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Cultural Property (Armed Conflicts) Bill [HL] (Bill 66 of 2016-17)

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Summary

The *Cultural Property (Armed Conflicts) Bill [HL] 2016-17* [Bill no. 66] was introduced in the House of Commons on 13 September 2016. This briefing paper has been prepared for the Second Reading debate on 31 October 2016.

[The Bill](#), [Explanatory Notes](#), and an [Impact Assessment](#) are available from the parliamentary [website](#).

The Bill would introduce the necessary domestic legislation to enable the UK to ratify the [1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict](#) and accede to its two Protocols. The Convention entered into force in 1956 and has now been ratified by 127 states.

The UK signed the Convention in December 1954 and has been publicly committed to ratifying it since 2004.

In January 2008, the Labour Government published a [draft *Cultural Property \(Armed Conflicts\) Bill*](#) but no further progress was made on ratification.

The current Bill would:

- create offences to protect cultural property (as defined by the Convention) in the event of armed conflict
- create offences relating to the unauthorised use of the “Blue Shield” – the emblem used to identify cultural property protected under the Convention and its Protocols
- make it an offence to deal in cultural property illegally exported from occupied territory
- introduce immunity from seizure for cultural property which is being transported to, or through, the UK for safekeeping

The Bill was originally introduced in the House of Lords on 19 May 2016 where it received cross party support. However concerns were raised in a number of areas including:

- the maximum penalty of 30 years’ imprisonment for ancillary offences relating to cultural property
- the clause on immunity from seizure for cultural property in the UK
- the status of “embedded” military personnel (i.e. military personnel operating under the command of another country)

The Bill would extend to the whole of the UK.

1. The 1954 Convention and its Protocols

Summary

The 1954 [Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict](#) is one of the series of international treaties on the law of war created in the aftermath of the Second World War.

Though it was not the first or only convention concerning cultural property in wartime, it was the first world-wide international treaty exclusively on protecting cultural heritage in the event of armed conflict. It reflects a view that all cultural property is part of 'the cultural heritage of all mankind', and so must be protected.

The Convention and its two Protocols provide a system for protecting important cultural property in peacetime and during armed conflict (though with a waiver for 'imperative military necessity'), and a requirement to establish domestic criminal jurisdiction over cultural property offences.

The Convention and its Protocols are surrounded by a number of other international instruments on protecting cultural property in times of war, many of which already bind the UK.¹

1.1 The 1954 Convention

Context

The direct forbear of the 1954 Convention is Francis Lieber's *Instructions for the Government of Armies of the United States in the Field* of 24 April 1863. The 'Lieber Code' was the foundation for the modern laws of war and provides, amongst other things, that cultural property must be secured against all avoidable injury.

Provisions protecting cultural property against seizure, destruction or damage (subject to an overriding concession to military necessity), along with a duty to prosecute, appear alongside other measures in a series of treaties from then on. These include the 1899 Hague Regulations² and the 1907 Hague Regulations.³ The first international convention entirely devoted to the protection of cultural property was the 1935 Roerich Pact (now superseded).⁴

¹ A summary of other international instruments protecting cultural property is given in Appendix A of this Paper

² *Convention II with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*. The Hague, July 29, 1899.

³ *Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*. The Hague, October 18, 1907.

⁴ 15 April 1935, TS No. 899

But these early treaties failed to prevent the atrocities against cultural property deliberately and systematically committed by the Nazis in the Second World War.

During the Nuremberg Trials, Alfred Rosenberg was found guilty of offences against cultural property, among many other offences. For the first time, responsibility had been imposed by the victorious nations (rather than by its own government) on an individual official of the offending belligerent power for acts against cultural property committed in its name.⁵

Calls for a new convention led to UNESCO (the United Nations Educational, Scientific and Cultural Organization) organising a [conference](#) in The Hague. This produced the 1954 Convention and its First Protocol.

The 1954 Convention is based on a **cosmopolitan rationale** for protecting cultural property that rejects any distinction between cultural objects of merely local, national or regional interest and those of major international importance. Its preamble declares that:

...damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;

...the preservation of the cultural heritage is of great importance for all peoples of the world...⁶

It has been described as a 'charter for cultural internationalism, with profound implications for law and policy concerning the international trade in and repatriation of cultural property'.⁷

The 1954 Convention had 127 States Parties by October 2016.⁸

States' duties

The 1954 Convention requires States Parties to lessen the consequences of armed conflict for cultural heritage and to take preventive measures to protect it, not only during hostilities (when it is usually too late) but also in peacetime.

States' duties include these:

- consider registering a limited number of refuges, monumental centres and other immovable cultural property of very great importance in the International Register of Cultural Property under **Special Protection**;
- consider marking certain important buildings and monuments with a special protective emblem (the **Blue Shield**):

⁵ JH Merryman, 'Two ways of thinking about cultural property', 80 *American Journal of International Law* 831-853, at 835-6 (1986)

⁶ 1954 Convention, preamble

⁷ J.H. Merryman, 'Two ways of thinking about cultural property', 80 *American Journal of International Law* 831-853, at 837 (1986)

⁸ [UNESCO website](#) [accessed 24 October 2016]



- safeguard and respect cultural property **during armed conflicts**, whether international (state-to-state) or non-international (involving non-state armed groups);
- set up **special units within the military forces** to be responsible for protecting cultural heritage; and
- **prosecute or extradite** people accused of violating the Convention – in the most serious cases even non-nationals who come into their territory (as long as they are nationals of a State Party to the Convention).

The 1954 Convention does however contain a significant exception: like its predecessors, it allows cultural property to be damaged or destroyed if **military necessity** requires it (see section 1.7 below).

Implementation

The Convention envisages a **three-tiered system of control**:

- **National representatives** of cultural property, appointed by each State Party engaged in an armed conflict to safeguard cultural property situated in its territory, and **special representatives** for cultural property, appointed by a State Party in occupation of another territory to safeguard cultural property in the occupied territory.⁹
- Neutral '**Protecting Powers**' and their representatives.¹⁰ The parties to a conflict are under a duty at the beginning of the conflict or any occupation to appoint a State as Protecting Power, to safeguard the interests of the parties. The Protecting Power might for instance visit prisoners of war or settle disagreements between the parties. Formal use of this system since 1945 has for the most part been restricted to 'textbook' conflicts such as the Falklands conflict in 1982. No appointments were made in the Gulf conflict of 1990-91.¹¹ If there is no Protecting Power, the Commissioner-General for Cultural Property is to exercise the functions of a Protecting Power.
- **Commissioners-General for Cultural Property**, appointed to the State Party engaged in an armed conflict, from a list of States Parties' nominees. The Commissioner-General is to be chosen by joint agreement between the Party to which he will be accredited

⁹ Regulations for the execution of the Convention, Art. 2

¹⁰ Regulations for the execution of the Convention, Arts 3, 5. The concept of Protecting Powers is familiar in international law and was developed and expanded by the 1949 Geneva Conventions and Additional Protocol I – see below.

¹¹ UK Ministry of Defence, *Manual of the Law of Armed Conflict*, 2004, para. 16.11.1

and the Protecting Powers acting on behalf of the opposing Parties.¹²

States Parties are obliged to send UNESCO a report every four years on measures taken to fulfil their responsibilities under the Convention. UNESCO then produces an overall periodic report on the implementation of the Convention, based on the reports.

1.2 First Protocol, 1954

The 1954 Convention was accompanied by a [Protocol](#) of the same date, which covers occupation situations. It aims to prevent States Parties from exporting cultural property from territories that they occupy during armed conflict, and to provide for the return of cultural property deposited with a third State for safekeeping during a conflict.

The provisions of this Protocol have to some extent been overtaken by the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, to which the UK acceded in 2002.

The 1954 Protocol had 104 States Parties by October 2016.¹³

1.3 Second Protocol, 1999

The gradual change in contemporary conflicts from the end of the 1980s onwards, from inter-state warfare to internal conflicts, and the increasing scale of damage to cultural property, highlighted deficiencies in the implementation of the Convention. These included:

- an overly broad interpretation of the notion of military necessity;
- the ineffective special protection system and control system;
- the extent of protection for cultural property in non-international armed conflicts; and
- ineffective sanctions for breaches of the Convention.

In 1991, UNESCO and the government of the Netherlands therefore conducted a [review](#) of the working of the convention and the Protocol. Following a Diplomatic Conference in The Hague in 1999, the [Second Protocol](#) was adopted to supplement the Convention and its First Protocol.

The Second Protocol's main innovations are as follows:

- A new regime for '**enhanced protection**' for cultural heritage of the greatest importance for humanity which is protected by national legislation and is not used for military purposes (see below).
- An expanded definition of '**safeguarding cultural property**', giving some examples of the kind of preparatory measures that should be taken in peace-time. These include
 - preparing inventories

¹² Regulations for the execution of the Convention, Arts 1, 4, 6

¹³ [UNESCO website](#) [accessed 24 October 2016]

- planning emergency measures for protection against fire or structural collapse
 - preparing for the removal of movable cultural property and
 - designating competent authorities responsible for the safeguarding of cultural property.
- A clearer definition of when a waiver on the grounds of **imperative military necessity** may be invoked.
 - Strengthened provisions on **criminal responsibility**, setting out sanctions for serious violations against cultural property and defining conditions when individual criminal responsibility applies.
 - A new [inter-governmental Committee for the Protection of Cultural Property in the Event of Armed Conflict](#) to supervise the implementation of the Protocol and control the list of properties granted enhanced protection.
 - A new **voluntary fund**, to be filled largely with voluntary contributions from States Parties, to help States Parties protect their cultural property.

The Second Protocol entered into force on 9 March 2004, but even by October 2016 it had only 69 States Parties.¹⁴

It appears that only four States – the Czech Republic, the Netherlands, Slovakia and Switzerland – have so far [contributed to the cultural property protection fund](#).¹⁵ UNESCO does, however, have access to other funds which it uses to help UN Member States protect cultural property.¹⁶

1.4 Which cultural property is protected?

The Convention and its Protocols cover:

- immovable and movable objects, including monuments of architecture, art or history, archaeological sites, works of art, manuscripts, books and other objects of artistic, historical or archaeological interest, as well as scientific collections of all kinds regardless of their origin or ownership;
- buildings whose main and effective purpose is to preserve or exhibit such property (for example museums or large libraries); and
- centres containing a large amount of cultural property.

They rely on lists of cultural property being drawn up by States Parties, notified to UNESCO, maintained and then transmitted to forces on the ground. Those States which have notified UNESCO of their lists of

¹⁴ [UNESCO website](#) [accessed 24 October 2016]

¹⁵ UNESCO, [Tenth meeting of the Committee for the Protection of Cultural Property in the Event of Armed Conflict \(10-11 December 2015\)](#), Adopted Decision, 21 April 2016, p6

¹⁶ See UNESCO General Conference 38th session, [Reinforcement of UNESCO's Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict](#), Doc 38C/49, 2 November 2015, para 42 ff

cultural property to be protected under the Convention have drawn up very restrictive lists.

The extent to which the Convention and its Protocols cover digital property is contested.

Affixing the Blue Shield is not necessary for ensuring that cultural property is protected – except for properties under ‘special protection’ in times of armed conflict, which must be marked with a group of three blue shields in triangular formation.

1.5 Basic, special and enhanced protection

The complex protection system under the Convention and its Protocols comprises:

- **Basic protection**, for all property protected under the Convention.
- **Special protection** under the Convention, for designated cultural property. This has been taken up by only four States (Austria, Germany, Netherlands and the Vatican City).¹⁷ The two main concerns about it were that an entry on the register could be challenged by the objection of just one State Party, which was seen as being too political; and inclusion in the Register could act simply as an advertisement of the presence of the property.
- **Enhanced protection** under the Second Protocol, again for designated cultural property. Its take-up is still very low. A [March 2014 UNESCO list](#) shows ten sites in five countries (Azerbaijan, Belgium, Cyprus, Italy and Lithuania) on the register for enhanced protection, all of which are also World Heritage Sites. Georgia and Mali have submitted [requests for enhanced protection](#), which will be considered by the Committee for the Protection of Cultural Property in the Event of Armed Conflict in December 2016.

1.6 To whom does the Convention apply?

Between States Parties only

Both the Convention and its Protocols apply only between their States Parties. This means that the provisions do not apply unless at least two states that are parties to a conflict have ratified.

For example, the Convention was not applicable during the Iraq conflict to the extent that two of the principal protagonists of the conflict (the United Kingdom and the United States of America) were not States Parties to it. The United States ratified the Convention (though not its Protocols) in 2009, following the furore over the looting of the Iraq National Museum in 2003.¹⁸ This leaves the UK as the only Permanent

¹⁷ The properties on the register were: the whole of the Vatican City State; the Alt-Aussee Refuge in Upper Austria; the Oberried Mine Drift Central Refuge in Germany; and six refuges for cultural property in the Netherlands. Austria's refuge and three of the Netherlands' six refuges were subsequently been removed from the Register at the request of those States.

¹⁸ [US Committee of the Blue Shield](#). See also [Report on the 23 August 2006 Meeting on the US Ratification of The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict](#)

Member of the UN Security Council that has not yet ratified the Convention.

UN peacekeeping forces?

[UNESCO's 2004 report on the Convention](#) discusses its implementation by UN peacekeeping forces:

The Secretariat has been in contact with the United Nations with regard to the implementation of the Hague Convention by the United Nations peacekeeping forces and has kept the United Nations informed of UNESCO's activities. In addition, the Secretariat has prepared a one-page list of basic principles of the Convention based mainly on Article 4 of the Convention and which can be carried in a peacekeeper's breast pocket.

28. On 6 August 1999, the Secretary-General of the United Nations issued a Bulletin on Observance by United Nations forces of international humanitarian law. Section 6.6 of this bulletin prohibits the United Nations forces from attacking cultural monuments and objects, archaeological sites, museums, libraries and places of worship. Furthermore, the United Nations forces are prohibited from using cultural property or their immediate surroundings for purposes which might expose them to destruction or damage. The Bulletin also prohibits theft, pillage, misappropriation, any act of vandalism and reprisals directed against cultural property.¹⁹

The director of UNESCO, Irina Bokova, said in April 2015 that protecting national heritage must be included in the mandate of peacekeeping missions, as is the case in Mali following the destruction of Timbuktu shrines.²⁰

It is important to note that the Hague Convention and its Protocols apply in internal as well as international armed conflicts, and during occupations.²¹

1.7 The military necessity waiver

Article 4 of the Convention provides that some of States Parties' obligations to respect cultural property may be waived where 'imperative military necessity' requires it.

The Second Protocol (Article 6) provides more detail, saying that it is permissible to direct an attack against cultural property:

- when, and for as long as, that cultural property has by its function been made into a military objective; and
- there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that property.

¹⁹ UNESCO, *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*, para. 27

²⁰ [Culture stands on the front-line of conflict -- it should be at the front-line of peace building.](#) "Director-General states to UN Security Council", UNESCO News, 27 April 2015

²¹ 1954 Convention, Arts 18 and 19

States' obligations can be waived only:

- in the case of property under basic protection, at the level of a battalion or equivalent commander or higher;
- in the case of property under special protection, at the level of a divisional or equivalent commander or higher;
- in the case of property under enhanced protection, at the highest operational level of command.²²

The obligations to prohibit theft, looting and vandalism, and to refrain from acts of reprisals against cultural property, cannot be waived.

UNESCO has published a [guide for armed forces](#), including some practical examples of when the military necessity argument can be raised.²³

The possibility of disregarding obligations under the Convention and Protocols through imperative military necessity is controversial. At the conference that produced the Convention, the US (which proposed the provision), Great Britain and Turkey insisted on including it, arguing that without it the Convention would be unrealistic. On the other hand, the USSR, Romania, Greece, Belgium, Ecuador and Spain were amongst those who argued that such an exception was incompatible with the spirit and essential principles of the Convention.²⁴

One criticism is that the concept of military necessity is so indefinite and the circumstances of its use in the field so fluid that 'necessity' too quickly and easily shades into 'convenience'. General Eisenhower had previously recognised this difficulty when he told the Allied forces that 'the phrase "military necessity" is sometimes used where it would be more truthful to speak of military convenience or even or personal convenience. I do not want it to cloak slackness or indifference'.²⁵

Further, field commanders can be expected to place other values (human life, for example) higher than cultural preservation and to translate them into 'military necessity'.

More philosophically, it can be argued that 'military necessity is a relic of an age that treated aggressive war as a legitimate instrument of national policy... Why, such critics ask, should a great cultural monument be legally sacrificed to the ends of war?'²⁶ But cultural property is not the only matter to be subjected to the demands of military necessity.

²² 1954 Convention Arts 4 and 11; Second Protocol Art 13

²³ UNESCO website, [Inserts on the Second Protocol to the Hague Convention into military manuals](#) (dated 28 May 2001)

²⁴ Nahlik, 'La protection internationale des biens culturels en cas de conflit armé', 120 *Recueil des Cours* 61 (1967), quoted in J.H. Merryman, 'Two ways of thinking about cultural property', 80 *American Journal of International Law* 831-853, at fn 24 (1986)

²⁵ American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas, *Report 48* (1946), quoted in J.H. Merryman, 'Two ways of thinking about cultural property', 80 *American Journal of International Law* 831-853, at 838 (1986)

²⁶ J.H. Merryman, 'Two ways of thinking about cultural property', 80 *American Journal of International Law* 831-853, at 840-41 (1986)

1.8 Blue Shield Committees

The Convention and its Protocols are supported and promoted by the Blue Shield network – equivalent to the [International Red Cross and Red Crescent Movement](#) for the Geneva Conventions.

The [International Committee of the Blue Shield](#), founded in 1996, comprises representatives of the five Non-Governmental Organisations (NGOs) working in this field:

- the International Council on Archives: www.ica.org
- the International Council of Museums: www.icom.museum
- the International Council on Monuments and Sites: www.icomos.org
- the International Federation of Library Associations and Institutions: www.ifla.org
- the Co-ordinating Council of Audiovisual Archives Associations: www.ccaaa.org

Its roles include:

- coordinating preparations to meet and respond to emergency situations as well as post-crisis support;
- promoting good standards; and
- collecting and sharing information on threats to cultural property worldwide.

[National Blue Shield Committees](#) have been founded in a number of countries, including the [UK](#). These bring together various professions, local and national government, the emergency services and the armed forces, and provide a forum for sharing experiences and exchanging information, raising national awareness of the threats to cultural heritage and promoting the ratification and implementation of the Hague Convention. They work closely with the [National Commissions for UNESCO](#).

The [Association of National Committees of the Blue Shield](#) (ANCBS), founded in December 2008, aims to coordinate and strengthen international efforts to protect cultural property at risk of destruction in armed conflicts or natural disasters. The ANCBS has its headquarters in The Hague.

2. UK policy on ratifying the Convention and its Protocols

2.1 Signature, 1954

The UK Government did not ratify the Convention when it was first drafted because, along with a number of other countries, it considered that the Convention and the 1954 Protocol did not provide an effective regime for the protection of cultural property.²⁷

2.2 Intention to ratify, 2004

On 14 May 2004, during a UNESCO symposium on the 50th anniversary of the Convention,²⁸ the Government publicly announced its intention to ratify the Convention and accede to both its Protocols. It felt that the original drawbacks of the Convention had been sufficiently ameliorated by the 1999 Protocol, and that it now wished to complete its participation in all the major international humanitarian law treaties by ratifying this one.²⁹

2.3 The Draft Cultural Property (Armed Conflicts) Bill 2008

In September 2005, the DCMS published a [consultation](#) document on how the UK could best meet its obligations under the Convention and its Protocols.³⁰

A [summary](#) of the responses received, all from cultural organisations, was published in October 2006.³¹ There was a high degree of support for the Government's plans.³²

In January 2008, the DCMS published a [draft *Cultural Property \(Armed Conflicts\) Bill*](#) which proposed changes to national legislation to allow the UK to conform to the Convention.³³

The Culture, Media and Sport Committee welcomed the draft Bill in a July 2008 [report](#):

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...and it may encourage more

²⁷ DCMS, [Explanatory Notes to the Cultural Property \(Armed Conflicts\) Bill \[HL\] 2016-17](#) as brought from the House of Lords, September 2016; See also DCMS, [Draft Cultural Property \(Armed Conflicts\) Bill Impact Assessment](#), October 2007, p84

²⁸ [Archived DCMS website](#) [accessed 24 October 2016]

²⁹ A list of major international humanitarian law treaties is provided in Appendix A to this note

³⁰ DCMS, [Consultation Paper on: the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols of 1954 and 1999](#), September 2005

³¹ DCMS, [1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its Two Protocols of 1954 and 1999: A Summary of Responses Received to the Government's Consultation](#), October 2006

³² *Ibid*, p5

³³ DCMS, [Draft Cultural Property \(Armed Conflicts\) Bill](#), Cm 7298, January 2008

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Commonwealth states to sign up to the Convention and the two Protocols.³⁴

The main purpose of the Committee's inquiry was to establish whether or not the Bill would unduly constrain military operations. The Ministry of Defence (MoD) told the Committee that the Bill wouldn't have this effect.³⁵

The Committee was concerned that the Government hadn't decided 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.³⁶ In its [response](#), the then Government said that the general categories of property put forward for protection were enough and that a list of specific sites was not necessary.³⁷

No further progress was made on ratifying the Convention.

UNESCO has published a [draft bill](#) for common-law States seeking to implement the Convention and its Protocols.

Appendix B to this Paper sets out the general rules on treaty ratification in the UK.

³⁴ Culture, Media and Sport Committee, [Draft Cultural Property \(Armed Conflicts\) Bill](#), HC 693 2007/08, July 2008, p3

³⁵ Ibid, p3

³⁶ Ibid, recommendation 12 on p22

³⁷ DCMS, [Cm 7472](#), October 2008, p25

3. The Cultural Property (Armed Conflicts) Bill [HL] 2016-17

3.1 Introduction

In June 2015, the Government said that it would introduce legislation to ratify the Convention at the “first opportunity”.³⁸

The *Cultural Property (Armed Conflicts) Bill [HL] 2016-17* [HL Bill 3] was introduced in the House of Lords on 19 May 2016.

According to the [Explanatory Notes](#) to the Bill, the UK already complies with the Convention during military operations, and recognises and respects the cultural emblem used to mark protected cultural property. However, primary legislation is needed to fully meet the obligations of the Convention and its Protocols.³⁹

An [Impact Assessment](#) on the Bill gives three “primary benefits” of ratification:

- It will formalise the responsibilities of UK troops when operating in armed conflict overseas with regard to the protection of cultural property
- It will provide reciprocal protection for UK cultural property in the event that we were attacked by a State Party to the Convention
- In the current context of unprecedented cultural heritage destruction in the Middle East and North Africa region, especially in Iraq and Syria, it will ensure that the UK can act and be seen to act legitimately according to international law in response to such crises⁴⁰

The Bill received cross party support in the House of Lords. The Bill was not amended at Committee stage. One minor amendment was made at Report Stage.⁴¹

The Bill [no. 66] was introduced in the House of Commons on 13 September 2016.

[The Bill](#), [Explanatory Notes](#), and an [Impact Assessment](#) are available from the parliamentary [website](#).

The Bill would extend to the whole of the UK.

³⁸ “UK to adopt Hague Convention to protect artefacts in war zones”, *BBC News*, 21 June 2105

³⁹ [Explanatory Notes to HC Bill 66](#), para 9; Paragraphs 10 to 18 set out in detail why existing domestic legislation does not meet the obligations of the Convention and its Protocols

⁴⁰ DCMS, [Impact Assessment on Ratification of the Hague Convention in the Event of Armed Conflict and accession to its two Protocols](#), 7 September 2016, p5

⁴¹ i.e. amendment 2 to clause 4(6)(b), agreed at [HL Deb 6 September 2016 c947](#)

A range of organisations have welcomed the Bill including the Association of National Committees of the Blue Shield,⁴² the British Red Cross,⁴³ Historic England,⁴⁴ the Council for British Archaeology,⁴⁵ the Heritage Alliance,⁴⁶ and the UK National Commission for UNESCO.⁴⁷

The rest of this Paper discusses the Bill's main provisions and some of the issues raised. The Explanatory Notes give detailed commentary on the Bill's clauses.

3.2 Definition of cultural property

Clause 2 of the Bill states that "cultural property" will have the meaning given in Article 1 of the Convention (section 1.4 above).

The Chair of the Antiquities Dealers Association (ADA), Chris Martin, has claimed that the Convention's definition of cultural property was "not specific enough" and that the definition given in Article 1 of the UNESCO Convention was more appropriate:

While it [the Hague Convention] cites "property of great importance to the cultural heritage of every people", it also includes "works of art", which could be just about anything and would have serious implications for the entire art market.

"We have no problem with adopting The Hague Convention in principle, but would argue that [Article 1 of the UNESCO Convention](#) – already adopted by 130 countries – is more appropriate," says Martin, "because it restricts the definition to items of 'outstanding universal value' in terms of cultural heritage."

[In 2008 the Government stated](#) its intention as being to "protect the nation's most important cultural property" in relation to ratifying the Hague Convention, so the ADA argues that the new Bill should reflect this intention and not expand its remit to cover a much wider field of artworks, even unintentionally...⁴⁸

During the House of Lords Committee stage [debate](#) on the Bill, Lord Stevenson of Balmacara tabled an amendment to clause 2 to make sure that the definition of cultural property would cover digital and cultural images.

Baroness Neville-Rolfe (Parliamentary Under-Secretary of State at the DCMS) replied that any amendment to the Bill's definition of cultural property was "undesirable" as it "would create uncertainty and inconsistency in the application of the convention and its protocols and could result in the UK failing to comply with its obligations under

⁴² ["UK to adopt Hague Convention"](#), UK National Committee of the Blue Shield press release, 19 May 2016

⁴³ ["Red Cross welcomes UK move to protect cultural sites"](#), British Red Cross news, 19 May 2016

⁴⁴ Historic England, [Statement on the Cultural Property \(Armed Conflicts\) Bill](#), May 2016

⁴⁵ ["The Cultural Property \(Armed Conflicts\) Bill"](#), Council for British Archaeology news, 18 May 2016

⁴⁶ Heritage Alliance, [Briefing on the Cultural Property \(Armed Conflicts\) Bill](#), June 2016

⁴⁷ ["UKNC welcomes UK Government's commitment to ratify the Hague Convention on Cultural Protection"](#), UK National Commission for UNESCO news, 20 May 2016

⁴⁸ ["Antiquities Dealers' Association \(ADA\) says new Culture Bill needs vital changes to safeguard refugees and legitimate art market interests"](#), ADA news, 13 June 2016

them”.⁴⁹ She said that the definition was “flexible enough” to meet any concerns about what sort of cultural property might be covered. The amendment was withdrawn.

3.3 Application to Service personnel and civilians subject to Service discipline

As a consequence of Article 53 of Additional Protocol I to the Geneva Conventions 1977, the UK Armed Forces are already party to the general principles of immunity of cultural property. This is reflected in the UK’s [Manual of the Law of Armed Conflict](#). Section 5.25 states:

It is prohibited:

- a. to commit any acts of hostility directed against the historic monuments, works or art or places of worship which constitute the cultural or spiritual heritage of peoples;
- b. to use such objects in support of the military effort;
- c. to make such objects the object of reprisals.

The obligations on British Service personnel to protect objects of cultural importance in theatre are also set down in the [Aide Memoire on the Law of Armed Conflict](#), which is issued to all personnel prior to operational deployment and forms part of their pre-deployment training.

One of the main aims of the Bill is to formalise the responsibilities of UK military personnel and those civilians subject to Service discipline, as defined in [Schedule 15](#) of the *Armed Forces Act 2006*, including private security contractors operating in theatre with the UK Armed Forces.

Given the observance of cultural protection within existing military law, the Bill’s Impact Assessment considered that the prosecution of military personnel under the Bill would be minimal:

The 1954 Hague Convention is treated by the UK military as being part of customary international law and so British troops have for a number of years been trained in the need to respect cultural property and not subject it to unnecessary attack or damage. The Tri-Service Manual has instructions explicitly covering cultural property and this forms part of the training for all UK troops. Thus, the likelihood of UK troops being prosecuted under this Bill for damaging cultural property is extremely small. It is worth noting in this regard that although there have been instances of damage to cultural property in Iraq by coalition forces, none of these have been carried out by UK troops.⁵⁰

⁴⁹ [HL Deb 28 June 2016 cc1479-80](#)

⁵⁰ [Ratification of 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and accession to its two Protocols \(of 1954 and 1999\): Impact Assessment](#), 1 May 2016. The references to Iraq largely relate to a number of incidents involving US military forces, both in terms of the failure to protect cultural sites and prevent looting, and also the construction of US military facilities on sites of cultural significance. For further detail see: [US Central Command Historical/Cultural Advisory Group](#)

The status of “embedded” personnel

During the debate in the House of Lords the status of “embedded” military personnel was raised (that is, military personnel operating under the command of another country).

UK personnel embedded in another nation’s armed forces

Several peers introduced a number of probing amendments at Committee Stage that would extend the jurisdiction of the bill to UK military personnel operating under the military command of another country.

Under the *Armed Forces Act 2006*, British Service personnel remain subject to UK law and military law wherever they are serving in the world. British personnel embedded with the armed forces of another country may, therefore, come under the command and control of that host nation, but they remain, at all times, subject to UK military jurisdiction. As such the provisions of the Bill would still apply to British personnel embedded with other nation’s armed forces. In answering those amendments Baroness Neville-Rolfe stated:

I turn to Amendments 7 and 8, the proposed new clauses on embedded forces and private military contractors. I think that their intended effect is already covered in the Bill and I have concerns about potential unintended consequences if we were to make the amendments. First, the Armed Forces Act 2006 provides that regular members of the Armed Forces remain subject to UK service law at all times. This includes times when they are under the command of another country. Embedded personnel would therefore still be within the definition in Clause 3 (6) of,

“person subject to UK service jurisdiction”,

and the Bill would apply to them in the same way as if they remained under UK command.

The noble Lords, Lord Touhig and Lord Howarth, talked about private military contractors. Such contractors and their individual staff are also already covered by the Bill and will be criminally liable in the same way as any other legal or natural person. For example, should an employee of a private military contractor who is a UK national or subject to UK service jurisdiction commit an act abroad of a kind described in Article 15(1)(d) or (e) of the Second Protocol, they could be criminally liable under Clause 3 on the same basis as any other person—so I think they are covered.⁵¹

Foreign personnel embedded in the UK armed forces

What is not clear, however, is the status of personnel who may be embedded within, or operating under the command of, the British armed forces whose own nation is not a State Party to the Hague Convention and/or its Protocols.

Article 16 (2) of the Second Protocol states that people from States that are not parties to the Convention and Second Protocol cannot be prosecuted for offences under them, unless they are serving in the armed forces of a State Party. However, is being “embedded” in another nation’s armed forces or operating under their command, in

⁵¹ [HL Deb 28 June 2016 cc1488-9](#)

legal terms, the same as “serving” in that armed forces, and therefore subject to the jurisdiction of the Convention and its Protocols?

In August 2016 the MOD described embedded personnel thus, without directly addressing this question:

When embedded, UK service personnel operate as fully as possible as members of their host nation’s military but, under the Armed Forces Act 2006, UK personnel embedded with other nations’ armed forces remain subject to Service law, operate in accordance with the UK interpretation of International law and the criminal law of England and Wales, and within any specified UK policy constraints that are articulated to the embed before deployment and, where applicable, more restrictive UK Rules of Engagement. UK service personnel will only be embedded with our allies after the Ministry of Defence has fully considered the role that they will be expected to undertake with their host nation, the theatre into which they will be deployed and any other implications such as personal security. This strict governance process ensures that a member of our Armed Forces would not support an operation with which HMG does not agree. The Ministry of Defence keeps these deployments under review and if there are any adverse changes to an embeds requirements then we reserve the right to remove them from another nation’s chain of command at any point.⁵²

While the majority of countries have ratified the Convention, the most notable exception is Ireland which, to date, is only a signatory.⁵³ It is also worth noting that most military operations conducted in the present international environment are likely either to be coalitions of the willing, UN peacekeeping operations, or conducted under the auspices of NATO or the EU.

A particular question is the extent to which the actions of foreign nationals embedded within, or operating under the command of, the UK armed forces, and whose sending State is not a party to the Convention, could have implications for British military commanders.

3.4 Responsibility of commanders and other superiors

Although Additional Protocol I sets down some level of international legal obligation on the Armed Forces with respect to cultural property, it is not specific in its designation of legal responsibility for the actions of subordinates on military commanders and other superiors.

Clause 5 of the Bill sets down precisely that burden of responsibility. It extends criminal liability to military commanders and superiors who fail to prevent the commission of an offence in certain circumstances.

A distinction is, however, made between the standards expected of a military commander and those expected of other individuals in a position of superiority, in recognition of the fact that the latter category of individual may not have as much control over the actions of their

⁵² Personal correspondence with the author (Claire Mills)

⁵³ In March 2013, UK and Irish military personnel deployed on a joint training mission to Mali. See: [“Irish Army troops working from British Army bases is ‘a regular occurrence’”, *Irish Post*, 17 April 2013](#)

subordinates. In the case of 'superiors' liability will only be incurred where they knew of, or consciously disregarded information indicating that an offence was being committed. For the military commander that liability is incurred where they knew, or owing to the circumstances *should* have known, that their forces were committing an offence.

The language is almost identical to section 65 of the [International Criminal Court Act 2001](#) which establishes criminal liability for acts in contravention of international humanitarian law. Under subsection (5) courts will be obliged to take account of the jurisprudence of the International Criminal Court (ICC) in interpreting and applying this clause. During the passage of the ICC bill in 2001, this debate over the liability of military commanders and specifically the issue of what they "should" have known, compared to the liability criteria of 'superiors', received much attention in the House of Lords at the time. In particular, concerns were expressed over the ability of the ICC to interpret what "should" have been known by a commander, outside of the conditions of war. A detailed discussion of this issue is set out in Library Research Paper RP01/39, [The International Criminal Court Bill](#), 28 March 2001.

However, in its [2008 Regulatory Impact Assessment](#) on the *Draft Cultural Property (Armed Conflicts) Bill*, the Government suggested that such a clause would be beneficial to military commanders as it would "provide both greater certainty over what is and is not permitted and provide a legal framework within which to take and validate decisions. This will provide clarity to military commanders and personnel with regard to what they can and can't do and where the responsibility for actions lie".⁵⁴

During second reading in the House of Lords on 6 June 2016, Baroness Neville-Rolfe commented:

Concerns have been raised about this legislation placing yet another burden on British soldiers. However, as has been said, the Ministry of Defence and our Armed Forces already act as if bound by the Hague Convention, and respect for cultural property is upheld across the UK's Armed Forces in military law, our targeting policy, training and in-battle area evaluation and assessment. My department has worked closely with the Ministry of Defence in preparing the Bill [...]

It is the Government's view that the Bill will not constrain the military or have any negative consequences for UK soldiers or their commanders.⁵⁵

As outlined above, however, the status of foreign nationals embedded with, or operating under the command of, British military commanders, and whose sending state is not party to the Convention, is not clear.

3.5 Serious violations of the Second Protocol

Article 28 of the 1954 Convention requires that States Parties take all necessary steps to prosecute and impose penalties upon persons who commit, or order to be committed, a breach of the Convention.

⁵⁴ DCMS, [Cm 7298](#), January 2008, p91

⁵⁵ [HL Deb 6 June 2016 c616](#)

Article 15 of the [Second Protocol](#) provides much more specific requirements. Article 15 (1) defines certain acts, if committed intentionally, as “serious violations” of the Second Protocol:

- a. making cultural property under enhanced protection the object of attack;
- b. using cultural property under enhanced protection or its immediate surroundings in support of military action;
- c. extensive destruction or appropriation of any cultural property protected under the Convention and the Second Protocol;
- d. making cultural property protected under the Convention and the Second Protocol the object of attack;
- e. theft, pillage or misappropriation of, or acts of vandalism directed against, cultural property protected under the Convention.

Under Article 15(2), each State Party must make these acts criminal offences under its domestic law. The [Explanatory Notes](#) to the Bill set out in detail why “existing UK laws are not sufficient to meet the obligations set out in the Convention and its Protocols in full”.⁵⁶

Part 2 of the Bill (clauses 3 to 7) incorporates the offences created by Article 15 of the Second Protocol into domestic law.

Clause 3 (1) would make it an offence for a person to commit one of the acts set out in Article 15(1) of the Second Protocol if the act was intentional, in violation of the Convention and the Second Protocol, and the person knew that the property in question was cultural property.

According to the Explanatory Notes, the offence set out in Article 15(1)(e) is the most likely to be prosecuted as this applies to offences against cultural property committed in the many countries that have ratified the Convention regardless of whether they are also Parties to the Second Protocol.⁵⁷

A person guilty of an offence under clause 3, or the ancillary offences set out in **clause 4**⁵⁸, would be liable to a prison term of up to 30 years (**clause 6**).

The Joint Committee on Human Rights has [argued](#) that the maximum penalty is “potentially disproportionate”.⁵⁹ At Lords Report Stage, Lord Brown of Eaton-under-Heywood moved an amendment that would have reduced the maximum penalty to 14 years.⁶⁰ The Government

⁵⁶ DCMS, [Explanatory Notes to Bill 66](#), paras 9-18

⁵⁷ DCMS, [Explanatory Notes to Bill 66](#), para 26

⁵⁸ Para 32 of the [Explanatory Notes](#) state that clause 4 is necessary to “implement fully the obligation in Article 16 of the Second Protocol to establish extra-territorial jurisdiction for the offences set out in Article 15”. The exact wording differs for the three jurisdictions of England and Wales, Northern Ireland and Scotland. The wording of clause 6(b) was amended at Lords Report stage ([HL Deb 6 September 2016 c947](#)) – the only amendment to the Bill in the House of Lords. For further background on clause 4 see [Deposited Paper 2016-0617](#)

⁵⁹ Joint Committee on Human Rights, [Third Report of Session 2016-17](#), HC 739/HL Paper 48, 14 October 2016, para 89

⁶⁰ [HL Deb 6 September 2016 c948](#)

resisted the amendment.⁶¹ Lord Brown of Eaton-under-Heywood said that although he had not been persuaded by the Government's arguments, he was confident that judges would reach sensible solutions on appropriate penalties.⁶² He withdrew his amendment.⁶³ The Joint Committee on Human Rights said that it regretted the Government's position.⁶⁴

International prosecutions

International courts and tribunals have prosecuted individuals for serious offences against cultural property in armed conflict, and could do so again if the state(s) concerned were considered unable or unwilling to prosecute.

As mentioned above (section 1.1), the Nuremberg trials included charges of destruction of cultural property.

Others arose from the conflicts in the former Yugoslavia. The [International Criminal Tribunal for the former Yugoslavia](#) (ICTY), established to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991, has jurisdiction over violations concerning 'seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science'. It prosecuted a number of people under this provision, and held that the destruction or willful damage done to institutions dedicated to religion, charity, education, and the arts and sciences, and to historic monuments and works of art and science represent a violation of values especially protected by the international community. It clearly followed the ethos of the 1954 Convention when describing the shelling attack on the Old Town of Dubrovnik as an attack 'not only against the history and heritage of the region, but also against the cultural heritage of the whole of humankind'.⁶⁵

The International Criminal Court (ICC) has also prosecuted individuals for damage to cultural property. It has recently concluded its first case where cultural property offences were the main charge, that of Islamist militant [Ahmad al-Faqi al-Mahdi](#). Mr al-Mahdi admitted directing the destruction of religious monuments in Timbuktu, Mali, in 2012. On 27 September 2016 the ICC found him guilty, and sentenced him to nine years imprisonment.

⁶¹ [HL Deb 6 September 2016 cc950-1](#)

⁶² [HL Deb 6 September 2016 c951](#)

⁶³ Ibid

⁶⁴ Joint Committee on Human Rights, [Third Report of Session 2016-17](#), HC 739/HL Paper 48, 14 October 2016, para 92

⁶⁵ Trial Chamber, [Prosecutor v Miodrag Jokic](#)

3.6 Use of the cultural emblem

Article 16 of the Convention created a “cultural emblem”, a blue and white shield, to be used to identify cultural property protected by the Convention (see pp5-6 above).

Under Article 17, the cultural emblem on its own can be used to identify cultural property not under special protection. It can also be used on armbands and identity cards for people engaged in protecting cultural property under the Convention and its Protocols. The use of the emblem for any other purpose is forbidden. The use of a design resembling the cultural emblem is also forbidden.

Clause 9 of the Bill would create a new offence of unauthorised use of the cultural emblem as well as any other design that “nearly resembles the emblem”. The offence would be punishable by a fine (no maximum cap in England and Wales; up to level 5 on the standard scale in Scotland and Northern Ireland).

There would be a number of defences to the offence (**clause 13**). These include using the emblem where it forms part of a trademark, registered before the Bill comes into force, and where the trademark is used lawfully in relation to the goods and services for which it was registered – e.g. a badge for a sports club.⁶⁶

Clauses 10 to 12 would authorise the use of the emblem for the purposes described in the Convention.

3.7 Property exported from occupied territory

Under the First Protocol, States Parties have an obligation to take into custody cultural property which has been exported from occupied territory. This property must be returned at the close of hostilities.

Article 21 of the Second Protocol requires States Parties to take measures to suppress any illicit export, other removal or transfer of ownership of cultural property from occupied territory in violation of the Convention or the Second Protocol.

Part 4 of the Bill would enable the UK to implement the above obligations.

Under **clause 16**, property is “unlawfully exported cultural property” if it is exported from occupied territory, and its export is unlawful under either the laws of the territory in question, or under rules of international law. Cultural property unlawfully exported from occupied territory at any time after 1956 (when the First Protocol came into force) will be captured by this definition.

Clause 17 would make it an offence to deal in cultural property unlawfully exported from occupied territory if the perpetrator either knew, or had reason to suspect, that the property had been unlawfully exported.

⁶⁶ Clause 13(3) of the Bill; for further detail see paras 49-51 of the Explanatory Notes

Penalties

The offence would be triable “either way”. For a conviction in the Crown Court, the maximum penalty would be seven years’ imprisonment, or a fine, or both.

For a conviction in the magistrates’ court, the maximum penalty would be:

- England & Wales: imprisonment up to 12 months⁶⁷, or a fine (no maximum limit), or both
- Scotland: imprisonment up to 12 months, or a fine up to the statutory maximum, or both
- Northern Ireland: imprisonment up to 6 months, or a fine up to the statutory maximum, or both

Where someone has been convicted of dealing with unlawfully exported cultural property, the court would be able to order the forfeiture of the property, and may make further provision for its retention or disposal (**clause 18**).

Forfeiture of property

Under **clause 19**, a court would be able to order the forfeiture of unlawfully exported cultural property otherwise than in connection with the new offence. A court would be able to make the forfeiture order conditional on compensation being paid (**clause 20**). This is to protect the interests of someone who acquired cultural property in good faith not knowing that it was unlawfully exported from occupied territory.

Search and seizure

Clauses 23 to 27 set out when the police can search for, seize and retain cultural property suspected of being unlawfully exported. They also describe how property is to be returned to the owner at the end of an investigation or if a forfeiture order is not pursued.

3.8 Property removed for safekeeping

Under Article 14 of the Convention, States Parties are required to grant immunity from seizure to any cultural property which enjoys special protection under Article 12 of the Convention. Article 12 applies to cultural property which is being transported for safekeeping. The means of transport for cultural property which enjoys special protection must also enjoy immunity of seizure.

Clause 28 of the Bill would implement the UK’s obligations under Article 14 to ensure that cultural property entitled to special protection is not seized or forfeited while it is in the UK. The immunity applies both to cultural property which is being transported to the UK, and to cultural property which is in transit through the UK to another destination for safekeeping.

⁶⁷ Until section 281(5) of the Criminal Justice Act 2003 is commenced, the maximum sentence a magistrates’ court can impose for one offence is currently six months

The Joint Committee on Human Rights has [pointed out](#) that clause 28 is worded in such a way as to give objects protected under it complete immunity from seizure under any other legislation or rule of law. The Committee noted that a similar provision to clause 28, in the *Tribunals, Courts and Enforcement Act 2007*, had been made subject to international law and EU obligations.⁶⁸ At Lords Report Stage, Lord Brown of Eaton-under-Heywood moved an amendment so that if conflicting obligations arose between complying with Article 14 and other obligations under international law, the courts would decide on where the priorities should lie.⁶⁹ After the Government explained its position on this issue,⁷⁰ the amendment was withdrawn.⁷¹

3.9 Other issues raised in the House of Lords

A number of other issues were raised when the Bill was debated in the House of Lords. A summary of some of these is given below.

What would the Bill mean for those dealing with cultural property?

During the Lords Committee stage on the Bill, there was discussion of how those working in the sector would establish that an object was not “unlawfully exported cultural property” and how due diligence would be carried out in a “proportionate way”.⁷² Responding for the Government, Baroness Neville-Rolfe said that the Bill would “not require those dealing with cultural property to do anything that they do not already do”:

(...) The Collections Trust, on behalf of Arts Council England, provides extensive guidance for museums, collectors, dealers and others on compliance with the legal requirements relating to cultural property, including on conducting due diligence to establish provenance and on related moral and ethical issues. There is a section on the Collections Trust website that references the 1954 Hague convention and its obligations. A wide range of other organisations also provide advice and guidance to their members and sectors on these issues...⁷³

The [Impact Assessment](#) on the Bill says that the Bill would not impose any “significant new costs” on dealers in cultural property as existing codes of practice and conduct already include due diligence checks.⁷⁴ In addition, the principles of conduct of established trade associations already refer to the Hague Convention e.g., the [Code of Conduct](#) of the [Antiquities Dealers’ Association](#).⁷⁵

⁶⁸ Joint Committee on Human Rights, [Third Report of Session 2016-17](#), HC 739/HL Paper 48, 14 October 2016, para 89

⁶⁹ [HL Deb 6 September 2016 c954](#)

⁷⁰ [HL Deb 6 September 2016 cc956-7](#)

⁷¹ [HL Deb 6 September 2016 c957](#)

⁷² [HL Deb 28 June 2016 c1507-11](#)

⁷³ [HL Deb 28 June 2016 c1509](#)

⁷⁴ DCMS, [Impact Assessment](#), 7 September 2016, p8

⁷⁵ *Ibid*, p8

The Cultural Protection Fund

In November 2015, the Government announced that it would provide £30 million, over four years, to a new Cultural Protection Fund.⁷⁶ The objective is to “to help to create sustainable opportunities for economic and social development through building capacity to foster, safeguard and promote cultural heritage in conflict-affected regions overseas.”⁷⁷

The Fund works across three areas:

- the preservation, restoration and documentation of cultural heritage sites
- training of local heritage professionals
- cultural heritage education⁷⁸

The Government has said that “a balance needs to be struck between projects with long term benefits and emergency intervention at the time of a crisis”:

(...) The Fund's main focus will be on supporting projects with long term benefits. Applications will be welcome from projects seeking to address an emergency situation. However, it is often difficult for heritage protection work to take place in active conflict zones where emergency situations are most likely to have arisen. The UK government is committed to responding to emergency situations across the globe, for example responding to humanitarian crises. This work is supported by DfID and the FCO.⁷⁹

The Fund is targeted at the following countries: Afghanistan, Egypt, Jordan, Lebanon, Libya, Iraq, Occupied Palestinian Territories, Sudan, Syria, Tunisia, Turkey and Yemen.

The [British Council](#) manages the Fund. Details of the grants and funding rounds can be found on the Council's website.⁸⁰

Around £3 million funding has already been allocated to the British Museum's Iraqi Emergency Heritage Management programme.⁸¹

The Fund has been welcomed by organisations working in the sector e.g. the Heritage Alliance⁸² and the Council for British Archaeology.⁸³

During the Lords Committee stage of the Bill, Lord Collins of Highbury tabled a new clause that would have required the Secretary of State to

⁷⁶ DCMS website, [Government proposals to protect cultural heritage overseas](#), 14 January 2016

⁷⁷ British Council website, [Cultural Protection Fund 2016–2020](#), [accessed 24 October 2016]

⁷⁸ DCMS, [Letter from Baroness Neville-Rolfe to Baroness Bonham-Carter on the Cultural Heritage Bill](#), 14 June 2016

⁷⁹ Ibid

⁸⁰ British Council website, [Cultural Protection Fund 2016–2020](#), [accessed 24 October 2016]

⁸¹ [“British Museum to work with experts from Iraq to set up Emergency Heritage Management programme”](#), British Museum news, October 2015; [“New scheme to protect cultural sites from destruction”](#), DCMS/FCO news, 28 October 2015

⁸² Heritage Alliance, [Briefing on the Cultural Property \(Armed Conflicts\) Bill](#), June 2016

⁸³ [“After the Hague Convention”](#), Council for British Archaeology news, 8 September 2016

lay a report before Parliament on how the work of the Fund had supported the implementation of the Convention and its Protocols.⁸⁴

Replying for the Government, Baroness Neville-Rolfe resisted the amendment but acknowledged the need to be transparent about the Fund:

(...) It is absolutely right that this House has the opportunity to understand how the fund is supporting the work of cultural heritage protection at risk of, or already damaged by, conflict.

(...) We also monitor and report on the fund throughout its operation to ensure that it is successfully meeting the object of protecting cultural heritage affected by damage and destruction. In line with these general objectives, the Government will publish an annual report. Alongside this, the spend will be scrutinised and published by the OECD—all the more important an institution now given the way that things are going—on a biennial basis.

If the fund has any direct relevance to today's legislation, we will make sure that that is included in the report. For example, there is an obligation in the second protocol to take measures in peacetime to safeguard cultural property. This may include activity such as the preparation of inventories which could potentially be awarded funding.⁸⁵

Lord Collins of Highbury withdrew his amendment.

Syria and Iraq

Both the Convention and its Protocols apply only between their States Parties (section 1.6 of this Paper).

A number of members of the House of Lords referred to the destruction of cultural heritage in Syria and Iraq and the fact that the Bill would do little to prevent this.⁸⁶

Baroness Neville-Rolfe admitted that the Bill's application to Syria and other civil wars would be "limited":

(...) the UK does not recognise Daesh as a state and so the Bill's application to Syria and other civil wars is limited. The dealing offence in Clause 17 does not apply to Syria because it only covers unlawfully exported cultural property from occupied territories...

Under international law, territory could be occupied only by another state. As, rightly, we do not recognise Daesh as a state, Syria cannot be classed as occupied territory. However...this does not represent a serious gap in our provisions because sanctions already exist for cultural property removed from Syria since March 2011, and dealing in cultural property exported from Syria is prohibited under UK law.

A UK national fighting with Daesh in Syria can be prosecuted under our Bill in relation to,

"theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property",

protected under the convention. To expand or extend this application would, of course, be a serious over-implementation of

⁸⁴ [HL Deb 28 June 2016 c1537](#)

⁸⁵ [HL Deb 28 June 2016 c1539](#)

⁸⁶ See, for example, [HL Deb 6 June 2016 c589](#) and [HL Deb 28 June 2016 cc1494-7](#)

the convention in UK legislation. That, of course, is not the purpose of the Bill...⁸⁷

Cultural Property Protection Unit

A cultural property protection unit in the army reserves is to be set up to help with the protection of cultural heritage and monuments.⁸⁸

Baroness Neville-Rolfe was asked what progress had been made.⁸⁹ She said that a joint working group was still “developing the concept”⁹⁰ of the unit. However the “monuments men and women” were “well geared up and are starting to recruit specialists into the Army Reserve pending final approval of the Bill”.⁹¹

⁸⁷ [HL Deb 28 June 2016 cc1497-8](#)

⁸⁸ See, for example, [HC Deb 18 April 2016 c628](#) and [HL Deb 6 June 2016 c584](#)

⁸⁹ See, for example, [HL Deb 6 June 2016 c598](#)

⁹⁰ [HL Deb 6 June 2016 c616](#)

⁹¹ [HL Deb 28 June 2016 c1490](#)

Appendix A: Other international instruments protecting cultural property

The protection of cultural property in times of war is also covered in other international instruments, many of which already bind the UK. A selection of these are summarised below.

1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

This Convention's main purpose is to restrain the flow of cultural property from source nations by limiting its importation by market nations. It has a wider definition of cultural property than the 1954 Hague Convention, but, unlike its predecessor, it conceives of cultural property as a part of national heritage rather than the worldwide heritage of all humankind. Article 11 of this Convention requires States Parties to regard as illicit the export and transfer of ownership of cultural property under compulsion from a territory under occupation.

The UK acceded to the 1970 UNESCO Convention in 2002. The UK's [*Dealing in Cultural Objects \(Offences\) Act 2003*](#) complements the UK Government's obligations under the 1970 Convention. It includes an offence of dishonestly dealing in a cultural object (defined as an object of historical, architectural or archaeological interest) that is 'tainted', knowing or believing that object to be tainted.

1977 Additional Protocols I and II to the Geneva Conventions

Articles 53 and 85(4) of Additional Protocol I to the 1949 Geneva Conventions, which apply to international armed conflicts, prohibit a series of acts against 'historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of people'.

Article 16 of Additional Protocol II to the 1949 Geneva Conventions provides for similar protection of cultural objects and of places of worship in non-international armed conflicts.

The UK is bound by these provisions, but unlike the 1954 Convention, it is not clear whether they cover the full range of cultural property including scientific collections or libraries. Moreover, the UK declared when ratifying Additional Protocol I that property loses its protection if it is unlawfully used for military purposes.

1985 European Convention on Offences relating to Cultural Property

This Council of Europe convention, known as the Delphi Convention, sets out a detailed series of mandatory and optional offences of

trafficking cultural property. It has not been ratified by a single state, and is therefore not in force.

The Council of Europe is preparing a new criminal law convention to replace the Delphi Convention. A [Committee on Offences relating to Cultural Property](#) is aiming to draft the new convention by the end of 2017. It will cover the following areas:

- definition of cultural property;
- criminalisation of behaviour which has the potential to harm cultural property;
- criminalisation of illicit destruction of cultural property;
- criminalisation of trafficking in cultural property;
- prevention of offences relating to cultural property;
- international co-operation.

1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects

This Convention, from the International Institute for the Unification of Private Law, deals with the restitution of stolen cultural objects and the return of objects which have been illegally removed. It states that those who are in possession of illegally acquired objects must return them, and suggests that if the object was acquired in good faith and suitable checks were carried out, compensation may be given to the possessor. It is seen as more powerful than the 1970 UNESCO Convention (see above).

The UK is one of many States that have not signed or ratified the UNIDROIT Convention. In 2000 the Government explained that it had decided not to join it because 'in order to implement the convention, changes to our limitation periods and to our personal property law would be required, resulting in a special regime for cultural objects and arguably a less generous position for the original, rightful owners of objects which were later stolen'.⁹²

1998 Rome Statute of the International Criminal Court

This codifies many rules and principles of international humanitarian law. Amongst other things it establishes the International Criminal Court (ICC)'s jurisdiction over intentional attacks 'against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives' occurring both in international and non-international armed conflicts.⁹³

⁹² [HC Deb 7 February 2000 c9W](#)

⁹³ *Rome Statute of the International Criminal Court*, in force 1 July 2002, Articles 8(2)(b)(ix) and 8(2)(e)(iv)

The Rome Statute also confirms that individuals are responsible for war crimes that they commit themselves or which they order or assist others to commit.⁹⁴

The UK has jurisdiction over [Rome Statute](#) offences, including attacks on cultural property, committed since January 1991 in the UK or by a UK citizen or resident anywhere in the world. These are offences under various UK [International Criminal Courts Acts and Orders](#). For people subject to service jurisdiction, the service courts have jurisdiction (except for offences committed within the UK).

2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage

Following the destruction of the Buddhas of Bamiyan in Afghanistan in March 2001, UNESCO adopted a Declaration concerning the Intentional Destruction of Cultural Heritage on 17 October 2003.

While the Declaration is not specifically focused on the protection of cultural heritage during hostilities, it says that States should conduct their wartime activities in conformity with 'customary international law and the principles and objectives of international agreements and UNESCO recommendations concerning the protection of such heritage during hostilities'.

It stresses the need for States to establish jurisdiction over, and provide effective sanctions for persons who committed or ordered to be committed acts of intentional destruction.

It also provides for State responsibility for the intentional destruction of cultural heritage if the State concerned either intentionally destroys or intentionally fails to prevent such destruction.

2015 UNESCO strategy on protecting culture in armed conflict

In November 2015 UNESCO adopted a new six-year strategy for the '[Reinforcement of UNESCO's Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict](#)'.

The strategy responded to growing requests for assistance by Member States affected by conflict. Its aims are to:

- Strengthen the ability of Member States to prevent, mitigate and recover the loss of cultural heritage and diversity as a result of conflict, by developing institutional and professional capacities for reinforced protection [and]
- Incorporate the protection of culture into humanitarian action, security strategies and peace-building processes by engaging with relevant stakeholders outside the culture domain.

UN Security Council Resolution 2199 (2015)

This [Resolution](#), adopted unanimously under chapter VII of the UN Charter, condemns the destruction of cultural heritage in Iraq and Syria

⁹⁴ Art 25 para 3

(para 15). Using language that indicates binding force, it 'decides' that States 'shall' take appropriate steps to prevent the illicit trafficking of cultural property and other items of archaeological, historical, cultural, rare scientific and religious importance from Iraq and Syria, including by prohibiting cross-border trade in these items (para 17).

Other resolutions on cultural heritage destruction in Iraq are listed on the [UNESCO Iraq website](#).

Customary international law

There is some authority to regard the basic principles enshrined in the 1954 Convention – that there is a general interest in protecting cultural property as the heritage of all mankind, and that this justifies legal measures to ensure its preservation – as part of customary international law.⁹⁵ This would mean that the principles bind even those states that have not ratified the Convention.

Customary international law is one of the generally accepted trio of international law sources, the other two being treaties and general principles of law. It 'consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way'.⁹⁶ A principle of customary international law can be crystallised in treaty law, or conversely a provision of a convention can influence the creation of a customary rule. Customary international law binds all states, though it may be amended through treaty or state practice. In the national law of many countries (though not the UK), customary international law is even a part of the law of the land and may be invoked by victims of violations.

⁹⁵ The 27th session of the General Conference of UNESCO (October-November 1993) adopted 27 C/Resolution 3.5 which among other things, stated that 'the fundamental principles of protecting and preserving cultural property in the event of armed conflict could also be considered part of international customary law'.

⁹⁶ S Rosenne, *Practice and Methods of International Law*, 1984, p55

Appendix B: General rules on treaty ratification

In the UK the Government signs and ratifies treaties under the Royal Prerogative, but Parliament now has a statutory power under part 2 of the [Constitutional Reform and Governance Act 2010](#) (CRAGA) to object to ratification.⁹⁷

The general procedure is as follows:

- 1 The Government negotiates a treaty and then signs it.
- 2 Parliament makes any necessary legislative changes, so that the UK will not be in breach of its international obligations under the treaty.
- 3 The Government must lay any treaty that is subject to ratification or equivalent – along with an Explanatory Memorandum – before Parliament for 21 sitting days.⁹⁸
- 4 During the 21 sitting days, both Houses have the opportunity to pass a resolution that the treaty should not be ratified. If neither does so, the Government can go ahead and ratify the treaty.
- 5 If either the Commons or the Lords objects to ratification, the Government cannot immediately ratify the treaty, but must instead lay a statement giving the reasons why it wants to proceed with ratification.
- 6 If the Commons objects, it has another 21 days to consider the Government's reasons for ratifying, and can object again. This can continue indefinitely, effectively giving the Commons the power to block ratification.
- 7 The House of Lords has only one opportunity to object, and so can only delay ratification briefly.
- 8 If there is no outstanding objection from the Commons, the Government can ratify the treaty, and it will enter into force for the UK according to the provisions of the treaty (sometimes once a minimum number of states have ratified it).

Importantly, there is no requirement for a Parliamentary debate or vote on treaty ratification. Nor does Parliament have the power to amend treaties – it can only object to (or tacitly approve) ratification as a whole.

⁹⁷ See [Parliament's new statutory role in ratifying treaties](#), Commons Library briefing SNIA 5855, 8 February 2011

⁹⁸ 'Sitting days' means days on which both Houses sit. The Minister can extend this period by up to 21 sitting days.

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