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The Rt Hon Harriet Harman MP
Chair of the Joint Committee on Human Rights
Committee Office
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CMS 288107/DC
8 July 2016

Dear Harriet

Thank you for your letter of 29 June. I set out below my response to the two concerns you have raised.

Maximum penalty

You question whether the application of the maximum penalty of 30 years to all ancillary offences is proportionate.

You acknowledge that the substantive offence of a serious breach of the Second Protocol is a grave one and you do not appear to question the appropriateness of this penalty for the substantive offence. I will therefore focus on its appropriateness for ancillary offences.

The starting point is the requirement in Article 15(2) of the Second Protocol, which obliges Parties to make the relevant criminal offences, including ancillary offences, punishable by "appropriate penalties".

There is clearly significant scope for the UK to determine what might constitute an "appropriate" penalty. However, in doing so, I feel it is important to view the Hague Convention and its Protocols in the wider context of the body of international humanitarian law of which they form part, and to maintain consistency with existing UK legislation which implements related international obligations. It is also important that the penalty reflects the seriousness with which breaches of Article 15 of the Second Protocol are viewed, both in the UK and internationally.

Our policy in implementing Article 15 is therefore to mirror those provisions of the International Criminal Court Act 2001 ("the ICCA 2001") which relate to the offence of committing a war crime[1]. Although, on the face of it, the offence of committing a war crime might be thought more serious than the offence in clause 3 of the Bill, the definition of a war crime does include "intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments… provided they are not military objectives"[2]. I therefore consider that there is a direct parallel, and indeed a degree of overlap, between the ICCA 2001 and the present Bill.

30 years imprisonment is the maximum penalty on conviction for committing a war crime and the ICCA 2001 provides expressly that this applies equally in relation to ancillary offences[3]. For the reasons set out above, I consider it appropriate to mirror that approach in the present Bill, which accordingly provides for a maximum penalty of 30 years in respect of the new offence in clause 3 and related ancillary offences.

The penalty of 30 years is, of course, a *maximum* and it will be for the courts to consider all the circumstances and determine the appropriate penalty in any particular case. The offence in clause 3 could be committed in a wide range of scenarios, with an equally wide variety of possible ancillary offences. I do not think it would be right for us to attempt to address this variety of scenarios by setting different penalties in the Bill. These are questions best left to the courts to consider on a case by case basis.

Whilst I accept that the imposition by a court of a manifestly disproportionate sentence might raise an issue under Article 3 of the European Convention on Human Rights, I consider this is a matter properly to be taken into account by the court at the stage of sentencing. I do not consider that there is any issue as to the compatibility with Article 3 of a clause which provides for a *maximum* penalty.

You have asked whether the Government plans to request that the Sentencing Council issues guidelines. I understand that this would not be normal practice at this stage in the legislative process and we do not have any plans to do so in this case. I understand that the Sentencing Council does not normally issue guidelines upon new offences being created; rather, as it is obliged to consider current sentencing practice, it normally waits for that sentencing practice to develop before considering developing guidelines. Further, as prosecutions under clause 3 of the Bill are likely to be very rare, and the risk of inconsistent sentencing accordingly low, it seems unlikely that this offence is one which the Sentencing Council would wish to prioritise for consideration.

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[1] The International Criminal Court (Scotland) Act 2001 makes similar provision in Scotland.

[2] Article 8(2)(b)(ix) of the Rome Statute as set out in Schedule 8 to the ICCA 2001.

[3] s53(1)(c) and s53(6) of the ICCA 2001 in respect of England and Wales, and there is equivalent provision for Northern Ireland and Scotland.

Immunity from seizure

You state that clause 28 of the Bill would appear to place compliance with Article 14 of the Hague Convention above any international law obligation owed by the United Kingdom (including the European Convention on Human Rights and the EU Charter of Fundamental Rights) and you question why we have not used a similar form of wording to that in section 135 of the Tribunals, Courts and Enforcement Act 2007.

I wrote to the Constitutional Committee on 27 June, dealing with essentially the same issue, and I see little benefit in repeating the substance of that letter in detail here. I will, however, draw out the key points with particular reference to the human rights instruments you highlight.

As I noted in my letter to the Constitutional Committee, it is not our intention to prioritise compliance with the Hague Convention over other international legal obligations. However, for the reasons set out in detail in that letter, I am advised that it is very unlikely in practice that any conflict would arise between our obligations under the Hague Convention and other international obligations.

As regards the European Convention on Human Rights ("ECHR"), I consider that clause 28 is compatible with the relevant ECHR rights. The reasons for this assessment were set out in the memorandum sent to you on introduction of the Bill. Similar considerations apply in assessing compatibility with the EU Charter of Fundamental Rights and I similarly do not consider that there is any conflict. I am further advised that, for so long as the UK remains a member of the EU, the principle of supremacy of EU law means that, if necessary, our courts would interpret clause 28 as implicitly subject to EU law (including any requirement to comply with the EU Charter of Fundamental Rights).

I trust that this letter provides you with some reassurance on the concerns you have raised.

Baroness Neville-Rolfe DBE CMG
Parliamentary Under Secretary of State