



Category of paper: Discussion Group Summary

Protection of Works of Art in and after Conflict

A Summary of the Chatham House International Law Discussion Group meeting held on 8 May 2008.

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The meeting was chaired by Elizabeth Wilmshurst. Participants included legal practitioners, academics, NGOs, as well as museum and government representatives.

Speakers:

- Kevin Chamberlain CMG, barrister, author of *War and Cultural Heritage*
- Anne-Marie Carstens, Georgetown and Oxford Universities

The event was sponsored by the British Red Cross and Clifford Chance.

Kevin Chamberlain: Protection under International Law and the proposed UK Legislation

The speaker noted that recent years had witnessed widespread destruction of cultural property, including the destruction of the Bamiyan Bhudhas by Taleban forces in Afghanistan, the looting of the Iraq National Museum in Baghdad, and the extensive destruction of cultural property in former Yugoslavia where attacks against cultural property were seen as a means of ethnic cleansing. The protection of culture is important because it is aimed not just at the object in question but people as well. Protecting cultural property attempts to protect not only monuments but a people's memory, its collective consciousness and its identity, and indeed humanity as a whole. This is why the rules governing the protection of cultural property in times of armed conflict are rightly regarded as part of international humanitarian law.

The principal international instruments whose purpose is to protect cultural property in armed conflict are the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention), the 1954 Protocol and the 1999 Second Protocol. The UK so far is not a party to any of these instruments. The scenes of looting and destruction of cultural property following the invasion of Iraq by coalition forces in 2003 and in particular the looting of the Baghdad National Museum led to calls for the UK to become a party to the Hague Convention and its Protocols. The UK Government publicly announced its intention to ratify the Hague Convention and accede to its Protocols in May 2004, on the 50th anniversary of the Convention.

In January 2008 the UK published the draft Cultural Property (Armed Conflicts) Bill. The purpose of this legislation is to enable the UK to implement

the Hague Convention, as well as the 1954 Protocol and the 1999 Second Protocol.

The Hague Convention was adopted by UNESCO following the massive destruction of cultural property during the Second World War and provides a system to protect cultural property from the effects of international and non-international armed conflict. In peacetime States Parties to the Convention are obliged to take measures to safeguard cultural property against the foreseeable effects of armed conflict. In times of armed conflict they must respect cultural property by not attacking it and ensure that they do not use cultural property for military purposes, except where justified by imperative military necessity. The Convention defines cultural property to include movable and immovable property of great importance to the cultural heritage of every people, such as monuments, archaeological sites, buildings of historical or artistic interest, works of art, manuscripts, scientific collections, important collections of books, archives and as well as reproductions of property. The definition also includes museums, archive depositories and refuges. It also includes centres containing large amounts of cultural property, which would include historic centres and even whole towns, such as Venice. The Convention also sets up a system of special protection designed to protect cultural property of the greatest importance. It provides for cultural property protected by the Convention to be identified by a special symbol (the Blue Shield) and requires States Parties to prevent misuse of the symbol. Parties are also obliged to protect cultural property when in transit to a place for safekeeping.

The 1954 Protocol was drawn up at the same time as the 1954 Convention and obliges States Parties to prevent the exportation of cultural property from territory occupied by them. States parties are also obliged to seize cultural property imported either directly or indirectly from territory under occupation and to return it to the competent authorities of the occupied territory at the close of hostilities. The Protocol also provides for the return of cultural property deposited with a State Party for safekeeping during a conflict.

In 1999 in the aftermath of the conflict in former Yugoslavia a Second Protocol to the Hague Convention was drawn up under the auspices of UNESCO and opened for signature. This Protocol specifies the circumstances in which the obligation to protect cultural property may be waived on grounds of imperative military necessity. It creates a new category of protection called "enhanced protection" which would replace the category of special protection under the 1954 Convention. The Protocol reinforces the provisions relating to jurisdiction and criminal responsibility in the Convention

by requiring States parties to the Protocol to establish criminal jurisdiction over, and prosecute or extradite persons committing certain serious violations of the Convention and Second Protocol. Finally, the Second Protocol establishes new institutional structures to supervise the implementation of the Protocol, including setting up a new standing committee, the Committee for the Protection of Cultural Property in the Event of Armed Conflict.

Many of the provisions of the Convention and Protocols can be implemented by the UK without new legislation. However legislation is required to give effect to the criminal offences created by the Second Protocol, to implement the obligations in the First Protocol concerning the import of cultural property from occupied territory, and to protect the cultural emblem designated under the Convention.

Article 15.1 of the Second Protocol requires Contracting States to make serious violations of the Protocol criminal offences and prosecute or extradite persons committing such offences. A serious violation consists of the following acts when committed intentionally and in violation of the Convention or Protocol:

- 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 Protocol;
- making cultural property protected under the Convention and the Protocol the object of attack;
- theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

Under Article 16 of the Protocol Contracting States are obliged to take jurisdiction over such offences when the offence is committed within the territory of that State, when the alleged offender is a national of that State, and in the cases of offences in sub-paragraphs (a) to (c) of Article 15.1, when the alleged offender is present in its territory. The Protocol does not preclude the exercise of jurisdiction under national or international law, or affect the exercise of jurisdiction under customary international law. However the Protocol does not impose individual criminal responsibility over the members of the armed forces of a State or its nationals that are not Parties to the

Protocol or require Parties to the Protocol to establish jurisdiction over such persons or extradite them (except in cases where a non-Party has agreed to accept and apply the provisions of the Protocol).

The Bill will make it an offence to commit a serious breach of the Second Protocol. A person commits an offence if, (i) that person intentionally does any of the acts described in paragraphs (a) to (e) of Article 15.1 of the Second Protocol, (ii) the act is a violation of the Convention or the Second Protocol, and (iii) the person knows or reasonably suspects that the property to which the act relates is cultural property as defined in Article 1 of the Convention. The Courts are given jurisdiction over the offences irrespective of where the offences may be committed and, in the case of offences set out in sub-paragraphs (a) to (c) of Article 15.1, irrespective of the nationality of the offender. In the cases of offences set out in sub-paragraphs (d) and (e) jurisdiction will be exercised only if the offender is a UK national or a person subject to UK service jurisdiction.

As noted, Article 16 of the Protocol does not require the UK to establish jurisdiction over offences committed by persons who are nationals of States that are not Parties to the Protocol. There is nothing in the Bill that covers this expressly. However to constitute an offence under the Bill the act must not only be an act described in Article 15.1 but also be in violation of the Convention or Protocol. Thus action taken by the armed forces of a country that is not a Party to the Convention or Protocol would not amount to an offence since it would not be in violation of the Convention or Protocol.

Criminal responsibility is also imposed on military commanders or superiors who fail to exercise sufficient control over their subordinates to prevent the commission of the offences or to take adequate measures to repress such acts or submit them to the competent authorities for the purpose of investigation or prosecution. However the duties imposed on military commanders are more stringent than those imposed on superiors, such as government officials or heads of civilian organisations, where it is recognised that the latter may not exercise such strict control as military commanders. Military commanders will incur liability where the commander knew, or under the circumstances prevailing at the time should have known, that his or her forces were committing an offence, whereas a superior will only incur liability where he or she knew, or consciously disregarded information, that the subordinate was committing an offence. The Bill specifically states that the provisions on criminal responsibility of military commanders and superiors are based on Article 28 of the Statute of the International Criminal Court and in

interpreting or applying them a court must take account of any relevant judgement or decision of the International Criminal Court.

Persons convicted of offences of serious violations of the Second Protocol are liable to be sentenced by up to thirty years imprisonment.

The Bill also makes it an offence punishable by a fine of up to £5,000 for the unauthorised use of the cultural emblem as designated in the Convention. This would include the use of any other design that so closely resembles the cultural emblem as to be mistaken for it. There are a number of defences to a charge of unauthorised use. For example if the emblem forms part of a trade mark that was registered before the Bill became law, or was on a design on goods that were manufactured before the goods came into the possession of the accused. Provision is also made on conviction for the forfeiture of any article on which the symbol was being used without authorisation.

In implementation of the First Protocol as well as Article 21 of the Second Protocol (which obliges a Contracting Party to take measures to suppress any illicit removal or transfer of ownership of cultural property from occupied territory in violation of the Convention or Second Protocol), the Bill makes it an offence, punishable by up to seven years imprisonment, for any person to deal in cultural property that has been unlawfully exported from occupied territory if the offender knew or had reason to suspect that the cultural property concerned had been unlawfully exported. Cultural property is “unlawfully exported” if it has been exported at any time from territory occupied by a Party to the First or Second Protocol¹ and its export is unlawful under the laws of the territory in question or under international law. International law would include the Protocol which prohibits *all* export from occupied territory. The term “occupied territory” is defined by reference to Article 42 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land and a certificate of the Secretary of State as to whether territory is occupied is conclusive evidence of that fact. Although the unlawful export may have taken place before the entry into force of the Bill, for an offence to take place the cultural property must have been imported into the UK after the entry into force of the Bill. No offence is committed in relation to cultural property that has not been imported into the UK.

¹ The definition of ‘unlawfully exported’ may be too narrow given that the obligation under the First Protocol is to prevent the importation of cultural property exported from *any* occupied territory.

Provision is also made for the seizure and forfeiture of unlawfully exported cultural property², whether or not an offence may have been committed in the UK, and for compensation to be paid to any person who may have acquired the property in good faith. Once such property has been seized and forfeited it would be for the Secretary of State to make the necessary arrangements for the return of the property to the competent authorities at the close of hostilities in accordance with the First Protocol.

Paragraph 1 of the First Protocol would also oblige the UK in cases where it was in occupation of a territory to prevent the export of cultural property from that territory. The implementation of this obligation would be through the enforcement of the law of the occupied territory or through occupation law.

Finally, the Bill ensures that where cultural property is deposited with the United Kingdom for safekeeping, for example under Part II of the First Protocol, or being transported to or from the United Kingdom under Article 12 of the Convention, such property shall have immunity from seizure and forfeiture in any criminal or civil proceedings.

The draft Bill is now open for public consultation. Assuming it is included in the 2008-2009 Legislative Programme it should become law sometime in 2009 and UK ratification of the Convention and accession to both Protocols can then take place. In the meantime, work will need to be undertaken to prepare for the implementation of the Convention and Protocols, a major part of which will be the process of identifying the cultural property that the UK considers should be protected under the Convention, preparing inventories of such property, ensuring adequate protective measures are in place, and identifying the cultural property in respect of which the UK would seek enhanced protection under the Second Protocol.

Anne-Marie Carstens: Seizures by States and the UK anti-seizure legislation

The speaker first touched on the status of the 1954 Hague Convention in the US. President Clinton submitted it and part of the First Protocol to the US Senate in 1999 for ratification; the Bush Administration, as least as recently as February 2007, has recommended that the Senate ratify the Convention. The constitutional process in the United States requires the Senate to

² See note 1 above

approve any treaty that the executive authority seeks to join. Progress toward ratification therefore now rests with the Senate.

The speaker then addressed institutionalised seizures during armed conflict, that is, seizures carried out by States and excluding unauthorised looting or thefts by third parties.

First, the laws of armed conflict have had to evolve—and must continue to evolve—to meet the threat of institutionalised seizures. States continually put forward new legitimising rationales for removing works of art and other cultural objects to their own territories. Further, States have been reluctant to implement international laws that require them to rely on other States for the protection of their works of art in times of conflict. Finally, the speaker wished to address anti-seizure legislation in the UK because domestic anti-seizure laws sometimes operate in tension with legal remedies for institutionalised seizures. Anti-seizure laws generally prohibit the official seizure of works of art that are in the jurisdiction for temporary display or exhibition.

A few historical examples serve to demonstrate how international law has developed to counter the threat of institutionalised seizures, beyond establishing mere rules of restraint. Going back as early as the Napoleonic Wars, Napoleon came up with two innovative but questionable practices for seizing works of art: armistice agreements and forced contributions. Napoleon entered into armistice agreements with the Duke of Parma, with the Duke of Modena, and even with the Pope. The terms of the armistice in each case specifically included the transfer of works of art. The Dukes had to surrender 20 paintings apiece, chosen by French art commissioners assigned for the purpose, and the Pope, in one armistice agreement, had to give up 100 paintings, statues, etc. and 500 manuscripts. In addition, Napoleon's troops demanded works of art as forced contributions. It was standard practice during war at the time for States to impose contributions on occupied localities, requiring them to bear the expense for sustaining the war effort. Contributions generally consisted of money, munitions, and provisions, but the French collected, for example, paintings by Velazquez and Rubillo from the Spanish convents and cloisters as contributions. Following the Napoleonic Wars, the international community debated for much of the remainder of the nineteenth century whether these practices violated any laws against seizure.

At the 1899 and 1907 Hague Conferences, States firmly established that these practices violated international law. Each conference produced a convention governing land warfare, and the regulations appended to these

conventions essentially codified what States agreed were the laws of war at that time. The regulations provided that an occupying State could only levy money contributions and could only requisition goods for military needs.³

During World War II, States posited several new justifications for institutionalised seizures. One of the justifications that was employed not only by Germany, but also by the US and by Russia, was that removals were necessary for safeguarding of the works. In this context, 'safeguarding' is intended in the narrower, traditional sense used in international law, meaning to exercise control and exclude others, and not the broader meaning given to the term in the 1954 Hague Convention.

The safeguarding justification emerged early in the war, following Germany's 1939 invasion of Poland. Germany installed a Commission for the Seizure and Safeguarding of Art and Cultural Treasures (*Kommission des Sonderbeauftragten für die Erfassung und Sicherstellung der Kunst- und Kultureschätze*) in the German-controlled General Government for south-central Poland. The commission amassed works, then sent first-rate works to Germany. Germany produced an exhibition catalogue in 1940 that depicted these works under the title, 'Safeguarded Works of the General Government' (*Sichergestellte Kunstwerke im Generalgouvernement*).⁴ Certainly the title and the name of the Commission reinforced their claim of safeguarding. At the Nuremberg Trials, however, Hermann Goering admitted that Germany intended to keep certain 'safeguarded' works, including the famous Veit Stoss altarpiece that had been commissioned in Krakow but crafted there by German-born artist Veit Stoss.⁵

³ Convention with respect to the laws and customs of war on land (1899 Hague Convention (II)) (signed 29 July 1899, entered into force 4 September 1900); Regulations Respecting the Laws and Customs of War on Land (1899 Regulations); Convention respecting the laws and customs of war on land (1907 Hague Convention (IV)) (signed 18 October 1907, entered into force 26 January 1910).

⁴ Nuremberg Tribunal, K. Mülmann, Doc. 3042-PS; see also *Cultural Losses in Poland* (Karol Estreicher ed.) (London: manuscript edition, 1944) at 91-95; Lynn Nicholas, *The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War* (New York: Alfred A. Knopf, 1994) at 58-60, 66-70.

⁵ Nuremberg Proceedings, Vol. IX, at 313-14 (Goering testimony, 14 Mar. 1946).

At the end of the war, both the US and Russia removed works from Berlin museum collections to their own territories. In the latter part of the war, Germany had secured the Berlin museum collections first in a specially constructed flak tower at the Berlin Zoological Gardens, but later had removed part of the collections to a salt mine at Merkers in Thuringia. The US discovered the repository at Merkers, and the Russians located the collections that remained in the flak tower. The Merkers repository resided in what would become the Russian Zone, and the flak tower was in the eventual British Zone; the US forces moved the Merkers collections initially to a collecting point in their eventual zone, and the Russians likewise moved the flak tower contents first to a collecting point well within their eventual zone.

Of the works that the US recovered from Merkers, the US transported 202 works from the Kaiser Friedrich Museum and the Nationalgalerie to the US National Gallery in Washington. During the Potsdam Conference in 1945, US President Truman had approved an internal memorandum that stated that German collections ‘might well be returned to the U.S. to be inventoried, and cared for by our leading Museums’ and ‘could be held in trusteeship for return, many years from now to the German people if and when the German nation had earned the right to their return.’⁶ A subsequent White House press release emphasised that ‘the reason for bringing these perishable art objects to the United States is that expert personnel is not available within the American Zone to assure their safety’ and that Germany lacked adequate facilities for their proper storage.⁷ This action provoked a strong reaction from the US specialist arts and archives officers in Europe who assisted with protection during the war and with restitution after the war, and many of these

⁶ Charles L. Kuhn, ‘German Paintings in the National Gallery: A Protest’, *College Art Journal*, Vol. 5, No. 2 (Jan. 1946) at 78-79; United States, Report of the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas (Washington: GPO, 1946) at 148. The substance of this memorandum is quoted in the formal response from John Nicholas Brown, Adviser on Cultural Matters, to Deputy Military Governor of the US Group Control Council, 9 August 1945, *reproduced in* Walter I. Farmer, *The Safekeepers* (Berlin: Walter de Gruyter, 2000) at 199-202.

⁷ White House Press Release, September 26, 1945, *quoted in* Gladys Hamlin, ‘German Paintings in the National Gallery: Official Statement’, *College Art Journal*, Vol. 5, No. 2 (Jan. 1946) at 75-77 (statement of US Department of State).

officers signed a formal and strongly worded protest known as the Wiesbaden Manifesto.⁸ This protest, and the international and national furore it aroused, likely contributed to the fact that more of the German collections never crossed the Atlantic. The 202 works were returned to a US-run collecting point in Germany by 1949, and then transferred to West Germany in the mid-1950s, even though the museums where the works originated were located in what was, by then, East Germany.

Russia transferred German collections to Moscow, claiming publicly to save them from air raids over Berlin but privately claiming them as reparations for Russian losses earlier in the war. The Soviet Union entered into a series of agreements with East Germany during the 1950s for the return of works that belonged to East German museums, as part of an effort to solidify their political alliance with East Germany. The Soviet Union returned many works, such as artefacts from the Pergamon Altar, but they secretly retained some of these works and also retained works that belonged to museums in West Germany, such as the well-known Trojan Treasures. In 1995, the Russian Ministry of Culture and the Pushkin State Museum of Fine Arts held a special exhibition, 'Twice Saved', that continued to reinforce the safeguarding rationale. A copy of the exhibition flyer, available at the National Art Library here in London, depicts several of the works displayed in that exhibition.⁹ Since the end of the Cold War, Russian executive authorities have entered into a series of agreements intended to promote restitution, but the Russian legislature passed a law in 1998 that nationalised these collections and

⁸ Charles L. Kuhn, 'German Paintings in the National Gallery: A Protest', *College Art Journal*, Vol. 5, No. 2 (Jan. 1946) at 78-82 (account of Monuments Fine Arts and Archives officer and publication of Wiesbaden Manifesto); see also Walter I. Farmer, *The Safekeepers* (Berlin: Walter de Gruyter, 2000) (account of Monuments Fine Arts and Archives officer and reprinting Wiesbaden Manifesto with list of works); United States, Report of the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas (Washington 1946) at 148.

⁹ Exhibition Pamphlet, 'The Ministry of Culture of the Russian Federation [and] The Pushkin State Museum of Fine Arts present The Exhibition "Twice Saved . . . European Painting of the XIV-XIX Centuries Displaced to the Soviet Union from Germany as a Result of the Second World War", 27 February – 16 July 1995' (copy available at the National Art Library, London).

prohibited their transfer. The works remain in Russia, and Russian authorities remain at an impasse.

In order to respond to the risk that States would seize works of art under the pretext of safeguarding, the Hague Convention specifically forbids States from removing works from resident territories. When Iraqi authorities in the first Gulf War removed the contents of Kuwaiti museums to Iraq, the international community deemed this a violation of the laws of war, even though Iraq claimed to remove the works to safety given the threats posed by their invasion of Kuwait. This time, both UNESCO and the UN intervened, and after a UN Security Council resolution,¹⁰ the UN supervised the return of several thousand objects in September and October 1991.¹¹ The First Protocol to the 1954 Hague Convention also bars the retention of cultural property as reparations, again responding to one of Russia's justifications for its removal of German museum collections.

Given this history and the pervasive distrust between States during conflict, States have been reluctant to rely on other States for the protection of their cultural objects during conflict. This has contributed to a failure in some of the mechanisms provided in international law for the protection of works of art and other cultural property. The Hague Convention, for example, provides for a scheme of 'special protection' for refuges that States identify to the international community as the places where they will put their treasured objects during armed conflict. Only three States have established such refuges—the Netherlands for six refuges, Germany for one, and Austria for its infamous Alt Aussee refuge. The Khmer Republic during the 1970s sought special protection for a refuge at the Angkor complex, but four States objected on the grounds that they did not recognise the authority of the government submitting the request.¹² The Hague Convention similarly provides for 'special protection' of transport used to ferry works to safety in the same or another territory, but this requires States to notify a neutral Commissioner-General for Cultural Property, who will notify belligerents of identity, route, and destination of the works. One of the UK's objections to the Hague Convention at the time was that 'the Convention provides for neutral

¹⁰ Resolution 686(1991).

¹¹ Jiri Toman, *Protection of Cultural Property in the Event of Armed Conflict* (Paris: UNESCO, 1997) at 349.

¹² Jiri Jiri Toman, *Protection of Cultural Property in the Event of Armed Conflict* (Paris: UNESCO, 1997) at 108.

international inspection and control which would involve a serious security risk.¹³

The fear is that neutral States might be lured into war and also that pre-war Allies might become post-war Foes. To return to WWII examples, France diverted a touring art collection to the US, and the UK sent a copy of the Magna Carta to the US, then neutral. After the war, Canada and the US both retained works entrusted to them during the war by Eastern European governments because they were not fond of the new postwar governments. Canada had agreed to store various Polish treasures, including the royal coronation sword and several famous tapestries, on behalf of the Polish government (and then the Polish government-in-exile). Canada stalled the return of the objects until 1960.¹⁴ Similarly, the US obtained the Hungarian crown jewels at the end of the war from the Hungarian guard as Russian troops advanced, at least accordingly to a generally accepted account,¹⁵ and the US did not return these objects until 1978, again claiming to hold them 'in trust'.¹⁶ |

In order to respond to the risk of retention by States entrusted with works (even if those States did not formally seize them), the First Protocol to the Hague Convention requires contracting States to return at the conclusion of hostilities any works placed in their possession for care. In addition, the Second Protocol takes into account that States have not implemented the

¹³ National Archives of the United Kingdom, record file FO 371/101524.

¹⁴ Sharon A. Williams, 'The Polish Art Treasures in Canada, 1940-1960', *Canadian Yearbook of International Law* (1977) at 146-72.

¹⁵ James Rorimer & Gilbert Rabin, *Survival: The Salvage and Protection of Art in War* (New York: Abelard Press, 1950) at 154-57 (detailing circumstances under which Rorimer took control of Hungarian crown jewels).

¹⁶ US Department of State, 'The International Protection of Artistic and Historic Property: A Statement Released by the Department of State, July 27, 1951', in *The College Art Journal*, Vol. 11, No. 1 (Autumn 1951) ('The Crown of St. Stephen of Hungary, which was surrendered to the United States authorities for safekeeping, is being held in trust by the United States Government. It continues to be treated as property of a special status. The Government of the United States does not regard the present juncture as opportune or appropriate for taking action regarding its disposition.');

Dole v. Carter, 569 F.2d 1109 (10th Cir. 1977).

provisions for special protection, in particular, and attempts to create alternatives by establishing new mechanisms for 'enhanced protection'.

National anti-seizure laws generally prevent authorities from seizing movable works while they are in the relevant jurisdiction on temporary loan. Works of art are particularly vulnerable to seizure on one of two grounds: (1) seizure to effect a lien on an unrelated debt, and (2) seizure of the work based on a claim that the work was stolen or wrongfully appropriated.

The UK's new anti-seizure legislation has received a great deal of press because of Russian demands for anti-seizure protection for works it was sending to the UK for an exhibition at the Royal Academy of Art here in London. The new UK legislation provides an automatic or 'semi-automatic' exemption from seizure for works brought to the UK on temporary loan for display or exhibition (not on display as part of a sale, such as a preview at an auction house). Works do not obtain immunity from seizure by their mere arrival into the jurisdiction but the law requires that borrowing institutions establish that they meet due diligence requirements in the statute before they can take advantage of the legislation¹⁷ and must also provide notice pursuant to the regulations coming into effect on 20 May 2008. The regulations require the institution to identify on its website: the identity of the lender, a description of the object, the provenance, and the location and duration of the

¹⁷ The Tribunals, Courts and Enforcement Act 2007 (c.15), Pt. 6; The Tribunals, Courts and Enforcement Act 2007 (Commencement No. 2) Order 2007 (England) (23 Dec. 2007), Statutory Instruments 2007 No. 3613 (C.158) (providing that anti-seizure provisions came into effect in England as of 31 Dec. 2007); The Tribunals, Courts and Enforcement Act 2007 (c.15), Pt. 6; The Tribunals, Courts and Enforcement Act 2007 (Commencement) Order 2008 (Scotland) (14 Apr. 2008), Statutory Instruments 2008 No. 150 (C.14) (providing that anti-seizure provisions came into effect in Scotland as of 14 April 2008); The Tribunals, Courts and Enforcement Act 2007 (Commencement No. 4) (Wales and Northern Ireland) Order (21 Apr. 2008), Statutory Instruments 2008 No. 1158 (C.51) (providing that anti-seizure provisions came into effect in Wales and in Northern Ireland as of 21 April 2008); see also Ministry of Justice, 'Tribunals, Courts and Enforcement Bill: Detailed Policy Statement on Delegated Powers' (May 2007) at 63.

display.¹⁸ Also, a UK court can order the seizure of works to give effect to a EU Community obligation or international treaty obligation.

This differs from the federal US and Canadian legislation, which requires a party to apply for an exemption from the State Department for each individual exhibit and to certify that it has no reason to know of potential competing ownership claims. In the US, the State Department then grants the exemption on a case-by-case basis and provides a public notice if it decides the objects in question have cultural significance and their display will serve the national interest. As of the year 2000, the State Department had granted exemptions for more than 600 exhibits. Switzerland has similar anti-seizure legislation, but potential claimants can object and therefore block application of the anti-seizure restrictions.¹⁹

In the case of the RA exhibition, Russian authorities feared that the heirs of the pre-1917 owners would attempt to claim certain works because their collections had been nationalised in 1917 at the time of the Russian Revolution. The Pushkin Museum's Shchukin and Morosov collections had, in fact, already been subject of similar litigation in France, which was dismissed on foreign sovereign immunity grounds. More often, though, anti-seizure legislation is relevant in the context of WWII-era claims.

The UK bill aroused significant debate in the House of Lords, although DCMS obtained responses to its consultation paper that largely supported the bill.²⁰ Critics argued that the legislation blocks legitimate claims by rightful owners. DCMS maintained that UK's position as a major exhibition centre was

¹⁸ The Tribunals, Courts and Enforcement Act 2007 Protection of Cultural Objects on Loan (Publication and Provision of Information) Regulations 2008 (21 Apr. 2008).

¹⁹ Department for Culture, Media and Sport, 'Consultation Paper on Anti-Seizure Legislation' (including Annex of anti-seizure legislation in other jurisdictions, citing Anna O'Connell, Art Loss Register, 'Immunity from Seizure Study'); see *also* US federal statute on Immunity from seizure under judicial process of cultural objects imported for temporary exhibition or display, 22 U.S.C. Sec. 2459.

²⁰ Research Paper 07/22: The Tribunals, Courts and Enforcement Bill [HL], Bill 65 of 2006-07 (1 Mar. 2007) at 48-55; Department for Culture, Media and Sport, Consultation on anti-seizure legislation: a summary of responses.

threatened by the lack of legislation and that anti-seizure legislation would merely suspend, not extinguish, a litigant's ability to obtain relief.

To get some sense of whether the assertion that anti-seizure legislation merely suspends litigation, a few cases in the US are relevant. At least one federal US court, in a case called *Malewicz v. Amsterdam*,²¹ has held that even if the anti-seizure legislation means that the disputed works cannot be seized, the presence of works in the US at a temporary exhibition nonetheless can serve as a sufficient jurisdictional hook to defeat foreign sovereign immunity in claims against a State. The general rule of foreign sovereign immunity is that foreign States are exempt from jurisdiction in other States. Both the US and the UK have similar legislation that embodies a theory of restrictive sovereign immunity, whereby foreign States shed such immunity for claims related to property taken in violation of international law that is present in the jurisdiction in connection with a commercial activity carried out by the foreign State. In *Malewicz*, and in the more widely noted US Supreme Court case, *Austria v. Altmann* and yet another federal case, *Cassirer v. Spain*, US courts have held that temporary exhibition of the works in the jurisdiction and the marketing of foreign exhibitions in the jurisdiction constitutes such a commercial activity.

The potential difference between a case in which anti-seizure legislation operates and another where it does not essentially is this: Where anti-seizure legislation operates, the works themselves may be exempt from seizure for the duration of a temporary exhibit. The presence of the works in the jurisdiction for purposes of the temporary exhibit, however, might provide a sufficient jurisdictional hook so that claimants can obtain jurisdiction over a State. In this case, where the works cannot be seized but their presence can serve as a basis for obtaining jurisdiction against a State pursuant to an exception to the general rule of foreign sovereign immunity, a victorious claimant might emerge from the courthouse with a judgment that the claimant likely will have to present to authorities in another jurisdiction to enforce. Absent anti-seizure legislation, a claimant might be able to seize the works and, if victorious in litigation, emerge from the courthouse with a judgment and the works in hand.

²¹ 362 F. Supp.2d 298 (D.D.C. 2005); see also US Department of State, 'Culturally Significant Objects Imported for Exhibition Determinations: "Kazimir Malevich: Suprematism"', Pub. Notice 43351, 68 Fed. Reg. 17852 (11 Apr. 2003).

Discussion

The discussion opened with a question whether, in light of the remarks above, the portions of the Parthenon Frieze comprising the Elgin Marbles constituted a seizure by the UK contrary to international law. Noting both the disputed method of acquisition – purchase from the then sovereign – and the inter-temporal nature of the legal analysis required, the panellists considered that the 1954 Hague Convention was inapplicable, whilst noting that the Elgin Marbles remain on the agenda of the UNESCO Committee charged with resolving such disputes.

The meeting then turned to a discussion of whether the Hague Convention and the First and Second Additional Protocols constituted customary international law. This was considered particularly important given that neither the UK nor the United States had acceded to the Convention nor the Protocols at the time of the 2003 invasion of Iraq. Panel members noted that both the UK and American military manuals treated art and cultural property in line with the requirements of the Hague Convention; Additional Protocol I to the Geneva Conventions was also relevant; they emphasised that international law had been central to the targeting process.

Speaking from the floor, Michael Meyer of the British Red Cross clarified that Britain had been looking at acceding to the Convention and the Protocols before the looting of the Baghdad Museums in March 2003; to imply that the UK decided to become a party to the agreements because of the events of the Iraq conflict was therefore misleading. The panel agreed, noting also that the perception of wholesale looting of the Baghdad Museums is at odds with the facts on the ground. Though looting did occur, the majority of the most important exhibits removed from the museums were moved at the behest of the Museum's Directors for safe-keeping. In order to protect the safeguarded objects, the Directors allowed the story of widespread looting to gain currency. Moreover, referencing the UK's unwillingness to lend the Elgin Marbles to Greece for the 2000 Olympics, the panel noted the general reticence of States to rely on international law to protect art, instead relying on self-help measures.

In relation to the Baghdad museums, participants noted that the US military should have planned on providing sufficient forces to secure the Baghdad museums. Moreover, as American forces in Baghdad were tasked with securing the Oil Ministry, they could and should have done more.

The group debated whether the customary status of the Hague Convention had created a positive obligation on States to protect art and cultural objects,

rather than merely a responsibility to avoid damaging them in conflict. It was pointed out that Article 43 of the 1907 Hague Regulations on the law of war could be relied on as providing a positive obligation on occupying States to protect art and cultural property. Moreover, State practice during and subsequent to World War II had demonstrated that military leaders on the ground considered themselves duty-bound to protect cultural objects – the essence of *opinio juris*; the issue now is when does this duty begin? The point was made that it began at the point at which a military force gained effective control of territory, although it was accepted that this meant that there would be a period when neither side had effective control, and therefore no-one would have the positive legal responsibility to protect cultural objects, though both sides would be bound not to target them.

Citing the Taliban's 2001 demolition of the Bamyán Buddhas a participant sought the panel's views on the responsibilities of non-state actors. It was agreed that the Bamyán case could be distinguished from the later 2006 and 2007 Al Qaeda attacks on the Golden Mosque in Samara, in that there was no armed conflict underway in Bamyán at the time, making this sheer vandalism.

By contrast, the attack on the Golden Mosque did take place in the midst of a non-international armed conflict, and both sides were bound by the customary rules of war to avoid targeting the Golden Mosque. In response to the suggestion that the presence of US military observers/snipers in the Mosque's minarets made it a legitimate target, it was stated that the US military had replaced enemy snipers who were there first; that Al Qaeda would in any event be bound by the proportionality rules, and it would have been wholly disproportionate to destroy the Mosque to attack the sniper teams.

A participant raised the issue if there existed crimes for acts against cultural objects. Clearly if stolen items could be restored to the rightful owner, they should be: contemporary cases in the United States conclusively demonstrated that this approach remained effective against art stolen by the Nazis. If destroyed, then there could be prosecution for the offenders and restitution for the victims. One participant noted that crimes against cultural objects had been on several Nuremberg indictments, and it featured in ICTY indictments, too.

Given the benefits and the customary nature of many of the rules, why then did the UK not sign the Hague Convention in 1954? The panel noted that the UK had been instrumental in drawing up the Convention, but that the "military

necessity” language was insufficiently broad for the War Department and the Foreign Office. There was also concern that the provisions should not be applicable in the event of nuclear conflict. The Colonial Office considered that it would pose significant difficulties to implement in the colonies. By contrast, the documentary evidence shows that the Ministry of Works were very positive about the Convention. More recently, the UK was unwilling to sign an instrument that it did not intend to ratify, and was concerned about whether the wording of the ‘imperative military necessity’ exception in the Convention struck the right balance.

The military necessity language struck one participant as too weak, and the group debated whether it was still effective. It was argued that the era of precision-guided munitions made the military imperative language more operationally useful since it was less likely that there would be a need to rely on the exception in most circumstances.