

The Cultural Property (Armed Conflicts) Act 2017 - changing attitudes to the wartime plunder of art

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Introduction

“That belongs in a museum!” once shouted the famous character Indiana Jones, as he tussled with a would-be thief over a priceless artefact. Well, Dr. Jones, that may be true for many artworks and cultural objects all over the world. But the question is, in whose museum?

The question of who owns cultural property and how to protect it has become all the more pressing of late following the industrial scale pillage and plunder trailing in the wake of a new breed of terrorist. It feeds their nihilistic vision and fuels their corrupt campaigns, pushing the issue centre stage.

As the Hague Convention is nearly finally fully ratified by the British Government, a mere 52 years after it originally became law, Britain is following the changing course of legal and social attitudes towards the plunder of art during conflict over the last two centuries. The recent conviction of Ahmad al-Faqi al-Mahdi at the International Criminal Court for the destruction of world cultural heritage as a war crime, sets the tone for a new way of thinking. Al Mahdi’s confession to crimes that all too often now populate our TV screens and social media feeds, demonstrate the power of the global community against the destruction of cultural heritage, of

how far the landscape of legal norms have changed and of how far we still have to go.

To the victor go the spoils? A brief history of art and warfare

It was the Roman lawyer Cicero who brought the first recorded challenge of art ownership to the courtroom in the 1st century BC. His blockbuster prosecution of the corrupt governor of Sicily, Gaius Verres, included Verres’ theft of artworks and statutes from Sicily to furnish his own mansion as a damning fact in the case of extortion and maladministration¹. Yet it would take until the 18th century for Cicero’s peacetime precedent to change the overwhelming concept of ‘to the victor go the spoils’ in war.

For centuries, plunder and pillage of art and cultural property has been the norm. Cultural treasures of the conquered boosted the status of the victorious, while their theft was psychologically demoralising for the defeated. Taking the spoils of war has been for many years a legitimate activity, a just reward for soldiers in the field and a demonstration of power. In the colonial era of the 18th and 19th centuries, seizing cultural artefacts from conquered lands was deemed necessary for public education. As the age of the Museum dawned in Europe, cultural objects removed from colonies formed the basis for vast ethnographical collections and museums, showcasing the triumphs of the state to

¹ Margaret Miles, *Art as Plunder: The Ancient Origins of Debate about Cultural Property* (Cambridge University Press 2008)

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their audiences. Significantly, a large amount of this colonial art booty was taken during violent military interventions, for example the 1867-1868 British siege of Magdala in Ethiopia². Today these same artefacts form the basis of some of the most passionate debates for cultural repatriation.

The Napoleonic wars were pivotal to changing perspectives on plunder. French armies had carried out a systematic and officially sanctioned confiscation of cultural treasures across Europe. Napoleon put these treasures on proud display in the Louvre, in the heart of a city he considered to be the spiritual homeland of art. In a change from precedent, after Napoleon's defeat in Waterloo the victorious allies demanded the treasures be repatriated, ushering in a new norm that wartime plunder was no longer acceptable, but that would yet wait to find place in law³.

It was not until Francis Lieber wrote his 1863 Code for US armies in the field (in the form of General Orders No 100 and Special Orders 399) that the issue of protecting art was addressed in a legal framework. Written during the carnage of the American Civil War, the Code gave art works, libraries, scientific and other collections the same recognition as hospitals, to be '*tenderly secured in the name of common humanity and civilization against all avoidable injury*'⁴. Interestingly, Lieber also criticised European armies for taking the valuables of their prisoners, distinguishing the moral superiority of American soldiers who would consider such an act to be 'dishonourable'. Clearly, the European appetite for taking booty

was well known and slowly was coming to be seen as being at odds with contemporary ideas about warfare.

Several years later, the 1899 Hague Convention on the Laws and Customs of War on Land (the "**1899 Convention**") became the first legal text to prohibit the '*pillage of any town or place*'⁵. Both the 1899 Convention and Lieber's Code would form the foundation for a new set of international regulations, catalysed by the overwhelming destruction of the Second World War.

Anti-plunder sentiment becomes international law

In 1954, the Convention for the Protection of Cultural Property in the Event of Armed Conflict (the "**Hague Convention**") was passed. In the aftermath of the Second World War, the Convention was a reaction to the atrocities perpetrated during the conflict, including Nazi systematic plunder of artworks across Europe. The resulting text would forever change perspectives on cultural property, making it an international responsibility to protect such property during conflict.

The preamble of the Hague Convention was the first time that the cultural internationalist idea of a '*common heritage of mankind*' was put into a

² Volker Matthies, *The Siege of Magdala: The British Empire against the Emperor of Ethiopia* (Markus Wiener Publishers 2012)

³ Wayne Sandholtz, *Prohibiting Plunder: How Norms Change* (Oxford University Press, 2007).

⁴ Francis Lieber, *A Code for the Government of Armies in the Field* (1863). Available online at <https://collections.nlm.nih.gov/ext/mhl/100938817/PDF/100938817.pdf>.

⁵ 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, 29 July 1899). Available online at <https://ihl-databases.icrc.org/ihl/INTRO/150?OpenDocument>.

binding international legal agreement⁶⁷. In the Convention, cultural property is an invaluable part of a common human culture, transcending national boundaries and to be preserved for the sake of humanity as a whole. This emphasis has enshrined a new norm going forwards- one where protecting artworks and cultural property is as important as the safeguarding of peoples in conflict zones. There is no doubt that introduction of the Hague Convention has signalled a permanent and significant shift in wartime attitudes of the international community.

Since the Hague Convention's inception, two subsequent protocols have been added to extend the level of protection afforded to cultural property and set forth the major obligations for warring states. Together, the Convention and its protocols form a key legal instrument in the fight against cultural destruction.

Furthermore, the cultural property of a nation is not just a status symbol to raise the status of a victorious army and cow the defeated. The cultural property of a people is intrinsically linked with those people's cultural heritage, a complex term which has many meanings but is a vital part of the collective and individual identity. The Hague Convention and its protocols constitute international legal recognition of this fact, to extent that to destroy or take away that cultural heritage is, as of 2016, considered a war crime by the International Criminal Court.

As time and circumstances evolve, so do our international laws. The later introduction of the UNESCO 1970 Convention on the Means of

Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the "1970 Convention") is an important peacetime addition to the legal arsenal in the fight against illicit property trafficking. Both the Hague Convention and the 1970 Convention are the main instruments that govern how UN Member States, including the UK, act within an international legal framework to protect cultural property.

The Cultural Property (Armed Conflicts) Act 2017

In February 2017, the UK Government passed the Cultural Property (Armed Conflicts) Act 2017 (the "Act") in order to finally ratify the Hague Convention and its protocols. The purpose of the Act is to bring the Hague Convention into English, Scottish and Northern Irish law, while additionally introducing a new criminal offence, that of dealing in '*unlawfully exported cultural property*' (as defined by Section 16). At the time of writing, the majority of the Act is not in force as the Government intend to bring the Act and the Hague Convention and protocols into force for the UK at the same time. The Hague Convention was ratified on 12 September 2017 and the Government has stated that, subject to confirmation by UNESCO, the Convention and its protocols (and therefore also the Act) will come into force on 12 December 2017⁸.

Under Section 16, '*unlawfully exported cultural property*' is defined as cultural property which had been unlawfully exported from a territory that:

⁶ UNESCO 'Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954'. Available online at <http://unesdoc.unesco.org/images/0008/000824/082464mb.pdf>

⁷ Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge University Press 2006).

⁸ <https://www.gov.uk/government/news/government-ratifies-hague-convention-on-protecting-cultural-property>

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- (a) is occupied by a state party to the First or Second Protocol; or
 - (i) is a party to either Protocol of that Hague Convention and
 - (ii) is occupied by another state

‘*Cultural property*’ is very wide definition, and, unlike the Dealing in Cultural Objects (Offences) Act 2003 (the “**2003 Act**”), may apply artworks and objects not just of ‘historical, architectural or archaeological interest’ (as under the 2003 Act). The definition of ‘*unlawfully exported cultural property*’ applies to cultural property regardless of when it was exported, even if the act of exportation occurred before the section comes into force, as long as the other requirements are fulfilled.

The Act further determines whether a territory is occupied by reference to Article 42 of the Regulations respecting the Laws and Customs of Land annexed to the Convention respecting the Laws and Customs of War on Land (“**Hague IV**”) of 1907. Article 42 of Hague IV states that ‘*Territory is considered occupied when it is actually placed under the authority of the hostile army.*’ Although the Section 16 definition is line with the Hague Convention’s text, it does not appear to include the concept of civil war or asymmetrical conflicts involving state and non-state actors. For example, while Syria is a party to the Hague Convention and would qualify as a territory for part (b)(i), areas occupied by ISIS would not appear to qualify for sub-section (ii), as the terrorist organisation, while it could be considered a hostile army under Article 42 of Hague IV, is not a ‘state’. While Article 22 of the Second Protocol does state that the Protocol applies in the event of an armed conflict not of international character (like civil wars) for

persons who commit theft, pillage, misappropriation or acts of vandalism against cultural property protected the Hague Convention, and Britain is now a party to this law, the Act makes no similar provisions for the new offence created.

Section 17 introduces the new offence of dealing in unlawfully exported cultural property when the person knows or has reason to suspect that the cultural property in question has been unlawfully exported from its country of origin.

Dealing in such property occurs where a person:

- (a) acquires or disposes of unlawfully exported cultural property in the UK, imports it into or exports it from the UK,
- (b) Agrees with another to do an act in (a), or
- (c) Makes arrangements under which another does such an act or another person agrees with a third person to do such an act

A person convicted of an offence under Section 17 may be given a maximum sentence of up to seven years in prison and/or a fine. Unlike Section 16, the offence is not retroactive and so only applies to property imported into the UK after the section comes into force.

While mostly uncontroversial, the Act did receive criticism from several MPs. They argued that the offence’s *mens rea* creates an unfair burden for the art markets and art dealers in general, who could be found guilty of the new crime on the basis that they should have had reason to suspect that a specific artwork was wrongfully imported into the UK⁹. Despite these claims, the Bill

⁹ HC Deb 20 February 2017, vol 621, cols 793-816

ultimately passed without amendment and received Royal Assent on 23 February 2017.

The impact of the Act

What will the Act change? The answer is likely very little in day-to-day life. An impact assessment of the Act envisages that there will be only one prosecution every 30 years¹⁰. Additionally, it is possible that it will not impact the art market very much at all, as dealers must already conduct due diligence about the provenance of their artworks.

Then what is the importance of the Act? Passing the Act shows that the British Government is willing to accede to modern norms regarding cultural property protection. The UK will be only the second member of the permanent UN Security Council, after France, to have ratified the Hague Convention and both protocols. Last year the Government released its first Culture White Paper in decades, stating the intention to ratify the Hague Convention and containing the promise of a new £30 million Cultural Protection Fund¹¹. Yet it has taken over fifty years for the Government to ratify what is generally considered an international legal precedent.

This is not the first time Britain has been slow to embrace UN treaties. The UK only acceded to the 1970 Convention in 2002, shortly before the invasion of Iraq when the issue of looting would come to the fore. A few short months later in April 2003, the US was globally condemned for failing to safeguard Iraqi Museums from looters

who stole and destroyed numerous irreplaceable, invaluable artefacts. Despite the fact that the UK Ministry of Defence in February of 2003 took the extraordinary step of asking archaeologists to help identify cultural sites on the ground, there had been no further follow up¹². Iraqi cultural property had been irrevocably plundered. It may be that the looting incentivised the Government to pass the Dealing in Cultural Objects (Offences) Act in October of the same year, complementing the 1970 Convention.

So why has Britain only now woken up to the importance of cultural protection? Why not pass the Hague Convention in 2004 when Parliament originally announced the intention to ratify it? After all, the devastation of cultural heritage is nothing new. From the Bamiyan Buddhas to the ravaging of Palmyra, the cycle of cultural destruction seems doomed to repeat itself. What is new is the growing intensity of the threats by extremist groups who see it as their mission to destroy anything that does not support their world view- a heritage of nothing but an apocalyptic and deeply twisted ideology. As our televisions and social media feeds beam into our homes the wanton violence against cultural property, anyone can witness the devastating consequences of war. It is this combination of public outcry and the change in the nature of warfare as we know it that is driving increasing international recognition of the importance of cultural protection. This recognition is reflected in the unanimous passing of a historic resolution by the UN Security Council in March of this year, condemning unlawful destruction and smuggling

¹⁰ HC Deb 15 November 2016, second sitting, col 61.

¹¹ Department for Culture, Media & Sport (2016). Available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/510798/DCMS_The_Culture_White_Paper__3_.pdf.

¹² Peter G Stone 'The Identification and Protection of Cultural Heritage during the Iraq War: A peculiarly English Tale' in Peter G Stone and Joanne Farchakh Bajjal, *The Destruction of Cultural Heritage in Iraq* (2008 Boydell & Brewer Ltd).

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of cultural heritage. During the session, Irina Bokova, the Director-General of UNESCO, called such deliberate acts “*a tactic of war, to tear societies over the long term*”, stating that defending cultural heritage is “*a security imperative, inseparable from that of defending human lives*”¹³. Britain has finally become a responsive part of a global movement that cannot come a moment too soon.

There is evidence that illicit antiquities from Syria and Iraq help fund ISIS's campaign of violence, even as the terrorist organisation carries out its campaign of iconoclasm¹⁴. During wartime, central authority breaks down and looting increases, driven by demand from collectors and local commanders recognising the commercial potential of antiquities to fund their soldiers, prolonging conflict¹⁵. Neil Brodie, archaeologist and Senior Research Fellow at Oxford University conducted an investigation of the London market in Iraqi antiquities from 1990 to 2005. Through statistical analysis of sales at auction house Christie's, he demonstrated that sales of unprovenanced Iraqi artefacts rose from 1990 until 2003 when the UK implemented the UN Security Council Resolution 1483, showing the link between conflict, illicit trade and implementation

of law¹⁶. The reality and consequences of war make the Act so important.

Despite the UK's long path to joining the international community, it is welcome move as nations become more aware of the devastating consequences of cultural destruction and the need to find innovative solutions. In the wake of the 2015 Paris terror attacks at the Bataclan, French President Hollande stated that Paris would become a ‘safe haven’ for endangered artefacts from Syria. The director of the Louvre, Jean Luc Martinez, even created a 50 Point Plan for protecting cultural treasures¹⁷, although over a year on from publication, the Plan seems more symbolic than practicable.

Even more recently, the first ever G7 of Culture was held in March 2017. Culture Ministers from England, the US, Canada, Japan, France Germany and Italy met in Florence to discuss threats to cultural heritage and protective solutions ahead of the G7 summit later this year. The States issued a joint statement, calling upon nations to prioritise the safeguarding of cultural property and take effective measures to prevent cultural trafficking. Such a momentous meeting demonstrates how far we have come in the last 100 years. Ratifying the Hague Convention at last draws Britain closer to the international

¹³ UN News Centre ‘Building peace requires culture, education - message of historic UN Security Council resolution’ (24 March 2017). Available online at <https://www.un.org/apps/news/story.asp?NewsID=56428#.WN11MnfMzEY>.

¹⁴ Leila Amineddoleh, ‘How western art collectors are helping to fund Isis’, *The Guardian* (26 February 2016). Available online at <https://www.theguardian.com/artanddesign/2016/feb/26/western-art-funding-terrorism-isis-middle-east>.

¹⁵ Neil Brodie ‘The Plunder of Iraq's Archaeological Heritage 1991- 2005, and the London Antiquities Trade’ in Neil Brodie, Morag M Kersel, Christina Luke and Kathryn Walker Tubb (eds), *Archaeology, Cultural Heritage and the Antiquities Trade*, 206-226 (University of Florida Press 2006).

¹⁶ Neil Brodie, ‘The Western Market in Iraqi Antiquities’ in Lawrence Rothfield (ed), *Antiquities under Siege: Cultural Heritage Protection after the Iraq War*, 63-73 (Altamira Press 2008).

¹⁷ Jean Luc Martinez, ‘Cinquante propositions françaises pour protéger le patrimoine de l'humanité: Rapport au Président de la République sur la protection du patrimoine en situation de conflit armé Novembre 2015’ (November 2015). Available online at <http://www.elysee.fr/assets/Uploads/Cinquante-propositions-francaises-pour-protoger-le-patrimoine-de-lhumanite.pdf>.

community, even as it begins the tumultuous process of exiting the European Union.

Concluding thoughts

It is important that our laws are active and dynamic, responsive to the changing nature of war. The laws that bind our nations are shaped now not by what is best for a State, but what is for the best for the common good of mankind. Cicero could have never imagined it.

Although there are arguments that international laws do not go far enough in the pursuit of their aims, we have certainly come a long way since the Napoleonic days of plunder. A recent review of legal obligations in relation to the destruction of Syrian cultural property argued that international frameworks like the Hague Convention are inadequate as they often remain unratified, and even when ratified are often unenforceable¹⁸. While there is truth in this, our international legal frameworks reflect an inter-community willingness to restrain the atrocities of conflict and attempt to limit what could otherwise be all-out chaos.

During the third reading of the Act, it is was called ‘entirely uncontroversial, deeply unexciting and about 50 years too late’¹⁹. While the Act, aside from the aforementioned sections,

may indeed be uncontroversial, it is wrong to say it is unexciting. Ratifying and passing this important legislation is a significant step for Britain in stemming the flow illicit antiquities which have links to terrorist financing. The Act creates closer ties with an international community amid growing awareness that protection rather than plunder of artefacts is of the utmost importance.

Professor Hilary Soderland, a lawyer and an archaeologist, wrote that law is the mechanism through which professionals institutionalise contemporary values and determine the path of cultural heritage and cultural property²⁰. In other words, what we as a society can and can’t do to protect cultural property is limited by the legal policies we adopt to frame it. It is not always possible to prevent the plunder of art during war. But the adoption of laws that restrain such acts do help and in turn, shape the nature of wars to come. Britain’s ratification of the Hague Convention is a welcome step forward.

Outside the bombed, vandalised and rebuilt National Museum of Afghanistan in Kabul stands an engraved plaque. The writing reads ‘a *nation stays alive when its culture stays alive*’. We would do well to remember such words.

¹⁸ Emma Cunliffe, Nibal Muhsen, and Marina Lostal, ‘The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations’, (2016) *International Journal of Cultural Property*, 23, 1- 31.

¹⁹ HC Deb 20 February 2017, vol 621, col 802.

²⁰ HC D Hilary A Soderland ‘Values and the evolving concept of heritage: the first century of archaeology and law in the United States (1906-2000) in George S Smith, Phyllis Mauch Messenger and Hilary A Soderland (eds), *Heritage Values in Contemporary Society*, 129-143. (Left Coast Press 2010). eb 20 February 2017, vol 621, col 802.

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