



United Nations
Educational, Scientific and
Cultural Organization



Convention for the fight
against the illicit trafficking
of cultural property

2 MSP

**C70/12/2.MSP/6
Paris, May 2012
Original French**

Restricted Distribution

**Meeting of States Parties to the Convention on the Means of Prohibiting
and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property
(UNESCO, Paris, 1970)**

**Second Meeting
Paris, UNESCO Headquarters, Room II
20-21 June 2012**

**Item 10 of the provisional agenda: Proposals for monitoring the implementation of
the 1970 Convention**

Decision required: paragraph 25

INTRODUCTION

1. The purpose of this document is to submit an analysis to the Meeting of States Parties of the options that might be considered for the monitoring of the 1970 Convention in order to improve its implementation. The first part is devoted to the question of the revision, in whole or in part, of the text of the 1970 Convention. It examines the procedure to be followed should the States Parties decide in favour of revision and the legal implications of such a revision. The second part outlines and comments on the procedure to be followed in the event of creation of an additional instrument to the Convention (such as a protocol). In regard to the monitoring bodies, the third part sets out the provisions laid down in the UNESCO Culture Sector's other conventions and considers the lack of such bodies for the 1970 Convention and the question of whether such bodies should be established.

I. REVISION OF THE 1970 CONVENTION IN WHOLE OR IN PART

I.1. Procedure to be followed in the event of revision of the 1970 Convention

2. Article 25 of the 1970 Convention provides for the following procedure in the event of revision:

“1. This Convention may be revised by the General Conference of the United Nations Educational, Scientific and Cultural Organization. Any such revision shall, however, bind only the States which shall become Parties to the revising convention.

2. If the General Conference should adopt a new convention revising this Convention in whole or in part, then, unless the new convention otherwise provides, this Convention shall cease to be open to ratification, acceptance or accession, as from the date on which the new revising convention enters into force.”

3. It is thus expressly provided that only the General Conference may revise the 1970 Convention. Consequently, Article IV, paragraph 4, of the Constitution of UNESCO and the Rules of Procedure concerning recommendations to Member States and international conventions covered by the terms of Article IV, paragraph 4, of the Constitution apply.

4. Article IV, paragraph 4, of the UNESCO Constitution provides as follows:

“The General Conference shall, in adopting proposals for submission to the Member States, distinguish between recommendations and international conventions submitted for their approval. [...] in the latter case a two-thirds majority shall be required”.

5. Furthermore, pursuant to Articles 2, 3, 4 and 6 of the abovementioned Rules of Procedure, the revision of the 1970 Convention, the scope of such revision and the form it might take must first be examined by the Executive Board before any decision is taken by the General Conference.

I.2. Legal implications of revision

6. If the States Parties decide to revise the articles of the 1970 Convention in whole or in part, and unless the new revising instrument provides otherwise, the 1970 Convention will cease to be open to ratification, acceptance or accession, as from the date on which the revising convention enters into force (1970 Convention, Article 25, paragraph 2). As a result, States that are currently considering

whether to ratify the existing Convention might be prevented from doing so or might refrain from doing so. The revision of the text of the 1970 Convention could, therefore, nullify the efforts made by the Secretariat to date to increase ratification (to date, there are 122 States Parties and a number of other States close to ratifying).

7. Patrick O’Keefe, in his 2006 commentary on the 1970 Convention,¹ was already questioning the impact revision might have:

“There are now, in April of 2006, 109 Parties to the Convention. Other States are in various stages of internal consideration of becoming party to it. At present it would seem preferable to encourage participation in the existing text, rather than to seek to modify it. Experience in its implementation will be the best guide to its amendment. Revision would complicate the net of reciprocal obligations since the revision would become binding only on States which became party to the revised Convention”.

8. Lastly, revising the provisions of the 1970 Convention could result in two different but parallel legal regimes. The juxtaposition of these instruments would inevitably result in confusion between the practices of the States Parties to the 1970 Convention and the States Parties to the new convention. The problems of interpretation that might arise could undermine the overall protection of cultural property which is unanimously desired by the international community and towards which UNESCO must direct its efforts.

II. PROCEDURE FOR ADDING AN INSTRUMENT TO THE 1970 CONVENTION

II.1. Procedure to be followed in the event of the creation of an instrument to supplement the 1970 Convention

9. By contrast with the procedure to be followed for revision (see *supra*), the 1970 Convention does not lay down any specific procedure for the addition of provisions to supplement the existing articles. Consequently, the adoption of new provisions would require the creation of a new instrument or an additional protocol. This would be governed by the rules of the international law of treaties. The States Parties to the 1970 Convention may take the opportunity of the June 2012 meeting to decide whether, with the assistance of the Director-General of UNESCO, to convene a diplomatic conference² to adopt a new instrument strengthening the provisions of the 1970 Convention, instead of revising it. In the event it is so decided, it might be opportune to hold such a meeting during the General Conference of UNESCO.

II.2. Legal implications of a supplementary instrument

10. If the States Parties were to choose the option of an additional protocol to complement or supplement the provisions of the 1970 Convention, the Convention would still remain the legal basis of their inter-State relations. Consequently, the Convention would remain open for ratification, acceptance or accession. The additional regime would therefore be optional, and its clauses would

¹ P. O’Keefe, *Commentary on the 1970 UNESCO Convention*, Institute of Art and Law, 2007, p. 97.

² A diplomatic conference is composed of plenipotentiary representatives of States. In the context of the 1970 Convention, their mandate would be to debate and adopt a protocol.
N.B. Such a procedure was followed for the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999).

have to complement the Convention and not contradict its text (which would be a form of “indirect revision”). The new instrument would be open to ratification only by the States Parties to the 1970 Convention.

11. If the States Parties decide to draw up and adopt a new instrument such as an additional protocol, it must be borne in mind that the drafting of the text will involve additional costs (especially if an *ad hoc* working group must be established). Extrabudgetary funds must therefore be allocated for the purpose.

II.3. Specific issue of penal aspects

12. If the inclusion of penal clauses is contemplated as a way of making the Convention more coercive in nature, it should be remembered that it already provides for the possibility of “penalties or administrative sanctions” (Articles 8 and 10 (a)). It would therefore be a matter of clarifying those provisions.

III. THE QUESTION OF MONITORING BODIES

III.1. The current situation with regard to monitoring of the 1970 Convention

13. Unlike the Culture Sector’s other conventions (see III.2), the 1970 Convention makes no formal provision for any monitoring body. There is, therefore, neither a General Assembly of States Parties nor any intergovernmental committee to ensure that this treaty is implemented. As a result, the Convention is currently monitored by (a) the Committee on Conventions and Recommendations of the Executive Board, (b) the Meeting of States Parties (held only from time to time) and (c) *de facto*, the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation.

(a) Monitoring by the Committee on Conventions and Recommendations

14. The Convention is monitored by means of national reports submitted by the States on the implementation of the instrument at national level.³ These reports are due every four years. They are submitted to the General Conference (Article 16 of the 1970 Convention) in the form of a summary prepared by the Secretariat. The process of examining these reports is conducted solely by the Committee on Conventions and Recommendations (CR),⁴ in accordance with the framework guidelines adopted by the Executive Board for the preparation of reports on the implementation of conventions for whose monitoring the CR Committee is responsible.⁵

15. At the 187th session of the Executive Board (September 2011), in compliance with the 2009-2013 timetable of work of the Committee on Conventions and Recommendations on the implementation of these standard-setting instruments and in pursuance of 184 EX/Decision 25, the Director-General submitted to the Executive Board a summary of the four-yearly reports received from

³ For further information on these national reports, see document C70/12/2.MSP/5.

⁴ In the context of strengthening the first limb of the terms of reference of the Committee on Conventions and Recommendations (CR), the Board at its 177th session (2007) adopted a Specific multi-stage procedure for the monitoring of the implementation of UNESCO conventions and recommendations for which no specific institutional mechanism is provided (see document 177 EX/35 Part I (Annex)).

⁵ UNESCO, document 177 EX/35 Part II.

Member States⁶ on the measures taken for the implementation of the 1970 Convention.⁷ That document, submitted to the General Conference at its 36th session, described the status of implementation of the treaty and provided information on the measures taken by Member States for its promotion and application covering the period of 2007-2010.⁸

(b) Meeting of the States Parties

16. The 1970 Convention makes no provision for governing bodies. However, where the States so request, the UNESCO Secretariat may from time to time arrange meetings of the States Parties to the Convention.

17. One such meeting was held on 15 October 2003. It was convened pursuant to paragraph 9(b) of 165 EX/Decision 6.2 of the Executive Board in implementation of 32 C/Resolution 24. The Board at that time invited the Director-General to organize, on the sidelines of the General Conference, a meeting of States Parties to conventions on which reports were due.

(c) De facto monitoring by the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation

18. This Committee was established in 1978 to deal, among other things, with cases of return and restitution that could not be resolved either by the 1970 Convention or by any other multilateral or bilateral instrument. Over 34 years, however, the Committee has become the *de facto* monitoring body for the Convention: in practice, it is thanks to the Committee's deliberations and the recommendations adopted by its Member States that the provisions of the Convention have been implemented and best practices on the subject shared. The Committee is in fact the instigator of the following projects, in accordance with the articles of the Convention:

- adoption of an International Code of Ethics for Dealers in Cultural Property (1999);
- establishment of a Database of National Cultural Heritage Laws (recommendation No. 5 of the 12th session, 2005);
- Model Export Certificate for Cultural Objects (2007);
- promotion of international cooperation, awareness raising and training, including through publications (Legal and practical measures against illicit trafficking in cultural property in 2006 and the Compendium in 2010) and video materials (film and video clips in 2010-2011);
- mediation and conciliation procedures (Rules of Procedure, in 2010);
- drafting of model provisions defining state ownership of cultural property (Recommendation No. 3 of the 16th session of the Committee in 2010, adopted in 2011).

III.2. Monitoring mechanisms of the Culture Sector's other Conventions

19. The Culture Sector's other five conventions each have their own monitoring mechanisms and governing bodies.

⁶ 48 reports have been received (see document C70/12/2.MSP/5).

⁷ UNESCO, document 187 EX/20 Part III.

⁸ UNESCO, document 36 C/25.

- (a) Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) and its two Protocols (1954 and 1999)
- Meeting of the High Contracting Parties to the Hague Convention (convened every two years by the Director-General).⁹
 - Meeting of the Parties to the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (convened by the Director-General, in coordination with the Meeting of the High Contracting Parties, in the year of the General Conference).
 - Committee for the Protection of Cultural Property in the Event of Armed Conflict (which meets in ordinary session convened by the Chairperson of the Committee every year by agreement with the Director-General).¹⁰
- (b) Convention for the Protection of the World Cultural and Natural Heritage (1972)
- General Assembly of States Parties (which meets in ordinary session every two years, during the General Conference).
 - Intergovernmental Committee (which meets in ordinary session every year).
- (c) Convention on the Protection of the Underwater Cultural Heritage (2001)
- Conference of States Parties (convened at least once every two years).¹¹
 - Scientific and Technical Advisory Body (convened once per year).¹²
- (d) Convention for the Safeguarding of the Intangible Cultural Heritage (2003)
- General Assembly of States Parties (which meets in ordinary session every two years).¹³
 - Intergovernmental Committee (which meets in ordinary session every year).
- (e) Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005)
- Conference of the Parties (which meets in ordinary session every two years).¹⁴
 - Intergovernmental Committee (which meets in ordinary session every year).¹⁵

⁹ Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), Article 27.1.
¹⁰ Committee for the Protection of Cultural Property in the Event of Armed Conflict, Rules of Procedure, Article 3.2.
¹¹ Convention on the Protection of the Underwater Cultural Heritage (2001), Article 23.
¹² Statutes of the Scientific and Technical Advisory Body, Article 4 (a).
¹³ Convention for the Safeguarding of the Intangible Cultural Heritage (2003), Article 4.2.
¹⁴ Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), Article 22.2.
¹⁵ Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), Article 23.2.

III.3. Establishment of monitoring bodies: definition, purpose and method

(a) Definition

20. In addition to deciding whether to revise the substantive provisions of the 1970 Convention or whether to put a protocol in place, the States Parties might also wish to determine whether it is necessary to establish bodies with specific competences for monitoring the implementation of the 1970 Convention. In this particular case, the States Parties might decide, for instance, to follow the model of the other Culture Sector conventions by establishing:

- an Assembly of States Parties, convened at a frequency to be determined (for example, every four years); and
- an Intergovernmental Committee,¹⁶ convened at a frequency to be determined (for example, every two years).

(b) Purpose

21. Setting the frequency with which these bodies must be convened would give the States Parties the advantage of being able not only to share best practices on the implementation of the 1970 Convention but also to discuss the problems arising therefrom. In practical terms, the meetings of such bodies would make it possible to:

- examine the national reports on the implementation of the 1970 Convention (currently four-yearly);
- evaluate international cooperation between police and customs services, etc.;
- strengthen the effectiveness of bilateral or multilateral agreements or create new ones;
- discuss cases of restitution falling within the scope of the treaty and, for those that do not, improve coordination with the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, whose role would be better defined as a result.

(c) Method

22. These monitoring bodies can be established, *inter alia*, in the following way:

- (a) by an amendment to the Rules of Procedure¹⁷ of the Meeting of States Parties to the 1970 Convention providing for the frequency of Meetings of the States Parties and the establishment of a subsidiary body (an Intergovernmental Committee). By choosing this option, the States Parties will avoid the pitfalls of the complex process of revising the Convention or adopting a protocol.
- (b) alternatively, by drawing up a Protocol that would on the one hand supplement some provisions of the 1970 Convention and on the other, provide for the establishment of such

¹⁶ The number of members and the functions of this Intergovernmental Committee would determine its nature, in other words whether it is an intergovernmental committee on the lines of those already existing at UNESCO, established for the purposes of some cultural conventions, or a steering committee or a Scientific and Technical Advisory Committee.

¹⁷ See document C70/12/2.MSP/3.

bodies (a General Assembly and an Intergovernmental Committee). As mentioned in paragraph 9, the States Parties would in that case be required to convene a diplomatic conference to draft such a protocol.

23. Whatever form the monitoring body takes, the States Parties must discuss and decide on the following points:

- composition: the number of members, their geographical distribution, the procedure for electing members, etc.;
- terms of reference: promotion of compliance with the Convention, oversight of conformity with its provisions, or only the provision of information;
- frequency and method of convening the meetings or sessions;¹⁸
- financial implications;
- the rules of procedure;
- the reporting system.

24. As matters stand, owing to the lack of formal governing bodies specific to the 1970 Convention, this international legal instrument has not been monitored properly. In 1970, the States did not consider it necessary to provide for such mechanisms. Forty-two years later, however, the 122 States Parties are explicitly calling for more regular and structured monitoring of the implementation of the Convention both internationally and nationally. Therefore, meetings while the period the General Conference is in session or a monitoring committee specially dedicated to the 1970 Convention might be useful.

25. In the light of the above, the Meeting of States Parties may wish to adopt the following resolution:

IV. DRAFT RESOLUTION 2.MSP 6

The Meeting of States Parties,

1. Having examined document C70/12/2.MSP/6;
2. Thanking the Secretariat for its work;
3. Decides ...

¹⁸ Generally speaking, meetings or sessions of subsidiary bodies are held during or at the end of the General Conference, given that representatives of most of the Member States of UNESCO are present at that time.