

Disclaimer

This is the Explanatory Memorandum to the *Wet tot teruggave cultuurgoederen afkomstig uit bezet gebied* [Cultural Property Originating from Occupied Territory (Return) Act] as enacted on 8 March 2007. 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) .

Rules on the taking into custody of cultural property from an occupied territory during an armed conflict and for the initiation of proceedings for the return of such property (Cultural Property Originating from Occupied Territory (Return) Act)

EXPLANATORY MEMORANDUM

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I. GENERAL

1. Introduction

Convention and Protocol

For many centuries occupying forces had a habit of removing cultural treasures from the territories they occupied and carrying them off as war trophies. Since the Napoleonic era, however, this practice has increasingly come to be regarded as unacceptable. Provisions for the return of cultural objects looted in wartime have been included in various national and international regulations since the middle of the nineteenth century. After the Second World War too, the international community felt a need to make arrangements for the protection of cultural heritage in wartime. Negotiations on this subject were conducted within the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and resulted in a Diplomatic Conference held in The Hague in 1954 at the invitation of the Dutch government. The Convention for the Protection of Cultural Property in the Event of Armed Conflict ('the Convention' or 'the Hague Convention') and the Protocol to the Convention (the Protocol) (Dutch Treaty Series 1955, 47) were concluded during this conference.

The Convention relates to the protection of both movable and immovable cultural property in the event of armed conflict. By contrast the Protocol relates mainly to movable property. Its aim is to prevent the exportation of cultural property from territory occupied during an armed conflict and to arrange for the return of objects that have been exported in contravention of the prohibition. A provision on the return of movable cultural objects initially formed part of the text of the draft convention. However, as various countries had indicated prior to the Diplomatic Conference that they would not sign the Convention if this provision were to be part of it, it was decided after much discussion to draw up a separate Protocol on the exportation of cultural goods from occupied territory.

Many countries have now acceded to the Convention and the Protocol. In early 2005, 113 countries were parties to the Convention and 91 to the Protocol. A list of countries that have acceded to the Convention and the Protocol can be found on UNESCO's website (www.UNESCO.org/culture).

[Paragraph explaining why the Dutch term for cultural property has changed ('culturele goederen' replaced by 'cultuurgoederen').]

The purpose of the present Bill is to implement the Protocol. This is because the Protocol includes obligations which, as will be seen below, necessitate the drawing up of statutory rules for the return of cultural objects taken from occupied territory. No such rules have yet been introduced. As far as the Convention is concerned, Dutch legislation need not be amended. The obligations introduced by the Convention are already fulfilled by the Netherlands.

Structure of the general part of the explanatory notes

The remainder of this general part of the explanatory notes deals with the background to the Protocol and the need for and manner of implementation. Part 2 considers the approval of the Protocol by the Netherlands. This is followed in part 3 by consideration of the need for implementation of the Protocol. Attention is also paid here to the event that actually prompted implementation, namely the proceedings instituted by the Greek Cypriot church before Rotterdam District Court for the return of a number of icons. Part 4 explains the scope of the Bill. Part 5 describes the broad outline of the Bill. The basic provisions of the Bill are examined in parts 6 to 10. The matters dealt with are the provision prohibiting importation into the Netherlands and possession in the Netherlands of cultural property from occupied territory (part 6), the taking into custody of cultural property from occupied territory (part 7), proceedings for the return of cultural property taken into custody (part 8), the possible reimbursement of loss to the possessor or holder who has to part with the property (part 9) and the allocation of the burden of proof between the defendant or possessor on the one hand and the plaintiff or Minister on the other (part 10). Part 11 goes on to deal with the relationship between the Protocol and the 1970 UNESCO Convention, while part 12 examines the relationship between the Protocol and the Iraq Sanctions Regulation 2004 II. Part 13 considers how the proposed legislation can be implemented and enforced. Finally, part 14 deals with the financial consequences of implementation.

2. The Netherlands and the Protocol

The Netherlands approved the Protocol for the Protection of Cultural Property in the Event of Armed Conflict by Act of 16 July 1958 (Bulletin of Acts and Decrees 1958, 356). It was one of the first countries to ratify the Protocol. An instrument of ratification was deposited by the Netherlands with the Director-General of UNESCO on 14 October 1958. The Protocol entered into force three months after the deposit, i.e. on 14 January 1959 (see article 10 (b) of the Protocol). The Explanatory Memorandum to the Bill for the approval of the Protocol listed the obligations which the Protocol imposes on the contracting parties (Parliamentary Papers, House of Representatives 1957/58, 5110, no. 3, pp. 3 and 4). In so far as relevant here, these obligations are as follows for each of the contracting parties:

- prevention by the contracting party of the exportation of cultural property from a territory occupied by it during an armed conflict;
- sequestration of cultural property which is imported either directly or indirectly from occupied territory, in contravention of the prohibition;
- restitution, at the close of hostilities, to the competent authorities of the territory previously occupied, of cultural property wrongly exported from that territory;
- payment of an indemnity by the contracting party that occupied a territory to the possessors in good faith of any cultural property which has to be returned in accordance with the above obligation.

The great importance which the Netherlands attaches to the Protocol is apparent from a quotation from the Explanatory Memorandum to the Bill for the approval of the Protocol referred to above (Parliamentary Papers, House of Representatives 1957/58, 5110, no. 3, p. 4): 'In the abstract, this separation between Convention and Protocol is regrettable as it would certainly be desirable in the light of the experiences of the Second World War for as many states as possible not only to accept the provisions of the Convention but also to comply with those of the Protocol.'

3. Need for implementation

No indication that the Protocol should be transposed into Dutch legislation is contained in the Act approving the Protocol, the Explanatory Memorandum to that Act or the

Parliamentary Papers concerning the passage of the Act through Parliament. On the subject of the Protocol the Act merely stated that it was approved for the Netherlands. Even after the entry into force of the Act no statutory measures were introduced. However, it is now evident that rules to implement the Protocol are needed in Dutch legislation in order to be able to comply with the obligations of the Protocol. This is because it must be doubted whether these obligations are based on provisions binding on all persons within the meaning of article 94 of the Constitution. In the light of the case law referred to below, it must be assumed that the provisions of the Protocol do not have direct effect. This means that the possessor of a cultural object that must be returned to the country of origin pursuant to the obligations of the Protocol cannot be compelled on the basis of the Protocol to part with possession of it. In this situation forcible surrender is possible only if Dutch legislation itself contains provisions to this effect. Implementing legislation is therefore necessary.

The reason why it took so long for the need for implementation to be recognised was that the first request by a foreign authority to the Dutch government for the return of cultural objects was not submitted under the Protocol until 1997. This was a request by the Cypriot authorities for the return of icons that had been removed from a Greek Orthodox Church in northern Cyprus after the Turkish occupation began in 1974 and had ended up in the Netherlands. All countries concerned (Cyprus, Turkey and the Netherlands) are parties to the Protocol. The request for the return of the icons was made following civil proceedings instituted in 1995 by the Greek Cypriot church before Rotterdam District Court for their return. In its judgment of 4 February 1999 (NJ kort 1999, 37), the District Court held that article 1.4 of the Protocol was not a provision binding on all persons within the meaning of article 94 of the Constitution. This judgment was upheld on appeal by The Hague Court of Appeal (judgment of 7 March 2002, case number 99/693; this judgment has not been published). The claim for the return of cultural objects on Dutch territory as referred to here was refused for this reason. The request of the Cypriot authorities for the return of the objects cannot be dismissed as a one-off event. In view of the many trouble spots in the world such as the former Yugoslavia, Congo, Cambodia, Afghanistan and Iraq, it is by no means inconceivable that the Dutch government will receive more requests of the kind made by Cyprus.

The conclusion to be drawn from this is that the Netherlands can no longer wait to implement the Protocol in national legislation. Moreover, the Netherlands has always played a pioneering role in relation to the Convention, for example in relation to the introduction of the Second Protocol to the Convention, which was adopted in March 1999. The parliamentary questions on this subject in 1997 (Appendix to Parliamentary Papers, House of Representatives, 1997/98, no. 213) and in 1999 (Appendix to Parliamentary Papers, House of Representatives, 1998/99, no. 1332) indicate to the government that the House of Representatives also believes the Protocol should be transposed into Dutch legislation. It should be noted that inquiries made of UNESCO have revealed that, as far as is known, no other parties to the Convention have yet implemented the Protocol in the manner which the Netherlands is now doing.

4. Scope of the Protocol

The statutory provisions to be introduced should be based on the rules of the Protocol. The scope of the proposed legislation is therefore determined initially by how the Protocol must be interpreted and by the terms used in the Protocol such as 'cultural property' and 'occupied territory'. In addition, the scope of application of the proposed legislation must be the same as that of the Protocol itself. It should be noted in this connection that the Protocol is applicable only between contracting parties. This can be inferred from article 18 (1) of the Convention and article 1 of the Protocol. An important provision in this connection is article 18 (3) of the Convention, which allows for the possibility that where a Power involved in a conflict is not a party to the Convention, the Powers which are parties to it will nevertheless remain bound by it in their mutual relations. Article 18 (3) of the Convention also provides that parties are bound by the Convention in relation to a Power that is not a party but has declared that it accepts the provisions of the Convention and the Protocol, so long as it actually applies them.

Against this background the question that arises is whether the Protocol would also be applicable in the obvious case that the Netherlands finds itself in the position of third state into whose territory cultural objects are imported from an occupied territory but either the occupying or the occupied state is not a party to the Protocol. It seems safe to assume that the Protocol would in any event be applicable if the occupying state is a party to the Protocol. However, article 1 (d) of the Bill allows for the possibility that the

Protocol would also be applicable between the Netherlands and the occupied state if the latter and not the occupying state is a party to the Protocol together with the Netherlands. In that case, no indemnity as referred to in article 1.4 of the Protocol can be claimed from the occupying state if it is not a party to the Protocol. Whatever the case, this is a question of interpretation of the Protocol about which the national legislator can make no binding pronouncements. If a dispute occurs in practice, this point will, if necessary, have to be decided by the courts, partly by reference to the latest developments in international law and views on this subject at the time of the decision.

Nor would the above reasoning be any different in the case of Dutch participation in peace missions. After all, the fact that peace missions should not be classified as 'occupations' or participants in such missions as 'occupying states' is a conceptual matter.

The operation of the Protocol is emphatically limited to *cultural property*. What should be understood by this is set out in article 1 of the Convention. This article contains a description of both movable and immovable property. As already noted above, it is above all the definition of movable property that is relevant to the Protocol. In accordance with article 1 (a) of the Convention, it concerns movable property 'of great importance to the cultural heritage of every people', such as:

- works of art, manuscripts, books and other objects of artistic, historical or archaeological interest;
- scientific collections;
- important collections of books or archives or of reproductions of the property defined in article 1 (a).

This definition allows much room for interpretation (particularly as regards what constitutes 'great importance'). In consequence, each contracting party has considerable discretion within the framework of article 1 of the Convention to determine what objects it will actually treat as cultural property.

The next point is that the Protocol is applicable only in the event of exportation (of cultural property) from an *occupied territory*. The concept of occupied territory occurs in various conventions. One of the first in which the term was used was the Hague Convention IV of 1907. No definition of the term is given in any of these conventions.

However, it has been described in the literature (see, for example, The Handbook of Humanitarian Law in Armed Conflicts, Oxford University Press 1995, chapter 5, at III.1, 'General provisions', p. 242 ff.).

The definition of occupied territory may also be fulfilled where the occupation is of part rather than all of the territory of a state. This distinction can be of relevance to the date on which cultural objects from the occupied territory are returned by the state into whose territory the objects have been imported. If only part of a state is occupied, it is likely that the cultural objects can be returned sooner than if its entire territory had been occupied. In addition, only territories that have been occupied from the date of entry into effect of the Protocol for the Netherlands (i.e. on or after 14 January 1959) qualify as occupied territory.

According to the Protocol, there must be an *armed conflict* that results in the occupation of a territory or the territory of another state. Understandably, the term armed conflict cannot be separated in the Protocol from the concept of occupied territory as just discussed. The term armed conflict is also included in various conventions, but it too is not defined in any of them. However, it is described in the literature, for example in The Handbook of Humanitarian Law in Armed Conflicts, Oxford University Press 1995, chapter 2, at I 'Armed Conflicts', p. 39 ff.).

5. Outline of the Bill

Where possible, the Bill is based on the provisions implementing Council Directive 93/7/EEC of 15 March 1993 (OJEC L 74) on the return of cultural objects unlawfully removed from the territory of a member state. This directive was transposed into Dutch law by the Protection of Cultural Property against Illegal Exportation (Implementation) Act (Bulletin of Acts and Decrees 1995, 145).

This choice was made for the following reasons. Although the Protocol admittedly requires action on the part of a contracting party to ensure the return of the cultural property concerned, it would not be advisable to introduce an administrative remedy for those whose interests under private law have been affected. While it is true that the present Bill confers an administrative power on the Minister to take cultural property into

custody by way of provisional measure and also establishes an administrative procedure for contesting such a measure, it concentrates the remainder of the legal proceedings before the civil courts, as is also the case under the legislation implementing the Directive referred to above. There are various good reasons for this.

First of all, the problems that are covered by the present Bill, as by the implementing legislation, are largely of a private law nature. They involve such matters as (a) who is the possessor or holder, (b) whether the possessor is also the owner and therefore entitled to indemnity and (c) whether, if he is not the owner, he is entitled to fair compensation. The next issue that arises is (d) what loss the owner has suffered or what would constitute fair compensation. This problem is connected with that of expropriation, as the cultural property is physically removed from the control of the holder, possessor or owner. Expropriation too comes within the jurisdiction of the civil courts. Here too, it is desirable for the indemnification or fair compensation to be decided by the courts themselves. The problem with an administrative law solution would be that the state (represented in this case by the Minister of Education, Culture and Science as administrative authority) would then itself be responsible for determining the amount of the indemnification or fair compensation owed by it and that the interested party would have to contest this decision before the administrative courts if he considered the amount to be too low. It would not be easy to provide reasoned arguments as to why the estimate of the loss underlying the indemnification or fair compensation is incorrect. A procedure before the administrative courts would therefore put the interested party in a more difficult position than if the loss were to be estimated or the compensation to be awarded directly by the civil courts, as prescribed in expropriation cases. In addition, the civil courts, unlike the administrative courts, have the experience and expertise necessary to determine the amounts of indemnification and compensation payable in cases of this kind, whether or not with the assistance of experts.

Such a system is also in keeping with government policy as set out in the report on the evaluation of the Expropriation Act (Parliamentary Papers, House of Representatives 2001/02, 24 036, no. 239). Following that report, the then government decided that the civil courts should continue to hear all aspects of expropriation proceedings, in other words both ruling on expropriation applications and determining the compensation payable to the expropriated owner.

Finally, it is of great importance in practice for the Bill to be in keeping as far as possible with all existing rules on the return of cultural property. In this respect too, it is logical for the framework of the legislation to be based, at least in outline, on the provisions implementing Directive 93/7/EEC.

Although the Bill therefore follows as far as possible the legislation implementing the Directive, differences have nonetheless proved necessary. This is due, for one thing, to the inclusion as a provisional measure of an instrument based on the Protocol, namely the taking into custody of cultural property. Other differences will be discussed at the end of part 8 below.

In view of the above, the main points of the Bill can be summarised as follows. First of all, it prohibits the importation of cultural property (from a territory occupied during an armed conflict) into the Netherlands (section 2). Naturally, the prohibition covers only acts performed after the entry into force of the Act. This subject is examined in part 6 below.

Cultural property from an occupied territory is taken into custody by the Minister if there is a reasonable suspicion that the above-mentioned prohibition has been contravened (section 3). This is an obligation for the parties under the Protocol. The Minister takes this action either of his own volition or at the request of the authorities of the occupied territory. He takes cultural property from an occupied territory into custody of his own volition if there is a reasonable suspicion that they have been imported into the Netherlands in contravention of the prohibition (section 3, subsection 1 (a)). Cultural property may also be taken into custody at the request of the above-mentioned authorities where there is once again a reasonable suspicion of contravention of the prohibition (section 3, subsection 1 (b)). Such requests may therefore relate not only to cultural property imported into the Netherlands in breach of the prohibition but also to cultural property which is in someone's possession in the Netherlands in contravention of that provision after the entry into force of the Act. The latter situation also covers cultural property from an occupied territory which a person in the Netherlands already had in his possession after the ratification of the Protocol and before the entry into force of the present Act.

The Minister is also empowered to take cultural property discovered in the Netherlands into custody of his own volition if there is a reasonable suspicion that the prohibition in section 2 has been contravened and there is also a reasonable expectation that a request for return will be received from the authorities of the occupied or previously occupied territory (section 3, subsection 2). This is an addition to section 3, subsection 1, which the Minister is not obliged to use. However, if the Protocol is to be properly applied, it would be hard to do without such a power. The decision to take property into custody is made in writing by the Minister (section 4). The possibility of recovering the costs of taking property into custody is regulated in section 5. Section 6 contains a provision concerning termination of the custody. The subject of taking property into custody is dealt with in part 7 below.

After taking property into custody the Minister lodges a claim in proceedings before the civil courts for the return of the cultural property concerned (section 7). Needless to say, he does this only if the possessor does not part with it voluntarily. In the proceedings that follow, the civil court concerned then independently rules on the facts and the law. It does this in accordance with the rules of the Civil Code, taking account of a number of special rules included in the Bill. These special rules are derived from the rules that are also laid down in the Protection of Cultural Property against Illegal Exportation (Implementation) Act. One of the most important of them concerns the withdrawal of the protection provided by the Civil Code to a possessor acting in good faith who acquires property from someone who does not have the capacity to transfer it (section 7, subsection 2). The Bill categorically states that this protection cannot serve as a defence to a claim brought by the Minister. The same approach applies to other rules in the Civil Code which provide protection to possessors and other interested parties. For example, the rules concerning positive and negative prescription are also rendered inoperative in the Bill (section 7, subsections 2 and 5). Similarly, agreements alienating or encumbering cultural property from an occupied territory cannot frustrate a claim by the Minister (section 7, subsection 2).

A possessor may, if he chooses, voluntarily surrender the cultural property during the course of proceedings. In such a case the Minister will terminate the proceedings before the civil courts as the cultural property has then been brought within the control of the

state. The Minister's right to bring proceedings and the related subject matter are dealt with in part 8 below.

When allowing a claim by the Minister, the court awards indemnification to the possessor of the cultural property if he is also the owner. A holder or a possessor who is not also the owner is also entitled to compensation if he exercised due care and attention in acquiring the cultural property (section 7, subsection 3). The basic principle is that a possessor who also owns the property is entitled to indemnification. Other possessors or holders receive such compensation as is fair in these circumstances, provided they exercised due care and attention when acquiring the property. The latter rule (award of fair compensation) has also been borrowed from the rules introduced in the Protection of Cultural Property against Illegal Exportation (Implementation) Act; see article 86a of Book 3 of the Civil Code. The allocation of the burden of proof applicable to that provision has also been adopted in the present Bill. As regards reimbursement of loss and the allocation of the burden of proof see also parts 9 and 10 below.

After a claim has been upheld by the civil courts or after the possessor has voluntarily surrendered the object, the Netherlands is in a position to comply with the obligation in the Protocol to return the cultural property to the competent authorities of the territory previously occupied. At that point the Minister not only has the property in his possession but is also legally empowered to comply with the obligations of the Convention.

The Bill takes the form of an independent statutory regulation. This is conducive to the clarity of the regulation to be implemented. Nonetheless, as already noted above, some provisions for the implementation of the Protocol have also been included in the Civil Code. These are provisions dealing with the derivative rights of third parties (pledgees and lien holders).

6. Prohibition

The Bill contains a provision prohibiting the importation into the Netherlands of cultural property from an occupied territory and having such property in one's possession in the Netherlands. It should be noted first of all that the prohibition relates only to cultural

property from an occupied territory. Cultural property exported from a territory before an occupation or after the end of the occupation are not therefore covered by the prohibition. Indeed, the Protocol does not apply as such to cultural property of this kind.

The next point to consider is the meaning of the words 'importation into the Netherlands' in the prohibition. The Bill uses the term 'importation' exclusively in combination with the term 'the Netherlands'. The Dutch term 'binnenbrengen' is used here in a different sense than in Community Customs Code (Council Regulation (EEC) No. 1913/92). There 'binnenbrengen' (bringing into) refers only to the bringing of cultural objects into the European Union across its external borders. In the Bill the expression 'importation into the Netherlands' refers not only to the importation of cultural objects across the external borders of the European Union but also to their importation into the Netherlands from other EU member states, i.e. across the internal borders.

The next point is the meaning of the words 'in one's possession in the Netherlands'. This passage relates to those cases in which cultural property from occupied territory is held in the Netherlands after the present Bill becomes law. Possession of property may have been obtained after entry into force of the Act, but it may also have been obtained at an earlier date. If possession of the property started before the entry into force of the Act, it will come within the scope of the legislation only if it postdated the ratification and entry into force of the Protocol for the Netherlands (14 January 1959).

In itself the Protocol does not make such a prohibition obligatory. Nonetheless, there are good reasons connected not only with the Protocol but also with the Convention for introducing a prohibition of this kind. The same principle underlies both the prohibition and the Protocol, namely that it is not right to remove cultural objects from occupied territory and bring them into circulation. To maintain the international legal order it is important to show that acts of this kind in relation to cultural objects from occupied territory are not tolerated in the Netherlands. However, this does not warrant the conclusion that a contravention of the prohibition in the Bill should carry a criminal sanction. The undersigned have decided against using the criminal law to enforce the prohibition since the nature of any such contravention does not warrant a criminal sanction. Nor does the Protocol require such a sanction. It is sufficient to have a system of enforcement under private and administrative law. The private law enforcement is in

the hands of the civil courts. Part 9 below examines how the compensation under section 7 is affected by the private law consequences of contravening the prohibition. Administrative law enforcement is dealt with in part 13.

7. Custody

The Protocol (article I.2, second sentence) expressly requires cultural property obtained directly or indirectly from any occupied territory to be taken into custody automatically upon the importation of the property or, failing this, at the request of the authorities of the occupied or previously occupied territory. This requirement is fulfilled in section 3, subsection 1 of the Bill. The Bill provides that the Minister should take into custody cultural property where there is a reasonable suspicion that the prohibition in section 2 has been contravened. Objects can, in principle, be taken into custody in two ways. First, the Minister may of his own volition take into custody cultural property imported into the Netherlands. For the meaning of the words 'importation into the Netherlands', reference should be made to part 6 above.

Second, the Minister may take into custody cultural property at the request of the authorities of the occupied or previously occupied territory. In addition to these two cases subsection 2 of section 3 makes provision for a special case. Subsection 2 confers a discretionary power on the Minister to take into custody of his own volition cultural property discovered in the Netherlands if there is a reasonable suspicion that the prohibition of section 2 has been contravened, even without a request from the authorities of the occupied or previously occupied territory. The reason for this difference is that once the cultural property has been imported into the Netherlands, greater weight is attached to the fact that taking property into custody is a far-reaching instrument which should in principle be used only at the request of the authorities of the occupied or previously occupied territory and if it is also evident from the request precisely what objects are concerned. However, it is possible that those responsible for supervision may become aware, whether through active inquiries or otherwise, that cultural property from an occupied territory is present in the Netherlands for which no request has been received from the authorities concerned. It must then be possible for the Minister to act immediately to take the objects into custody if there is a reasonable expectation that such a request will be made.

Taking property into custody can be regarded as a physical act. This is not altered by the fact that the Bill provides for the Minister of Justice to take the property into custody. Naturally, it is not the Minister personally who does this, but someone acting on his authority. The Bill contains a provision that must be observed when property is taken into custody. It stipulates, among other things, that the decision to take property into custody must be made in writing and that it also constitutes an administrative decision within the meaning of the General Administrative Law Act (AWB). Such an arrangement is not uncommon in administrative law. A similar arrangement is made for example in connection with enforcement action by an administrative authority (see section 5:24 AWB).

In very urgent cases the Minister can take property into custody even before his decision has been recorded in the form of an administrative decision. In such cases he must arrange for it to be recorded in writing and published as quickly as possible thereafter.

Costs are incurred when property is taken into custody. These may be charged by decision of the Minister to the person contravening the prohibition in section 2. This will be dealt with below in relation to section 5 in the explanatory notes on individual sections. A separate provision has also been included on termination of the custody. This will be dealt with below in relation to part 6, once again in the explanatory notes on individual sections.

As a decision to take property into custody constitutes an administrative decision within the meaning of the General Administrative Law Act, a party wishing to contest it has a right lodge an objection with the administrative authority concerned and a right to apply to the courts for review of the decision on the objection under sections 7:1 and 8:1 respectively of that Act. It should be noted in this connection that it is for the civil courts under section 7 to decide whether the prohibition in section 2 has been contravened and whether surrender and return of the property must therefore follow in keeping with the Protocol. Under section 3 the Minister merely has to decide whether there is a 'reasonable suspicion' that the prohibition has been contravened. Such a suspicion must be sufficient to justify application of the pre-judgment measure of taking property into custody. In any subsequent objection procedure or in review proceedings before the

administrative courts, it will be necessary to assess whether such a suspicion was reasonable. Such an assessment leaves the civil courts free to decide whether or not the objects should be returned.

As is evident from the above, the taking of property into custody (*inbewaringneming*) is a provisional pre-judgment measure under administrative law. It does not therefore constitute attachment-linked custody (*bewaring*) within the meaning of civil or criminal procedure. In this case there is no need for attachment of this kind in addition to the instrument of custody chosen here. The physical act by the Minister of taking property into custody makes it unnecessary to resort to attachment.

Nor would a form of pre-judgment attachment of the kind applied in civil procedure be appropriate here for technical reasons. Attachment is not possible, after all, without the leave of the president of the District Court, and any such decision could then be challenged in interim injunction proceedings. Moreover, attachment ceases to apply in the event of bankruptcy (section 33 of the Bankruptcy Act). This would produce complications that can better be avoided. The instrument of taking property into custody is better suited to the urgency needed in such cases and to the requirements which the Protocol imposes on the contracting parties, namely that they should arrange for property to be taken into custody and returned.

8. Proceedings for return

The part of the Bill relating to proceedings for the return of property is organised as follows. To start with, a right is created for the Minister to bring civil proceedings for the return of cultural property which he has taken into custody. The Minister lodges a claim against the possessor, whom failing against the holder. This last point should be interpreted as meaning that proceedings are brought against a holder only if no possessor can be found against whom proceedings can be brought.

If the Minister's claim is allowed by the court, the person against whom the claim has been brought is compelled to return the cultural property. It makes no difference in this connection whether he is the owner, the possessor in good or bad faith or the holder. In all these cases the return of the property is compulsory if the claim is allowed. The

infringement of the rights of the person who has to surrender the cultural property can be justified by the international interest that is at stake. It concerns objects that are subject to special international rules which the Netherlands has undertaken to observe. These international rules are intended not only to provide a framework within which cultural property that has been exported from an occupied territory in contravention of the provisions of the Convention can be protected, but also to promote the eventual return of such property.

The justification referred to here is also relevant to the requirements laid down by the Constitution for the expropriation of property by the State (see article 14 of the Constitution), a fact which merits particular attention. One of these requirements is that expropriation must be in the public interest. The international interest endorsed by the Netherlands can be considered to be such an interest. It is not necessary to decide whether taking property into custody, followed by the return to the competent authorities of the occupied territory, can or should be treated as equivalent to expropriation within the meaning of article 14, paragraph 1, of the Constitution since the present Bill in any event fulfils the requirements made in that provision. Not only is the public interest requirement fulfilled, but also the requirement of prior assurance of full compensation. This also means that the Bill meets the property protection requirement laid down in article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which provides that every person is entitled to the peaceful enjoyment of his possessions and that no one may be deprived of his possessions except in the public interest and subject to the conditions provided for by law. The European Court of Human Rights (ECtHR) allows states a wide 'margin of appreciation' in this respect. The ECtHR examines whether an infringement of the property right serves a legitimate public interest and whether a reasonable balance is struck between ends and means (proportionality). In general, compensation must be paid in the event of expropriation. In the government's view, the proposed regulation fulfils the requirements of article 1 of the First Protocol: it concerns a legitimate measure that serves an international interest, namely returning cultural property taken from an occupied territory during an armed conflict. There is also the certainty in advance that compensation will be paid for any loss of ownership. In addition, adequate legal protection is afforded, thereby fulfilling the requirements of article 6 ECHR.

The creation of a right to lodge a claim in proceedings for return is not sufficient in itself. This is because it is necessary to ensure that a claim for return cannot be defeated by the defence available under articles 3:86 and 3:88 of the Civil Code to a transferee who acquires property in good faith from a transferor who lacks competence to transfer it. The applicability of these provisions is therefore excluded in section 7, subsection 2, of the Bill. The same applies to the rule contained in article 3:99 of the Civil Code. A possessor of cultural property who acts in good faith must not be able to rely on the positive prescription rule contained in that article. Nor, under section 11 of the Bill, may the defence be raised that a pledge or right of lien was obtained in good faith as referred to in articles 3:238 and 3:291 respectively of the Civil Code. It should be noted in this connection that the primary purpose of these provisions of the Civil Code whose operation is excluded is to protect legal certainty in transactions involving movable property in general and thus to promote the smooth conduct of business. This interest is outweighed by the interest which the present Bill is intended to serve.

Legal proceedings for the return of property are brought after the property has been taken into custody. Events take place in this order because it must be ensured that the cultural objects concerned do not vanish from sight and can, if necessary, be returned to the competent authorities of the occupied or previously occupied territory. Subsection 5 of section 7 provides that claims under legal proceedings are not subject to a time limit. This is because the power to take property into custody and to return property as referred to in article 1 of the Protocol is not subject to a time limit. It follows that it cannot be argued in proceedings for return that the power to take property into custody and hence the power to bring proceedings have been barred by the passage of time. A Dutch time limit, for example running from the date that the objects are imported into the Netherlands (see articles 3:306 and 3:313 of the Civil Code), would therefore be contrary to the Protocol.

However, it may follow from the general principles of proper administration that after taking property into custody the Minister cannot wait for an unreasonably long time before instituting proceedings for return. Here too, however, there is no scope for a specific time limit. The Minister may possibly wish to wait and see whether the authorities of the occupied or previously occupied territory make a request for return or whether they are willing and able to supply the necessary documentary evidence and

particulars. If an objection or application for review has been lodged against the decision to take property into custody, this does not prevent proceedings being brought for return. As the objection or application for review relates only to the question of whether there was a reasonable suspicion as referred to in section 3 that was sufficient to justify the pre-judgment measure of taking the property into custody, the civil court before which the proceedings for return are brought need not await the outcome of the objection or review procedure. Finally, it is also conceivable that proceedings for return need not be brought or can be discontinued because the possessor voluntarily surrenders the cultural property.

As stated in part 5 above, the means chosen to amend the Civil Code in the Bill are based as far as possible on those previously chosen in the Protection of Cultural Property against Illegal Exportation (Implementation) Act. However, not all aspects of the rules on proceedings for return in the Bill are modelled on the Implementation Act. There are three differences. First, the authorities of previously occupied territories are not granted an independent right to take proceedings, which would enable them to apply to the Dutch courts for the return of the cultural objects concerned. There are two reasons for this. The first is that under the Protocol the contracting parties have an active obligation to return cultural property taken from occupied territory. The second reason is that the Protocol, unlike the Directive, does not require other contracting parties to be granted an independent right to initiate proceedings in the Netherlands. In view of these considerations, only the Minister is granted the power in the Bill to bring proceedings for the return of cultural property.

The second difference between the Bill and the Protection of Cultural Property against Illegal Exportation (Implementation) Act is that agreements for the alienation or encumbering of cultural property taken from occupied territory may not be raised as a defence against the Minister. This provision ensures that proceedings brought by the Minister for the return of cultural property can succeed even in cases in which the objects concerned were brought into the Netherlands before the entry into force of the legislation and good title was acquired by the possessor.

The third way in which the Bill differs from the Protection of Cultural Property against Illegal Exportation (Implementation) Act is that the Minister's exclusive right to bring

proceedings is included not in the Code of Civil Procedure but in the independent statutory regulation provided for in the Bill. This has been done because this aspect is so closely connected with the rest of the Bill, for example as regards terminology and powers, that its inclusion in the proposed special statute rather than in the Code of Civil Procedure is in the interests of clarity.

9. Reimbursement of loss

The Bill provides that the court allowing a claim for the return of property should grant a possessor who has to surrender the cultural property concerned either indemnification or such compensation as is fair in the circumstances (section 7, subsection 3).

Indemnification may be awarded only if the possessor is also the owner of the cultural property. Fair compensation is awarded in all other cases, provided the possessor exercised due care and attention in acquiring the cultural property. As already noted in part 5 above in relation to the outline of the Bill, the provision on the award of fair compensation is derived from the Protection of Cultural Property against Illegal Exportation (Implementation) Act, which incorporates a provision on this subject in article 3:86a, paragraph 3, of the Civil Code.

The distinction in the Bill between indemnification and fair compensation is connected with the fact that cultural objects from an occupied territory may have been imported into the Netherlands even before the entry into force of the Act. In such a case the cultural objects in question would have been imported after 14 January 1959 (the date on which the Protocol entered into force for the Netherlands) but before the entry into force of the legislation proposed in the present Bill. In these cases it is quite conceivable that ownership of the relevant cultural objects would have been acquired by those who are obliged to surrender them. The prohibition provided for in the Bill did not, after all, apply to them. It follows that when acquiring ownership of the property the person concerned or his successors in title were able to fulfil all the standard ownership criteria in the usual way. The Bill therefore expressly includes a provision that the courts should grant indemnification if the person required to surrender the cultural property was the owner (section 7, subsection 3). This provision also does justice to the requirement in article 14 of the Constitution that expropriation may take place only on prior assurance of full compensation.

In all cases in which ownership of the cultural objects concerned has not been acquired, the courts will grant such compensation as is fair in the circumstances if the possessor or holder of the objects exercised due care and attention when acquiring them. A distinction may be drawn between two different types of case. First, cases in which the prohibition has been contravened. Such a contravention occurs in all cases where cultural objects from occupied territory are acquired after the entry into force of the Act. As a rule, the existence of the prohibition will mean that good title to the objects will not exist. The agreement by which the objects were acquired could not, after all, have been concluded without both the transferor and the transferee having contravened the prohibition in section 2 on having cultural property from an occupied territory in one's possession in the Netherlands. Particularly in cases where the parties should have been aware of the prohibition, this means that the title to the property will be void because it is of a prohibited nature and therefore constitutes a breach of public order (article 3:40, paragraph 1, of the Civil Code). The second category of case involves acquisitions before the entry into force of the Act. Although the prohibition in the Bill cannot have been contravened in such cases, no ownership was nonetheless acquired because at the time of the transfer there was no valid transfer of ownership for one reason or another or because the predecessor in title lacked competence to transfer title.

Where ownership of the cultural objects concerned was not acquired, it is not necessarily the case that the possessor can be reimbursed for his loss. In such cases the possessor must after all show that he exercised due care and attention in acquiring the cultural property. If he acquired it after the entry into force of the Act he will not, in principle, succeed in proving this. As indicated above, such an acquisition is of a prohibited nature and the title may thus be void. In cases where the property was acquired before the entry into force of the Act, the possessor may be eligible for fair compensation in so far as he has not performed any acts that are contrary to unwritten legal standards commonly applied. If he has performed such acts, they may be an obstacle to the award of fair compensation to him. An example would be where he knew or should have known from facts or circumstances that existed at the time when he acquired possession that the cultural objects concerned had been obtained by theft or by illicit exportation from occupied territory.

The provision that the courts will award indemnification or such compensation as is fair in the circumstances does not result directly from the Protocol. The Protocol does not explicitly impose an obligation on the Netherlands to introduce a regulation for reimbursement of loss. On the other hand, the Protocol does expressly oblige the contracting party whose obligation it was to prevent the exportation of cultural property from the territory occupied by it to pay an indemnity to the holders in good faith of any cultural property which has to be returned (article I.4 of the Protocol). As previously explained, however, the Netherlands does have an obligation under the Protocol to take such cultural property into custody and, above all, to return it. The inescapable conclusion to be drawn from these obligations is that return of property by the Netherlands is possible only if proceedings can at least be brought against the possessor for its return. Equally inevitably, the Netherlands must introduce not only a regulation ensuring the forcible return of the cultural property referred to here but also a regulation for the protection of third parties through the reimbursement of any loss they suffer as a result of having to surrender their property. Such a regulation is necessary in order to fulfil the general principles of legal certainty. Moreover, in so far as the forcible return of cultural property by an owner must be deemed to be expropriation within the meaning of article 14, paragraph 1, of the Constitution, it is even necessary to provide for prior assurance of full compensation. A consequence of the regulation is that the indemnification or fair compensation awarded by the courts must be borne by the Dutch state. And it is up to the Dutch state to try to recover this sum from the occupying state under the provisions of article I.4 of the Protocol.

Cultural property may be subject to a pledge or usufruct. In such a case the reimbursement should, in principle, be awarded to the owner. The sum paid out as reimbursement will then be subject to the pledge or usufruct, in keeping with article 213, paragraph 1, second sentence, and article 229 of Book 3 of the Civil Code.

10. Burden of proof

This part deals with the allocation of the burden of proof in relation to the question whether the possessor is entitled to indemnification or to fair compensation as referred to in section 7, subsection 3 (a) and (b). Under the system adopted by the Bill it is for a possessor to show that he has become the owner and is therefore entitled to

indemnification under section 7, subsection 3 (a). Equally, it is up to a possessor who cannot prove ownership to show that he exercised due care and attention within the meaning of section 7, subsection 3 (b) and is therefore entitled to fair compensation as referred to in that provision. This is in accordance with the basic rule laid down in article 150 of the Code of Civil Procedure and is also in keeping with the provisions of article 3:86a, paragraph 3, of the Civil Code, which was added by the Protection of Cultural Property against Illegal Exportation (Implementation) Act. This arrangement differs from the allocation of the burden of proof in civil proceedings in which the ownership of property is claimed by the possessor of that property. Articles 3:109, 3:118 and 3:119, paragraph 1, of the Civil Code are not applicable in relation to the matters covered by section 7, subsection 3, namely whether there is entitlement to indemnification or to fair compensation. Nor is it reasonable for the burden of proof to be shifted to the Minister since the possessor and not the Minister will generally have evidence about the question of ownership and whether due care and attention was exercised. In this system it would not be appropriate for the plaintiff to be allocated the full burden of proving that the possessor does not have and has not acquired ownership or did not exercise due care and attention.

11. Relationship between the Protocol and the 1970 UNESCO Convention

The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 was adopted in Paris on 17 November 1970 (Dutch Treaty Series 1972, no. 50, and 1983, no. 660). To date this Convention has not been signed by the Netherlands. Initially, the signature of the UNESCO Convention gave rise to problems under civil law, mainly due to the fact that it was initially thought that acceptance of the Convention would reduce the protection afforded to possessors acting in good faith. The obstacles to signing and subsequently ratifying the 1970 UNESCO Convention appeared to have been removed when Council Directive 93/7/EEC was implemented in 1995. However, it was precisely in that period that the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects was concluded (Dutch Treaty Series 1996, no. 227). When the UNIDROIT Convention was in due course signed by the Netherlands, it was no longer considered expedient to sign the UNESCO Convention. The UNIDROIT Convention could, after all, be regarded as a private law complement to the UNESCO Convention. This situation has now changed.

The House of Representatives was informed in a policy letter of 19 July 2004 (Parliamentary Papers, House of Representatives 2003/2004, 29 314, no. 8) that the aim would no longer be to ratify the UNIDROIT Convention but to sign and ratify the 1970 UNESCO Convention. Preparations are now being made to do so.

The question arises of whether implementation of the Protocol will still be necessary after implementation of the 1970 UNESCO Convention. This question must in any event be answered in the affirmative. First of all, even apart from the Netherlands, the countries that have ratified the two Conventions are not always the same.

In addition, the definitions of the term cultural property differ. For example, the 1970 UNESCO Convention relates to cultural property designated as important by the state party concerned. By contrast, the Protocol makes no mention of property designated as important, but instead refers only to cultural property of great importance. The remainder of the definition in the two conventions also differs. The UNESCO Convention defines cultural property as property which, on religious or secular grounds, is specifically designated by each state as being of importance for archaeology, prehistory, history, literature, art or science. Article 1 of the Hague Convention describes cultural property as property of great importance to the cultural heritage of every people. Other aspects of the definitions also differ. Article 1 (a) to (k) of the UNESCO Convention lists eleven different categories of cultural property. And article 4 of the UNESCO Convention indicates what objects are actually eligible for its protection. By contrast, article 1 (a) of the Hague Convention provides a more general description. The scope of the UNESCO Convention and the Protocol also differs. The UNESCO Convention relates to the return of cultural property that has been removed from a country after theft or illicit exportation (see articles 7 and 13). The Protocol concerns the return of cultural property exported from an occupied territory during an armed conflict. In such a case there need not have been any theft or illicit exportation.

12. Relationship between the Protocol and the Iraq Sanctions Order 2004 II

In 1990 the Security Council of the United Nations adopted Resolution 661 imposing a comprehensive trade embargo on Iraq. This resolution was later supplemented by further resolutions. In due course the embargo was lifted by the Security Council in

Resolution 1483 of 22 May 2003. Under this resolution some of the general sanctions were replaced by specific restrictions relating, for example, to the trade in property belonging to the cultural heritage of Iraq. The aim of these restrictions is to facilitate the safe return of such property.

The Council of the European Union adopted the resolutions of the Security Council virtually intact. For this purpose the Council introduced a regulation providing for a comprehensive embargo in keeping with the above resolutions of the Security Council (Council Regulation (EC) No. 2465/96 of 17 December 1996; OJ EC L337). This was later repealed by Regulation (EC) No. 1210/2003 of 7 July 2003; OJ EC L169. The latter regulation also introduced provisions closely mirroring the specific restrictions adopted by the Security Council on the trade in the cultural heritage of Iraq. The precise categories of cultural objects concerned were recorded in an annex, which was identical to an annex to Resolution 1483 of the Security Council. The annex contains a much more specific list of cultural objects than either the Convention or the Protocol. What is also striking is that the annex indicates in respect of almost every category of cultural objects how old they should be in order to qualify as cultural objects within the meaning of the Regulation of 7 July 2003. These ages range from at least 50 years to at least 200 years. In summary, the Regulation of 7 July 2003 has its own definition of the term cultural property.

Pursuant to the Regulation of 7 July 2003, the Minister of Foreign Affairs adopted the Iraq Sanctions Order 2004 II. The Iraq Sanctions Order 2003 II included the prohibitions introduced in the Regulation of 7 July 2003. The statutory basis for the Iraq Sanctions Order 2004 II was the Sanctions Act 1977. Breaches of the rules laid down by or under the Sanctions Act 1977, including therefore contraventions of the prohibitions of the Iraq Sanctions Order 2003 II, are classified in the Economic Offences Act as a serious offence (*misdrif*) in so far as the acts are intentional and as a minor offence (*overtreding*) in all other cases.

The underlying premise of the Regulation of 7 July 2003 and, in consequence, the Iraq Sanctions Order 2004 II differs from that of the Protocol and the present Bill. As far as cultural property is concerned, the former contain only prohibitions. The recitals in the EC Regulation state that the objective of the specific restrictions on the trade in goods

belonging to Iraq's cultural heritage is to facilitate the safe return of those goods. Unlike the Protocol, the Regulation of 7 July 2003 does not contain an obligation to introduce rules on the taking into custody of cultural property, the return of cultural property wrongly exported from previously occupied territory and the payment of an indemnity to persons who have acquired cultural property in good faith and are required to surrender such property. This explains the differences between the present Bill and the Iraq Sanctions Order 2004 II.

13. Practicability and enforceability

The Bill will have some consequences for the administrative burden of the public sector. Enforcing the provisions of the legislation will involve an extra burden (exercise of supervision, taking property into custody and conduct of legal proceedings for return). The Bill may thus result in some increase in the duties of the Cultural Heritage Inspectorate, Customs and the judiciary.

As far as the enforceability of the legislation is concerned the following points can be made. As explained in part 6 above, it was decided that the criminal law should not be used for enforcement of this legislation as a system of enforcement under private and administrative law would be sufficient. The system of enforcement under private law takes place before the civil courts. This was dealt with in parts 8-10 above. The system of enforcement under administrative law requires further explanation in so far as it concerns the exercise of supervision. As far as taking into custody is concerned reference should be made to part 7 above. Supervision means supervision of compliance, as referred to in part 5.2 of the General Administrative Law Act. A consequence of the use of the term 'supervising' in section 8 of the Bill is that part 5.2 of the General Administrative Law Act (sections 5:11 to 5:20) is applicable.

Supervision consists of the activities involved in checking compliance with the rules. The supervisory authority may exercise its supervisory powers only in so far as this is reasonably necessary for performance of its duties. These powers concern, in particular, gaining entry to buildings, demanding information, inspecting business data and documents, and enforcing the duty to cooperate, as well as ascertaining whether the prohibition has been contravened. It should be noted in this connection that these

activities cannot be said to constitute an investigation within the meaning of the Code of Criminal Procedure. The instrument of investigation can be used only in the field of criminal law. As explained in part 6 above, contravention of the prohibition contained in the Bill does not carry a criminal sanction.

If it is concluded on the basis of the supervision that the prohibition contained in section 2 has been contravened, the cultural property in question will be taken into custody (see also part 7 above).

The bodies responsible for supervision are Customs and the Cultural Heritage Inspectorate (section 8). Agreements will be made between Customs and the Cultural Heritage Inspectorate to ensure that the supervision is as effective as possible. These agreements will amend the Framework Agreement on the supervision of the importation and exportation of cultural property concluded between the Minister of Finance and the State Secretary for Finance on 4 July 2000.

The practical arrangements for enforcement are as follows. If cultural property which may possibly come within the ambit of the legislation is discovered during the course of supervision conducted by one of the agencies responsible for enforcement, namely the Cultural Heritage Inspectorate or Customs, it will be decided whether it is necessary for the property to be taken into custody by the Minister. If Customs encounters such goods, it will postpone the process of verification (i.e. the examination of the customs declaration, the attached documents and the goods themselves), contact the Cultural Heritage Inspectorate and not release the goods to the person filing the customs declaration until the Inspectorate has completed its work in connection with the goods concerned. Finally, the Cultural Heritage Inspectorate will advise the Minister on whether there are grounds for taking the property into custody. If such grounds do exist, it will also generally take the property into custody on behalf of the Minister. Before giving its advice the Inspectorate may seek expert advice and should, if possible, contact the authorities of the occupied territory if this has not already been done. If the cultural property has already been imported into the Netherlands, the Minister is entitled to take it into custody only if a request has been received from the authorities of the occupied territory clearly describing the individual objects concerned or if there is a reasonable expectation that such a request will be received from these authorities. This is a duty

which may involve all the officials referred to in section 8. Here too, Customs will have to contact the Cultural Heritage Inspectorate if it discovers cultural objects. This is with a view to enabling the Inspectorate to carry out its enforcement duties and dispose of the case.

14. Financial consequences

The financial consequences of the Bill are hard to predict, except in so far as the administrative expenses are concerned (i.e. a slight increase). However, it is possible to make some observations of a more general nature about these consequences. As indicated above, provisions must be included in Dutch legislation to allow for the forcible surrender of cultural property taken from occupied territory (section 3). As also explained above, the Netherlands can fulfil its obligation to return such goods only if it introduces the possibility of bringing proceedings for return (section 8 and section 9, conclusion). Such proceedings for return may in some cases necessitate reimbursement of loss. A distinction should be made in this connection between cases in which ownership of the cultural property concerned has been acquired and other cases. Where property of which ownership has been acquired has to be returned, indemnification may be paid. In other cases fair compensation may perhaps be awarded (section 9).

No cases of reimbursement of loss have yet occurred. In the period during which the Protocol has been in force for the Netherlands (1959-2002) the Protocol has been invoked on only one occasion. This concerned the request of the Cypriot authorities for the return of four icons, as discussed in part 3 above.

Although the financial consequences of the Bill cannot be gauged in advance, it would seem safe to conclude on the basis of the above that the costs entailed by the Bill can be met within the existing budgets. The following can also be added in this connection. If cultural property is discovered which is likely to have come from occupied or previously occupied territory, the obvious course of action would be to contact the competent authorities of that territory. A decision can then be taken after consultation with these authorities on whether the cultural property should actually be taken into custody and returned to these authorities, if necessary after legal proceedings for their return. It would also be logical to try to come to an understanding with the authorities of the

occupying state about its obligations under treaty law to indemnify possessors who acquired the property in good faith. Basically, this will involve the payment of compensation by this state to the Netherlands for any sum awarded to the possessor as reimbursement. In normal circumstances, it would therefore be possible to ascertain in advance whether or not the Netherlands will be able to recover the sum paid out as compensation. If, despite all precautions, it transpires that a reimbursement awarded by the Netherlands will not be compensated by the occupying state, this will be covered by the budget of the government departments most closely involved.

II. EXPLANATORY NOTES ON INDIVIDUAL SECTIONS

Section 1

[Paragraph explaining why the Dutch term for cultural property has changed ('culturele goederen' replaced by 'cultuurgoederen').]

For a more detailed explanation of the terms 'cultural property' and 'occupied territory', reference should be made to part 4 of the general part of this Explanatory Memorandum.

Section 2

The meaning of the prohibition in this section is discussed in parts 6 and 9 of the general part of this Explanatory Memorandum.

Section 3

Section 3 deals with the implementation of article I.2 of the Protocol, which provides that each of the contracting parties undertakes to take into custody cultural property imported into its territory either directly or indirectly from any occupied territory. Subsection 2 of section 3 confers an additional power on the Minister. As already explained in part 5 of the general part of this Explanatory Memorandum, if the Protocol is to be properly applied it would be hard to do without such a power. For an explanation of the obligation to take property into custody and how this is implemented, reference should be made to part 7 of the general part of this Explanatory Memorandum.

Section 4

Subsection 1

Subsection 1 provides that the Minister should record his decision to take property into custody in writing and that this written decision constitutes an administrative decision. For the significance of this, reference should be made to part 7 of the general part of this Explanatory Memorandum.

Subsection 2

Subsection 2 (a) refers to 'the authorities of the occupied territory concerned'. This phrase is taken from article I.2 of the Protocol. The precise identity of the authorities is not specified in the Protocol. It is possible that they are the authorities of the previously occupied territory. But it is equally possible that they are the authorities of the occupied territory. The wording of subsection 2 (a) allows both interpretations.

The provisions of (b), (c) and (d) of subsection 2 have been included for the following reasons. First of all, it is not always known in advance whether the persons for whom the notification is intended are interested parties within the meaning of the General Administrative Law Act (see also section 3:41, subsection 2, of the General Administrative Law Act). Second, there must be no doubt as to the identity of the persons covered by the duty of notification. The duty applies in respect of all those persons who may be connected in any way with the cultural property prior to its being taken into custody (the owner, beneficial owners and the holder). The care which must be exercised when giving notice of the custody may mean that it is desirable where appropriate to give notice of the administrative decision not only to the persons referred to in subsection 2 (b), (c) and (d) but also to a wider range of persons. In such cases the administrative decision may naturally also be published in, for example, the Government Gazette or a national trade journal or both.

Subsection 3

The provision in subsection 3 concerns urgent cases and resembles section 5:24, subsection 6, of the General Administrative Law Act, which concerns notice of enforcement action by an administrative authority.

Section 5

This provision regulates the costs of taking property into custody. Although section 5:25 of the General Administrative Law Act, which regulates the costs of taking enforcement action, was taken into account, a different solution had to be chosen here owing to the nature of the present case. The basic rule of section 5 is that the Minister is entitled, in appropriate cases, to charge all or part of the costs of the administrative decision to the person who has contravened the prohibition in section 2. This is the possessor or holder of the cultural property that must be taken into custody.

Taking property into custody is a provisional measure pending a decision on any proceedings for return, the outcome of which is not known in advance. Nor is the duration of the custody known in advance. If the proceedings for return are successful in due course and it is established that the person deprived of the custody does not fulfil the requirements of section 7, subsection 3, there will be grounds for charging the costs of custody to him. However, there is no reason to charge these costs to him if he is entitled to indemnification or fair compensation under section 7, subsection 3. Nor is there any reason to make a decision as to costs if the Minister ultimately decides against returning the property, for example because the authorities of the occupied or previously occupied territory do not indicate that they wish the property to be returned or because they fail to provide sufficient information or evidence. See section 6 (c) and (d).

When property is taken into custody it is usually therefore still completely unclear whether there will be reason to charge the costs of custody to a person who has contravened section 2. Similarly, it is also impossible at that time to gauge the extent of the costs, since this will largely be determined by the duration of the custody. This is in turn partly dependent on the question of the extent to which the Minister considers urgency to be necessary in the given circumstances. It should be noted here that the

legal proceedings referred to in section 7 are not subject to a time limit. All of this means that, unlike the case of enforcement action by an administrative authority, as regulated in section 5:25 of the General Administrative Law Act, the basic rule here cannot be that the costs should be borne by the person contravening the prohibition. The present section 5 therefore merely provides only in subsection 1 that these costs may be charged *where appropriate* to the person in contravention.

Subsection 2 provides in any event that no costs are payable in the cases referred to in (a) and (b). Subsection 3 adds that if the Minister has already made a decision as to costs in such cases, he must revoke it. The decision as to costs should state the amount to be charged (see section 5, subsection 4, first sentence).

'Costs' means in the first place the costs of the custody itself, i.e. the costs involved in actually taking the cultural property into custody and storing it. According to the second sentence of subsection 4 of section 5, costs also include the costs of making the preparations for the property to be taken into custody. The extent of these costs should naturally be based on the actual situation and therefore be capable of being substantiated, as should the decision that the costs will be charged to the person in contravention.

Subsection 5 provides for the possibility of collecting the costs of collection by serving a warrant of execution if a request for payment is not met voluntarily. However, account should also be taken of subsection 2. As long as the situation referred to in subsection 2 (a) can still occur and hence the administrative decision can still be revoked, no enforcement should take place. This is regulated in the second sentence of subsection 6 of section 5. No express mention is made there of the case envisaged in section 2 (b); as the Minister can still always decide against returning the property this possibility cannot theoretically be excluded. It can be left to the Minister to decide whether he wishes to proceed with the enforcement, even if he has to pay back what has been collected if he changes his mind about returning the property.

Under subsection 7 an action may be brought to have a warrant of execution set aside. Such an action is brought before the civil courts. An action to have a warrant of execution set aside suspends the operation of the warrant (subsection 8, first sentence).

It follows that where such an action is brought a warrant of execution need not be complied with for the time being. However, the civil courts may lift the suspension at the request of the Minister. In such a case, the warrant of execution may be enforced pending the action (subsection 8, second sentence). Subsections 5-8 are for the most part modelled on the provisions of section 5:26 of the General Administrative Law Act. Here too, however, account must be taken of the individual character of the present subject matter.

Section 6

Custody of cultural objects always comes to an end. Section 6 summarises the grounds for termination of custody. Points (a) to (c) of section 6 set out the most obvious reasons. To start with, custody ends if a legal claim for the return of the relevant cultural property is granted (point a) or if the proceedings are dismissed (point b). Custody also ends if the authorities of an occupied territory withdraw a request submitted by them for cultural property to be taken into custody or state that they will not submit such a request (point c). Finally, termination of custody is also possible for reasons other than those referred to above (point d). This residual category could include, for example, a situation in which the Minister takes cultural property into custody of his own volition, but no request is subsequently received for return from the authorities of the occupied or previously occupied territory and no proceedings for return are brought by the Minister.

Subsection 2 specifies to whom the property should be transferred if the custody ends because the proceedings for return are dropped or because the Minister himself decides against returning the property, for example because no request to this effect is received from the authorities of the occupied or previously occupied territories. In principle, the cultural property is returned to the person from whom it was taken into custody. Generally, this will also be the person entitled to it. It is also conceivable that the property may have been removed not from the possession of the person entitled to it but from someone who had it in his possession illegally, such as a thief or receiver of stolen goods. Cultural property may also have been transferred to someone else in the meantime. In that case the Minister may return the property to the person reasonably deemed to be legally entitled to it. The words 'can reasonably be designated' prevents a situation in which the Minister is called on to decide private law issues of legal

entitlement on the merits. After the Minister's provisional ruling the civil courts can still decide differently.

Section 7

Subsection 1

It is evident from the words 'lodge a claim in legal proceedings' in subsection 1 that the proceedings should be instituted by writ of summons before the court that has jurisdiction in accordance with the rules of the Code of Civil Procedure. In so far as this would not be contrary to the special nature of the present legislation, the provisions of that Code also apply in the usual way to other aspects of the proceedings, for example right of appeal, force of res judicata, counterclaim, consolidation of actions, intervention and execution.

Subsection 2

Articles 86, 88 (1) and 99 (1) of Book 3 of the Civil Code as referred to in subsection 2 protect a person who acquires property in good faith. This protection applies not only to the first person to acquire the property but also to his successors in title. They may include, for example, the insurer of a person from whom the property has been stolen. A situation may occur in which an insurer arranges for stolen property to be transferred to it pursuant to article 3:95 of the Civil Code (i.e. without obtaining possession as referred to in article 3:90 of the Civil Code) in order to be able to recoup something of the payment it has made under the policy. Article 88 may also apply to a transfer of this kind. To ensure that the Minister's claim under the present Bill cannot be frustrated by the operation of articles 86 and 88, subsection 2 of section 7 stipulates that these provisions cannot be raised as a defence against him.

Subsections 3, 4 and 5

For an explanation of these subsections reference should be made to parts 8-10 of the general part of this Explanatory Memorandum.

Section 8

For a general explanation of the enforceability of the provisions of this Bill reference should be made to part 13 of the general part of this Explanatory Memorandum.

Section 9

Points (a) and (b)

Points (a) and (b) correspond to sections 17 and 18 respectively of the Cultural Heritage Preservation Act.

Point (a)

Entry into a dwelling without the consent of the occupant is a breach of article 8 (1) ECHR, which provides that everyone has the right to respect for his private and family life, his home and his correspondence. Article 8 (2) ECHR provides that interference with this right is permitted only subject to certain conditions.

First, the interference must serve one of the legitimate aims described in article 8 (2) ECHR. The Bill fulfils two of these aims. The first is the protection of possessors in cases where cultural property has been illicitly exported during an armed conflict. In addition, the Bill is intended to prevent disorder. In the view of the legislator, an important aim of the prohibition is to convey the message that acts of this kind are not tolerated in the Netherlands, partly in order to enforce the international legal order. The prohibition in the Bill is therefore partly intended to prevent disorders at the international level, which include importing into the Netherlands cultural property illicitly removed from occupied territories, and having such property in one's possession in the Netherlands, contrary to international treaty obligations.

Second, the provisions of the Bill meet the requirement that an interference with the right to protection is possible only in substantive legislation or Act of Parliament. The Bill also fulfils the third requirement in article 8 (2) ECHR, namely that the interference with the fundamental right must be necessary in a democratic society. From the perspective of

preserving cultural heritage, measures to combat the illicit importation into the Netherlands of cultural property taken from occupied territory or having such property in one's possession in the Netherlands serve an urgent social objective. Point (a) also meets various other substantive requirements imposed by the European Court of Human Rights (ECtHR). For example, the ECtHR requires that the means should be in proportion to the ends. Entering a dwelling without the consent of the owner on the basis of a written authorisation, as referred to in section 2 of the General Act on Entry into Dwellings, is an instrument that is in proportion to the objective, namely to provide effective protection for cultural property removed from occupied territories.

Point (a) also meets the subsidiarity criterion imposed by the ECtHR. In this case, there are no other suitable means that would cause less interference to private life. To ascertain whether dwellings contain the cultural property concerned, the competent authorities must be able to enter and search them.

Point (c)

Section 5:17 of the General Administrative Law Act confers on supervisory authorities the power to demand to inspect business information and documents and to make copies of them. If it is not possible to make copies on the spot, the information and documents may be taken away for a short time so that copies may be made elsewhere. A supervisory activity in which business information and documents play a role may involve so much work that it cannot be completed within a day. In such a case point (a) provides that areas may be sealed off in order to continue the investigation the following day. Objects such as cupboards and computers can also be sealed. This sometimes causes less inconvenience than sealing off the entire area in which these objects are located. Breaking a seal is a criminal offence under article 199 of the Criminal Code.

Point (d)

Point (d) confers the power to use police assistance in order to obtain information and documents which the supervisory authority wishes to inspect and of which it wishes to make copies pursuant to section 5:17 of the General Administrative Law Act. This means the cupboards, drawers and so forth which may contain documents may, if necessary, be forcibly opened. Computer files too may be forcibly inspected.

Section 10

This section confers the powers referred to in chapter 2 (Inspections) and chapter 3 (General Provisions) of the Customs Act on the officials of Customs. In this way, these officials can exercise their powers under the Customs Act in the context of the Cultural Property Originating from Occupied Territory (Return) Act. These powers are granted for an obvious reason, namely that the officials concerned are ideally equipped to carry out inspections of cross-border goods movements.

Section 10 declares that chapters 2 and 3 of the Customs Act are applicable *mutatis mutandis*, with the exception of section 10 of chapter 2. Section 10 of the Customs Act provides that central government, public bodies and legal persons that have acquired legal personality by or pursuant to a special Act of Parliament are obliged to provide information and data free of charge if so requested by Customs. This provision can be disregarded here because the information that is requested comes almost exclusively from bodies that already provide information free of charge either of their own volition (the Cultural Heritage Inspectorate) or pursuant to further agreements made in the Framework Agreement between the Minister and the State Secretary for Finance about supervision of the importation and exportation of cultural objects (museums and universities).

Section 11

Part A

The addition to article 238, paragraph 4, of Book 3 of the Civil Code, contains a necessary supplement to subsection 2 of section 7 in the case of pledge. Under this provision a pledgee of cultural property removed from occupied territory may not invoke the protection of article 3:238, paragraphs 1 to 3, of the Civil Code. However, if the possessor/pledgor receives fair compensation, the pledgee may be entitled to all or part of it in accordance with article 3:229 of the Civil Code.

Part B

In keeping with the derogation from articles 3:86, 3:88 and 3:238 of the Civil Code, the addition of a third paragraph to article 3:291 of that Code makes clear that even the right of lien cannot frustrate a claim lodged in proceedings by the Minister. However, to recover his claim the lien holder may garnish the compensation payable to the owner that is in the possession of the State.

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J.P.H. Donner
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