

## Disclaimer

This is the Explanatory Memorandum to the *Rijkswet tot goedkeuring van de op 14 november 1970 te Parijs tot stand gekomen Overeenkomst inzake de middelen om de onrechtmatige invoer, uitvoer en eigendomsoverdracht van culturele goederen te verbieden en te verhinderen* (Kingdom Act approving 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) 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](http://www.minocw.nl); e-mail address: [ocwinfo@postbus51.nl](mailto:ocwinfo@postbus51.nl)) or the Cultural Heritage Inspectorate ([www.erfgoedinspectie.nl](http://www.erfgoedinspectie.nl); e-mail address: [info@erfgoedinspectie.nl](mailto:info@erfgoedinspectie.nl)).

## **Approval 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**

### **EXPLANATORY MEMORANDUM**

#### **1. General**

This explanatory memorandum, which has been written partly on behalf of the Ministers of Foreign Affairs and Justice, deals with 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.

The text of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ('the 1970 UNESCO Convention') was adopted in Paris in November 1970 at the Sixteenth General Conference of the United Nations Educational, Scientific and Cultural Organisation (UNESCO). The adoption of this UNESCO Convention (Dutch Treaty Series 1972, 50) is part of the ongoing process for the protection of national cultural property which began in the nineteenth century.

Initially, individual countries such as France, Greece and Italy enacted rules for the protection of their cultural property. After the First World War the subject of the protection of cultural property was brought into the international arena as a result of an exchange of ideas in the League of Nations, where the possibility was discussed of concluding a convention for the international protection of national items of cultural, historical or scientific interest. These

discussions never produced any definite result as they were interrupted by the outbreak of the Second World War.

After the Second World War these efforts were continued in the context of the United Nations. UNESCO was involved in the moves to provide protection for cultural property in wartime. This resulted in the adoption in 1954 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954; Dutch Treaty Series 1955, 47), commonly known as the 1954 Hague Convention. Even after the adoption of this convention UNESCO continued its activities for the protection of cultural property. A Recommendation on International Principles Applicable to Archaeological Excavations was adopted at the Ninth Session of the General Conference in Delhi from 5 November to 5 December 1956. And this was followed at the Thirteenth Session of the General Conference in 1964 by a Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property. In that same year UNESCO established a committee of experts from different countries to advise on a future convention on the protection of cultural property. After the committee had made its recommendations, instructions were given in 1968 for the preparation of a draft convention. This resulted in the 1970 UNESCO Convention. 116 countries are now parties to the Convention (position in May 2007).

## **2. Reason for becoming party to the 1970 UNESCO Convention**

Initially, Dutch civil law was an obstacle to the plans of the Kingdom of the Netherlands to become party to the Convention. Far-reaching measures would have to be taken to adapt civil law. These changes related in particular to innocent purchasers, in other words people who did not know and could not be expected to have known that the cultural property concerned had been stolen or illegally exported. As a consequence of these measures, such purchasers would be compelled to relinquish title to the property even if they had acted in good faith. The problem was to strike a reasonable balance between the interests of the original owner and those of an innocent purchaser. The deadlock was ultimately broken by the implementation of Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a member state (OJEC L 74). When the directive was transposed into Dutch law, the protection of innocent purchasers was set aside for certain types of precisely defined (or yet to be defined) cultural property. This adjustment to Dutch law made it possible for the Netherlands to become party to the 1970 UNESCO Convention.

By this time, however, the limitations of the 1970 UNESCO Convention had been recognised and addressed by UNESCO. UNESCO requested the International Institute for the Unification of Private Law (UNIDROIT) to draft a convention that could serve as a private law component of the 1970 UNESCO Convention. This resulted in the adoption of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Dutch Treaty Series 1996, 227). The reaction of the Netherlands to the UNIDROIT Convention was initially positive, and it was signed on behalf of the Kingdom of the Netherlands on 29 June 1996. At that time ratification of the 1970 UNESCO Convention was no longer judged expedient. However, in a letter of 19 July 2004 the State Secretary for Education, Culture and Science and the Minister of Justice informed the House of Representatives (Parliamentary Papers, House of Representatives 2003/04, 29 314, no. 8) that the UNIDROIT Convention would not be presented for parliamentary approval. The reasons for this were explained at length in the letter. The main ones are summarised below.

First of all, the scope of the term cultural objects in the UNIDROIT Convention is very wide and, unlike the definition in the 1970 UNESCO Convention, there is no limitation to the effect that the cultural property should have been designated by the state from which it comes as being of importance for archaeology, prehistory, history, literature, art or science.

Moreover, the period for extinctive prescription in the UNIDROIT Convention (three years from the time when the claimant knew the location of the cultural object and the identity of its possessor and in any case within a period of 50 years from the time of the theft) imposes a heavy burden on those engaged in normal trade transactions. It is also important to note that many more states are parties to the 1970 UNESCO Convention than to the UNIDROIT Convention (116 compared with 26). The final reason given to the House of Representatives was that becoming a party to the 1970 UNESCO Convention would be a more effective way of combating the illicit trade in cultural property.

The letter to the House of Representatives of 19 July 2004 led to parliamentary questions and answers from the government (Parliamentary Papers, House of Representatives 2004/05, 29 314, no. 11) and later to a meeting on 28 April 2005 of the relevant ministers with the House of Representatives' permanent committees on education, culture and science and on justice (Parliamentary Papers, House of Representatives 2004/05, 29 314, no. 13). The intention to ratify the 1970 UNESCO Convention and introduce implementing legislation was explained in the answers to the questions and at the meeting. As a result of the meeting, the House of Representatives agreed that the government could carry out its intention of ratifying the UNESCO Convention.

The grounds on which ratification of the Convention is considered desirable can be summarised as follows. Property of cultural, historical and scientific interest which forms part of the cultural heritage of a state needs effective protection. It is a generally recognised fundamental principle that the cultural heritage of a state deserves the respect and recognition not only of the state itself but also of other states. The country of origin should in principle provide this protection by designating objects that are of national importance and introducing rules for their protection, for example by prohibiting the export or transfer of ownership of such objects. Often, however, the trade in such property is so profitable that such rules are constantly flouted. The resulting illicit trade can cause substantial damage to the cultural heritage of a country. It is therefore of great importance to ensure that cultural property which has left the country of origin illicitly, either because the prohibition on export or transfer of ownership has been breached or because the property has been stolen or embezzled, can be recovered by the authorities of the country of origin or by the original owner without encountering difficulties due to the rules of the country where the cultural property has been sold or found. This is of particular importance as the laws of many countries, including the Kingdom of the Netherlands, protect a person who acquires movables in good faith. Another problem is that export prohibitions can, in principle, be enforced only by the country of origin. Similarly, a prohibition on transfer of ownership will not usually affect a transfer in another country. To be effective an arrangement for the protection of cultural property must therefore be international and cover a large number of countries, which can then implement one another's rules.

It is essential for the Kingdom of the Netherlands to become party to the 1970 UNESCO Convention. The Convention allows States Parties a large measure of freedom in determining the manner of implementation, yet is at the same time focused on international cooperation for the recovery of cultural property that has been removed or stolen from the country of origin in breach of the rules of that country. An international arrangement on this subject can be effective only if a large number of countries participate in it. The 1970 UNESCO Convention meets this requirement. More and more countries throughout the world have acceded to the Convention over the years. 116 states were parties to it in May 2007 and this number is expected to increase. Given the role of the Netherlands as a transit country for goods in general, it is all the more desirable for it to become a party as it is very likely to be confronted with situations in which cultural property enters the country after being illegally exported from another country. In addition, the Netherlands is one of the countries whose standard of living is such that buyers can be found for cultural property of this kind.

The Netherlands therefore has a significant trade – both internal and international – in art and antiques.

### **3. Content of the Convention**

The 1970 UNESCO Convention is a global convention designed to combat the illicit import and export of cultural property. Its preamble states that cultural property is one of the basic elements of civilisation and national culture. Attention is also drawn to the significance of the interchange of cultural property among nations for scientific, cultural and educational purposes. This interchange increases knowledge of the civilisation of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations. According to the preamble, the interests formulated here are endangered by the illicit trade in cultural property. The aim of the Convention is to afford protection against this trade. The protection can be effective only if organised both nationally and internationally. In summary, the Convention is intended to protect cultural property in the states that are parties to it and to promote international cooperation on this subject.

The 1970 UNESCO Convention imposes obligations with which the individual States Parties must comply. These obligations may necessitate the introduction of legislative or administrative measures. The obligations in question serve as a minimum and the countries concerned are free to take other, more far-reaching measures. Some countries acceding to the Convention already comply with some of the obligations imposed by it. The Netherlands is one country that already fulfils some of the obligations of the Convention. For example, the Cultural Heritage Preservation Act already contains provisions prohibiting the export of designated categories of cultural property. In addition, the Cultural Heritage Inspectorate is responsible for enforcing the rules in the Cultural Heritage Preservation Act.

As the provisions of the 1970 UNESCO Convention are not self-executing, implementing legislation will be required in the Netherlands. It follows that a Bill to implement the 1970 UNESCO Convention is being presented to the States General together with this Bill for its approval. The implementing Bill provides for an amendment to the Code of Civil Procedure and the Civil Code. It also amends the Cultural Heritage Preservation Act. The Bill to implement the Convention is being presented to the State General at the same time since it regulates more than is strictly required by the 1970 UNESCO Convention. The explanatory memorandum to the Implementation Act also explains why such an approach is considered necessary.

#### 4. Explanatory notes on individual articles

Article 1 contains a definition of the term 'cultural property'. According to article 1, cultural property is property specifically designated by the State Party concerned, on religious or secular grounds, as being of importance for archaeology, prehistory, history, literature, art or science. In addition the property must belong to one of the eleven categories of cultural property specified in the article. Whether cultural property comes within the definition of the 1970 UNESCO Convention is therefore determined by the country of origin and not by the country in which the stolen or illicitly exported property ends up. The Convention thus recognises the right of States Parties to decide for themselves what they regard as cultural property.

Articles 2 and 3 of the 1970 UNESCO Convention also distinguish between three forms of illicit trade in cultural property, namely the illicit import, export and transfer of ownership of cultural property.

- Illicit import involves the import of cultural property into a country contrary to the rules protecting the cultural property of another country from which the cultural property originates, where both countries are parties to the Convention.
- Illicit export relates only to the export of cultural property from a country of origin that is party to the Convention. Such export involves the breach of prohibitions imposed by that country for the protection of such cultural property which, according to the rules adopted there, may not be exported without the fulfilment of conditions, for example possession of a prior export licence.
- Finally, the illicit transfer of ownership involves infringement of rules introduced in a country that is party to the Convention to prohibit the transfer of certain cultural property or to require a licence for such transfer. Where such a prohibition is breached or a licence has not been obtained, the transfer of ownership is contrary to the law. Such transfers come under the above-mentioned article 3 and are therefore 'illicit' (see also article 13 (c) and (d)).

Article 4 defines certain categories of cultural property that form part of the 'cultural heritage' of each party to the Convention. This indicates what links a country should have with a particular item of cultural property if this is to form part of its cultural heritage. There is a connection between this position and that of article 1. When designating cultural property as referred to in article 1, a country may not ignore the provisions of article 4.

Article 5 imposes an obligation on States Parties to set up the services described in the article and provide sufficient qualified staff to carry out the functions listed.

Article 6 obliges States Parties to prohibit the exportation of cultural property from their territory unless accompanied by a prescribed export certificate.

Article 7 imposes a number of specific obligations on States Parties in respect of cultural property acquired by or stolen from museums and similar institutions.

Article 8 concerns the criminal or administrative sanctions for infringement of the prohibitions listed in articles 6 and 7.

Article 9 introduces a special obligation to participate in a concerted international effort in specific cases of pillage of archaeological or ethnological materials and to take provisional measures in such cases.

Article 10 contains obligations similar to those in article 5, for example in the educational field. The parties to the Convention also undertake to oblige antique dealers, subject to criminal or administrative sanctions, to maintain a register recording certain prescribed data.

Article 11 deals with cultural property from occupied territory. The obligation in this article therefore corresponds to the subject matter of the First Protocol to the above-mentioned Hague Convention of 1954 (see Dutch Treaty Series 1955, 47) to which the Cultural Property Originating from Occupied Territory (Return) Act (Parliamentary Papers, House of Representatives 2004/05, 30 165, nos. 1-7) relates.

As regards the other provisions, mention should be made of article 13 which provides in points (b), (c) and (d) for the recovery or restitution of illicitly exported, transferred or stolen cultural property. While it is evident from a phrase in the opening words of the article, namely 'consistent with the laws of each State', that there is no obligation to amend the law, a State Party is assumed to have sufficient statutory powers to allow for the return of illicitly exported, imported or transferred cultural property for the benefit of both the States Parties and the person with valid title.

## **5. Position of the Kingdom of the Netherlands**

Under article 22 of the 1970 UNESCO Convention the parties recognise that it is applicable not only to their metropolitan territories but also to all territories for the international relations of which they are responsible. In the case of the Kingdom of the Netherlands this means that illegal export and import of cultural property must be prevented not only in the Netherlands

but also in the Netherlands Antilles and Aruba. Section 1 of the Kingdom Bill to approve the 1970 UNESCO Convention therefore provides that the Convention applies to the entire Kingdom.

Implementing legislation is therefore required not only in the Netherlands but also in the Netherlands Antilles and Aruba. In the case of Aruba implementation of the Convention also requires amendment of its Civil Code and Code of Civil Procedure. These amendments will supplement the existing articles 3.86a and 3.310a of Aruba's Civil Code. It will also probably be necessary to amend the National, Import, Export and Transit Ordinance.

As the introduction of legislation is dependent on a variety of factors, it is not yet possible to indicate within what period the implementing legislation of the Netherlands Antilles and Aruba will be completed. However, the Netherlands Antilles and Aruba will make vigorous efforts to introduce this legislation without delay. As soon as the Netherlands Antilles and Aruba have completed the implementing legislation, the Convention will be adopted for these countries.

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