupied territory with his own possessions. Although the Explanatory Notes consider the draft legislation in the light of the ECHR, it is difficult to see how a refugee could, in practice, ensure that he continued to have peaceful enjoyment (ie unencumbered title) of his property once he had left the occupied territory.

At the time of leaving he would need to be sure:

- (i) Whether or not the object he was taking with him conformed with the definition of protected property as set out in Article 1(a) of the Convention (and in Part 1, Section 2 of the draft law). The drafting of Article 1(a) is imprecise and therefore liable to unpredictable interpretation. It would appear to focus only on objects of very significant international importance, but clarification is needed as to whether the term “of great importance to the cultural heritage of every people” relates to the whole of Article 1(a).
- (ii) What the export regulations were at the time of departure in the territory from which he was fleeing.
- (iii) Whether the export might also be in contravention of “any rule of international law” (Part 4, Section 17(2)(b)) and what is meant by that term.
- (iv) What proof he needed to obtain, and from whom, in order to establish legitimate export.

No attempt is made in the draft legislation to address these matters by introducing more precise definitions or by setting out the obligations of an occupying power to provide the means for a refugee to be able to establish conformity with the Convention and the draft law. With regard to the protection of refugees leaving with their own property, we would therefore question whether the law, as it is currently drafted, is consistent with Protocol 1 of the ECHR.

We would urge that British armed forces should have standard procedures in place to oversee applications to export works of art during periods of British occupation and that other signatories to the Convention and its Protocols should be encouraged to do likewise.

The problem of determining unencumbered title is much greater in respect of objects that may have been taken from occupied territories decades ago, where proof of legitimate export may be hard to establish. In these circumstances, it will be essential at least to have details of the export laws prevailing at the time and how the occupying power managed them.

DEFINITION OF CULTURAL PROPERTY

The definition of cultural property in Article 1(a) of the Convention is open to differing interpretations (see comments above).

March 2008

Supplementary memorandum submitted by the British Art Market Foundation (BAMF)

In response to the inquiry being conducted by the Select Committee for Culture, Media and Sport, our Federation submitted written comments on the above draft legislation for the Committee’s consideration. Since presenting our comments, we have been in discussion with DCMS officials. Yesterday we had a meeting with them at which the concerns expressed in our submission were discussed in detail.

While we concluded that officials fully understood the points we are making, we still remain very concerned about the key issues set out in our submission.

The first involves the practical steps needed in connection with conducting due diligence (ie background research) on an object. It is often the case that detailed due diligence can only be carried out after taking possession of an object. As things stand, an auctioneer or dealer would be guilty of a criminal offence under the Bill if, subsequent to taking possession of an object, their own research suggested that the object was, or may have been, removed illegally from an occupied territory since 1954. In the Dealing in Cultural Objects (Offences) Act 2003 there is a requirement for the prosecution to prove dishonesty in the handling of an object. As a result of this, if an auctioneer or a dealer takes possession of an object in good faith but subsequently discovers, as a result of his searches, that it is tainted, he can hand the object over to the appropriate authorities without fear of prosecution. Unlike the Dealing in Cultural Objects (Offences) Act,

the draft Bill does not include a requirement to prove dishonesty. Therefore the auctioneer or dealer would technically be committing a criminal offence, having already accepted an object for potential sale, as soon as his due diligence led him to have a suspicion, even though, at the time he accepted it, he had no reason to believe that the object was tainted and could not in fact have discovered this without having the object in his possession to carry out his research. We do not see why a dishonesty element should not be included in this Bill for the reasons set out above. We hope that the Select Committee will be sympathetic to this.

Secondly, we continue to believe that it is essential that a list of occupied territories and their dates of occupation is published by the Government prior to enactment and that the list is kept up to date. If our members are to conduct due diligence properly, under threat of criminal prosecution if they get it wrong, they must surely be given these basic facts. If they are uncertain about the due diligence to be undertaken, legitimate business will be driven from the UK. The Bill already provides for the Secretary of State to be able to issue a certificate, in the context of proceedings, to confirm whether a territory is occupied so there is no reason why that confirmation could not be given in advance by way of a list. I hope that the Committee will support what we believe is a thoroughly reasonable request.

Finally, we remain concerned as to how a refugee leaving an occupied territory with his own possessions can in practice avoid tainting his possessions and therefore making them difficult to sell on the legitimate art market. We discussed this with DCMS officials and we recognise that it is a difficult problem to solve in practice. But, nonetheless, it remains a matter of concern that a genuine refugee might be deprived of the opportunity of getting a fair market price for his possessions because there was no machinery in place for him to prove legitimate export from a territory under occupation. At present the Bill has no scope for the legitimisation of such objects.

May 2007

Witnesses: Mr Anthony Browne, Chairman, and Mr Tom Christopherson, Member of the Executive Board, British Art Market Federation, gave evidence.

Q40 Chairman: Can I welcome to this part of the session Anthony Browne, the Chairman of the British Art Market Federation, and Tom Christopherson, a member of the Executive Board. You, I think, like most of the people who have given evidence to us, are generally supportive of the provisions of the Bill, but we are aware that you have two, perhaps three, particular areas of concern, so perhaps we can concentrate on those. What reasons have been given so far by the Government for not having provided this definitive list of occupied territories and how important do you think it is in order to try and provide some certainty to your members that they do actually have such a list?

Mr Browne: Well, I do not quite understand why there cannot be a list in fact and I do not think we have been given a satisfactory reason, and I think that it is very important that there is as much precision as possible because, if you are introducing a criminal offence to handle objects which may have been taken from an occupied territory since 1954, by the way, you really do need to know what to look for and, therefore, you need to know what territories are occupied or regarded as being occupied and between which dates crucially as well because an object could perfectly legitimately have left the same territory another time. Perhaps I could just draw attention in that I think the sort of mist of uncertainty is quite well summed up in the impact assessment on page 88 which says that the number of occupied territories around the world is currently very small and the only territories which the UK would now regard as being unequivocally occupied are the West Bank, east Jerusalem and the Golan Heights, and the word “unequivocally” really implies that maybe there are some which were equivocally occupied and I think

that there is a need for more precision, particularly if people are facing potential criminal prosecutions.

Q41 Chairman: So, for instance, the events around the Balkans, that might well be an example where there is some uncertainty about what was occupied and at what time?

Mr Browne: Precisely, and the question is when occupation begins and conflict, as it were, ends because our point, which I may want to come to later, about a refugee leaving with his own property, if he is doing it when a conflict is taking place before the occupation technically begins, then it would be covered by one set of circumstances and clearly this law would apply when the occupation has actually started, and I think that is very important to know when it begins and when it ends, particularly going back, as I say, to the 1950s and 1960s.

Q42 Chairman: The Government have essentially said, “Well, you’re under a duty to carry out due diligence in any case, so this is all part of that and it is not really any greater a burden than you have at present”.

Mr Browne: Well, it is actually a greater burden because you do need to have the facts. The Government say what is said in section 17(3) which is that the definition is in Hague IV, but somebody would have to have an encyclopaedic knowledge of post-war history and military history to actually match, firstly, this definition to any particular territory that might have been occupied by a party to the Convention.

Q43 Chairman: And you have put this argument to the Government?

10 June 2008 Mr Anthony Browne and Mr Tom Christopherson

Mr Browne: Yes.

Q44 Chairman: But it has fallen on stony ground?

Mr Browne: Well, not necessarily stony ground. The officials with whom we are dealing are, I think, sympathetic to our concerns. I think it just needs to be perhaps given a push, if possible.

Q45 Janet Anderson: You say in your opening that you are particularly concerned about cultural property being traded and the ability to check whether it was obtained illicitly. What reasons have the Government given for not including in the draft Bill a requirement to prove dishonesty?

Mr Browne: Well, the reason we were told is that it is not consistent with the Conventions, but we do not quite see that, and reference was made earlier in this hearing to the Dealing in Cultural Objects (Offences) Act in which I was quite closely involved with Richard Allan who was the sponsor to the Bill. The inclusion of dishonesty there was very specific because the process of due diligence is such that you first research an object, and, during the course of that research, you may be led to believe, or to have a suspicion, that an object may have been illicitly removed. At that point, you should be able to hand it over to the authorities without fear of criminal prosecution and that is precisely why the dishonesty clause was included in the Dealing in Cultural Objects (Offences) Act. So, provided you did not act dishonestly, the object was handed over and then handed back to wherever it was supposed to have come from.

Q46 Janet Anderson: Do you think there is any way in which the Bill could be amended which would help make it easier for refugees to prove the legal export of cultural property which they possess and which they may want to offer for sale in the United Kingdom?

Mr Browne: Well, the Brigadier referred to civilian administration. That is fine, as long as it all works. The problem that this Convention has is that I think everybody was thinking in terms, when they wrote the Convention, of things that are looted, plundered and stolen and I think not enough attention was given to the fact that a perfectly bona fide person may actually leave the territory with his own property. It is very important that he is not deprived of the opportunity to sell it perfectly legitimately by the fact that it is somehow tainted because he is unable to provide proof of legal export. Now, I do not necessarily offer a solution to this because I think it is a serious problem, but it is one which we would flag up as being something which would best be avoided, if possible.

Q47 Janet Anderson: The Brigadier made it plain that he did not think this was a matter for the military, it was for the civilian authorities.

Mr Browne: Exactly.

Q48 Janet Anderson: But do you think, nevertheless, there is a need to just make sure that the military are aware of this as an issue in times of conflict?

Mr Browne: I would hope so, yes, but of course the problem is also that we are not just talking about territories that are occupied by our own military who may have quite different standards from some other occupying forces, so this is likely to be a greater problem going further back in time, I would suspect. I would just add that it is to some extent aggravated by the point that the Brigadier made which is that there really is not a very precise definition of what is actually meant by “cultural property”. It seems to have quite a high level of importance in Article 1(a), but there is no precision in this and, when the Government acceded to the UNESCO Convention of 1970, the Government made the reservation that it would take the definition of “cultural property” as being in the annex to the European Union Directive, which we all are familiar with, which deals with restitution between Member States. We are told that the Government do not make reservations to humanitarian conventions and, therefore, we cannot do that in this instance, although, I have to say, I do not understand what the definition of a “humanitarian convention” is when this is completely involved with inanimate objects rather than human beings, but it is a shame that there cannot be a more precise definition because it would again help us enormously if there were a more precise definition.

Q49 Chairman: You have talked about your experience with the Dealing in Cultural Objects (Offences) Act. How effective has that piece of legislation been, would you say?

Mr Browne: Well, I have no reason to believe it has been ineffective. It was always, quite rightly, framed to target criminals, so it is always very hard to know the extent to which it has been effective in deterring people who would otherwise act in a criminal manner, but we felt that it is clearly good law which plugged a gap in the existing offence of handling effectively.

Q50 Chairman: How great, in your estimation, is the sort of black market in goods and is this legislation simply going to drive more objects into that black market?

Mr Browne: Well, the answer to your first question is that I have absolutely no idea how large the black market is, but the answer to the second question is that the greater the lack of clarity in legislation, the more danger there is that the market gets pushed underground, which is why we want to see, because we want the market not to be underground, as great a precision and clarity in the legislation for that reason.

Mr Christopherson: I think there is another point on that and that is that the way one encourages the proper sale of these objects is to encourage due diligence into their background and to ensure that people undertaking that due diligence have the opportunity to do the right thing. This goes back to the point that was raised earlier about dishonesty. The way the draft is currently formulated, because the definition of dealing in these goods is so broad

10 June 2008 Mr Anthony Browne and Mr Tom Christopherson

and it is much more broad than the previous Act, the risk is that actually somebody could take an item in, start researching it and, during the course of their research, develop a suitable level of suspicion for them to research further and already have created the offence under the draft Bill. I think that is a material problem with the draft as it is now, that it does not encourage people to take the objects in and do detailed research and due diligence into them, and due diligence in this area is jolly difficult.

Q51 Chairman: And that goes back to the dishonesty point.

Mr Christopherson: Well, it does. If you have the dishonesty in the process, then there would be the encouragement to do the due diligence. You then do the due diligence and when you have found out what you can, you make an honest decision as to should it be handed in or is it all right.

Q52 Chairman: And is that what is happening currently under the terms of the Cultural Objects (Offences) Act?

Mr Christopherson: Yes, and it is also what is happening under the Codes that are referred to in the assessment pack.

Q53 Chairman: And how regularly would you say an auction house or dealer carries out due diligence and says, "Hold on, I think this looks a bit dodgy. I'm going to hand it in"?

Mr Christopherson: It is very difficult to quantify it, but it does happen.

Q54 Chairman: It does happen?

Mr Christopherson: Yes.

Mr Browne: It sometimes of course happens with things that are stolen.

Mr Christopherson: Due diligence covers an enormous range of issues, but, yes, it happens.

Q55 Chairman: You raised a potential conflict between the Human Rights Act and the European Convention. Have you actually taken legal advice and do you think that is a serious problem?

Mr Browne: Well, we have not taken legal advice on that, Chairman, as it is not so much a problem for the art trade as for the legitimate owner of property, which he has not been able to prove he has legitimately exported from an occupied territory. That is where the problem lies, that, because he has taken out his own objects which may or may not fall under the definition of "cultural property" under Article 1(a), if he cannot show that he has got an export licence, if it was required and if indeed there were authorities able to issue an export licence and so on, if he cannot show that, then he cannot actually remove the sort of potential taint from the object and that means that it is actually very hard for him to sell it in the legitimate market because, as soon as we start doing due diligence, he has no way of demonstrating this. I should say I am not a lawyer, but it would seem to conflict with the Human Rights Act and the free enjoyment of property.

Q56 Chairman: I entirely see the desirability of it, but it just strikes me that, if somebody is so concerned about their own safety that they feel it necessary to flee the country, taking their possessions with them, to expect the country to have in place a sort of functioning, organised system of export licensing seems a little unrealistic.

Mr Browne: Well, I agree. I think that is exactly the problem, but this is one of the real problems of the Convention, that an object is tainted, not because it has been stolen, plundered or whatever, but just because it has been illicitly exported and that is one of the chief difficulties about this.

Mr Christopherson: The problem is distinguishing between the smuggler and the refugee because their actual action may be the same and I do not have a solution for that.

Chairman: In which case, thank you very much.

Further supplementary memorandum submitted by the British Art Market Federation (BAMF)

During the hearing on 10 June, my colleague Tom Christopherson and I were asked about the concern that was raised in our written submission that a new criminal offence was being created in the draft Bill, which (unlike the Dealing in Cultural Objects (Offences) Act) would not require a finding of dishonesty. This, we considered, could result in the criminalisation of honest behaviour.

Before the hearing, we had raised this concern at a meeting with DCMS officials. We were told that, as "dishonesty" was not a requirement of the Convention and its protocols, it would be difficult to introduce it in the dealing offence created in the draft Bill.

We did not have the opportunity to address this issue in detail with the Select Committee, and the purpose of this letter is to put forward a solution for you to consider.

We suggest that the present problem lies with the direct linkage between the section 18 dealing offence and the section 19 forfeiture provisions.

The Regulatory Impact Assessment states (page 88) that the draft Bill will "*provide that cultural property that has been unlawfully exported from occupied territory is liable to forfeiture whether or not an offence has been committed*". This would appear to be the correct approach, but it appears to be at odds with the requirement in section 19 of the draft Bill that the court may order forfeiture of property for which the section 18 offence had been committed. Linking the forfeiture to the section 18 offence creates the difficulty in providing for dishonesty for the offence and thereby linking dishonesty to the order for forfeiture.

This is not required by the Convention and Protocols, which simply require the state to return property unlawfully exported from territories occupied by Convention parties. Indeed the second Protocol suggests (for example) in relation to the offences prescribed in Article 15.1 of the Second Protocol, that measures adopted by the Parties should “*comply with the general principle of law and international law* [. . .] (Article 15.2). In the case of the UK this would not encompass the criminalisation of an honest act, when existing and partially overlapping provisions currently require dishonesty in the commission of an offence of this nature.

A dealing offence, without the requirement of dishonesty, therefore appears to go beyond the requirements of the Convention and the Protocols. The answer, we suggest, is to make the section 18 dealing offence subject to dishonesty, while creating a right of seizure through forfeiture by the Court under section 19 in respect of items which have been unlawfully exported within the terms of section 17, not items for which the section 18 offence had been committed. This would apply the intent of the Regulatory Impact Assessment quoted above and would enable the State to meet its obligations under the Convention, without the unintended criminalisation of individuals’ honest acts.

We explained the importance of this at the hearing: Objects usually have to be taken in for detailed due diligence to be carried out—either on consignment to a dealer or an auction house. As drafted, if the item was of a generic type which would suggest the possibility of origin from a part of the world that had been, or may have been, an occupied territory at some time in the past, then this alone might constitute “suspicion”. Accordingly, the section 18 dealing offence could be committed at the point of consignment, and investigation into that preliminary suspicion would not cure or prevent commission of the offence.

The unintended effect of the current draft Bill would therefore be to deter dealers and auctioneers from taking in any objects which might, by their generic nature, potentially fall within the section 17 prohibition, whether or not the objects could be lawfully owned and traded—at the point of consignment they would not know and could not take the risk. This would have a significant impact on the legitimate antiques trade in the UK, without any benefit to the UK or to the relevant Occupied Territories, who would miss out on the advantages of due diligence and research by the reputable and expert UK art market. They therefore might actually miss the potential for restitution to which such research might give rise.

We would therefore urge that the section 19 seizure provision should be tied to the status of the object under section 17, to reflect the requirements of the Convention and as predicated in the Regulatory Impact Assessment, and to provide that section 18 becomes an offence of dishonesty in line with current law. This would enable the Government to fulfil its seizure obligations under the Convention and Protocols, and would provide a material disincentive to any persons possessing or dealing in items without conducting due diligence to ensure that they were not at risk of forfeiture. By encouraging honest due diligence and research, the State would enhance its obligations to identify and return of objects unlawfully exported from territories occupied by parties to the Convention and Protocols.

July 2008

Memorandum submitted by English Heritage

INTRODUCTION

1. English Heritage welcomes the decision of the Culture, Media and Sport (CMS) Committee to examine two aspects in relation to the draft bill namely the overall aims of the Bill and whether the Bill is structured and drafted in a way which enables those aims to be met.

2. English Heritage is the Government’s statutory adviser on all matters relating to the historic environment in England. We are a non-departmental public body established under the National Heritage Act 1983 to help protect England’s historic environment and promote awareness, understanding and enjoyment of it. We are responsible for over 400 properties throughout England which we open to the public and we have a growing membership of 667,000 in 2007–08.

3. The work of English Heritage is overseen by a Chairman and a board of up to 16 Commissioners selected by the Government for the breadth of their national and regional expertise. The Commission is, in turn, advised by 13 expert advisory committees and panels. The draft Bill has been considered by our English Heritage Advisory Committee.

OVERVIEW

4. English Heritage strongly welcomes the introduction of the draft Bill as this will enable the UK to ratify the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its 1954 and 1999 Protocols. The Convention and Protocols form the principal international instrument of humanitarian law devoted to the protection of cultural property in the event of armed conflict. They provide for a system of general, special and enhanced protection for cultural property during international and domestic armed conflict and provides protection for “moveable and immoveable property of great importance to the cultural heritage of every people such as monuments of architecture art or history,

whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other object of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or reproductions of the property defined above”.

GENERAL POINTS

5. We are pleased to see that the draft bill has taken on board many of the comments that English Heritage and others made at consultation stage. We welcome the fact that DCMS and MoD have worked closely and effectively with us towards ratification since 2005. We have also worked in tandem with DCMS to assist UNESCO and the other State Parties to prepare guidelines for the implementation of the Second protocol. Completion of these international guidelines is likely to be in 2009–10 with the first sites likely to be submitted for enhanced protection by State Parties in 2010–2011 at the earliest.

6. English Heritage strongly welcomes the fact that the draft bill will:

- introduce offences designed to protect cultural property including the creation of a new criminal offence of attacking cultural property or its immediate surroundings, except in situations of imperative military necessity, with alleged offenders tried in the UK rather than in The Hague. This covers both the UK armed forces and UK security organisations;
- give legal protection to the Blue Shield emblem;
- make it illegal to deal in cultural property illegally imported from occupied territory and allow such property to be seized and returned to the relevant competent national authority after the cessation of hostilities. This complements and strengthens the 2003 Dealing in Cultural Objects (offences) Act 2003; and
- introduce immunity from seizure for cultural property in the UK which is being transported for safe keeping during a conflict between two or more states.

7. However English Heritage is concerned that the draft bill does not identify:

- an indicative timetable/commitment to resourcing for identifying cultural property selected for general or enhanced protection (enhanced protection is where the State Party agrees not to use the cultural property for military purposes in perpetuity thus ensuring that the “imperative military necessity” clause cannot be invoked);
- an indicative process and timetable for schemes to promote civil society awareness of disaster planning or emergency planning. Whilst not strictly a requirement under the Second Protocol this provides a good opportunity to make linkages with Civil Resilience objectives and to demonstrate joined up government as well as the opportunity to raise the profile of the Convention to all. This could build on the work of the National Recovery Working Group which sets out information on resilience and recovery on its website (<http://www.ukresilience.info/response.aspx>). Whilst small scale seed core funding for projects such as the preparation of clear, simple guidance on how to protect houses and treasured possessions from flooding would help enormously, far more useful in the long term would be establishment of a central body linking up to and providing information on the various projects;
- the possibility of enhanced training schemes for the military building on that already in place to better equip troops on overseas defence or humanitarian missions; and
- the need for increased capacity training schemes for the crown prosecution service, police and others who might be involved in dealing with seizure of looted objects.

8. We consider that the above would help strengthen public awareness of the Convention and its effective implementation both in the UK and overseas. We look forward to working with the Government and the Select Committee on the Bill and implementation strategy.

March 2008

Memorandum submitted by the United Kingdom National Commission for UNESCO (UKNC)

1. The UK National Commission for UNESCO (UKNC) is pleased to respond to the Committee’s inquiry on the Draft Cultural Property (Armed Conflicts) Bill (the “Bill”), specifically on:

- (i) the overall aim of the draft Bill; and
- (ii) whether the Bill is structured and drafted in a way which enables those aims to be met.

2. The UKNC is an independent civil society organisation set up by HM Government in 2004 as the focal point in the UK for policies relating to UNESCO (United Nations Educational, Scientific and Cultural Organization). UKNC brings together a network of over 200 experts in education, culture, natural and

social sciences and communication and information across the UK. By working closely in partnership with HM Government, the UKNC enables it to engage a wide range of UK organisations and specialist institutions in the above fields.

3. UKNC's Culture Committee has 20 volunteer members, nominated by organisations across the spectrum of the culture sector, including the arts, museums and cultural heritage. The Committee's key aims include:

- (i) to be the formal link between civil society, relevant departments in HM Government (primarily the Department for Culture, Media and Sport) including the Devolved Administrations and UNESCO on matters relating to all aspects of culture;
- (ii) to advise and work with HM Government on UNESCO's cultural activities which have specific relevance to the UK including UNESCO requests and initiatives, Conventions, World Heritage Sites matters, and cultural education; and
- (iii) to provide independent and expert analysis, comment and advice to HMG on cultural matters relating to UNESCO, including as input to UK policy-making on key UNESCO programmes and cultural issues.

4. The Culture Committee's priority areas for action include detailed consideration of UNESCO's culture-sector conventions. It looks at a range of issues including, *inter alia*, the impacts of UK ratification of conventions, whether the UK might ratify existing conventions, monitoring and enforcement of existing conventions.

AIMS AND STRUCTURE OF THE DRAFT BILL

5. The UKNC responded to HM Government's 2005 public consultation on the 1954 UNESCO Convention on the Protection of Cultural Property in the Event of Armed Conflict (the "Hague Convention") and its two Protocols of 1954 and 1999; and is pleased that some of the issues the UKNC raised have been addressed in the draft Bill.

6. The UKNC congratulates HM Government for the progress made; and welcomes the draft Bill.

7. The UKNC is in support of the draft Bill and its overall aim. The UKNC is content that the draft Bill's structure and drafting is adequate to fulfil its stated purpose of allowing the UK to ratify the 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict (the "Hague Convention") and to accede to the Convention's two Protocols of 1954 and 1999.

8. The UKNC continues to believe that the Hague Convention and its Protocols provide important protection for the UK's cultural heritage, both movable and immovable.

IMPLEMENTATION

9. Whilst the Bill supports enacting the Hague Convention in the UK, its implementation cannot be effectively achieved without adequate resourcing. The UKNC strongly believes that the funding should be proportionate and reasonable; and that the issue of training, advice and support is critical to successful implementation. The UKNC therefore urges HM Government to ensure a robust, well-resourced implementation programme based on wide consultation with all stakeholders.

10. The Hague Convention second protocol committee at UNESCO has been working with international experts to prepare guidelines on how the provisions of the Convention can be implemented. Preparation of the guidelines and case studies, envisaged to be universally applicable irrespective of regimes, is currently ongoing but is likely to take some years. In order to maintain momentum, the UKNC is of the view that the UK should actively participate in the preparation of the guidelines and case studies using these as a basis for its own robust implementation programme which should be carried out in parallel.

TRAINING AND SUPPORT

11. The UKNC recognises the cross-linkage between natural disaster preparedness and that for armed conflict. The spectrum of stakeholders for whom training and support is needed extends beyond the owners, guardians and trustees of all cultural property protected under the draft Bill's regimes for general and enhanced protection to include the police, the judiciary, emergency planners and the heritage community.

12. Existing guidelines and templates for emergency natural disaster preparedness in eg museum and archives would provide useful precedents.

13. The UKNC notes the importance of addressing aspects of immediate and longer-term training in the implementation of the draft Bill for military personnel. Training for the military and civilian forces in other countries such as Australia and the Netherlands could be considered as a source of information and best practice by the Ministry of Defence.²

² The word Austria should replace the word Australia see Q72.

PUBLIC EDUCATION AND AWARENESS RAISING

14. Furthermore there should be provision for public education, outreach and recognition of HM Government's commitment to international humanitarian and cultural duties under the Hague Convention and other cultural property instruments.

FURTHER OBSERVATIONS

15. We recognise that HM Government does not take its international duties lightly. Ensuring a robust implementation programme of the draft Bill will send a strong and positive signal to the international community about HM Government's commitment to respecting and protecting the cultural property of other nations and upholding international humanitarian law.

16. The UKNC and its Culture Committee is much encouraged by the draft Bill. Given our terms of reference and priorities, the UKNC Culture Committee would be pleased to assist in the implementation process. Please do not hesitate to make contact if you require further information or clarification.

March 2008

Annex

UK NATIONAL COMMISSION FOR UNESCO CULTURE COMMITTEE

TERMS OF REFERENCE

1. To be the formal link between civil society, relevant departments in Her Majesty's Government (primarily the Department for Culture, Media & Sport) including the Devolved Administrations and UNESCO on matters relating to all aspects of culture. Specifically, to co-ordinate civil society's culture-sector contribution to the biennial UNESCO general conferences, UNESCO conventions, and to UK policy on UNESCO's programme in the culture sector.

2. To promote recognition and awareness of and participation in UNESCO's cultural work, and to promote the work of UNESCO as an organization where all countries can learn from each other.

3. To participate, as appropriate, in UNESCO's early development of initiatives for cultural activities.

4. To advise and work with HMG, particularly the Department for Culture, Media & Sport, on UNESCO's cultural activities which have specific relevance to the UK (including the Devolved Administrations), including UNESCO requests and initiatives, Conventions, World Heritage Sites' matters, and cultural education.

5. To provide independent and expert analysis, comment and advice to HMG on cultural matters relating to UNESCO, including as input to UK (including the Devolved Administrations) policy-making on key UNESCO programmes and cultural issues.

6. To advise HMG on ways of raising awareness of UNESCO's cultural work in the UK across the whole of civil society, but in particular in the UK culture sector.

7. To encourage and facilitate the use of UK cultural expertise around the world, especially within developing countries.

8. To establish links with other National Commission Culture Committees of UNESCO Member States, to share and receive appropriate knowledge and research.

9. To undertake such actions as would enhance culture internationally.

Memorandum submitted by the British Red Cross

GENERAL

The British Red Cross is pleased to have the opportunity to offer its comments on the draft Cultural Property (Armed Conflicts) Bill. The views which follow have been endorsed by the International Committee of the Red Cross (ICRC) in Geneva, Switzerland.

The British Red Cross and the ICRC very much welcome the comprehensive nature and scope of the draft Bill; a Bill of this kind, once enacted, will certainly enable the United Kingdom to give effect to its obligations under the 1954 Hague Convention and its two Protocols of, respectively, 1954 and 1999. This is positive. It will be the first time that a country with a common law legal system has adopted such implementing legislation. It may well serve as a model for Commonwealth and other countries.

The draft Bill is quite complicated in places. This appears unavoidable, however, given that some of the provisions in the treaties themselves are complex.

We have a number of specific comments on provisions of the draft Bill. These are set out below and are intended to be helpful.

The United Kingdom is committed to ratifying the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and acceding to its two Protocols on the 50th anniversary of the date of the adoption of the Convention in 2004. It would be excellent, and in keeping with the UK's established role as a leader in the field of international humanitarian law, if the revised version of the draft Bill could be submitted to Parliament during the 2008–09 Parliamentary session, in time for the 55th anniversary of the Convention next year.

CLAUSE 4(1)

The provisions in the Second Protocol on ancillary offences are extremely complicated. It is not surprising therefore that the draft Bill too is complicated. However, the current wording might be seen as slightly ambiguous. Does this clause mean that, as anyone of any nationality would be liable where the substantive offence is committed in the UK, then anyone can commit an ancillary offence abroad? Or is it supposed to mean that where the ancillary offence is committed abroad, only those people would be liable for such ancillary offence if they would have been liable if the substantive offence had been committed abroad? Certainly this is what seems to be envisaged by the Explanatory Notes in paragraph 21. Thus for offences under Article 15(1)(a)–(c), anyone would be liable for an ancillary offence abroad whether or not they are a UK national, provided that they are present in the territory—and whether or not the substantive offence was committed abroad. This would of course be subject to Article 16(2)(b) of the Protocol. On the other hand, for offences under Article 15(1)(d) and (e), in cases where the ancillary offence is committed abroad, only UK nationals and persons subject to service jurisdiction would be liable, even if the substantive offence took place in the United Kingdom or the substantive offence was committed abroad by another UK national. This certainly meets the treaty obligation. For clarity, it might be useful to insert “outside the United Kingdom” at the end of clause 4(1). This would put the point absolutely beyond doubt.

CLAUSE 5

This clause deals with the responsibility of commanders/superiors and is designed to reflect Article 28 of the Rome Statute as the direct reference to Article 28 in clause 5(6) makes plain. However, the drafting is different from that contained in s. 65 of the International Criminal Court Act 2001, which originally codified the concept of command/superior responsibility into English law. The different style does not appear to be intended to alter the substance but this might be incorrect in relation to clause 5(3). Under clause 5(2), forces must be under the military commander's “command and control” but under clause 5(3) where someone is “effectively acting as a military commander” the test is “authority and control”. Presumably, where someone “effectively acting as a military commander” exercised command, this would amount to “authority” but this might not work in reverse. Thus, it is possible that a military commander might argue that he did not have “command” although it was obvious he had “authority”, thus bringing himself outside the scope of clause 5. The wording of s. 65 of the International Criminal Court Act 2001 is:

“A military commander, or a person effectively acting as a military commander, is responsible for offences committed by forces under his effective command and control, or (as the case may be) his effective authority and control, as a result of his failure to exercise control properly over such forces where [. . .]”

The addition of “authority and control” was indeed inserted to catch the “effective military commander” but it also catches the military commander who argues that he had no command. This is not the case under clause 5. The answer might be to include “authority and control” in clause 5(2), in the same way as in s. 65 of the International Criminal Court Act 2001, so that it covers both the military commander and the “effective military commander”.

Would it not have been preferable simply to have replicated the language of s. 65 of the International Criminal Court Act 2001, since there is merit in consistency?

CLAUSE 9

This clause deals with the definition of the cultural emblem. Is it necessary to have a separate order? The Geneva Conventions Act 1957 contains the definition of the red cross and other emblems within the Act itself. Here, someone who wants to see what is the emblem will presumably have to go to a separate order, despite Article 16 of the Convention, where the emblem is defined, being attached as a Schedule. Either the order will have to repeat the exact wording of Article 16, in which case what is the point of the duplication, or, if it seeks to paraphrase, there could be a risk of confusion between the emblem as described in the Convention and as described in the order.

It is noted that the model identity card referred to in Article 21(3) of the Regulations attached to the 1954 Convention and attached as an Annex to those Regulations, has not been included in Schedule 2 to the draft Bill. This could provide a partial solution as the emblem features on that identity card and could be used as a model.

CLAUSE 10

This clause deals with unauthorised use of the emblem. The offence is limited to “a person” which we understand to include a body corporate (see Schedule 1 to the Interpretation Act 1978). In those circumstances, there should perhaps be a provision equivalent to section 6(5) of the Geneva Conventions Act 1957, which reflects clause 6 of the Bill. At present, clause 6 only applies to clause 3 offences, serious breaches of the Protocol, and offences ancillary to such offences. It does not apply to offences in relation to the misuse of the emblem.

The wording in clause 10(1)(b) is “so closely resembles the cultural emblem as to be capable of being mistaken for it”. The wording in section 6(2)(b) of the Geneva Conventions Act 1957 is “so nearly resembling any of the emblems or designations specified in the foregoing subsection as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems.”

There are two subtle changes here. Is there any difference between “closely” and “nearly” or are they intended to mean the same thing? It is perhaps unfortunate that different wording has been used as again, there is value in consistency. In the reference to “understood as referring to”, the phrase was not used in relation to the international distinctive sign of civil defence in section 6(2)(c) of the Geneva Conventions Act 1957 but only in relation to the red cross, red crescent and red lion and sun emblems and designations. We understand that this was because the phrase was seen as referring only to the designations. However, there have been cases where courts have specifically applied the phrase “understood as referring to” to designs resembling the emblems. The argument is similar to that used in clause 5 where a narrow interpretation has been adopted. Do we wish deliberately to narrow our options?

CLAUSE 11

We understand that cultural matters fall within those devolved to the Administrations. However, this Bill deals with the protection of cultural property in time of armed conflict, a matter that would also seem to come under defence which is not a devolved issue. Under the Geneva Conventions Act 1957 a single authority, the Secretary of State, acts on behalf of the complete United Kingdom with respect to other protective emblems established under international humanitarian law. It is difficult to understand, therefore, why the authorisation of the cultural emblem is considered to be a devolved matter whereas the authorisation of, for example, the red cross emblem is not.

CLAUSE 12

There is a small typo in clause 12(1) where it should read “Use of the cultural emblem”.

This clause seems to be independent from clause 11, in that use of the emblem can be authorised either under clause 11, 12 or 13 (see clause 10(1)(a)). If that is correct, no further authority is required for the use of the emblem if it is “for the purpose of identifying moveable cultural property” (clause 12(1)), or “cultural property that is undergoing protected transportation” (clause 12(2)). This would seem to open a Pandora’s Box, enabling anyone to argue that he/she is entitled to display the emblem. It would make it much harder to prevent smuggling of cultural objects in that unscrupulous dealers might be minded to use the emblem and argue that they were self-authorising.

In our view, it would be highly dangerous to permit such a subjective test for the use of the emblem. All use should be authorised under clause 11. This is the system adopted under the Geneva Conventions Act 1957 for the other protective emblems established under international humanitarian law and would avoid the necessity for clause 12 as the authorising authority would only authorise those uses in accordance with the Convention. Protected transportation would only take place in time of war and it would require expertise to ensure that the relevant regulations were being followed. It would be disastrous and possibly highly dangerous if an individual could “self-certify” through his/her own interpretation, however well meaning.

CLAUSE 13

This again seems to be a stand alone clause on authorisation (see clause 10(1)(a)). However, there seems to be an overlap between clause 11(1) and clause 13(1)(b) in that the latter requires authorisation, presumably under clause 11(1). In so far as clause 13(1)(a) is concerned, which refers to persons representing various control organisations established under the Regulations, all appointments under the Regulations have to be approved by the Party concerned. Is there therefore any reason why the same provision, namely national authorisation, could not apply to them? There is a stronger argument for allowing them automatic authority but this again differs from the approach taken in the Geneva Conventions Act 1957 where any

use of a protective emblem (even by the International Committee of the Red Cross itself) has to be authorised. The UK would be in breach of its international obligations if in a particular case it did not grant authorisation but it may still be wiser to keep control centrally.

CLAUSE 16

The devolution issue has already been raised in relation to clause 11. Section 6A of the Geneva Conventions Act 1957 grants a regulatory power to enable authority to be delegated. Although no regulations have been made, it is anticipated that this power would be used in the case of armed conflict. The burden of authorisation in peacetime is comparatively limited but will inevitably grow in time of armed conflict at a time when the pressures on the Secretary of State (or any other primary authorising authority) would be at its peak. Consideration therefore may need to be given to introducing a similar provision. If this were done, it could incorporate clause 11(3) or even be part of clause 11. The issue of a regulatory power may also be relevant to clause 9.

CLAUSE 17

Presumably, clause 17(3) would only be relevant where there is not a certificate issued under clause 17(4). In that case, it might be more logical to reverse the order of the two sub-clauses.

CLAUSE 18

There appears to be an inconsistency between clause 18(7) and paragraph 47 of the Explanatory Notes. The final sentence of paragraph 47 seems to indicate that the maximum sentence that can be imposed summarily is 12 months regardless of whether s. 282 of the Criminal Justice Act 2003 has come into force. However, that is not our reading of clause 18(7)(a), which seems to limit the maximum sentence to 6 months prior to the commencement. That seems to us, as a matter of legal principle, to be the correct approach.

CLAUSE 19

This clause deals with forfeiture provisions in connection with a dealing offence. Schedule 5 of the Bill lays out the forfeiture procedures, otherwise than in connection with an offence. Under paragraph 7 of that Schedule, the Secretary of State is under an obligation to make arrangements to return forfeited property in certain circumstances. The obligation seems to flow from Article 3 of the First Protocol. The provision imposing that obligation does not appear to apply under clause 19 forfeitures. Under clause 19, it is the court that has the power to make provision for the disposal of the property. Is there any reason why the Secretary of State is not under the same obligation in respect to clause 19 forfeitures and if not, how is it reconciled with the powers of the court?

CLAUSE 24

The relationship between clause 24 and clause 19(3) is unclear. The Explanatory Notes, in paragraph 55, indicate that clause 24 is designed to operate in situations where the prosecution is no longer active either through a decision not to proceed or through an acquittal. However, the clause itself seems to go wider (see clause 24(1)(a)). Could a constable, whilst a case is progressing, apply under clause 24(2), thus bringing in the provisions of Schedule 5, and, if so, how would that sit with the powers of the court under clause 19? Please see clause 26 and comments thereon.

CLAUSE 25

Subject to the comments in relation to clause 24 there are no additional remarks.

CLAUSE 26

Unlike clause 24, this makes it plain in clause 26(2) that it only applies after the object “ceases to be needed for that purpose” ie investigation or prosecution (see clause 26(1)(a)).

SCHEDULE 2

This annexes the Regulations for the Execution of the 1954 Convention. It however, leaves out the Annex showing a model identity card and there would be merit in including this, not least for the reasons outlined in the comments on clause 9.

SCHEDULE 5

See also comments on clause 19.

This lays out the procedure for forfeiture of property seized under clause 23 or retained under clauses 24 and 25. There may be a problem in the relationship between paragraphs 5 and 7 of the Schedule. The First Protocol is commendably brief on the issue of forfeiture but not of much help. It places an obligation on States to return property but also an obligation on the “High Contracting Party whose obligation it was to prevent the exportation of cultural property from the territory occupied by it” to pay an indemnity to the holders in good faith. There may be concerns about the way in which these obligations are reflected in the Bill.

First, in relation to the obligation to return property, the obligation is placed on the Secretary of State but only in relation to property forfeited under the Schedule (see paragraph 7 of the Schedule). This would exclude property forfeited under clause 19 of the Bill in relation to a dealing offence, forfeiture proceedings in relation to which are not subject to Schedule 5. Furthermore, where an order for compensation is made under paragraph 5 of the Schedule, forfeiture can only take place once that compensation is paid. In those rare cases where the UK is itself liable to pay compensation under Article 4 of the First Protocol (ie where the UK had the obligation to prevent the exportation of cultural property from the territory occupied by it), this should not be a problem as the Secretary of State would pay. But what would be the situation where the obligation to pay the compensation actually falls upon another State? Recovering such compensation from that third State may prove difficult and so it is likely that the Secretary of State will have to pay initially in order to enable the UK to comply with its own international obligations to return the property under Article 3 of the First Protocol.

This is recognised in the Financial Effects paragraph of the Explanatory Notes (paragraph 75), although the Evidence Base on pages 90 and 91 adopts a narrower approach, seeming to indicate that the need to pay compensation would only arise in cases where the UK itself has the obligation under Article 4 of the Protocol. However, there is no obligation on the Secretary of State to pay in cases other than those arising under Article 4, ie those where the UK is not itself under an obligation to pay the compensation, and so technically there may be cases where forfeiture orders will lapse because no compensation has been paid, and the property will revert to the owner under paragraph 5(5)(b). Presumably, this will not prevent an application for a further forfeiture order.

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Witnesses: **Ms Sue Cole**, Senior Policy Officer (International), English Heritage; **Dr David Gaimster**, Chair, Culture Committee Working Group; UK National Commission, UNESCO; and **Mr Charles Garraway**, International Law Adviser (External), British Red Cross, gave evidence.

Chairman: For the final part of this morning’s session can I welcome Sue Cole of English Heritage; David Gaimster from the UK National Commission for UNESCO; and Charles Garraway, representing the British Red Cross. It is Alan Keen to start.

Q57 Alan Keen: Good morning. I was surprised to see the Red Cross’s interest in this draft Bill. Could you explain why that was and why it is?

Mr Garraway: Certainly. Under our Royal Charter, if I may quote from it, we are tasked to “co-operate with Our Ministers to ensure respect for International Humanitarian Law and to protect the Red Cross and Red Crescent emblems and any other distinctive emblems, signs and signals established under International Humanitarian Law.” The British Red Cross has always had a leading role in international humanitarian law and in protection of emblems in this country and that is the particular focus from which we have approached this Bill.

Q58 Alan Keen: Could you explain the difficulties from the Red Cross’s point of view and how the Red Cross gets involved in an area of conflict? I am interested because my mother was a member for a long time.

Mr Garraway: There are many parts of the Red Cross movement. The Red Cross is a movement made up of three main parts: the International Committee of the Red Cross, which everybody knows about; the National Societies, of which the British Red Cross is one; and the International Federation, which is an amalgam of all of the National Societies. They are concerned primarily with national disasters but in time of conflict the National Societies are an auxiliary to the Government in the humanitarian field and work very closely with the Government on international humanitarian law and other related matters. We have a duty to try to protect the Red Cross and Red Crescent emblems and other emblems under international humanitarian law and that is what we try to help the Government in doing. That is particularly why we are involved with this. As part of international humanitarian law we also have a great interest in the protection of cultural property in general and certainly from my time in the military when I was teaching international humanitarian law (which I still do) cultural property plays a major part in those teaching courses.

Q59 Alan Keen: As you mentioned training, it must be a pretty important part of this and you say you

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are involved in it. As we heard earlier, the military does take it seriously. Could you explain a little bit more about it?

Mr Garraway: Yes certainly. I have taught it both here in the United Kingdom and abroad, and the cultural property emblem for example has been included in all our training aids and all our training documents and in our training exercises for many, many years. We have always taken the issue of cultural property seriously. If I can give an example from the Gulf War in 1990-91 in which I was actually involved, there was a MiG fighter which was deliberately parked next to the ziggurat down at Ur of the Chaldees and it was a deliberate “Come on, come and get us”. The fighter was parked there, it was not going to do anything, there was absolutely no point in attacking it and if we had attacked it, all that would have happened was risk of damage to the ziggurat. There was no way we were going to attack that fighter and it was just left there.

Q60 Alan Keen: Could I ask all of you why was the Bill needed and what are the main differences that it is going to have on the problem that the Bill is obviously set out to deal with?

Ms Cole: We strongly welcome it. We think it is going to have very positive, tangible benefits. We think it will put us up there with the other countries that have ratified, the likes of France, Iraq and Kuwait. We think that it is going to create a cultural war crime and having been to conferences with the military from other states and other countries, they are taking this issue of cultural war crime very, very seriously. We are pleased to see that the Allan Bill, the Dealing in Cultural Objects (Offences) Bill, is being strengthened, but for us we also see that at home this has an opportunity to link up with emergency planning and preparedness. We see this as a very, very strong benefit in actually making a good public benefit to this Bill. It is not just the greatest importance to all humanity objects; the sort of peacetime preparation processes that the Second Protocol called for are just as relevant for my wedding albums and my treasured photos as they are for the wonders of Saltaire or the wonders of Blenheim, which are both World Heritage Sites.

Q61 Chairman: Could you just clarify that; it is relevant to your personal records?

Ms Cole: That is right. Not in terms of the Bill but in terms of promoting emergency planning and actually putting in place a system of information. If my house is flooded I go through exactly the same processes to stop that destroying all my possessions as Blenheim does or Saltaire does to protect them.

Q62 Chairman: I see, so you are posing an analogy with the national photograph collection, as it were?

Ms Cole: Yes.

Q63 Chairman: Yes, I see.

Dr Gaimster: Just to back up what has been said. I think for UK UNESCO—and of course this is a UNESCO instrument—the UK Commission is very supportive of the Government taking forward

ratification at this time. Effectively, it is like a lot of these instruments, it is a standard setter, it is a benchmark for how we should as a nation act in scenarios around the world where the UK Government is frequently involved in international conflict resolution and peace-keeping roles and so on. We are often in scenarios where we are both protecting humanitarian interests but also cultural property and cultural heritage which is instrumental to the protection of cultural identity in those regions and also central to building and reinvigorating the economy in the post-conflict situation. I think that is the main thrust, and that is what makes the difference. The UK is involved internationally in these roles and needs to come on board and be leading in the setting of standards and benchmarks for how we should behave and actually protect cultural property on the ground.

Ms Cole: May I add one further thing which is, having been to some of the international conferences and talking to others, there is a real feeling from UNESCO and some of the other states that UK ratification could help to deliver ratification by a huge number of other countries: the Commonwealth countries; the former Commonwealth countries; and possibly even the United States. That has been hinted at.

Q64 Chairman: There are quite a lot of countries that have ratified it already.

Ms Cole: There are but there are a lot more to go.

Q65 Chairman: According to our list, it is about 115 who have ratified and we are 55 years late.

Ms Cole: Indeed, let us ratify now.

Q66 Chairman: It is better late than never!

Ms Cole: Absolutely.

Q67 Alan Keen: I am sure that Brigadier Gordon Messenger gave an answer that said there was not, as far as he knew, any liaison between other nations’ forces on this issue.

Dr Gaimster: That is incorrect.

Mr Garraway: Certainly at the level of military lawyers there has been for many, many years. I myself have been involved in many discussions both at UNESCO and outside UNESCO on these issues and we have discussed training and other matters so, yes, that has been done. I think Brigadier Messenger actually raised another point which is relevant to the Chairman’s previous question in which he said it is changing policy into law, and I think that is very important. This is actually the last major international humanitarian law treaty that the United Kingdom is not party to and by joining this we send a very strong signal. Very few common law countries have introduced legislation on cultural property in time of war and the protection of it, and this will be seen as a standard bearer. I think Sue is absolutely right on that. Certainly there are a number of Commonwealth countries in particular that are looking at this Bill very closely.

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Q68 Alan Keen: Why has it taken us so long to ratify the Convention? What have been the reasons for the lack of taking that step which seems so simple to do?

Mr Garraway: I think the Cold War held up a lot of it. During the Cold War there were various reasons why people did not wish to go down this particular line. There were concerns about the original 1954 Convention itself and those concerns caused the conferences that led to the 1999 Second Protocol which expands the Convention and itemises certain things like the term “military necessity”, so the concerns that people had had in the late 1950s and 1960s were really dealt with by the 1999 Second Protocol. It is since that Protocol came into effect that the number of ratifications of the Convention itself has increased quite sizeably and that is why certainly I believe the United Kingdom is now very positive in its willingness to ratify.

Q69 Alan Keen: We are not taking a lead, are we, we are so far behind the others, but you have explained that it will be an advantage and it will give an example to other nations. Apart from that, what real difference are we going to see from this if it becomes an Act? What are the real benefits?

Dr Gaimster: I get the impression from what has been said already today that there are going to be considerable benefits for developing best practice and on-the-ground treatment of cultural property in those scenarios. We have heard quite an interesting explanation of what the British Army/UK forces have at the moment and the phrase “ad hoc” has been used, and I was not aware until today that a lot of that information is unclassified about the practice that is actually employed at the moment, but what is clear is that we need to look at the level of training that is being given to UK armed forces, we need to put that into international context and look at benchmarking internationally to see who is leading in terms of how we should be treating cultural property in those situations and ensuring that UK armed forces are not only behaving within that context but also with their experience on the ground actually leading how we should be dealing with cultural property in those situations. I think there is an awful lot of (never mind all the technical issues that we have heard about) best practice and standard-setting that UK forces could be involved in now. This releases them effectively, as you say, from abiding by general international policy to actually delivering responsibility on the legislation but also working internationally with others.

Alan Keen: Thank you very much.

Q70 Janet Anderson: Dr Gaimster, you have mentioned training and if we can just discuss resources in general, you say that implementation cannot be effectively achieved without adequate resourcing. Where do you think resources might come under strain?

Dr Gaimster: We have heard from military colleagues that it is not believed that extra resourcing is necessary. I would like to look at that in more detail and just have that international benchmarking exercise. Our understanding is that

not only in terms of UK military but also in civil society resources will need to be looked at to see how we cascade this new level of cultural property protection across the sector. Whether that is new resources or whether it is reviewing and reusing resources that we already have and meshing in with our current cultural property protection regime, is a question that needs to be taken forward by DCMS and others and working with historic environment agencies and so on. I do not know and the honest answer to your question is I am not quite sure. I think a scoping exercise needs to be effected to look at what resourcing is required and whether we can reuse some of the arrangements and some of the resourcing we already have. A little bit more scoping needs to be carried out, I think, on how it meshes with the new cultural heritage protection regime, with the Heritage Protection Bill, for example.

Q71 Janet Anderson: Sue, from your point of view at English Heritage, has any estimate been made of the extra demand, for example on the Police and the Crown Prosecution Service? Is that something that you have looked at?

Ms Cole: We do not actually know yet what the implementation is going to be, partly because we have not ratified but partly because UNESCO have not finalised their guidelines on what level of documentation or what they actually want to see put forward and how they want it put forward, so that the best guess that we can do is looking at the existing heritage legislation, the Ancient Monuments and Archaeological Areas Act (as amended) 1979, and what the prosecutions are. Our colleagues in our legal section have done that and there are less than ten investigations/prosecutions per year. Looking at the sort of mechanisms that they have put in place to help train the police, for example each police force now has a liaison officer to deal with cultural crime, and the same with wildlife crime. It is again a case of making the existing resources work a bit harder so it will be relatively simple to put some training in place on the effect of this Bill with the police using the existing set-ups.

Q72 Janet Anderson: Thank you and if I could just go back to you Dr Gaimster, training materials for armed forces; you particularly refer to Australia and the Netherlands as good practice. What is it that they do that we should be copying?

Dr Gaimster: I am not quite sure about the reference to Australia. It came out of a Culture Committee Conventions Working Group discussion on the Convention and I think we actually meant Austria, so I apologise to the Committee and you, Chairman, for that slight error and let me put the record straight. When I was in DCMS a few years ago I was invited to a seminar being organised by the Austrian Society for the Protection of Cultural Property and the Austrian Ministry of Defence looking at best practice for the military and the protection of cultural property in the time of armed conflict, and I can pass this proceedings document on to the

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Committee.¹ Yes, there are a number of European countries in particular that have really taken forward the guidance and best practice in how instruction and how the whole policy should be cascaded on to people on the ground, to commanders and everybody else. I think that is the key thing. UNESCO itself has a committee which reviews progress on the guidance for the Convention and its latest 2004 report has a series of reports on military measures by States Parties and I would commend this report to the Committee because you have here a set of latest information about what various European states parties are doing in terms of cascading best operational practice to Armed Forces.² We have a section here on Austria, for example, which cites the training of a cadre of officers—I think we have heard that term already today—for cascading protection of cultural property to forces on the ground, a programme of training liaison officers and so on and preparing information, documents and manuals for pre-deployment exercises and training. Germany seems to be very advanced in its manual preparation and the Netherlands offers further case studies for better liaison between international armed forces in Europe and for looking at how this best practice has a coherence across the international sector: so it is not one country that is developing best practice, we have a common approach and one that is being increasingly recognised.

Q73 Janet Anderson: If I could just interject here. Do they deal at any point with this issue of refugees and their cultural property and the need to prove dishonesty and so on?

Dr Gaimster: This document does not go into that level of detail. It cites a set of manuals and documentation that has been produced. I cannot answer the question honestly. I assume then if this is being produced that these issues are being looked at on a scenario basis. Yes, it is all very well and we have heard the difficulties of planned policy in this case, but I think what we need to do is to work together internationally to look at case studies and best practice on the ground to see how you resolve the issue of how you distinguish smugglers from innocent people moving their own property and how you apply those policies on the ground. I think that is what is needed and that is where the UK military needs to be very closely involved, and once we have ratification I think there will be greater incentive for it to be so.

Q74 Janet Anderson: Sue?

Ms Cole: I was simply going to confirm what David was saying that there is a lot of very good practice already going on around the world, and the UK is already doing some of that, but let us not reinvent the wheel, let us share expertise internationally. If

the Americans are doing something that we are not, for example the Americans in Iraq have recently produced a pack of playing cards which they give to all their troops which have examples of bits of pottery or clay tablets and it says on them “Do not buy any of these things if you are offered them in the market” and that is something that is very practical, very clear, and I know that the UK is looking at those sorts of measures as well. There is lots of good practice out there that we do not want to reinvent, particularly if we are part of a coalition on a peace-keeping mission for example.

Mr Garraway: If I may be permitted to say, in fact Austria and the Netherlands are both countries that I have worked with very closely when I was in the Army, liaising with their cultural property representatives. They both have extremely strong programmes so I can confirm that it is Austria. From the British Red Cross point of view it would not take us any extra resources. For example from our leaflets—this is one “Protecting the Emblems”—you will see on the back that we already have the cultural property emblem included in our leaflets and it is already included in our IHL training and,³ as a matter of practice, we have been assisting the Ministry of Defence for several years in actually dealing with misuse of the cultural property emblem because with no formal set-up for protection of the emblem we have equated it to the Red Cross and Red Crescent emblems and the civil defence emblems and the other emblems, and the Secretary of State who controls those under the Geneva Conventions Act has actually acted in respect of the cultural property emblem and we have assisted him in that task.

Q75 Chairman: Can I finally just look at the process for designation. I think this is probably particularly English Heritage’s area of expertise. Can you first of all explain the procedure for deciding what should be designated as having either enhanced protection or general protection under the Convention?

Ms Cole: As you said, there are two separate regimes: there is enhanced protection, which is cultural property that the UK certifies is not being used for military purposes and will never be used for military purposes; and then there is general protection, which is other things of importance. For enhanced protection that is a list which is held by UNESCO. The UK nominates cultural property for enhanced protection to UNESCO. If we follow the same process that is used for the World Heritage Convention then UNESCO will ask its expert bodies—which are the International Committee on Monuments and Sites, the International Committee of the Blue Shield and the International Union of Conservation and Nature—to look at what has been submitted and say, yes, this is worthy of international enhanced protection.

¹ Not printed.

² *Note by Witness:* Report on the Implementation of the 1954 Hague Convention for the protection of cultural property in the event of armed conflict and its two 1954 and 1999 Protocols report on the activities from 1995 to 2004 (2004) <http://unesdoc.unesco.org>.

³ *Note by Witness:* “IHL training” includes courses run by, and publications of, the British Red Cross on international humanitarian law, both internally for staff and volunteers, and externally for the armed forces, government officials, journalists and others.

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Q76 Chairman: Just to clarify, the reference that each party should submit to the committee a list of cultural property; the committee is UNESCO?

Ms Cole: The Committee is the Second Protocol Committee and the Convention Committee of UNESCO and it is the Director-General of UNESCO who holds the list and makes it available in times of conflict. In the UK, there is obviously going to need to be considerable discussion about what gets put forward. The DCMS in 2005 put forward its consultation on the sorts of things that it thought would be put forward so those are World Heritage Sites, Grade 1 listed buildings, parks and gardens, national museums, copyright libraries, archives, with Scottish, Welsh and Northern Irish equivalents. We are not yet clear what is going to happen to Grade 2* buildings and that is certainly an issue that English Heritage wants to see resolved.

Q77 Chairman: Do you want them on the list?

Ms Cole: We would like them on the list please; that would be very kind, thank you. There are also private collections which again may be very, very important but do not fall within the definition of a national museum or library or archive.

Dr Gaimster: And independent collections.

Ms Cole: And independent collections as well. I know DCMS are considering that as an issue at the moment. Those will all need to be looked at in consultation with the military because obviously if there is a military site within, say for example, a World Heritage Site then that would not then be put forward, so it needs to be very carefully considered.

Q78 Chairman: Stonehenge for instance is a World Heritage Site.

Ms Cole: It is indeed.

Q79 Chairman: And also is one of the prime tank training areas for the United Kingdom.

Ms Cole: The military area of Stonehenge is on the Larkhill side. The World Heritage Site excludes any of the military training ground but there are issues about Stonehenge and those sorts of things need to be very carefully discussed with UNESCO who have not yet decided how they want to see those things done, so we are in a bit of a “suck it and see” situation at the moment.

Q80 Chairman: And one thing which did puzzle me was that under the Second Convention it is a serious offence both to make cultural property under enhanced protection the object of attack and to make cultural protection protected under the Convention the object of attack. So if both are serious offences I do not quite see what extra advantage you get by enhanced protection.

Ms Cole: Under enhanced protection, as I understand it—and I am not a lawyer or a military person obviously—the military and the state party

are certifying that that site is not used and will never be used for military purposes, you are not saying that for the others, so it would be a war crime to attack something that is under enhanced protection because there is no legitimate reason to do so. The waiver of imperative military necessity would not be used. That is my understanding.

Q81 Chairman: Under the Second Protocol it is still a serious offence to attack an object or a monument which is designated under the Convention but not necessarily under enhanced protection.

Ms Cole: Yes and military colleagues and lawyers will be able to explain this far better than me.

Q82 Chairman: I can see Mr Garraway limbering up.

Ms Cole: My understanding is that if you have an item under general protection and it is being used as a munitions dump or as a store or there are snipers on it that could constitute a legitimate military objective whereas under enhanced protection you are saying, “We will never use that.” Is that right?

Mr Garraway: Effectively yes, but insofar as the offences are concerned, the offences under Article 15 of the Second Protocol are divided into two parts. A, B and C, which includes attacks on enhanced cultural property, are such that they attract what we call universal jurisdiction and you can prosecute anybody for committing an offence anywhere in the world before the UK courts, whereas D and E (and D is attacking ordinary cultural property) are limited so that you can only charge within the jurisdiction, for offences within the jurisdiction or offences committed by UK nationals. It is a lesser type of offence shall we say.

Q83 Chairman: Finally, the effort to draw up this list, particularly if we are going to include the wider categories of protected buildings for instance that you are describing, is going to be quite a major undertaking. Is DCMS resourced to do this? Is it going to occupy a lot of time and money for the Department?

Ms Cole: That is an issue that you should really address to DCMS, but from our point of view there is a lot of work that is already being done on collecting information and you could, as I said earlier, make it work a bit harder. For example, the area that I am particularly involved with at English Heritage is World Heritage Sites and we have already a process of putting a risk assessment into each World Heritage Plan so it will identify the sorts of things that could affect that World Heritage Site, and armed conflict provisions will form yet another example. Museums already collect information, so do libraries, so do archives. The main issues are going to come where you are talking about historic buildings, the Grade I buildings, the Grade 2* buildings. If and when the Heritage Protection Review Bill goes forward then that could be a category of information which is collected as part of

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the statement of significance. I think it is also fair to say that this is not something that is going to be introduced wholesale overnight. I think it is going to have to be done incrementally so there will be time to collect this information.

Q84 Chairman: We can probably do it before the invasion occurs!

Ms Cole: Hopefully there will not be one!

Chairman: I think that is all we have. Can I thank the three of you very much.

Written evidence

Memorandum submitted by the National Council on Archives (NCA)

1. The National Council on Archives (NCA) welcomes the opportunity to submit its views on the draft Cultural Property (Armed Conflict) Bill. The NCA was established in 1988 to bring together the major bodies and organisations, including service providers, users, depositors and policy makers, across the UK concerned with archives and their use. It aims to develop consensus on matters of mutual concern and provide an authoritative common voice for the archival community.

2. The NCA considers that the draft Bill fully meets its aim of being an instrument to allow the UK to accede to the Hague Convention and the relevant protocols relating to cultural property in armed conflicts. The Bill's coverage is comprehensive and in theory it should prevent violations such as the bombing of the Bosnian National Library in Sarajevo by the besieging Serbian forces and the destruction of the Bamiyan Buddhas by the Taliban in Afghanistan—if the parties concerned are signed up to the convention and the armed forces are properly trained and briefed.

3. There appear to be a few areas where the supporting text requires editing to clarify its meaning. Paragraph 34 of the explanatory notes on Clause 13 of the Act has a mistake in the last sentence “property of cultural property”. Similarly in paragraph 63 on schedule 5 (p 72) the second sentence is missing a clause. There is an “either” clause but not a corresponding “or”.

4. The NCA would like to highlight the importance of ensuring good preservation practice regardless of who is the responsible custodian. Archival material comprises fragile material such as paper, film, photographs and electronic media. As such archival collections are sensitive to poor handling, inappropriate packaging, transport, poor environmental conditions and rapid changes in those conditions. Therefore, it is proposed that the Bill include a responsibility to ensure that cultural property is held in conditions which do not prejudice the longevity of those collections and under the guidance of preservation experts. This responsibility should be placed on all who could be responsible for the physical care of cultural collections including bodies such as the armed forces, the police and HMRC, and those transporting collections.

5. Another important point to bear in mind is that not only national but also local archive services should also be identified for protected status. Archives are essential to the cultural heritage, but also vital for the rebuilding of communities shattered by conflict. Archives should be valued for their evidential content as well as their cultural and heritage value; for example they can be essential to prove property ownership, academic qualifications, voting rights etc, all of which can be of critical importance. This sort of information is often held at the local level.

6. The Government should note that archive buildings are at inherent risk because often their robust construction, to high standards, makes them attractive to local commanders for military use. This was substantiated by the Kosovo experience where several record offices were commandeered by the military for gun batteries and the like.

7. Finally the NCA would like to extend its assistance to the practical implementation of the Bill. NCA members are experts in all aspects of archival management and would be happy to assist in providing advice and training to ensure the full implementation of this very important legislation.

March 2008

Memorandum submitted by the Museums Association (MA)

1. The Museums Association is pleased to respond to the Committee's inquiry on the Draft Cultural Property (Armed Conflicts) Bill (the “Bill”), specifically on:

- (i) the overall aim of the draft Bill; and
- (ii) whether the Bill is structured and drafted in a way which enables those aims to be met.

2. The Museums Association (MA) is an independent membership organisation representing museums and galleries in the UK and people who work for them. The Association has over 5,000 individual members and 600 institutional members.

These institutional members encompass around 1500 museums in the UK ranging from the largest government-funded national museums to small volunteer-run charitable trust museums. Formed in 1889, it is a charity, receiving no regular government funding, which seeks to inform, represent and develop museums and people who work for them in order that they may provide a better service to society.

3. The Museums Association responded to HM Government's 2005 public consultation on the 1954 UNESCO Convention on the Protection of Cultural Property in the Event of Armed Conflict (the “Hague Convention”) and its two Protocols of 1954 and 1999; and it is pleased that some of the issues the MA raised at that point have been addressed in the draft Bill.

4. The Museums Association is also represented on the UKNC for UNESCO Culture Committee Conventions Working Group and has contributed to and supports the UKNC response.

AIMS OF THE DRAFT BILL

5. The Museums Association welcomes the draft Bill and is in support of the draft Bill and its overall aim. The MA believes that the draft Bill is adequate to fulfil its stated purpose of allowing the UK to ratify the 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict (the “Hague Convention”) and its two Protocols.

6. The MA believes that the Hague Convention and its Protocols provide important protection for the UK’s cultural heritage, including museums.

IMPLEMENTATION

7. The MA strongly believes that the Hague Convention cannot be effectively implemented without adequate resourcing; consultation with all stakeholders, training, advice and support are all critical to successful implementation.

8. Disaster planning, guidelines and procedures for natural disasters and other emergencies already exist for museums, it seems sensible to link natural disaster preparations with that for armed conflict. It is also essential to look beyond cultural institutions and incorporate wider stakeholders such as local authority emergency planners and the police.

9. We strongly feel that the matter of selection of assets for protection needs more in depth discussion. There needs to be more meaningful consultation with the sectors involved in order for implementation to be successful; this should be driven by a body that understands the issues and has the ability to deal with this issue swiftly but comprehensively.

10. The MA is particularly concerned that the relevant devolved administrations and their appropriate cultural bodies are included in the consultation process.

11. The MA also reinforces the need for a coordinated information and training programme for the armed forces so that they can make informed decisions about their actions in conflicts in or near cultural assets.

FURTHER OBSERVATIONS

12. The MA believes that this is a welcome and important step for the UK towards ratification of the Hague Convention and its Protocols. We also see the Bill as a positive signal to other nations regarding how the UK views the respect and protection of cultural property. This is, we feel, a timely and important message to give to the international community.

March 2008

Memorandum submitted by the Department for Culture Media and Sport (DCMS)

At the evidence session before the CMS Committee on Wednesday 2 July, I undertook to write in response to the Committee’s question about UK military operations with respect to the draft Cultural Property (Armed Conflicts) Bill (“the Bill”).

I have also taken the opportunity to provide fuller answers on the Committee’s other questions on the Bill which allows for the UK to accede to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 and its two protocols (“The Convention”).

MILITARY OPERATIONS

The Committee sought assurance that the Bill would not restrain the ability of the British Armed Forces to defend themselves. The Committee suggested an example of British troops under attack while operating abroad and asked whether they would be liable to prosecution under the proposed legislation if they damaged local heritage in the course of defending themselves.

My Department has been working closely with the Ministry of Defence to ensure that the obligations in the Bill are compatible with the requirements and realities of military operations. The MOD has confirmed that UK military doctrine and procedures already accommodate the provisions of the Convention and its Protocols.

For an offence under Clause 3(1) of the Bill, the act must be committed intentionally and the individual must know or have reason to suspect that the property is *cultural property* as defined by the Convention. Furthermore, in circumstances such as the example suggested by the Committee, the obligation to respect cultural property may be waived in the case of military necessity when the property has by its function been made into a military objective and there is no feasible alternative available to obtain a similar military advantage. It is thus very unlikely that all the elements of the offence will be satisfied in such circumstances.

Furthermore under common law, if a person acts reasonably and in good faith to defend himself or others, self-defence is available as a defence to crimes committed by use of force.

Before bringing any prosecution, prosecutors must first consider all the evidence, including any defences available. If the case passes the evidential stage, prosecutors must then decide if a prosecution is needed in the public interest. Finally, any prosecution under the Act would require the consent of the Attorney General.

OCCUPIED TERRITORY

The Committee asked whether DCMS, in connection with the Bill, was seeking a list from the Foreign and Commonwealth Office of territories that the Government considers to have been occupied since 1954.

Officials in my Department have been co-operating with the FCO to determine how best to address the concerns raised by the British Art Market Federation and others on this issue. I consider that a situation in which a person is dealing in cultural property protected by the Convention—and yet cannot resolve any doubts about the status of that cultural property’s country of origin by reference to publicly available information will be extremely rare. I am not aware of any of the 118 States Parties to the Convention that has produced a list of territories that they consider to have been occupied since 1954.

ENHANCED PROTECTION

The Committee sought clarification about the Enhanced Protection regime provided for by the Second Protocol to the Convention and about the British cultural property that would be nominated for Enhanced Protection. In my answer to the Committee I referred to “UNESCO rules”. I would like to clarify the conditions for enhanced protection. Cultural property may be placed under enhanced protection if it meets the three criteria set out in Article 10 of the Second Protocol to the Convention:

- (1) it is cultural heritage of the greatest importance for humanity;
- (2) it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection;
- (3) it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.

Any State Party that wants to make use of the Enhanced Protection regime has to nominate to UNESCO the cultural property in question. If the nomination is accepted, the cultural property will be added to the Enhanced Protection List, which will be kept by UNESCO and will be publicly available. No State Party to the Convention has yet nominated cultural property for Enhanced Protection and, indeed, the rules for nomination have yet to be finalised by UNESCO.

The third condition, quoted above, for the nomination of cultural property for Enhanced Protection requires a declaration on the part of the State Party that the cultural property will never be used for military purposes or to shield military sites. Any nomination by the UK for Enhanced Protection will therefore require close liaison with the military. The Government response published in October 2006,¹ to the earlier public consultation on the Convention set out the categories of UK cultural property that the Government would seek to nominate, subject to discussions with the Ministry of Defence. These categories were:

- those UK World Heritage Sites that were nominated as cultural sites
- the collections of the museums and galleries that are Non-Departmental Public Bodies or Assembly Sponsored Public Bodies
- the National Archive Bodies and
- the five legal deposit libraries.

GENERAL PROTECTION

The Government response to the public consultation also set out the categories of UK cultural property that the Government believes should be considered as covered by the general protection of the Convention. These categories were:

- listed buildings of Grade I status (Category A in Scotland and Northern Ireland)
- in England, listed historic parks and gardens of Grade I status
- the collections of those museums and galleries that are directly sponsored or funded by Government and
- the museums, galleries and universities in England with designated collections and, in Scotland, with important collections

¹ The response is available at: http://www.culture.gov.uk/reference_library/publications/3485.aspx

The Committee pointed out that there has been some discussion as to whether certain historic town centres and Grade 2* listed buildings should be added as categories to this list. The Government's view regarding historic town centres has not changed from that given in the response to the public consultation. While Article 1(c) of the Convention includes "centres containing monuments" as cultural property qualifying for general protection, the Government feels it is unnecessary to specify historic city centres as a category that it considers to be under the general protection of the Convention. The heritage of such city centres will already be protected by virtue of falling under the definitions in Article 1 (a) and (b) of the Convention and blanket protection to cover wide areas would cause buildings that have the lowest form of designation—or even no heritage designation at all—to be included, which would not be consistent with the aims of the Convention.

The current categories, listed above, that the Government considers will fall under the general protection of the Convention amount to approximately 31,000 individual buildings and monuments. To include Grade 2* listed buildings would increase that figure by approximately 75%, to around 54,000. We all instinctively want to protect as much UK heritage as possible, but the Government feels that adding Grade 2* listed buildings would, in fact, be counter-productive. A hostile State Party, presented with an excessive list of cultural property considered by the UK to be generally protected by the Convention, will be more inclined to invoke the waiver of "imperative military necessity" provided for in Article 4.2 of the Convention. The MoD has stated that for the Convention to be effective, it must strike a balance between protecting cultural property and the legitimate requirements of military operations. Unrealistic constraints on military commanders will undermine the aims of the Convention.

In any event, it is important to appreciate that adding a category of cultural property to the government list does not, of itself, afford any protection to that cultural property. The list has very limited relevance to the application of the Convention. While States Parties are encouraged under the terms of the Second Protocol Guidelines to produce such a list, cultural property is not required to appear on any list in order to benefit from the general protection of the Convention. It will be for the courts to decide whether specific cultural property satisfies the definition given in Article 1 of the Convention and consequently falls under the general protection of the Convention. Although the courts may have regard to the types of cultural property that the UK considers protected, they are not bound by this.

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