Measures against the illicit trade in cultural objects: the emerging strategy in Britain

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Until recently the UK was notorious for its illicit market in unlawfully removed art and antiquities from around the globe. Today the UK marketplace is operating in a very different climate. The UK has recently become a state party to the 1970 UNESCO Convention and is now introducing a package of measures designed to strengthen its treaty obligations, central to which is the creation of a new criminal offence of dishonestly dealing in cultural objects unlawfully removed anywhere in the world. These also include the development of effective tools to aid enforcement and due-diligence. Recent events in Iraq have also forced the UK Government to announce its intention to ratify the 1954 Hague Convention.

Keywords: illicit trade, art market, 1970 UNESCO Convention, *Dealing in Cultural Objects (Offences)* Act 2003, 1954 Hague Convention

Introduction

The editor's *cri de coeur* (Editorial, *Antiquity* 78 (2004), 253) about Iraq and to the UK's attitude to trade in illicit antiquities is pessimistic – at least in theory. The UK Government has made considerable strides in the past few years to curb the illicit trafficking in looted antiquities and thereby reduce the threat of destruction to cultural sites both in this country and worldwide. The globalisation of tourism and organised crime, together with the development of new technology, have revolutionised the means of detecting and looting archaeological sites. Far from injecting hard currency into hard-pressed local economies, local people usually receive very little in return for destroying their own cultural heritage. Asset-stripping this finite resource is, by definition, unsustainable in economic terms. The recent reports of damage to the ancient sites of Afghanistan and Iraq, where the looting of rich but vulnerable landscapes forms part of the emergency cash economy in the aftermath of conflict, reinforces the importance of the anti-illicit trade programme being developed by the Department for Culture, Media and Sport (DCMS).

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The scale of the problem has been eloquently set out by Lord Renfrew, who is unsparing in his condemnation of the violent separation of major archaeological finds from their geographical and social context (Renfrew 2000). We are also now more aware of the link between the trafficking in antiquities and other illegal and indeed organised criminal activities, notably drug smuggling, money laundering and the corruption of impoverished bureaucracies overseas (Brodie *et al.* 2000: 16-17).

Meanwhile, London, by virtue of its long-established marketplace, has become known as a centre of the global supply network in stolen and unlawfully removed cultural property. Here the pattern of movement and dispersal through a chain of dealers is a regular practice and details of provenance can become lost in the process. Licit and illicit antiquities become hopelessly mixed, and looted artefacts acquire a 'patina of legitimacy' (to use Renfrew's phrase) since they can ultimately be sold, without provenance, by dealers and auction houses. Despite the many positive steps towards self-regulation, it is widely acknowledged that many antiquities surface on the London market without any declared previous history or archaeological context.

In 2000 the Culture, Media and Sport Select Committee of the House of Commons (equivalent to a US Congressional Committee), collected evidence for a report on *Cultural Property: Return and Illicit Trade*. The inquiry reviewed the positions of national governments, archaeological bodies, the antiquities trade, journalists, cultural groups, police, and other law enforcement agencies. The Government welcomed the Select Committee's recommendations for pro-active measures to prevent the UK being used as a haven for the illicit traffic in cultural property.

In response to calls from archaeologists and the legitimate art trade, the Department for Culture (DCMS) established, in the Spring of 1999, an Illicit Trade Advisory Panel (ITAP) under Norman Palmer, Professor of Commercial Law at University College London, to review both legislative and non-legislative options for action. The Panel's membership was drawn from the worlds of archaeology, museums and the art trade. Their Report, published in December 2000 (Palmer 2000) marked a very significant landmark in developing public policy in this area, not least because it represented, for the first time, a consensus between all those groups interested in the trade in cultural objects on practical measures to improve the current situation. The UK Government has favoured a 'bottom-up' approach aimed at aiming the support of the art market through offering participation in the policy development process, rather than imposing new regulations upon it. The fact that the British Art Market Federation and the British Antiquities Dealers Association were both involved in the formulation of a new regulatory framework gives added strength to the force of Government action.

In addition to immediate accession to the 1970 Convention of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) *on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, the principal recommendations of the Panel were the passing of a new criminal offence covering the dishonest importing, dealing in or possession of any cultural object, knowing or believing that the object was stolen, or illegally excavated, or removed from any monument or wreck contrary to local law; the proactive use of the export licensing system to retard the outward movement from the UK of cultural objects unlawfully removed from countries of location; and the development of improved intelligence on the cultural property laws of other countries and on stolen and unlawfully removed cultural objects of UK and overseas origin.

International co-operation: accession to the 1970 UNESCO Convention

The UK Government acceded to the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* in October 2002. The Convention is a reciprocal treaty that enables states to claim back stolen antiquities that surface in the countries of fellow signatories. The Convention is not retroactive: it is applicable only to cultural objects stolen or illicitly exported from one state party to another state party after the date of entry into force of the Convention for both states concerned. ITAP advised against accession to the 1995 UNIDROIT Convention on *Stolen or Illegally Exported Cultural Objects* on the basis that claims could be made for the return of stolen cultural property up to 50 years after the theft. Accession to UNIDROIT would have required primary legislation and so would have taken time, whereas acceptance of UNESCO could be enacted in Britain without delay.

Widespread adoption by over 100 states (including recently key market countries such as Sweden and Japan following the lead of the United Kingdom) has enhanced the value of the treaty as a means of recovering objects unlawfully removed from the UK (DCMS 2004 a). In signing up to the Convention, the UK Government sent out a powerful signal, both to those who do so much damage to the world's cultural heritage and to those in the international community, that the UK is serious about playing its full part in the international effort to stamp out the illicit trafficking in cultural objects.

The need for a new criminal offence

The 1970 UNESCO Convention was signed by the UK Government on the basis that no fresh legislative commitment was required. However, ITAP recognised that introduction of a new criminal offence designed to target the trafficking of cultural objects from around the world would complement the Convention and reinforce its implementation in the UK. Action on this matter was felt to be too important to be left to the vagaries of private law. And a do-nothing option was not thought to be viable, nor was an amendment to existing offences under the Theft Act (1968). Given the continuing growth of the illicit traffic in cultural objects, experience also shows that voluntary codes of due diligence are limited in their effect on the criminal element of the trade which ignores them. The Panel advised, and the Government agreed, that a pre-emptive measure, such as the creation of a new criminal offence to counter the illicit traffic in unlawfully removed cultural objects, is the best solution.

The existing offences of theft and the handling of stolen goods will continue to apply to many of the activities that the proposed offence is intended to catch. However, the underlying purpose of the Theft Act is to protect owners' interests. The new offence has a different purpose, namely, to strangle the traffic in unlawfully removed cultural objects and, indirectly, to assist in maintaining the integrity of monuments and wrecks worldwide by removing the commercial incentive to those involved in the looting of such sites. As such it is intended to go further than the protection of proprietary interests under the Theft Act, and will cover objects, which although not stolen, have been illegally excavated or removed from a monument or wreck. The proposed offence should apply irrespective of the place where the cultural object was unlawfully excavated or removed. The conclusion of widespread consultation was

that the elimination of the UK as a marketplace for the illicit trade could best be achieved by creating a new freestanding offence. The *Dealing in Cultural Objects (Offences)* Act 2003 came into force on 30th December 2003 and was supported during its final critical stages of Parliamentary progress by the UK art market.

How the new offence works

The new offence covers the dishonest dealing in a cultural object knowing or believing that the object was illegally excavated or removed from a monument or wreck either in this country or anywhere in the world. For these purposes "dealing in" a tainted cultural object means acquiring, disposing of, importing or exporting such an object, or agreeing or arranging to do so. The requirement for the prosecution to prove that the person was acting dishonestly when dealing in the cultural object provides an important safeguard.

The trigger for the offence is removal from a site or building of historical, architectural or archaeological interest under protection. Any person found guilty of the offence is liable on conviction in the Crown Court to imprisonment for up to seven years and/or an unlimited fine or conviction in the Magistrate's Court to a maximum of six months imprisonment and/or a fine up to £5000 (DCMS 2004 b).

Impact on the marketplace

The Act does not necessarily oblige dealers to take steps to ascertain provenance or to exercise due diligence to avoid committing the offence. Knowledge or belief and dishonesty must be proved by the prosecution. Rather, the measure is designed to target irresponsible trading. It will inject greater transparency into the process of acquiring and disposing of cultural objects within the art market so that clear chains of ownership can be established in the event of suspected unlawful removal or excavation. In effect, the Act does not impose further costs in terms of due diligence checks but, rather, formalises them and encourages those not complying with industry-approved standards of good practice to come on board. The measure is designed to protect small business from the illicit trade, which threatens their commercial position through unfair competition. An increase in costs to legitimate business, therefore, is agreed to be minimal.

Equally, the requirements of the UNESCO Convention and the new criminal offence in the UK make it more important than ever that our museums and galleries have robust procedures for assessing the legitimacy of potential acquisitions and loans. The new regulations should ensure that museums do not acquire artefacts of doubtful provenance and so stimulate the market. The Department for Culture (DCMS) is now working with UK museum professional to convert high-level ethical codes into practical-steps guidance on the acquisition of cultural objects from overseas. A DCMS–sponsored working party is expected to deliver a final version of the new guidance for ITAP's approval towards the end of 2004.

Next steps: testing the system

Now the regulatory framework is in place, the UK Government has a duty to ensure it delivers improved intelligence for due diligence purposes and the necessary enforcement tools to make the new systems work.

To this end, and in response to Culture Select Committee criticisms of fragmented policy in this area (CMS Select Committee 2003, para 47), DCMS Ministers are now developing a more structured approach to inter-Departmental working on this issue by creating a new steering group of policy officials and law enforcement counterparts under Department for Culture chairmanship. The group comprising DCMS policy officials, HM Customs and Metropolitan Police officers will review policy issues, operational strategies and intelligence sharing and progress specific cases so as to ensure the most effective working of the new framework. Should loopholes be identified in the overall provision, the group will work together on remedial measures to ensure comprehensive protection against criminal activity in the marketplace (DCMS/HO 2004, paras 21-23). British Arts Minister, Estelle Morris, announced on 26 May 2004 during a Commons adjournment debate on the illicit trade in antiquities that the first meeting of the cross-Whitehall enforcement group had taken place that week (*Hansard*, HoC 26.05.04, vol. no. 421, part no.94, column 480WH).

On the question of using the UK export licensing system to restrict the outflow of tainted objects from non-European Union (EU) countries of origin, the DCMS has been exploring the compatibility of proposals to regulate in this manner with national obligations under EU regulations on the export of cultural goods. In response to confirmation that the wording of the regulations does not allow spot-checks on objects of non-EU origin leaving the country, DCMS Ministers have recently announced that they have asked for an amendment to the legislation (*Hansard*, HoC 26.05.04, vol. no.421, part no.94, column 480WH). In this DCMS is strongly supported by HM Customs, where officials wish to see any legislative loopholes closed so that the factor of tainting can be dealt with as part of the export licensing process.

The UK Government regards the provision of improved intelligence for due-diligence purposes as fundamental to its long-term strategy to assist the art market in policing itself. A database of stolen and unlawfully removed cultural objects is regarded by the art trade and the museum community as a key part of the package of due-diligence measures designed to curb the circulation of stolen and unlawfully removed cultural objects. The database would enable both art and antiquities dealers and museums to conduct due diligence checks more effectively, and facilitate the police and law enforcement agencies to identify and track suspect objects. Access to the proposed database should be extended to businesses in the trade, museums and to private individuals.

A key provision of the offence recommended by the DCMS Illicit Trade Advisory Panel is that a person can only be found guilty if he acts knowing or believing that an object has been illegally removed. The availability of an efficient database is integral to establishing the 'mental element' in prosecuting the proposed new criminal offence of dishonestly acquiring, disposing of, importing or exporting tainted cultural objects, or agreeing or arranging to do so.

Besides an improvement in the provision of due-diligence services for the marketplace, web-based translations of the cultural property laws of other countries will be of significant benefit to UK police and HM Customs officers working in front-line enforcement roles. It is widely agreed that the UNESCO is the best organisation to take the lead on this initiative. Such a resource would have the widest possible dissemination through availability in its original language and automatic translation into the two official working languages of UNESCO.

At its 32nd General Conference in October 2003 UNESCO voted a budget for launching at the earliest possible date an electronic cultural property legislation database "bringing together all national legislation applicable in Member States of UNESCO concerning the import, export and transfer of ownership of cultural property and also including models of the export and import certificates for cultural property in use in Member States". The UK was among the states parties registering support for the necessary amendment to the budget vote on major programmes and projects relating to crosscutting cultural property themes for 2004-05. UNESCO has recently issued a letter to Member States of the 1970 Convention requesting electronic copies of the relevant documentation. By the end of May 2004, over 26 separate pieces of legislation had been received by UNESCO (*Hansard*, HoC 26.05.04, vol no. 421, part no.94, column 480WH).

Epilogue: Iraq, Hague Convention and beyond

The United Nations (UN) trade embargo with Iraq introduced at the time of the first Gulf War came to an end with UN Security Council Resolution (UNSCR) 1483 adopted on 22 May 2003. However, the UN maintained a limited embargo, which includes Iraqi cultural property and items of archaeological, historical, cultural, rare scientific and religious importance illegally removed from Iraq after 6 August 1990.

The UK Government acted swiftly to bring the *Iraq (UN Sanctions)* Order into force on 14 June 2003 implementing the UNSCR, with a maximum penalty of 7 years' imprisonment. The Order makes it a criminal offence both to deal in and to hold Iraqi cultural property illegally removed after 6 August 1990. In order to avoid prosecution the person dealing in or holding the relevant objects must show he/she did "not know or had no reason to suppose that the object in question was illegally removed from Iraq after 6 August 1990". The reversal of the burden of proof with regard to the question of prior intent has been questioned vigorously by ITAP and by the UK art market associations. Normally the prosecution is required to prove guilty intent (*mens rea*). In this case of the new Order the defence must prove that they did not know and had no reason to suppose that the item in question was unlawfully removed from Iraq and thus liable to criminal sanction (Chamberlain 2003). However, given the emergency and on-going nature of the post-conflict looting crisis in Iraq and the potential use of the UK as a marketplace for illicit Mesopotamian cultural objects, the UK Government has implemented the UNSCR embargo on cultural objects unlawfully removed from Iraq as comprehensively as possible.

The looting of the Iraq National Museum in Baghdad during the recent conflict has brought into sharp focus the rights and obligations of the parties involved in armed conflict with regard to the protection of cultural property in the theatre of hostilities. It is a sad fact that in any armed conflict there will be casualties and the loss or destruction of property having no intrinsic military value. Often the loss or destruction to cultural property is regarded as inevitable 'collateral damage'. On other occasions the loss or destruction results from a cultural site being used, or being perceived to be used, for military purposes. Recent conflicts have exposed numerous instances of the deliberate loss or destruction to cultural property in order to secure a military or political objective.

Following the wholesale destruction of cultural property which took place in Europe during the Second World War and the revelations about the looting of cultural sites that emerged during the Nuremberg Trial, moves were initiated by the UNESCO to develop of convention to protect cultural property in time of armed conflict. The outcome was the landmark Hague Convention of 1954 for the *Protection of Cultural Property in the Event of Armed Conflict*. Cultural property is defined by the Convention as museums, libraries, archives, archaeological sites and monuments of architecture, art of history, whether religious or secular. Cultural property also includes the portable heritage: manuscripts, books and other objects of artistic, historical or archaeological interest. Today there are over 103 states parties to the Convention. Crucially, to date, the US and the UK are not among them (Gaimster 2004).

In time of conflict, states parties are required under the Convention to respect cultural property situated within their own territory as well as within the territory of other parties by refraining from committing any hostile act against it and prohibiting, preventing, and if necessary stopping any form of theft, pillage or misappropriation of the property or any acts of vandalism against it. Use of the property or of its immediate surroundings for military purposes or to support military action is also prohibited. 'Imperative military necessity' is the only ground on which the obligation to respect cultural property can be waived. A party to the conflict is bound by that obligation even when the cultural property is being used for military purposes by the opposing party (unless imperative military necessity should relieve him of the obligation).

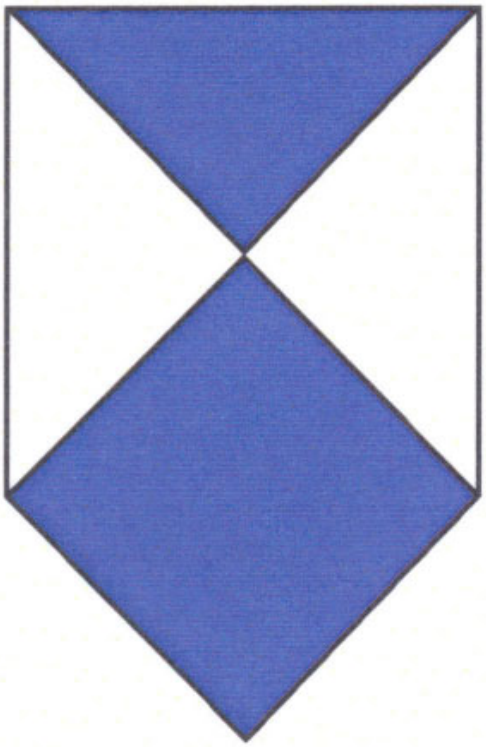

Figure 1 The blue shield: emblem for the protection of cultural property under the 1954 Hague Convention during armed conflict.
Its use is restricted to preserve its protective value. For further information about the emblem, please contact the British Red Cross, International Law Department, 9 Grosvenor Crescent, London SW1X 7EJ.

A state that is an occupying power must as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property, as well as take any necessary measures of preservation where cultural property is damaged by military operations and the competent national authorities are unable to take such measures. To benefit from the protection offered by the Convention, states parties are required to mark cultural property with a distinctive emblem (a blue and white shield, Figure 1).

The Second Protocol of the Convention, adopted on 26 March 1999, crucially reinforces the provisions relating to jurisdiction and criminal responsibility in the Convention by requiring states parties to establish certain acts against cultural property as criminal offences under their domestic law and to make those offences punishable by appropriate penalties

when they are committed intentionally and in violation of the Convention or the Second Protocol. States parties are also required to establish criminal jurisdiction over, and prosecute or extradite, persons committing serious violations of the Convention or the Second Protocol.

Although Coalition forces refrained from attacking Iraqi cultural property during the recent conflict, even in those instances where Iraqi forces were using such property for military purposes, they failed to prevent widespread looting and pillage of public and private property, including that to cultural institutions and sites. These widely reported events directly contravened Article 4(3) of the Convention, which obliges an occupier to 'prohibit and prevent any theft, pillage or acts of vandalism directed against cultural property'. As a result, the pressure for the UK Government to reconsider its former resistance to accepting the 1954 Hague Convention has intensified. The Standing Conference on Portable Antiquities, hosted by the Council for British Archaeology, has been proactive in raising the issue and passed a resolution at its emergency meeting on the Iraq cultural heritage crisis in June 2003 for the UK to ratify the Hague Convention.

In the light of the necessity for the UK to maintain its involvement in Iraq as part of the Coalition administration and the prospect of future armed interventions and peacekeeping missions elsewhere, the UK Government has been reconsidering its attitude to the 1954 Hague Convention and its value for establishing clear protocols for the protection of cultural property in time of military conflict and penalties for non-compliance. Past concerns at the Ministry of Defence (MOD) that the Convention imposed unrealistic rules in the context of global (or nuclear) war have been resolved with the acceptance that, following the end of the Cold War, future military conflicts are likely to be more confined geographically and predominantly fought by conventional weapons. In addition, the contribution of the UK to anti-terrorist and peacekeeping missions around the world is not expected to recede. Following a review of policy, in 2003 the Ministry confirmed that it was now content that the UK ratify the Hague Convention and its two Protocols as comprehensively as possible.

In his capacity as the Minister for the historic environment and with the lead responsibility for policy on international heritage protection issues, Lord McIntosh formally announced on 14 May 2004 that DCMS would co-ordinate the accession programme for the UK in consultation with other Government departments and stakeholder bodies. This process will involve scoping an analysis of primary legislation required to enact both the Convention and the criminal sanctions required by the Second Protocol. Given its new position as a standard-setter in the fight against the illicit trade in cultural objects, pressure is expected to be unstinting in the Westminster Parliament for swift and comprehensive accession to this further instrument of concerted international protection.

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