

LEGISLATIVE CONSENT MEMORANDUM

CULTURAL PROPERTY (ARMED CONFLICTS) BILL

Background

1. The UK Cultural Property (Armed Conflicts) Bill was announced in the Queen's speech on 18 May and introduced in the House of Lords on 19 May 2016. The Scottish Government acknowledges that this memorandum has been lodged outside of the normal period of *'normally no later than 2 weeks after introduction'* as set out in Rule 9B.3.1(a). This is a result of the time required by the Scottish Ministers to give due consideration of the UK Bill after the election and provide agreement to the UK Government to bring forward a legislative consent motion.

2. The UK Bill is intended to enable the UK to implement the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 and the Protocols to that Convention of 1954 and 1999. The offences outlined in the Bill apply across the UK. This legislative consent memorandum (LCM) has been lodged to summarise the provisions of the Bill, explain how they relate to the Parliament's legislative competence and the executive competence of the Scottish Ministers, and explain why, therefore, the consent of the Parliament is being sought for the UK Parliament to legislate on these matters.

3. The Hague Convention, adopted in 1954 in the wake of massive destruction of cultural heritage during the Second World War, is an international treaty on the protection of cultural heritage in the event of armed conflict. It covers immovable and movable cultural heritage, 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. The States that are party to the Convention benefit from a mutual commitment to sparing cultural heritage from the consequences of possible armed conflicts. More than 115 States are party to the Convention.

4. The UK already has many of the measures required by the Convention in place. The Bill sets out the additional measures necessary in order for the UK to ratify the Convention, mainly around the introduction of new offences, introduction of the cultural emblem, and immunity from seizure for cultural property under special protection in the UK e.g. when being transported for safekeeping during a conflict between two or more other States.

Content of the Cultural Property (Armed Conflicts) Bill

5. The content of the Bill relates to the devolved matter of cultural property and includes provisions dealing with the creation of new criminal offences and the powers of the courts and police.

New offence of serious breach of the Second Protocol

6. Article 15(1) of the Second Protocol lists five acts which constitute offences when committed intentionally and in violation of the Convention. Article 15(2) of the Second Protocol requires parties to establish those acts as criminal offences under their domestic law. The relevant acts are:

- Making cultural property under enhanced protection the object of attack;
- Using cultural property under enhanced protection or its immediate surroundings in support of military action;
- Extensive destruction or appropriation of cultural property protected under the Convention and the 1999 Protocol;
- Making cultural property protected under the convention and the 1999 Protocol the object of attack;
- Theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

7. The behaviour which article 15(1)(a) and (d) seeks to criminalise (making cultural property the object of attack) is partially covered by existing offences under section 1(1) of the Geneva Conventions Act 1957, section 51 of the International Criminal Court Act 2001, and section 1 of the International Criminal Court (Scotland) Act 2001. However, neither offence is sufficient for the following reasons:

- in neither case is the definition of the property protected sufficient to encompass attacks directed at all forms of cultural property, as defined in Article 1 of the Hague Convention;
- the offences are more restricted than the offences under Article 15(1) of the Second Protocol.

There is no equivalent offence for Article 15(1)(b) of the Second Protocol (using cultural property under enhanced protection in support of military action).

8. A breach of Article 8(2)(b)(xiii) (destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war) of the International Criminal Court Statute is a criminal offence under section 51 of the International Criminal Court Act 2001, and section 1 of the International Criminal Court (Scotland) Act 2001. These offences, though not specifically directed at cultural property would cover the behaviour criminalised under Article 15(1)(c). However, the offences do not apply in relation to non-international conflicts; and the jurisdiction we have taken to prosecute this offence is not sufficiently wide to meet our obligations under Article 16 of the Second Protocol.

9. There are also a number of existing offences in domestic law which could be used to prosecute the behaviour covered by Article 15(1)(e). However, jurisdiction to prosecute United Kingdom nationals for the existing domestic offences committed outside the United Kingdom only applies where they are subject to military discipline, or in the service of the Crown and acting (or purporting to act) in the course of their employment. This is not sufficient even to satisfy the more limited jurisdictional requirements for this offence. For example, it would not enable the United Kingdom to prosecute a United Kingdom national,

in the context of an armed conflict which is taking place in a state that is a Party to the Convention, for the intentional vandalism of cultural property done in a personal capacity.

10. Clause 3 creates a new offence of 'Serious Breach of the Second Protocol.' Subsection (1) creates a new criminal offence, a serious breach of the Second Protocol, which is committed where a person intentionally does an act listed in Article 15(1) of the Second Protocol knowing that the property to which the act relates is cultural property.

11. Subsection (1b)(b) stipulates that the act concerned must violate the Convention or the Second Protocol. It is therefore necessary to identify how the act set out at Article 15(1) violates the Convention or Second Protocol. For example, if the military forces of a Party to the Convention were to make cultural property protected by the Convention and Second Protocol the object of an attack, this would constitute a violation of the obligation in Article 4(1) of the Convention to refrain from any act of hostility against such property. In contrast, the same act would not constitute such a violation if the obligation in Article 4(1) was waived on the basis of military imperative as permitted by Article 4(2). Acts will not be covered if they occur in peacetime – relevant provisions of the Convention and the Second Protocol apply in the event of war or armed conflict between two or more Parties or an occupation of the territory of a Party as well as in the event of armed conflicts "not of an international character" occurring within the territory of one of the Parties.

12. Articles 15(1)(a) and (b) of the Second Protocol set out offences against cultural property under "enhanced protection". The Second Protocol sets out a system whereby cultural property in countries which are parties to the Second Protocol can be granted enhanced protection. Such protection is only granted to cultural property which is "of the greatest importance for humanity". Enhanced protection status is very rare; there are currently only 10 pieces of cultural property that have received enhanced protection worldwide and they are all World Heritage Sites. Article 12 of the Second Protocol obliges the Parties to a conflict to refrain from making cultural property under enhanced protection "the object of attack or from any use of the property or its immediate surroundings in support of military action." The threshold for receiving enhanced protection is very high and therefore it is unlikely that such offences will in practice be committed.

13. Articles 15(1)(c) and (d) deal with offences against cultural property which is protected by both the Convention and the Second Protocol. Damage to cultural property in a country which is not a Party to both the Convention and the Second Protocol will not be covered by these offences.

14. Article 15(1)(e) covers theft, pillage or misappropriation of, or acts of vandalism directed against, cultural property protected under the Convention. This offence is the most likely to be prosecuted of the five Article 15 offences since it will apply to offences against cultural property committed in the many countries which have ratified the Convention regardless of whether they are also Parties to the Second Protocol.

15. Action taken by the armed forces of a country which is not a party to the Convention or the Second Protocol, and is not therefore bound by the obligations set out in the Convention and the Protocol, will not amount to an offence under this clause, since the requirement under Article 15 that there must be a violation of the Convention or the Second Protocol will not be satisfied. Article 16(2)(b) of the Second Protocol makes it clear that members of the armed forces and nationals of a State which is not a Party to that Protocol do not incur individual criminal responsibility by virtue of the Second Protocol unless they are serving in the armed forces of a State which is a Party to the Protocol.

16. The remaining subsections of this clause make provisions about jurisdiction making it clear that for each of the offences described in Article 15(1) of the Second Protocol, the act can take place within the United Kingdom or in another country and that both UK and non-UK nationals can be prosecuted for a serious breach of the Second Protocol in relation to the acts set out at Article 15(1)(a)-(c). In contrast, subsection (4) provides that in relation to the acts set out at Article 15(1)(d)-(e), which are considered less serious, the criminal offence can only be committed by a UK national or a person subject to UK service jurisdiction.

New offence of unauthorised use of the cultural emblem

17. Article 16 of the Convention describes the distinctive emblem of the Convention. Article 17 sets out conditions for its use, and provides that any other uses shall be forbidden. Although perfidious use of the cultural emblem is a grave breach of the Protocol 1 Additional to the Geneva Conventions 1977, forbidden uses of the cultural emblem under the Convention would not in most cases be considered to be “perfidious”. The Hague Convention also has a broader application in that it applies in the event of an armed conflict not of an international character within the territory of one of the High Contracting Parties. Legislation is therefore needed to implement the obligation under Article 17 of the Convention to ensure that the emblem is not abused.

18. Clause 9 creates a new offence of unauthorised use of the cultural emblem. This implements the obligation under Article 17 of the Convention to prevent use of the emblem except as authorised by the Convention. It is also an offence to use another design which is capable of being mistaken for the emblem because it so closely resembles it. The offence is punishable by a fine, and proceedings may only be brought with the consent of the Director of Public Prosecutions in England and Wales, or, in Northern Ireland, the Director of Public Prosecutions for Northern Ireland. No consent requirement is made in relation to Scotland as the position of the Lord Advocate as master of the instance in relation to all prosecutions in Scotland means that such provision is unnecessary. The other clauses in this Part of the Bill set out authorised uses of the cultural emblem; establish the Scottish Ministers as the ‘appropriate national authority’ for the purposes of permitting particular uses of the cultural emblem; establish three defences for unauthorised use of the emblem; and forfeiture provisions relating to articles in respect of which the offence was committed.

19. In respect of authorisation of the use of the cultural emblem by the Scottish Ministers as the appropriate national authority, any guidance necessary will be developed in consultation with key stakeholders and in line with the other UK administrations.

New offence of dealing in unlawfully exported cultural property

20. The Convention and Protocols also impose obligations on Occupying States and other Parties to take measures to suppress any illicit export of cultural property from occupied territory and return any cultural property protected by the Convention at the end of hostilities.

21. Under the First Protocol, the United Kingdom is under an obligation to take cultural property which has been exported from occupied territory and imported into the United Kingdom into its custody, and to return that property to the competent authorities at the close of hostilities. Further, under Article 21 of the Second Protocol, the United Kingdom must 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. This Part of the Bill is intended to enable the government to implement those obligations. Under Article 1 of the First Protocol all export of cultural property from occupied territory is prohibited.

22. There is existing UK legislation in this field such as the Return of Cultural Objects Regulations 1994 (as amended), the Dealing in Cultural Objects (Offences) Act 2003 and the Iraq and Syria Sanctions orders. However, these are not sufficient to enable the UK to comply fully with its obligations under the Convention and Protocols, due to differences in application and scope.

23. Article 14 of the Convention requires Parties to give immunity from “seizure, placing in prize, or capture” to any cultural property which is protected under Articles 12 (Transport under special protection) or 13 (Transport in urgent cases), and to the means of transport exclusively engaged in transferring protected cultural property. Although some property and transport would already be covered by existing legislation, such as the State Immunity Act 1978 and the Diplomatic Privileges Act 1964, these only apply to state owned property, so legislation is needed to ensure that cultural property and transport is afforded the necessary protection whilst it is in the UK.

24. Clause 17 of the Bill therefore establishes an offence of dealing in unlawfully exported cultural property, which makes it an offence to deal in cultural property which has been unlawfully exported from occupied territory after commencement of the Convention, if the perpetrator either knew or had reason to suspect that the cultural property concerned had been unlawfully exported. An offence is only committed where the property is imported into the United Kingdom after commencement.

25. A dealer does not commit an offence under this clause if, for example, they take temporary possession of a cultural object to enable them to carry out due diligence, or provide a valuation, only for them to discover that it has been unlawfully exported from an occupied territory. In such a scenario, the dealer could not be said to have 'acquired' the object, and therefore no dealing has taken place. In order to commit an offence in this context, a dealer would have to both "acquire" the object i.e. buy, hire, borrow or accept, and do so knowing, or having reason to suspect that it is unlawfully exported cultural property.

26. Other subsections in this clause:

- define ‘dealing,’ identifying each of the activities which may result in the commission of an offence;
- provide for prosecution in cases where a person may not have directly dealt with the unlawfully exported cultural property themselves, e.g. where an antiquities dealer Y makes arrangements for a statue to be sold at auction, knowing that it is unlawfully exported cultural property, Y will be guilty of an offence, even if he or she does not actually “acquire” or “dispose” of the statue at any point themselves;
- provide that the offence is triable either on indictment or on summary conviction; and
- set out the maximum penalties.

27. Clause 18 of the Bill establishes arrangements for the courts to make an order, where a person has been convicted of the offence of dealing with unlawfully exported cultural property, requiring the forfeiture of that property, and to allow the courts to make

further provision for its retention or disposal. The forfeiture provision is required in order for the United Kingdom to comply with its obligation to take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory.

28. Clauses 19-27 make provision for the forfeiture of unlawfully exported cultural property otherwise than in connection with an offence in line with Article 2 of the First Protocol.

29. Cultural property is liable to forfeiture, provided that it has been imported into the United Kingdom after clause 19 comes into force. Forfeiture orders can only be made if an application is made to the Court within four months of the day on which either the property is seized under clause 23, or an order made for the retention of the property under clause 24.

30. Clause 21 provides that a court may decide to only make a forfeiture order under clause 20 if compensation is paid. This enables the court to protect the interests of a person who acquires cultural property in good faith not knowing that it was unlawfully exported from occupied territory. The court does not have power to order the payment of compensation itself. Compensation may be paid by the authorities which are seeking the return of the cultural property in question, or by the Secretary of State. If the compensation due has not been paid within four months of the date on which the forfeiture order was made, the order ceases to have any effect.

31. Clause 22 gives the court power to make an interim order for the safekeeping of property which is or may be the subject of an application for a forfeiture order. For example, where cultural property is in a fragile condition and requires work to stabilise it, the court would be able to order that it should be transferred to the custody of a museum for the necessary conservation work to be carried out.

32. Clause 23 ensures that the police may apply to a sheriff for a warrant authorising a constable to enter the premises identified in the warrant in order to search for cultural property which has been unlawfully exported from an occupied territory and, where such property is discovered as a result of the search, to seize it. The police must be able to demonstrate to the sheriff that there are reasonable grounds for believing that such cultural property is situated in the premises in question. The issue of a warrant under this clause is subject to the safeguards set out in section 15 of the Police and Criminal Evidence Act 1984. Once cultural property has been seized under this provision, it must be retained by the police until either a forfeiture order is made or the property is returned or disposed of.

33. Clause 25 gives a sheriff the power to authorise the continued retention of property which was originally seized in connection with the investigation or prosecution of the offence of dealing in unlawfully exported cultural property, on the application of a constable. This may happen, for example, where cultural property was originally seized as evidence in relation to an offence of dealing in unlawfully exported cultural property, but either it is decided that no criminal proceedings should be brought, or any criminal proceedings brought result in the acquittal of the accused, so that the power under which the police originally seized that property no longer applies.

34. Clause 26 deals with property seized in connection with investigation or prosecution of the “dealing” offence under clause 17 and which is not being held by the police. An example of this scenario would be if an object had been sent to a museum for expert advice on its provenance. Once the object is no longer needed for the investigation or

prosecution of the clause 17 offence, it must be transferred to a constable as soon as is reasonably practicable (see subsection (2)). The police can then make an application to retain the property pending forfeiture or return/disposal.

35. Clause 27 imposes a duty on the person who has custody of cultural property which has been seized to return it to the owner, as soon as reasonably practicable, once forfeiture is no longer being pursued. However if it has not been reasonably practicable to return the cultural property to its owner within a period of twelve months, then the person who has custody may dispose of it as they think appropriate.

36. Clause 29 provides that, if an offence under this Bill is committed because an officer of a company or partnership (e.g. private military contractors) agrees to the offence (e.g. looting of protected cultural property), or assists with its commission by failing to prevent it, then the officer will be guilty of an offence as well as the company or partnership.

37. Clause 30 makes clear that all the provisions contained in the Bill apply to the Crown. This means for instance that enforcement powers such as powers of entry apply to premises carried out or used by or on behalf of the Crown (e.g. to government offices).

Reasons for seeking a legislative consent motion

38. The provisions of the Bill so far as relating to Scotland are within the legislative competence of the Scottish Parliament and Part 3 relates to the executive competence of the Scottish Ministers. It is for the UK Government to accede to an international instrument such as the Hague Convention. The same or similar standards will need to be applied across the UK. The UK Government's Bill contains all of the provisions which are necessary to enable implementation of the Convention in the UK and makes appropriate provision for Scotland.

Consultation

39. The draft Cultural Property (Armed Conflicts) Bill was published for public consultation by the Department for Culture, Media and Sport in 2007/08. The draft Bill received five written responses from individuals and organisations. These responses were largely duplicated in the nine written pieces of evidence given to the Culture Media and Sport (CMS) Committee of the UK Parliament during their pre-legislative scrutiny.

40. The UK Government received 13 comments and recommendations from the CMS Committee, based on both its own pre-legislation scrutiny and the public consultation, in relation to the draft Bill. The Committee stated that the draft Bill represented a 'major milestone' towards the ratification of the 1954 Hague Convention and that it strongly supported the Bill. The Government published its response to the Committee's recommendation in October 2008—

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243360/747_2.pdf).

Conclusion

41. It is the view of the Scottish Government that it is in the interests of the Scottish people and good governance that the provisions outlined above should be considered by the UK Parliament. The draft motion, which will be lodged by the Cabinet Secretary for Culture, Tourism, and External Affairs, is:

“That the Parliament agrees that the Cultural Property (Armed Conflicts) Bill, introduced to the House of Lords on 19 May 2016, which provides for the introduction of measures to enable the ratification by the United Kingdom of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 and the Protocols to that Convention of 1954 and 1999 and which so far as applying to Scotland is within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.”

Scottish Government
June 2016

This Legislative Consent Memorandum relates to the Cultural Property (Armed Conflicts) Bill (UK legislation) and was lodged with the Scottish Parliament on 23 June 2016

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