Written evidence submitted by Professor Roger O'Keefe (CPB 04)

About the author

Professor Roger O'Keefe BA, LLB (Sydney), LLM, PhD (Cantab.) is Professor of Public International Law at the Faculty of Laws, University College London (UCL), where he teaches public international law, international cultural heritage law and international criminal law. Prior to this he taught for fifteen years at the University of Cambridge, where was Senior Lecturer in Law, Deputy Director of the Lauterpacht Centre for International Law and Fellow of Magdalene College. He has been a visiting professor since 2009 at Central European University, Budapest, and in 2015 he was Distinguished Visiting Professor at Universitat Pompeu Fabra, Barcelona. He is on the *Conseil scientifique* of the *Revue Belge de Droit International*, the peer review committees of the *German Yearbook of International Law* and *Spanish Yearbook of International Law*, the academic review board of the *Cambridge Journal of International and Comparative Law*, the editorial board of the monograph series *Philosophy, Public Policy, and Transnational Law* (Palgrave-Macmillan), and the advisory boards of the *Hungarian Yearbook of International and European Law*, the *Journal of Philosophy of International Law*, the *UCL Journal of Law and Jurisprudence* and the monograph series *Cultural Heritage Law and Policy* (Oxford University Press).

Professor O'Keefe is the author of, among other things, *The Protection of Cultural Property in Armed Conflict* (Cambridge University Press 2006, paperback reissue 2011) and *International Criminal Law* (Oxford University Press 2015), and from 2002 to 2012 he was responsible for the section of the *British Yearbook of International Law* on British cases involving public international law. He has published many articles and book chapters on the international legal protection of cultural heritage, especially during armed conflict; has lectured on the same at the Hague Academy of International Law; and has spoken on the topic at the annual meetings of the American Society of International Law, the European Society of International Law and the Canadian Council on International Law, as well as at expert meetings and workshops convened under the aegis of UNESCO, the UN Human Rights Council and NATO. In 2002 he prepared an expert report for UNESCO on national implementation of the penal provisions of Chapter 4 of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and in 2016 he was academic coordinator of the drafting team and principal drafter of a military manual on the protection of cultural property in armed conflict commissioned by UNESCO and prepared under the auspices of the International Institute of Humanitarian Law, Sanremo.

Professor O'Keefe provided both written and oral evidence in 2008 to the House of Commons Select Committee on Culture, Media and Sport on the Draft Cultural Property (Armed Conflicts) Bill. He has been thanked on the floors of both Houses of Parliament for his assistance during the Bill's current legislative progress.

SUMMARY

No honest antiquities dealer of ordinary prudence conducting the sort of due diligence routinely conducted in the light of existing legislation and industry codes of conduct has realistic cause to fear conviction for the offence of dealing in unlawfully exported cultural property under the 'reason to suspect' standard in clause 17 of the Bill.

The relevant provisions of the 1954 Hague Convention and its 1999 Second Protocol and consequently the offence of a serious violation of the Second Protocol in clause 3 of the Bill apply as much to non-state armed groups, such as Daesh, taking part in non-international armed conflict on the territory of a state party to the Convention and Second Protocol as they do to a state party's armed forces.

The term 'cultural property' as defined in the 1954 Hague Convention and relied on in its two Protocols and the Bill is capable of encompassing digital and similar archives.

Introduction

1. This submission seeks to clarify and to allay concerns expressed over three aspects of the Cultural Property (Armed Conflicts) Bill that attracted comment on the Bill's second reading in the House of Commons. These are:

A. the alternative standard of knowledge, namely 'reason to suspect', sufficient for the offence of dealing in unlawfully exported cultural property in clause 17 of the Bill;

B. the applicability of the relevant provisions of the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its 1999 Second Protocol, and therefore of the offence of a serious violation of the Second Protocol in clause 3 of the Bill, to non-state armed groups such as Daesh; and
C. the applicability of the definition of 'cultural property' in article 1 of the 1954 Hague Convention, as adopted in turn by the First and Second Protocols to the Convention and the Bill, to digital and similar archives.

On none of these points, it is submitted, is there any need, as some honourable members intimated on second reading, either for amendment of the Bill or, at the international level, for seeking revision of the 1954 Hague Convention or its Second Protocol.

A. Dealing in Unlawfully Exported Cultural Property and 'Reason to Suspect'

2. During the second reading of the Bill, several honourable members of the House articulated concerns expressed by some UK antiquities dealers as to the effect on their trade and even their liberty of the alternative *mens rea* of the offence of dealing in unlawfully exported cultural property provided for in clause 17(1). With the greatest of respect, these concerns—which, it has to be said, follow in a long line of concerns expressed by UK antiquities dealers each time Her Majesty's Government moves to tighten the regulation of their activities—are overstated. No honest antiquities dealer of ordinary prudence who conducts the sort of routine due diligence already conducted in the light of existing legislation and industry codes of conduct has realistic cause to fear prosecution, let alone conviction, under clause 17(1) of the Bill as it stands.

3. The offence provided for in clause 17(1) is committed if a person deals in unlawfully exported cultural property knowing or, in the alternative, 'having reason to suspect' that it has been unlawfully exported. Clause 16(1) defines 'unlawfully exported cultural property' to mean cultural property unlawfully exported from occupied territory. Clause 16(5) states that, in determining whether territory is occupied, regard must be had to the established international legal definition of occupied territory found in article 42 of the 1907 Hague Regulations respecting the Laws and Customs of War on Land. (For its part, clause 16(6) provides that, in any proceedings where an issue arises as to whether cultural property has been unlawfully exported, a certificate by the Secretary of State is conclusive evidence as to whether territory was occupied at the time, although this does not assist a dealer in ascertaining in advance whether cultural property was unlawfully exported.)

4. Clause 17(1) is directly comparable to, although less stringent than, two existing legislative provisions applicable to the UK antiquities trade. Under article 8(2) of the Iraq (United Nations Sanctions) Order 2003 (SI 2003/1519), made pursuant to section 1 of the United Nations Act 1946 (1946 c. 45), persons who hold or control any item of illegally removed Iraqi cultural property and who fail to cause the transfer of that item to a constable are guilty of an offence unless they prove that they did not know 'and had no reason to suppose' that the item was illegally removed Iraqi cultural property. ('Illegally removed Iraqi cultural property' is defined in article 8(4) of the Order to mean Iraqi cultural property and any other item of archaeological *etc* importance illegally removed from any location in Iraq since 6 August 1990.) Likewise, under article 8(3) of the Order, persons who deal in any item of illegally removed Iraqi cultural property are guilty of an offence unless they prove that they did not know 'and had no reason to suppose' that the item was illegally removed Iraqi cultural property. The standard of 'reason to suppose' sufficient for conviction under articles 8(2) and 8(3) of the Order is, as will be evident, on all fours with the standard of 'reason to suspect' sufficient under clause 17(1) of the Bill. Articles 8(2) and 8(3) of the Iraq (United Nations Sanctions) Order 2003 are more demanding, however, than clause 17(1) of the Bill insofar as the onus under them lies on any persons dealing in illegally removed Iraqi cultural property to prove that they had no reason to suppose that the property was such, rather than

on the prosecution to prove—as it must under clause 17(1)—that they did have reason. No UK antiquities dealer has been unjustly convicted under the provisions of the Order.

5. Clause 17(1) of the Bill is also comparable to the terms of the import prohibition imposed, by operation of article 11c(1) of Council Regulation (EU) 36/2012, on Syrian cultural property and other goods of archaeological *etc* importance 'where there are reasonable grounds to suspect' that the goods have been removed from Syria without the consent of their legitimate owner or have been removed in breach of Syrian law or international law. Although the relevant offences provided for under domestic law by way of article 12A of the Export Control (Syria Sanctions) Order 2013 (SI 2013/2012) and sections 50 and 170 of the Customs and Excise Management Act 1979 (1979 c. 2) require actual intent to evade the import ban effected by article 11c(1) of Council Regulation (EU) 36/2012, the requisite standard of knowledge on the part of the defendant that the goods have been removed from Syria without the consent of their legitimate owner or have been removed in breach of Syrian law or international law is, as per article 11c(1), 'reasonable grounds to suspect'. Again, no UK antiquities dealer has been unjustly convicted under these provisions.

6. Honest UK antiquities dealers of ordinary prudence already conduct thorough due diligence as to provenance before dealing in an item of cultural property originating in foreign territory. This includes, in relevant cases, obtaining appropriate legal advice. This is not only a pragmatic precaution in the light of articles 8(2) and 8(3) of the Iraq (United Nations Sanctions) Order 2003, article 12A of the Export Control (Syria Sanctions) Order 2013 and sections 50 and 170 of the Customs and Excise Management Act 1979, as well as of the generally applicable but more lenient section 1(1) of the Dealing in Cultural Objects (Offences) Act 2003 (2003 c. 27) (providing for the offence of dealing in tainted cultural objects) and of the criminal law on handling stolen goods. It is also required by the Code of Conduct of the Antiquities Dealers Association (ADA) and the Code of Conduct of the Association of International Antiquities Dealers (AIAD). To this extent, clause 17(1) of the Bill asks little more of UK antiquities dealers than honesty, prudence and both the existing law and industry standards presently do.

7. The specific concern, however, on the part of some honourable members of the House in relation to clause 17(1) of the Bill would appear to be that ascertaining in advance, in accordance with clause 16(5), whether given foreign territory was occupied at a given time is so difficult that even honest, prudent antiquities dealers will be at unwitting risk of conviction, with the upshot that they will avoid dealing altogether in cultural property that they have reason to suspect was exported from any foreign territory after the entry into force in 1956 of the 1954 Hague Convention and its 1954 First Protocol.

8. With respect, the concern is misplaced. All antiquities dealers need do is to obtain appropriate legal advice, as they doubtless do already in a wide range of situations. A competent barrister with a specialization in public international law, of which today London boasts an embarrassment of riches unequalled in the world, could readily provide an answer to whether, at a given time, particular foreign territory was or could reasonably be said to have been occupied within the meaning of international law. It is a routine matter of applying to the facts, as per clause 16(5) of the Bill, the international legal definition of occupied territory in article 42 of the 1907 Hague Regulations and of taking account of any express or implied legal characterization of those facts by states, international organizations and international courts and tribunals. Indeed, a competent barrister versed in public international law could compile in relatively short order a year-by-year list from 1956 onwards of foreign territory that was or could reasonably be said to have been occupied. This is effectively conceded by those UK antiquities dealers who complain that the government has declined to date to furnish them, in what would amount to the provision of free legal advice, with a list of every territory considered occupied at one time or another since 1956.

9. In short, the usual due diligence as to provenance can be expected to alert antiquities dealers as to when and from where a given item of cultural property was or may have been

exported, and with this information they will be in a position to ascertain, on the basis of readily-available legal advice, whether any such foreign territory was or could reasonably be said to have been occupied at the time of the export. There is no realistic possibility of the prosecution under clause 17(1) of the Bill as it stands of honest antiquities dealers of ordinary prudence for unwittingly dealing in cultural property exported from occupied territory since 1956. If the facts and law give them reason to suspect that an item of cultural property was so exported, they can avoid dealing in that item. Conversely, if neither the facts nor the law gives them reason to suspect that the item was exported from occupied territory, they can deal in the item with confidence, secure in the knowledge that no prosecutor could prove beyond reasonable doubt that they did in fact have reason so to suspect.

B. The 1954 Hague Convention and Second Protocol and Non-State Armed Groups

10. The second reading of the Bill revealed, with the utmost respect, confusion on the part of many honourable members of the House as to the applicability to non-state armed groups such as Daesh (so-called 'Islamic State') of the 1954 Hague Convention and its Second Protocol and, with them, of the offence of a serious violation of the Second Protocol provided for in clause 3 of the Bill. (Note, for the avoidance of doubt, that serious violations of the Second Protocol encompass criminal acts in violation of the Convention.) Contrary to what some honourable members appear to believe, there is no need for the government to pursue at the international level the revision of the Convention and Second Protocol—of which, as it is, there is not the remotest possibility—to encompass such groups.

11. The relevant provisions of the 1954 Hague Convention and its Second Protocol, including the criminal provisions of Chapter 4 of the latter, apply as much during non-international armed conflict as during international armed conflict. This is made clear in article 19(1) of the Convention and article 22(1) of its Second Protocol. As a consequence, these provisions apply as much to any non-state armed group, such as Daesh, taking part in a non-international armed conflict as they do to a state's armed forces in either type of conflict. The sole limitation on the application to non-state armed groups of the relevant provisions of the 1954 Hague Convention and Second Protocol is whether the state on whose territory the non-international armed conflict occurs is party to the Convention and Second Protocol. (Note that there is no legal requirement that the non-state armed group consent to the application to it of the Convention and Second Protocol.)

12. In this light, the offence of a serious violation of the Second Protocol provided for in clause 3 of the Bill, which gives effect in domestic law to the offence of a serious violation of the Second Protocol provided for in Chapter 4 of the Protocol, applies not only to the members of the armed forces of a state party to the 1954 Hague Convention and Second Protocol but also to members of any non-state armed group taking part in a non-international armed conflict on the territory of a state party to the Convention and Protocol. Putting it simply, the offence of a serious violation of the Second Protocol provided for in the Bill will in future cover acts such as those perpetrated in Iraq and Syria by Daesh and Al-Qaeda and those committed by Ansar Dine and AQIM in Mali.

13. With respect, honourable members appear to have confused the scope of application of the core provisions of the Convention and the provisions, excepting article 9, of its Second Protocol, and thereby of the criminal provisions of Part 2, including clause 3, of the Bill, with the scope of application of the Convention's First Protocol and of article 9 of its Second, and thereby of the criminal provisions of Part 4 of the Bill, including clause 17, which establishes the wholly different offence of dealing in unlawfully exported cultural property. The First Protocol and article 9 of the Second, along with clause 17 of the Bill, apply only in respect of occupied territory within the meaning of international law, and in international law territory is considered occupied only when the military forces of a foreign state—and not of a non-state armed group—establish and exercise authority over it.

C. ‘Cultural Property’ and Digital and Similar Archives

14. Several honourable members of the House voiced a concern during the Bill’s second reading as to the applicability of the definition of ‘cultural property’ in article 1 of the 1954 Hague Convention, as adopted in turn by the First and Second Protocols and the Bill, to digital and similar archives. There is no ground for concern and no cause for doubt on this point. The term ‘cultural property’ as defined in the Convention and relied on in its two Protocols and the Bill is capable of encompassing digital and similar archives.

15. Article 1(*a*) of the 1954 Hague Convention defines ‘cultural property’ in general terms to mean ‘movable or immovable property of great importance to the cultural heritage of every [*viz* each] people’, leaving it to each state party to determine, within the bounds of good faith, what movable or immovable property within its territory is of great importance to its cultural heritage (and thereby, as the preamble makes clear, to the cultural heritage of all mankind). Article 1(*a*) goes on to give examples of what such property might comprise. One example given is ‘important collections … of archives’. In short, the UK would be perfectly entitled to designate as protected by the Convention and its Protocols, and consequently the Bill, any important collection of archives, including digital and similar archives, housed on its territory. It is immaterial that the format of any archive may have been unknown to the Convention’s drafters. The application of a treaty’s terms is not confined to that foreseen by its drafters. It is restricted only by the meaning of those terms and the requirement of good faith.

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