

Disclaimer

This is the Explanatory Memorandum to the *Wet tot uitvoering van de op 14 november 1970 te Parijs tot stand gekomen Overeenkomst inzake de middelen om de onrechtmatige invoer, uitvoer of eigendomsoverdracht van culturele goederen te verbieden en te verhinderen (Uitvoeringswet UNESCO-verdrag 1970 inzake onrechtmatige invoer, uitvoer of eigendomsoverdracht van cultuurgoederen)* [1970 UNESCO Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property (Implementation) Act] as enacted on 12 June 2009. Please note that only the original Dutch-language text of the legislation is legally binding. The most recent version of the text of the Act can be found, in Dutch, on the website: <http://www.wetten.nl>.

Further information can be obtained from the Ministry of Education, Culture and Science (www.minocw.nl; e-mail address: ocwinfo@postbus51.nl) or the Cultural Heritage Inspectorate (www.erfgoedinspectie.nl; e-mail address: info@erfgoedinspectie.nl).

Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property adopted in Paris on 14 November 1970 (1970 UNESCO Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property (Implementation) Act)

EXPLANATORY MEMORANDUM

I. GENERAL

1. Introduction

The purpose of the Bill is to implement the proposals we communicated to the President of the House of Representatives in our letter of 19 July 2004 (Parliamentary Papers, House of Representatives 2003/04, 29 314, no. 8). The letter stated, among other things, that legislation was being prepared to implement the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property adopted in Paris on 14 November 1970 and thus to allow the Convention to be ratified. The aim of the present Bill, which is being presented together with the Bill to approve this Convention, is to implement the Convention in Dutch legislation. As explained in the Explanatory Memorandum to the other Bill, such implementation is necessary because the Convention is not self-executing owing to the nature of its subject matter.

The Explanatory Memorandum referred to above includes a summary of the history and content of the Convention, to which reference may be made. It also explains why the Convention has not been ratified until now. Here it is still necessary to explain what approach

is preferred for the implementation. This is important because the Convention allows the States Parties wide discretion in respect of the manner of implementation. However, this discretion must be used in such a way as to create an effective system of protection for cultural property. Effective protection of this kind should exist even when the Convention itself does not provide any definite rules on a specific point. It is therefore inevitable that the present implementing legislation contains rules that do not appear as such in the Convention, but are necessary in order to give full effect to the general provisions of the Convention. The purpose of the Convention is, after all, to oblige the States Parties to prevent the illicit import, export and transfer of ownership of cultural property by all means at their disposal and to take the measures needed for reparation. In short, they are required to combat effectively the illicit trade in cultural property. However, the Convention rarely specifies exactly how this is to be done. For example, where sanctions are required the Convention usually does not indicate whether they should be provided in administrative, criminal or private law. As will become apparent in sections 3 and 4 below, the present Bill imposes sanctions in private law; see chapters 1, 2 and 3. The international developments since the Convention also point in this direction.

Mention should be made in the first place of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, concluded in Rome on 24 June 1995. This Convention can be regarded as a private law counterpart to the 1970 UNESCO Convention, to which the present Bill relates. It follows that since the conclusion of the UNESCO Convention major progress has been towards the adoption of a private law approach. It is therefore only logical that considerable significance should be attributed to this progress in the present Bill. Moreover, a private law solution was also opted for at European level, in particular in Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, which was transposed into Dutch law by the Protection of Cultural Property against Illegal Export (Implementation) Act.

Both the UNIDROIT Convention and the Directive are based on the assumption that it is the task of the state of origin itself to apply for the return of illegally exported or illegally acquired cultural property in the country in which it is located and that such return should not be hampered by private law impediments, for example the rules in many countries for the protection of innocent purchasers and the rules on prescription. The present Bill therefore builds on these international agreements.

This is a subject of particular importance to the Netherlands. It is one of the countries that goes to great lengths to protect innocent purchasers and it also has a relatively short period of prescription. However, as a transit country and market for art and antiques the Netherlands is in a position where it is desirable to waive such rules in the interests of protecting cultural property by combating this illegal trade.

As explained in our above-mentioned letter of 19 July 2004 and repeated by the government at the meeting with parliamentary committees on 28 April 2005 (Parliamentary Papers, House of Representatives 2004/05, 29 314, no. 13), we ultimately concluded that the UNIDROIT Convention was not suitable for ratification. Not only does it have very far-reaching consequences, but its definition of cultural objects is also very broad and vague and hence hard to delimit. As the UNIDROIT Convention does not permit reservations, for example about the types of cultural objects to which it applies, it cannot be adopted only in part. However, the UNESCO Convention provides greater scope, for example to adopt the basic principle of the UNIDROIT Convention. This is why we announced in our above-mentioned letter and at the subsequent meeting with the parliamentary committees that we would seek to ratify the UNESCO Convention and to base the implementation in part on the good elements of the UNIDROIT Convention while also taking account of the above-mentioned directive and its implementing legislation.

This does not alter the fact that the objectives of the Convention have also been achieved in some respects by including in chapter 4 a number of powers of an administrative or private law nature. In order to show how the various Convention provisions have been implemented in the present Bill, a transposition table showing the corresponding provisions of the Bill has been included at the end of this memorandum.

It should also be noted that the present implementing legislation will apply only to the Netherlands. What position the Netherlands Antilles and Aruba wish to take in relation to the Convention is currently being discussed with these countries. Similar consultations in the past resulted in an announcement in 1984 that the then Netherlands Antilles did not wish the Convention to apply to it. As this was a long time ago it was felt that the question should be asked anew, albeit on this occasion not only to the Netherlands Antilles but also to Aruba, which has gained separate status in the intervening period.

2. Scope of the Bill

The Convention relates both to protection of the cultural property of a State Party against illicit export and to the recovery of cultural property from other States Parties into which it has subsequently been imported. As far as the former is concerned implementation is hardly necessary as the Cultural Heritage Preservation Act already provides sufficient protection for Dutch cultural property. This Act also fulfils in particular the requirements of article 6 (a) and (b) of the Convention. However, section 2 of the present Bill explicitly defines what objects are treated as cultural property within the meaning of article 1 of the Convention in the Netherlands. As regards the recovery by the Netherlands of Dutch cultural property from other States Parties, the Dutch state or the person with valid title to the property must rely on the legislation of the other State involved. The Dutch legislator cannot change the legislation of the other country. By contrast, adequate implementing legislation is necessary for the protection of cultural property illicitly exported from other States Parties and subsequently imported into the Netherlands. The emphasis of the present Bill is therefore on this subject. As announced in the above-mentioned letter of 19 July 2004 and repeated by the government at the parliamentary committee meetings on 28 April 2005, implementation in the Bill follows the lines of Council Directive 93/7/EEC and the legislation transposing it into Dutch law, namely the Protection of Cultural Property against Illegal Export (Implementation) Act. The operation of the directive and its implementing legislation is limited to the Member States of the European Union and the countries of the European Economic Area (EEA). By contrast, the operation of the Convention and the present implementing legislation is global in the sense that it applies to all countries that are party to the Convention, i.e. over 100 countries spread across all continents.

The scope of the Bill is also determined by the definition of the cultural property to which it applies. At the end of our above-mentioned letter of 19 July 2004, at (c), we announced that we wished to limit the legislation to 'objects of great cultural, historical and scientific importance that belong to the statutorily protected cultural heritage of a country'. The idea underlying this intention is entirely consistent with the Convention. This is reflected as follows in the Bill. First, the definition in section 1 (d) refers to article 1 of the Convention. The definition included there is limited to cultural property 'which has been designated by each state, on religious or secular grounds, as being of importance for archaeology, prehistory, history, literature, art or science' and which belongs to one of the categories of cultural property listed in the article. The requirement that the state concerned should have designated the property as of importance for the subjects listed is in itself a limitation in relation to the definition of cultural objects in the UNIDROIT Convention. However, this

limitation does not in itself have to be specific and can instead be couched in general terms. This raises the question of whether this is a real limitation. It is therefore of importance to point out that the definition should be viewed partly in connection with the stated purpose of the Convention, namely to protect the cultural heritage of the countries of origin, as expressed in article 2 of the Convention. Article 4 of the Convention defines in more detail what the parties to the Convention should in any event recognise as belonging to the cultural heritage of a state. Article 5 (a) of the Convention also refers to 'contributing to the formation of draft laws and regulations designed to secure the protection of the cultural heritage and particularly prevention of the illicit import, export and transfer of ownership of important cultural property'. In view of this provision it is considered desirable for section 1 (d) to follow the wording of article 1 of the Convention, but to add for the sake of clarity the words 'and hence of essential importance to its cultural heritage'. This provides a definition which is entirely in keeping with the Convention, as this must be interpreted in the light of the above-mentioned provisions.

The proposed wording provides a sufficiently clear definition. It follows that it is not necessary to limit the definition in the Bill either by reference to cultural property above a given value, as is done in Council Directive 93/7/EEC, or by means of a formula such as 'of great importance to the cultural heritage of every people', as is done in article 1 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, concluded in The Hague on 14 May 1954, together with the accompanying Protocol, which resulted in the Cultural Property Originating from Occupied Territory (Return) Act (Bulletin of Acts and Decrees 1007, 123).

Finally, as regards the scope of the Bill it should also be noted that it relates only to cultural property exported from or unlawfully appropriated in a State Party after the entry into force of the Act. This is in keeping with article 7 (b) (ii) of the Convention regarding the specific cases mentioned in that provision. This rule is reflected in section 13 of the present Bill.

3. Private law approach

The intention of modelling the Bill on the arrangements in the Protection of Cultural Property against Illegal Export (Implementation) Act means that, just as in that implementing legislation, the manner of protecting cultural property of other States Parties is in principle of a private law nature and must to a large extent be regulated in the Civil Code and in the Code of Civil Procedure. Such an arrangement is also in keeping with the tenor of the UNIDROIT Convention. It too seeks to protect cultural property by private law means.

Another important reason for adopting a private law approach is that this is in keeping with the existing policy of leaving it as far as possible to the parties concerned to enforce their rights, without their being dependent on the availability and willingness of government agencies to act on their behalf.

4. Legal proceedings for return

The basis for this private law approach is set out in sections 3 and 4 of the Bill. Section 3 provides that it is prohibited to import into the Netherlands cultural property which has been removed from the territory of a State Party in breach of the provisions adopted by that State Party in accordance with the objectives of the Convention in respect of the export of cultural property from that State Party or the transfer of ownership of cultural property or which has been unlawfully appropriated in a State Party. According to section 4 cultural property that has been brought into the Netherlands in breach of this prohibition may be reclaimed by the State Party from which the property originated or by the person with valid title to such property. The legal proceedings for return of the property are regulated in the proposed articles 1011a-1011d of the Code of Civil Procedure. Defences to such proceedings based on acquisition in good faith, acquisitive or extinctive prescription or acquisition of a pledge in good faith are wholly or partly suspended in a series of proposed amendments to the Civil Code. Both the provisions of the Code of Civil Procedure and those of the Civil Code are in keeping with existing provisions of a similar nature introduced at the time of the Protection of Cultural Property against Illegal Export (Implementation) Act.

As already noted, the UNESCO Convention does not compel the adoption of this solution, particularly not as regards the setting aside of the defences listed above. This solution is acceptable for the cases dealt with in the present Bill because the operation of the Convention is limited to the cultural property described above in part 2 of this Memorandum. Although the Convention does not therefore require this arrangement, it should be seen as a way of implementing the Convention. It does, after all, in any event involve 'reparations' within the meaning of article 2 (2) of the Convention, and it also serves to put 'a stop to current practices' as referred to in that paragraph. The terms of article 5 (a) of the Convention also make clear that this is essentially a means of implementing the Convention. Furthermore, the arrangement can be seen as implementing article 13 (a) and (d) of the Convention. Nor is this altered by the fact that all these Convention provisions are vaguely worded and leave wide discretion to the States Parties in finding a solution.

5. System adopted by Switzerland and the United States

It follows from the above that the Netherlands has not stipulated that property can be recovered only by countries with which a bilateral agreement for such return has been concluded on the basis of the Convention – a system adopted, for example, by Switzerland and the United States. Like various other states, including Canada, the Netherlands has preferred to provide in the Bill that the only condition for the return of property is that the requirements of Dutch law are fulfilled, without the need for the prior conclusion of a bilateral agreement. The advantage of this approach is that, where necessary, decisive action can be taken without the necessity of first concluding an agreement.

6. Illicit trade

The Bill contains no criminal law provisions. Dutch criminal law already includes a series of instruments for tackling the trade in unlawfully appropriated or illicitly exported cultural property. Reference may be made to the following. As ‘unlawful appropriation’ amounts to theft, embezzlement or a corresponding offence that qualifies as an indictable offence under Dutch law, ‘obtaining, holding or transferring’ cultural property unlawfully appropriated elsewhere is also an offence if the requirements relating to criminal intent or negligence of articles 416 or 417bis of the Criminal Code are fulfilled. The same applies to the import of property into the Netherlands in breach of a foreign export prohibition, where this also constitutes an indictable offence. This too meets the requirement of articles 416 and 417bis that the property in question must have been obtained by means of an indictable offence. The export of cultural property from the Netherlands without the requisite documents is also an offence. This is because a breach of sections 7, 8, 9 14a and 14b of the Cultural Heritage Preservation Act constitutes an economic offence under section 1 (2) of the Economic Offences Act.

Finally, reference is made to article 437 of the Criminal Code. Under this provision dealers designated by order in council (including ‘dealers in second-hand and unregulated goods, platinum, gold, silver, precious stones, timepieces, art objects’ and a series of other objects) are guilty of a criminal offence if they fail to keep records of the objects they have obtained or if they have obtained an object from someone without having kept a record of that person's identity. They are required immediately to produce such records for inspection upon request by an official designated for this purpose. They are also guilty of an offence if they obtain or

hold an item in circumstances where they are aware from a report by or on behalf of the police, which contains a clear written description of the property, that it has been lost by or unlawfully appropriated from the person with valid title to it.

However, the Bill does provide additional private law instruments for combating the illicit trade in cultural property. Not only is there the right under private law to claim the return of the property, as described in parts 3 and 4 above, but there is also the proposed article 3:87a of the Civil Code, which includes a provision concerning the diligence to be exercised by a dealer in cultural property. One of the aims of this provision is to arrange for the offence defined in article 437 of the Criminal Code to have consequences in private law. It will be explained below, in relation to section 3, that the prohibition referred to in that section can also have private law consequences other than the right of a State Party or person with valid title to recover the property. For example, the fact that a breach of the prohibition also constitutes a tort can help to combat the illegal trade.

7. Unlawful appropriation from a museum or similar institution (article 7 of the Convention)

The limited group of cases described in article 7 (b) (ii) of the Convention must be considered separately here. This concerns cultural property that has been stolen from a museum or a religious or secular public monument or similar institution in another State Party. Article 7 (b) (ii) provides that the State Party into which such cultural property has been imported undertakes, at the request of the State Party of origin, to take 'appropriate steps' to recover and return the property 'provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property'. The request for recovery and return must be made through diplomatic offices. A provision for appropriate steps for recovery can be found in the proposed article 1011b of the Code of Civil Procedure. This confers on the Minister of Education, Culture and Science the power to take the measures referred to in the existing article 1010 of the Code of Civil Procedure, which was introduced by the Protection of Cultural Property against Illegal Export (Implementation) Act. The Minister is therefore empowered to take provisional measures at the request of a State Party, for example provisional attachment, taking into custody, appointment of an administrator or application for an interim injunction. The administrative law measure referred to in section 10 of the Bill is also possible. The requirement of article 7 (b) (ii) of the Convention is therefore met in this respect. The same applies to the obligation to take 'appropriate steps' for return to the State Party of origin. Like the Protection of

Cultural Property against Illegal Export (Implementation) Act, the Bill is based on the principle that the State Party itself should institute legal proceedings against the person holding the cultural property, always assuming that the latter disputes the right to return of the property. The role of the Minister is merely to ensure that the other country concerned has suitable means of enforcing its rights. Examples would be the provision of information and the provision of support through measures as referred to in the proposed article 1011b of the Code of Civil Procedure and the section 10 measure. The State Party concerned may apply directly to the Minister of Education, Culture and Science for this purpose. The request need not be made through diplomatic offices as stipulated in the Convention.

8. Administrative law measures

Clearly, the solution to the problem described above in part 7 has therefore been sought in private law. Nonetheless, measures under administrative law are also possible under chapter 4 of the Bill, as will be explained below in relation to that chapter. The most obvious example is the power of limited custody under section 10, which is intended merely to give the State Party concerned the opportunity under private law to attach the property before judgment. The possibility of criminal law seizure will also be discussed in relation to that chapter.

However, for the type of cases involved here there is no reason to introduce a detailed scheme for long-term custody under administrative law, as proposed in the Cultural Property Originating from Occupied Territory (Return) Act. First of all, such a scheme is not required by article 7 (b) of the Convention. Second, in the present case there is also no need for a scheme comparable to that adopted in the above-mentioned Act. Where cultural property comes from occupied territory, allowance must be made for the possibility that the authorities of the country concerned are themselves unable to take the measures needed to determine what cultural property has been lost, ascertain its whereabouts and possibly also resume responsibility for looking after such property, always assuming that the property has been traced and that its return is therefore possible in principle. Where there is a reasonable suspicion that cultural property comes from occupied territory, it is clearly desirable in such circumstances, which may be of protracted duration, to have the possibility of taking the property into custody, whether or not at the request of the authorities of the state whose territory is occupied, pending further developments and also pending any request for return after the occupation has ended. The custody should continue until such time as a final and

unappealable judgment has been given by a court in expropriation-type proceedings. This also requires, for example, detailed rules on costs, which can mount up considerably.

As none of this occurs in the present case, there is no reason to introduce detailed rules on custody. Nor does the Protection of Cultural Property against Illegal Export (Implementation) Act have custody arrangements of this nature. The same applies to the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 24 June 1995, which instead seeks to provide protection for cultural property exclusively in private law. It is desirable for the present Bill too to be in line as far as possible with these other provisions.

9. Penalties or administrative sanctions (article 8 of the Convention)

Article 8 of the Convention also requires the imposition of 'penalties or administrative sanctions' on any person responsible for infringing the prohibitions referred to in articles 6 (b) and 7 (b) of the Convention. Implementation of this provision is not necessary, however, as infringements of these prohibitions are already offences under existing law.

Article 6 (b) prohibits the export of cultural property from the Netherlands without the requisite documents. Since, as already explained in part 6 above, infringement of sections 7, 8, 9, 14a and 14b of the Cultural Heritage Preservation Act constitutes an economic offence under section 1 (2) of the Economic Offences Act infringement of the prohibition laid down in article 6 of the Convention is also punishable.

Article 7 (b) prohibits the import of cultural property stolen from a museum or a religious or public sector monument or similar institution in another State Party. As 'unlawful appropriation' includes theft, embezzlement or a corresponding offence that is also punishable under Dutch law, 'obtaining, holding or transferring' cultural property unlawfully appropriated elsewhere is also an offence in the Netherlands if the requirements relating to criminal intent or negligence of articles 416 or 417bis of the Criminal Code are fulfilled.

10. Occupied territory (article 11 of the Convention)

Article 11 of the Convention, like article 8, need not be implemented. The subject matter of article 11 is already covered by the Cultural Property Originating from Occupied Territory (Return) Act, in so far as the Protocol is applicable between the countries concerned. As the

Netherlands has now acceded to the Protocol, it is sufficient for either the occupying or the occupied state to be party to the Protocol; see p. 5 of the Explanatory Memorandum to the Act (Parliamentary Papers, House of Representatives, 2004/05, 30 165, no. 3). In other respects, the case covered by article 11, namely the export and transfer of ownership of cultural property under compulsion, qualifies as unlawful appropriation within the meaning of section 3 (b) of the present Bill.

11. Actual implementation, supervision and enforcement

The Convention also contains a large number of provisions that are not suitable or only partially suitable for implementation by means of statutory rules. These are articles 2, 5, 6, 7, 9, 10, 13 (a), (b) and (d) and 14. They should be implemented by means of physical acts, legal acts under private law or administrative decisions. The statutory basis for this is provided by section 7 of the Bill, which instructs the Minister of Education, Culture and Science to do whatever is necessary to implement the relevant provisions of the Convention. The minister is authorised for this purpose to lay down further rules by ministerial order. This power is contained in the second sentence of the section. The provision is followed by rules governing supervision and enforcement, which are consistent with the provisions of sections 8-10 of the Cultural Property Originating from Occupied Territory (Return) Act.

12. Interpretation of the Convention

An observation should also be made about the interpretation of the Convention, which is often formulated in vague or ambiguous terms. Differing views are therefore held on its interpretation. It is often assumed, particularly in the United States, that most of the provisions are of a 'ceremonial, rhetorical and ineffective' nature and thus do not have any legal significance and that articles 7 and 9 therefore form the essence of the Convention. It is accordingly argued that these are the only provisions that need to be implemented. They are derived from proposals made by the United States at a late stage.

The Bill is based on a more balanced interpretation. As such, it is in keeping with the authoritative book entitled 'Commentary on the UNESCO 1970 Convention on Illicit Traffic' by Patrick J. O'Keefe (Institute of Art and Law, Leicester 2000) (see pp 26-31), which sets out to give as much meaning as possible to the provisions of the Convention, in accordance with article 31 of the Vienna Convention on the Law of Treaties.

13. Overlap with other conventions or legislation

The provisions of the Bill may overlap with those of the Cultural Property Originating from Occupied Territory (Return) Act. This does not pose a problem as the two statutes supplement each other. It follows from article 15 of the Convention that the 1970 Convention does not detract from the Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict and the accompanying Protocol. The possibility of applying the provisions of the present Bill and those of the Cultural Property Originating from Occupied Territory (Return) Act in conjunction with each other is also evident from article 11 of the Convention, which assumes that this Convention can, where necessary, supplement the 1954 Convention on matters that were left unregulated in 1954, always assuming that the States concerned have acceded to both Conventions. Article 24 of the 1954 Convention also provides that the parties to that Convention are free to conclude special agreements on all matters concerning which they deem it suitable to make separate provision, although no special agreement may be concluded which would diminish the protection afforded by this Convention to cultural property and to the personnel charged with its protection. The Convention to which the present Bill relates meets the requirement of article 24 of the 1954 Convention since it does not diminish the protection afforded by that article.

It follows from the scope of the two Conventions that if proceedings were to be instituted by two parties for the return of the same item of cultural property, one under the present Bill and the other under the Cultural Property Originating from Occupied Territory (Return) Act, the proceedings under the latter Act would take precedence. Reference may be made to the memorandum following the report on that Act (Parliamentary Papers, House of Representatives, 2005-2006, 30 165, no. 6, p. 3, first full paragraph).

Overlap is also possible with the provisions of the Protection of Cultural Property against Illegal Export (Implementation) Act based on the directive. Here too no difficulties are anticipated. Article 15 of Council Directive 93/7/EEC provides that the directive is without prejudice to any civil or criminal proceedings that may be brought, under the national laws of the Member States, by the requesting Member State and/or the owner of a cultural object that has been stolen. This means that proceedings based on the provisions of the present Bill are not in breach of the Directive. The only exception would be where a Member State

institutes proceedings and another person who is not the 'owner of the cultural object that has been stolen' as referred to in article 15 of the Directive attempts to frustrate these proceedings. In such a case the provisions of the Directive would take precedence over national law. The Convention implemented by the present Bill permits this.

14. Workload of the judiciary

The Bill increases the workload of the judiciary as there will be more opportunity than at present for States Parties and persons with valid title to bring proceedings for the return of cultural property which has been illicitly exported or stolen and then imported into the Netherlands. However, the number of cases can be expected to remain within bounds as only three cases have been instituted since 1995 on the basis of the Protection of Cultural Property against Illegal Export (Implementation) Act, which implements Directive 93/7/EEC.

15. Administrative burden

The Bill will not increase the burden on businesses. Under the proposed article 87a, paragraph 1 of Book 3 of the Civil Code, a dealer will have to consult every reasonably accessible register of stolen cultural property and any other relevant information and documentation which he could reasonably have obtained and consult the accessible agencies in order to satisfy the requirement of exercising due diligence in acquiring the cultural property. As dealers are already required under the existing article 437 of the Criminal Code (to which private law consequences are attached in article 87a, paragraph 2) to keep a register in which they record, among other things, the provenance of the cultural property, they are already subject to this burden. In checking the provenance of the cultural property they must already consult the registers etc. In order to be deemed to have acted in good faith within the meaning of article 3:86, paragraph 1 and article 3:87 of the Civil Code, they must also at present investigate the provenance of the object and the identity of the seller. Moreover, under the Cultural Property Originating from Occupied Territory (Return) Act, they also already bear the burden of investigating every reasonably accessible register of stolen cultural property and any other relevant information about the provenance of the cultural property which they could reasonably obtain. Reference may be made to the memorandum following the report on that Act (Parliamentary Papers, House of Representatives, 2005-2006, 30 165, no. 6, p. 6).

It should also be noted that there will be no increase in the burden on individuals. Even under the existing law, individuals are required under article 3:86 of the Civil Code to check the provenance of any object which they purchase if they wish to be able to invoke the defence of good faith. This includes consulting the registers as far as possible, as now also provided for in the proposed article 3:87a, paragraph 1 (c) of the Civil Code.

II. EXPLANATORY NOTES ON INDIVIDUAL SECTIONS

Chapter 1. General

Section 1

This section contains a number of definitions, (a) to (c) of which are self-explanatory. The definition of the term at (d) is discussed above in part 2 (Scope of the Bill) of the general part of this memorandum.

Section 2

This provision replaces section 6 of the Cultural Heritage Preservation Act, which is limited to objects 'designated' as protected property. That definition appears to be connected only with section 2 of that Act and not with the considerably more comprehensive section 14a, which also prohibits the export of such cultural property if the prescribed documents have not been issued for this purpose.

The consequence of the inclusion of the present section, in connection with the prohibition contained in section 14a of the Cultural Heritage Preservation Act, is that the requirements of article 6 of the Convention are fulfilled. This makes it easier for the Dutch state or the person with valid title to recover cultural property that has been exported from the Netherlands in breach of this prohibition and imported into another State Party.

It should be noted that section 12 of this Bill proposes an addition (in the form of a new subsection 3) to section 14a of the Cultural Heritage Preservation Act. Section 2 refers to the entire section 14a and hence also to this subsection. It is desirable for the property referred to in this subsection 3 to be designated as cultural property for the Netherlands, thereby bringing it within the provisions of the Convention and allowing for the recovery of cultural property from other States Parties, albeit of course in accordance with the rules that apply there to such cases.

The section makes no reference to section 14b of the Cultural Heritage Preservation Act, which prohibits the export of cultural property without a licence *outside the territory of the Member States of the European Union or of other States that are party to the Agreement on the European Economic Area*. The provision is intended as implementation of Regulation (EEC) No. 3911/92 on the export of cultural goods. This concerns not only cultural goods designated as such by the Netherlands, but also all cultural goods that have been or *may* be designated by the above-mentioned states and come within the definition of article 1 of that Regulation and belong to one of the categories specified in the Annex to the Regulation. It would not be desirable to designate all such goods as Dutch cultural property since such a designation would entirely lack specificity and would also include all property designated or yet to be designated by other Member States.

Section 3

The provision at (a) corresponds to article 3 of the Convention in so far as it concerns the import of cultural property into the Netherlands. The provision prohibits the import into the Netherlands of cultural property which has been removed from the territory of a State Party in breach of the provisions adopted by that State Party in accordance with the Convention for the export of cultural property from that State Party or for the transfer of ownership of cultural property. In addition, point (b) of the section incorporates the prohibition in article 7 (b) (i) of the Convention concerning property unlawfully appropriated in a State Party. It should be noted that under section 13 of the present Bill this only applies to cultural property which has been illicitly exported or stolen after the present legislation enters into force.

In the case of unlawful appropriation it is not necessary to show that a provision concerning export from the country of origin has also been infringed. It is therefore desirable to include the provision on unlawful appropriation separately in the section. Unlawful appropriation includes not only theft but also comparable offences such as embezzlement and obtaining goods by false pretences or unlawful excavation at archaeological sites. Section 3 (b) is formulated more broadly than is strictly required by article 7 (b) (i) of the Convention, since it does not include the limitation that the unlawful appropriation must have taken place from a museum or a religious or secular public monument or similar institution. A factor of relevance in this connection is that the UNIDROIT Convention of 24 June 1995 also relates both to illegally exported and stolen cultural objects and equates acquisition by unlawful excavation at an archaeological site with theft.

Section 3 means that the export restrictions imposed by a State Party are operative in the Netherlands and that the same applies to a restriction on the possibility of transferring cultural property. Examples would be provisions stipulating that cultural objects excavated from archaeological sites can only be the property of the country in which the site is located or that ownership of certain cultural property may be transferred only if the requisite licence has been issued.

The prohibition is also worded in such a way that it includes cases where cultural property has entered the Netherlands through a third country, whether or not it is a party to the Convention, provided that the cultural property was exported from the territory of the State Party of origin in breach of the rules adopted by that country or the cultural property was stolen in that country. It should also be noted that the words 'import into the Netherlands' are intended to cover not only cases in which cultural property is brought across the external borders of the European Union but also cases in which property is brought into the Netherlands from other Member States of the European Union, in other words across the internal borders. In this respect the same terminology is used as in section 2 of the Cultural Property Originating from Occupied Territory (Return) Act (see part 6 of the general part of the Explanatory Memorandum to that Act).

As already noted in part 4 of the general part of this Explanatory Memorandum, the sanction for infringement of the prohibition in section 3 is exclusively of a private law nature. The prohibition does not confer any extra powers on the Customs or the criminal justice authorities. The main sanction is included in section 4 of the Bill. Proceedings for the return of cultural property imported into the Netherlands in breach of the prohibition referred to in section 3 may be brought, in accordance with articles 1011a-1011d of the Code of Civil Procedure, by the State Party from which the property originates or by the person with valid title to such property.

These proceedings under private law are regulated in chapter 2 of the Bill. Chapter 3 of the Bill wholly or partly sets aside a large number of possible defences to such legal proceedings, in particular defences based on acquisition of the cultural property in good faith, acquisitive and extinctive prescription and acquisition of a pledge in good faith. The section 3 prohibition also has a number of other private law consequences. Infringement of the prohibition constitutes a tort, which can result in an award of damages. This is of importance, for example, if the country of origin or the person with valid title suffers damage

as a consequence of the costs incurred in tracing the cultural property in the Netherlands or securing its return from the Netherlands, including any reasonable compensation that may have to be paid to the possessor. It is also conceivable that a dealer who repeatedly infringes the prohibition to the detriment of a particular country or a particular owner may be ordered in interim injunction proceedings brought by the country or owner concerned to cease and desist from such actions, on pain of a penalty payment. Finally, reference can be made to the case of an agreement under which a dealer undertakes to import an item of cultural property into the Netherlands, for example in order to be able to deliver it to a purchaser. Such an agreement entails an obligation to commit a prohibited act and is therefore void under article 40 of Book 3 of the Civil Code. In consequence, neither the dealer nor the processor can derive rights from such an agreement. If the property is sold only after being imported into the Netherlands the agreement is valid, but proceedings for the return of the property can still be brought under section 4 by the country of origin or the person with valid title.

Unlike the position under section 2 of the Cultural Property Originating from Occupied Territory (Return) Act and contrary to the announcement in our letter of 19 July 2004 (end of point (e)), it has been decided not to include a provision prohibiting possession of cultural property in respect of which the provisions referred to in section 3 have been infringed. Such a prohibition is justified in cases where cultural property comes from occupied territory (see parts 6 and 9 of the Explanatory Memorandum to the said Act). In the present Bill, however, there is insufficient reason for such a drastic rule. It is not necessary for the section 4 sanction referred to above. Prohibition of possession of the cultural property in the Netherlands would also create a significant degree of uncertainty, even in cases where no proceedings for return of the property under section 4 are considered. Such a prohibition could cause confusion as a series of contracts of sale or other agreements possibly concluded in respect of cultural property in the Netherlands might be void, thereby resulting in infringement of the prohibition by the person acquiring the cultural property under each new transaction. In this way buyers and sellers could evade their contractual obligations without this necessarily having any connection with proceedings as referred to in section 4. The consequences of the nullity of such contracts would also be hard to gauge if both parties have fulfilled their mutual obligations over a long period. For the protection of cultural property as intended by the present Convention, it is sufficient to provide for the possibility of return proceedings on the basis of section 4 of the Bill.

Section 4

As noted above, this section contains the main private law sanction for the section 3 prohibition, in combination with the private law provisions of chapters 2 and 3 of the Bill. As already explained in parts 3 and 4 of the general part of this Explanatory Memorandum, the system is in keeping with the rules introduced in connection with the Protection of Cultural Property against Illegal Export (Implementation) Act.

The essence of the provision is that proceedings for the return of cultural property on the basis of this implementing legislation may in future be brought in the Netherlands not only by a Member State of the European Union but also by states that are parties to the 1970 UNESCO Convention and by the person with valid title to the cultural property concerned. The term 'person with valid title' means not only the owner but also, for example, a usufructuary or, if the property formed part of trust assets abroad, the trustee.

If cultural property has been imported into the Netherlands in breach of the prohibition in section 3 of the Bill and both the State Party from which the cultural property originates and the person with valid title to the property bring proceedings for its return, the court will apply Dutch private international law and usually determine who has obtained title to the property and is thus entitled to bring proceedings for its return by reference to the law of the country from which the property originates. According to a judgment of the Supreme Court of 3 September 1999 (*Nederlandse Jurisprudentie* 2001, 405), the transfer will have to be assessed by reference to the law of the country of origin if the cultural property was acquired by transfer when it was still in that country. The same applies if the cultural property has been acquired by inheritance and the testator had the nationality of the country of origin at the time of his death (see Supreme Court 16 March 1990, *Nederlandse Jurisprudentie* 1991, 575). Dutch law cannot provide further rules here. The relationship between the state and the person with valid title may also mean that proceedings can be instituted only by the country of origin itself. No further rules can be given on the subject of this relationship, since this too will generally not be governed by Dutch law. An example would be where the person with valid title has himself been guilty of illicitly exporting the property from the country of origin. In such a case the country concerned will not, it may be assumed, issue a declaration to the person concerned as referred to in the proposed article 1011a, paragraph 2 (b) of the Code of Civil Procedure and will itself institute proceedings. Nor would there be any point in making further provisions to cover situations in which the person with valid title who institutes proceedings is not the owner but the usufructuary or pledgee of the cultural property.

According to the judgment of the Supreme Court of 14 December 2001 (*Nederlandse Jurisprudentie* 2002, 241), this too must be assessed by reference to the law of the country where the cultural property was situated when the pledge or usufruct was created; this will generally be the country of origin of the property. More detailed provisions on this point in the present Bill would only cause confusion.

It has already been pointed out in the general introduction, at 3 and 4, that the provisions of the Bill therefore go further than the present Convention requires. The Convention does not, after all, have a general provision concerning proceedings for return which excludes or limits important defences under private law. Although article 7 (b) of the Convention does contain a provision of this kind for a limited group of cases (in brief, museum theft) and article 13 (c) of the Convention also provides that action for recovery by the rightful owner must be admitted, no obligation to introduce a general right of recovery as referred to in section 4 of the Bill can be inferred from these provisions. The desirability of consistency with the above-mentioned implementing legislation is, however, considered more important, mainly because this also implements the basic aim of the Convention as expressed in articles 2 (2), 5 (a) and 13 (a) and (d) of the Convention, as already indicated above under point 4 of the general part.

It should be noted that the words 'subject to articles 1011a-1011d of the Code of Civil Procedure' mean that the proceedings must comply with the formal requirements laid down in article 1011a. It is not contrary to the Convention to specify these requirements here since the present legal proceedings are not required by the Convention.

Chapter 2. Amendment of the Code of Civil Procedure

Section 5

A

Article 1011a

The provision follows as far as possible articles 1008 and 1009 of the Code of Civil Procedure, introduced by the Protection of Cultural Property against Illegal Export (Implementation) Act. Paragraph 2 (a) requires a document describing the movable whose return is sought and showing that it is cultural property within the meaning of section 1 (d) of the Implementation Act and is therefore of essential importance for the cultural heritage of the State Party from which it originates.

It should also be noted that, unlike article 1009, paragraph 2 (a) of article 1011a requires that it should be evident from the document that the item constitutes cultural property in the above-mentioned sense. A simple declaration that this is the case is therefore not sufficient. This difference from article 1009, which merely requires a declaration, is justified both by the fact that the proceedings in article 1011a can be instituted not only by the States Parties but also by the person with valid title, and by the worldwide scope of the Convention, which means that a mere declaration in a 'document' provides an insufficient safeguard against the institution of vexatious proceedings.

Articles 120 (2) and (4), 121 and 122 of the Code of Civil Procedure apply to the issue of nullity. The absence of such a declaration can therefore be remedied. In addition, the provision does not exclude the possibility that further evidence may be required in the course of the proceedings.

Article 1011b

This provision corresponds to article 1010, which was introduced by the previous Implementation Act. It should be noted that the summary of articles 1010 and 1011b is not exhaustive. The custody referred to in article 1010 is, in principle, the judicial custody provided for in article 709 of the Code of Civil Procedure. This does not alter the fact that the custody referred to in section 10 of the present Bill is also possible pending a provisional attachment under private law.

Article 1011c

This provision corresponds to article 1011, which was introduced by the previous Implementation Act. It should be noted that the provision does not concern the costs of the proceedings or the costs of execution in so far as these can be charged to the other party. An example is the costs of transport to the country from which the cultural property originates.

Article 1011d

A conflict of interest may exist between the State Party concerned and the person with a valid title to the cultural property. For example, the State Party may start proceedings for the recovery of cultural property which the person with valid title wishes to put into safekeeping abroad. Where there is a conflict of interest the return of the cultural property may be

suspended in accordance with article 1011d until the property is no longer in danger. Section 2 (2) of the Swiss *Kulturgütertransfergesetz* of 20 June 2003 (KGTG) has a similar provision.

B

Article 1012

The rule in this article has been expanded in the new text to cover cases in which return of property has been obtained by a State Party as referred to in article 1011a. The provision does not regulate cases where return has been obtained by a person with valid title. Such situations are left to the general rules of private international law, so that account can be taken of the circumstances of the case.

Chapter 3. Amendment of the Civil Code

Section 6

As noted previously, the proceedings referred to in section 4 derive their value mainly from the fact that important defences under private law do not apply in such cases. Examples are the protection afforded to innocent purchasers, acquisitive or extinctive prescription and acquisition of a pledge in good faith. The Protection of Cultural Property against Illegal Export (Implementation) Act incorporated similar provisions into Book 3 of the Civil Code in respect of defences to proceedings for the return of cultural property instituted by Member States. The provisions of the present chapter are based on them.

There is also a parallel between the section 6 arrangement and the provisions of section 7, subsections 2-4 and section 11 of the Cultural Property Originating from Occupied Territory (Return) Act. However, it has been decided in the present Bill not to waive the protection which a creditor in possession of the property derives from article 3:291 of the Civil Code. The Protection of Cultural Property against Illegal Export (Implementation) Act also leaves intact the rule contained in article 3:291 of the Civil Code.

A

Article 86b

This provision corresponds to article 3:86a of the Civil Code, which was introduced by the previous Implementation Act. As regards the words 'fair compensation' in article 3:86b, paragraph 2, it should be noted that this term is also used in paragraph 3 of article 3:86a.

However, in the latter provision these words must be interpreted in accordance with the European Directive from which they are derived. As article 3:86b, paragraph 2 is also relevant to compliance with article 7 (b) of the Convention, which refers to ‘just compensation’, the Convention may also be relevant to the interpretation of the present section. As both terms are vague, there would seem to be no reason why an interpretation based on the Directive could be deemed at odds with the tenor of article 7 (b). Such compensation could comprise the purchase price, sale transaction costs and the costs of conservation.

Unlike section 3, subsection 3 of the Cultural Property Originating from Occupied Territory (Return) Act, this article does not include a separate provision for cases in which the possessor shows that he has obtained ownership of the cultural property. Such a situation can easily occur in the case of cultural property from occupied territory since the above-mentioned Act has retroactive effect to 14 January 1959, the day on which the Protocol of 14 May 1954 to the Convention for the Protection of Cultural Property in the Event of Armed Conflict entered into force for the Netherlands. Accordingly, allowance had to be made in this Act for the acquisition of ownership of cultural property from occupied territory in the period from 1959 to the date of entry into force of the Act. As a result of this entry into force, proceedings for the return of property are tantamount to deprivation of ownership in all cases where title was acquired before the entry into force. However, such a deprivation of ownership can scarcely occur in the system of the Bill currently under discussion since section 13 of the Bill is not applicable to cultural property which was illicitly exported or appropriated before its entry into force. Under the provisions of the Bill, ownership rights that could prevent a return cannot be acquired in respect of cultural property illicitly exported from or stolen in the Netherlands after the date of entry into force. However, the possibility cannot be excluded that ownership may have been acquired after the date of entry into force and during a period in which the cultural property was outside the Netherlands and in a country where the degree of protection of cultural property afforded under the Bill did not exist at that time. But this exceptional case does not justify a separate provision. The reasonable compensation to which there is entitlement under the present article must in this case be interpreted by the courts as meaning full compensation. This must after all be assumed to be ‘just’ within the meaning of this article. The situation would, however, be different if a possessor who acquired ownership abroad and then imported the property into the Netherlands chose this course of action precisely in order to circumvent the provisions of the

Convention as he was well aware when he acquired title that the property had been illicitly exported from the country of origin.

B

Article 87

Paragraph 1 has been amended to take account of the insertion of article 86b.

C

Article 87a

The first paragraph of this article is derived from article 4 (4) of the UNIDROIT Convention. Such a provision is also desirable here since it takes account of what can currently be expected in practice of a person acquiring cultural property. The provision lists in particular what circumstances must be taken into account in determining whether the possessor of cultural property exercised due diligence when acquiring the property, as referred to in article 86b, paragraph 2 of the Civil Code. The provision applies to all parties, but stipulates that account must be taken of their 'capacity'. It is therefore relevant whether ownership is required by a dealer, by a government institution such as a museum or library, or by an individual, who may perhaps have little idea of the nature of the relevant object or of how to find information about its provenance. The provision is also in keeping with what can be inferred from the judgments of the Supreme Court of 4 April 1986, *Nederlandse Jurisprudentie* 1986, 810 and 7 October 2005, *Nederlandse Jurisprudentie* 2006, 351.

Paragraph 2 provides a private law amplification of article 10 (a) of the Convention by defining in greater detail the requirements of due diligence specified in article 3:86b, paragraph 2 of the Civil Code. Whereas article 10 merely refers to 'antique dealers', the present provision concerns all dealers covered by article 437 of the Criminal Code. The latter provision refers to an order in council for a definition of the group of dealers concerned. Article 1 of the Decree of 6 January 1992 (Bulletin of Act and Decree 1992, 36) defines dealers as 'wholesale buyers of and dealers in second-hand and unregulated goods, platinum, gold, silver, precious stones, timepieces, art objects, cars, motorcycles, mopeds, bicycles, cameras, film equipment, radios, audio and video equipment and automatic registration equipment'. Antique dealers are covered by this definition, in particular its opening words. In view of this enumeration there is no reason to limit the application of article 87a, paragraph 2 exclusively to antique dealers.

A separate provision is included in paragraph 3 for auction houses as they do not acquire ownership or possession of cultural property. Similar requirements of due diligence, for example for auction houses, are included in section 16 of the Swiss KGTG.

Provision has also been made for situations in which an auctioneer fails to fulfil the requirements of due diligence before returning cultural property to the person who has presented it for public auction.

D

Article 88

Paragraph 2 has been amended to take account of the new article 3:86b. The opportunity has been used to state more clearly that article 88, paragraph 1 'may not be invoked as a defence' to proceedings as referred to in article 3:86a, paragraphs 1 and 2 and article 3:86b, paragraph 1. With the exception of proceedings for the return of cultural property as referred to in articles 3:86a and 3:86b of the present Bill, article 3:88, paragraph 1 can remain applicable.

E

Article 99

The rule of acquisitive prescription contained in article 3:99 is suspended for legal proceedings as referred to in both article 3:86a, paragraph 1 and article 3:86b, paragraph 1 by the addition of a new paragraph 3, which states that such prescription cannot be invoked as a defence to proceedings of this kind. Nor does paragraph 3 mention the proceedings referred to in article 3:86a, paragraph 2. As such proceedings concern cultural property that has already been referred to in the existing article 3:99, paragraph 2, article 3:99, paragraph 1 clearly does not constitute an impediment to such proceedings.

There is no overlap between paragraph 2 and the new paragraph 3. This is because paragraph 2 relates exclusively to *Dutch* cultural property which is being recovered by the *Dutch* state or owner before the Dutch courts. The proceedings referred to in articles 3:86a, paragraph 1 and article 3:86b, paragraph 1, to which paragraph 3 of article 99 applies, relate exclusively to proceedings instituted before the Dutch courts by another Member State or

State Party in respect of cultural property which has been designated as such by another Member State or State Party.

F

Article 238

The provisions of the Protection of Cultural Property against Illegal Export (Implementation) Act should also be followed in the case of pledges.

G

Article 310c

Although the Convention does not require the prescription period to be changed, the Bill nonetheless adopts the prescription period applied in the Directive as referred to in the Protection of Cultural Property against Illegal Export (Implementation) Act. The 30-year period is in keeping with the prescription period for cultural property adopted in the Swiss KGTG, specifically in the new articles 728 (1 bis) and 934 (1 bis) *Zivilgesetzbuch* and articles 196a and 219 (1 bis) *Obligationenrecht*.

Paragraph 2 follows the same line as article 310a, paragraph 2. Under this provision the 30-year period referred to in article 310a, paragraph 1 is replaced by a period of 75 years in the case of movables that form part of public collections or the inventory of ecclesiastical institutions, as referred to in the Directive. In keeping with the system whereby the Bill follows the provisions of the directive wherever possible, the same prescription period has been adopted here for corresponding public collections and inventory of ecclesiastical institutions in States Parties. The definition of this cultural property follows as closely as possible the definition in article 1, second indent of the Directive. This concerns a vulnerable category of often important cultural property which deserves extra protection.

However, the following point should be made in connection with the long prescription period of the present article. Notwithstanding the length of this period, a claim for a return of property may fail long before the expiry of the period on the ground that such a claim would be unacceptable in the given circumstances according to the criteria of reasonableness and fairness. After, say, a period of 50 years a person in possession of cultural property will often have not the faintest idea how and in what circumstances the property was acquired by his predecessors in title. Nor will he be able to demonstrate that due diligence was exercised at

the time or, for example, that the export from the country of origin was indeed based on a valid licence. Dealers are not required to keep their records for 30, let alone 75 years; see article 3:15i, paragraph 2 in conjunction with article 2:10, paragraph 3 of the Civil Code, under which businesses have a duty to keep records for seven years. After a period of this length, the possessor will also not be able to seek redress against his predecessors in title or an expert on whom such predecessors relied. Such circumstances may be a reason for a court to hold that proceedings against the possessor are unacceptable according to the criteria of reasonableness and fairness. Claims for damages on account of death or injury have already been rejected by the Supreme Court on similar grounds in two cases where the facts on which the claims were brought had taken place 14 and 29 years earlier; see Supreme Court 29 November 1996, *Nederlandse Jurisprudentie* 1997, 153, and 30 May 1997, *Nederlandse Jurisprudentie* 1997, 544. On the other hand, a situation could be envisaged in which a thief or receiver would not be able to invoke the 30-year period as such a defence would not be judged acceptable according to the criteria of reasonableness and fairness. A statutory basis for this approach can be found in article 3:321, paragraph 1(f) of the Civil Code. Not only will the thief or receiver have obtained the cultural property by committing a criminal offence, but he will also have deliberately done everything possible to prevent the recovery of the property, notably by concealing both its whereabouts and the fact that he has it in his possession.

Chapter 4. Implementation and enforcement

This chapter lays down rules for both the implementation and the enforcement of the Convention and the present Bill. Although these are administrative rules, they do not preclude the possibility of criminal action in many cases.

It has already been explained in parts 6 and 9 of the general introduction that importing cultural property which has been removed from the country of origin in breach of that country's export rules or acquired in that country through crime is *prima facie* evidence of criminal intent or negligence, always assuming that the illicit export or crime would also have constituted an indictable offence in the Netherlands. In such circumstances, criminal-law seizure would also be possible under article 94 of the Code of Criminal Procedure. In practice, this will mainly be relevant to the stolen cultural property referred to in article 7 (b) (ii) of the Convention. Under article 116 of that Code, once there is no longer any objection from the point of view of criminal procedure a seized object may be returned, in principle to the person in whose possession it was seized. Pursuant to paragraphs 2-6 of that article and

articles 118 and 119, however, it may be possible to obtain a different decision which results in return to the person who can reasonably be deemed to have valid title. If the person holding the property at the time of seizure refuses to relinquish it, a person who believes he is entitled to the return of the property may lodge a complaint under article 552a et seq. of the Code of Civil Procedure. This possibility is also open both to a State Party which alleges an infringement of the prohibition in section 3 of the present Bill and to the person with valid title to the property. Under article 119, paragraph 4 of the Code of Civil Procedure, the State Party or the person with valid title may also arrange for the property to be provisionally attached under private law in the possession of the custodian referred to in that article. However, all of this is beyond the scope of the present Bill.

Section 7

This section has already been explained in part 11 of the general introduction. As noted there, it relates to provisions which are not suitable or only partially suitable for implementation by means of a statutory rule. This involves, for example, physical acts, such as organising the supervision of archaeological excavations (article 5 (d) of the Convention), seeing that appropriate publicity is given to the disappearance of any items of cultural property (article 5 (g)) and informing a country of origin that is party to the Convention of an offer of cultural property illegally removed from that country (article 2 (2) and article 7 (a)). It may also involve legal acts such as contracts or decisions which can help in achieving the objective referred to in article 9 of the Convention. Section 7, subsection 2 gives the Minister of Education, Culture and Science the power to lay down further rules in connection with the implementation referred to in the first sentence.

Section 8

This provision concerns supervision of compliance with the legislation. It is relevant both to the provisions of chapter 1 and to section 8 of the Bill. As a result of the use of the term 'supervision', the provisions of part 5.2 of the General Administrative Law Act (sections 5:11 to 5:20) are applicable. Supervision concerns the activities performed in order to check compliance with the rules. The supervisor may exercise his powers of supervision only in so far as this is reasonable for the discharge of his duties. The powers include obtaining access to places, demanding information, demanding access to corporate data and documents, invoking the duty of cooperation and determining whether the prohibition laid down in section 3 has been infringed. The bodies responsible for supervision are the Cultural Heritage

Inspectorate and Customs. Agreements will be made between these two bodies with a view to maximising the effectiveness of the supervision.

Section 9

This concerns an addition to sections 5:11-5:20 of the General Administrative Law Act, which is in keeping with the provisions of section 9 of the Cultural Property Originating from Occupied Territory (Return) Act. The provisions of section 9 (a) and (b) correspond to sections 17 and 18 of the Cultural Heritage Preservation Act. Section 9 (c) makes provision for cases in which the activities of a supervisor in relation to corporate data and documents are so time-consuming that they cannot be completed in one working day. In such a case point (c) provides that areas may be sealed off with a view to continuing the investigation the following day. Objects such as cupboards and computers may also be sealed, as this may be less intrusive than sealing off an entire area in which the objects are situated. Breaking a seal is a criminal offence under article 199 of the Criminal Code.

Section 9 (d) confers the power to use the police in order to compel the production of data and documents which the supervisor wishes to inspect or make copies of under section 5:17 of the General Administrative Law Act. This means that cupboards, drawers and so forth which may contain documents may, if necessary, be broken open and access to computer files may be forced.

Section 10

Where the officials referred to in section 8 have a reasonable suspicion that cultural property found by them has been obtained in breach of the prohibition in section 3, they should be able to retain control of the property for long enough to enable the provisional measures referred to in the proposed article 1011b of the Code of Civil Procedure to be taken. For this purpose the section confers on the Minister of Education, Culture and Science a limited power to take into custody the cultural property concerned for such period as is necessary to enable the State Party concerned to arrange for provisional attachment of such property, pending the institution of proceedings for return under private law as referred to in section 4. As is evident from the proposed article 1011b of the Code of Civil Procedure, the Minister too may give instructions for provisional attachment of this kind. It follows that an express request of the State Party concerned is not required.

Taking property into custody can be classified as a physical act. This is not altered by the fact that the Bill provides for the property to be taken into custody by the Minister. Needless to say, the Minister himself is not involved in taking property into custody, but the person authorised by him for this purpose pursuant to subsection 2 should record the decision in writing. The decision then constitutes an administrative decision. The decision should state the length of the custody. The final part of subsection 1 states that this period may not exceed 12 weeks. The provision does not exclude the possibility of the person holding the cultural property being designated as custodian. In such a case it is not necessary for the object concerned to be moved.

As the custody lasts only for a short period, it has not been considered necessary to include a rule on costs.

Under subsection 3 the period of custody may be extended once for a maximum of 12 weeks. Subsection 4 put beyond doubt that custody automatically ends when the cultural property has been attached on the instructions of the State Party concerned or the period for custody expires unused.

The question can arise of how custody under this section relates to the power of the Minister to arrange for property to be attached provisionally under article 1011b of the Code of Civil Procedure. Each of these measures is governed by its own legal rules. This means that provisional attachment under article 1011b and custody under section 10 may coincide. Provisional attachment may be necessary if there is a danger that custody will end as a result of the expiry of the period of custody. On the other hand, there may be a need to take property into custody if there is a danger that it cannot be provisionally attached in time, for example because the services of a lawyer are needed.

Section 11

The provision corresponds to section 10 of the Cultural Property Originating from Occupied Territory (Return) Act. It guarantees that Customs officials can exercise the powers of chapter 2 (inspection provisions) and chapter 3 (general provisions) of the Customs Act in the context of the rules proposed by the present Bill as well. However, there is no need to apply section 10 of chapter 2 of the Customs Act in the context of these rules as the information that will be requested in this connection comes only from bodies that already provide it free of charge either of their own volition (Cultural Heritage Inspectorate) or on the basis of the arrangements made under the Framework Agreement between the Minister of

Education, Culture and Science and the State Secretary for Finance concerning supervision of the export and import of cultural property (museums and universities).

Chapter 5. Concluding provisions

Section 12

A. In anticipation of the ratification of the UNESCO Convention, a link was included with the Convention in section 6 of the Cultural Heritage Preservation Act by providing that designation as protected property would also serve as a designation for the purposes of article 1 of the Convention. This provision is now replaced by section 2 of the present Bill, which clearly lists what objects are designated for the Netherlands as cultural property within the meaning of article 1 of the Convention.

B and C. The prohibition in section 14a, subsection 1 of the Cultural Heritage Preservation Act is extended in a new subsection 3 to include three new cases. This has been done not only because the need for inclusion of these cases has become apparent, but also because it is desirable in these cases too to be able to make use of the options offered by the Convention for obtaining recovery of the objects concerned from other States Parties; reference may be made in this connection to the explanatory notes on section 2.

The new subsection 3 (a) concerns protected monuments and historic buildings and parts thereof, within the meaning of section 1 (d) of the Monuments and Historic Buildings Act. These may be not only the structures themselves in so far as they are movable (e.g. arbours, gazebos and windmills), but above all parts of these structures (facades, sculpture, ornaments, murals and painted ceilings).

Subsection 3 (b) relates to illicitly excavated objects. By their nature, such objects will not have been included in any inventory as referred to in section 14a, subsections 1 and 2. In practice, however, they will be movable historic structures within the meaning of sections 43-47 of the Monuments and Historic Buildings Act 1988.

It is also desirable for archival material to be brought within the scope of the prohibition of section 14a, as is done in the new subsection 3 (c). However, in accordance with the Annex to Council Directive 93/7/EEC, applicability is limited to archival material that is more than 50 years old. The provision does not apply either to documentation as referred to in section 1 (c) (4^o) of the Public Records Act 1995. This is because it is not intended to apply to 'reproductions', as referred to in that provision.

Section 13

The Bill is based on the general transitional rule that provisions take immediate effect. This basic rule applies even without being expressly included in the Bill.

However, one exception should be made to this basic rule in order to cover cases in which cultural property is imported into the Netherlands after the entry into force of this Act, but the breach of the provisions referred to in section 3 (a) or the unlawful appropriation referred to in section 3 (b) occurred before the entry into force. The Convention too proceeds on the assumption (see article 7 (b)(ii) that it is applicable only if both the theft and the illicit import into another State Party take place after the entry into force of the Convention. It is also apparent from section 33 of the Swiss KGTG that the right of recovery does not yet apply in a case as described above.

Section 14

This Act should enter into force simultaneously with the Act to approve the Convention. The date of entry into force can be fixed for both Acts together.

E.M.H. Hirsch Ballin
Minister of Justice

R.H.A. Plasterk
Minister of Education, Culture and Science

Transposition Table

Convention	Bill and existing legislation
1	1 (d)
2	7
3	3, 4, 5 and 6 (import and transfer of ownership) 2 in conjunction with sections 7 and 14a Cultural Heritage Preservation Act (export)
4	1 (d) in conjunction with article 1011a (a) Code of Civil Procedure
5	7
6 (a) and (b)	7 and 14a Cultural Heritage Preservation Act
7 (a)	7
7 (b) (i)	3 and articles 416 and 417 Criminal Code
7 (b) (ii)	4 in conjunction with 5, 6, 7 and 9
8	Sections 7, 8, 9, 14a and 14b Cultural Heritage Preservation Act and section 1 (2) Economic Offences Act (export)
9	7
10	7 and articles 437 Criminal Code and section 9 Cultural Heritage Preservation Act
11	Sections 3 and 10 Cultural Property Originating from Occupied Territory (Return) Act
12	-
13	4, 5, 6 and 7
14	7