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Protection and Preservation of Cultural Heritage in the Netherlands in the 21st Century

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Table of Contents

1. Introduction	2
2. General Issues	3
2.1. The Categories of Cultural Heritage under Dutch Law	3
2.2. Overview of the Most Relevant Legal Instruments for the Protection of Cultural Heritage in the Netherlands	5
2.3. Coverage Groups of Heritage	7
2.4. Community-oriented Approach versus Separate Protective Realms for Tangible and Intangible Cultural Heritage	7
2.5. Categories of Cultural Heritage – Concepts / Definitions	7
2.6. Communities as Holders of Rights over Elements of Cultural Property?	10
3. Tangible Cultural Heritage	11
3.1. Immovables	11
3.2. Movables	28
4. Intangible Cultural Heritage	51
4.1. Safeguarding Intangible Cultural Heritage	51
4.2. Misappropriation of Traditions	56

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1. Introduction

The academic analysis of the protection of cultural heritage is currently experiencing a paradigm shift from a compartmentalised approach focusing on physical protection of tangible cultural objects towards a more integrated approach of dealing with cultural heritage. The protection of cultural property emerged as an academic field of interest only in the 1970s and initially focused on studying existing legal instruments for the protection of cultural property, the geo-political background against which they had emerged, as well as the drafting of new national and international legal instruments. This traditional or classical approach to analysing the protection of cultural property is marked by a strict compartmentalisation employing a number of dichotomies: source nation vs. market nation;¹ the protection of cultural property in times of war vs. times of peace; the restitution of cultural objects looted in times of war vs. the return of cultural objects (illegally) removed from a country, the protection of immovable cultural property vs. movable cultural property and the protection of tangible vs. intangible cultural heritage.

However, due to the geo-political changes in the world, non-Western countries are gaining a greater role and relevance regarding the protection of cultural heritage. Due to the interest and influence of non-Western countries, the approach to the protection of cultural heritage is seeking greater integration of formerly isolated subjects. One of the results is the greater relevance accorded to intangible cultural heritage. Different from Western countries, which traditionally focus on the protection of tangible cultural objects, Asian and African countries pay more regard to protecting intangible cultural heritage.² A second characteristic of the non-Western approach to protecting cultural heritage is the greater relevance accorded to position, role and involvement of communities. This is only logic as intangible cultural heritage can only exist with human interaction.

Due to the interest and influence of non-Western countries, the approach to the protection of cultural heritage is seeking greater integration of formerly isolated subjects and considers the protection of cultural heritage as a duty and privilege of communities rather than being the task of nation states only.³

A number of UNESCO instruments are already based upon this new approach: One of the earliest instruments proposing a community-oriented integrated approach to cultural heritage protection is the 1994 'Yamato Declaration on Integrated Approaches for Safeguarding Tangible and Intangible Cultural Heritage'. The Declaration highlights the importance of safeguarding both tangible and intangible heritage in their own right, taking

¹ Merryman J.H., Two ways of thinking about cultural property, *The American Journal of International Law*, 1986.

² See, e.g., the following instruments which are marked by a more integral approach to protecting cultural heritage in that they apply both to tangible and intangible cultural heritage: ASEAN Declaration on Cultural Heritage Bangkok, Thailand, 24-25 July 2000 (available online at: <http://www.aseansec.org/641.htm> Last visited 1 May 2008) or the Cultural Charter Africa 1976 (available online at: http://portal.unesco.org/education/en/files/13353/10444428880CULTURAL_CHARTER_FOR_AFRICA.doc/CULTURAL%2BCHARTER%2BFOR%2BAFRICA.doc Last visited 1 May 2008).

³ One of the earliest instruments proposing a community-oriented integrated approach to cultural heritage protection is the 1994 Yamato Declaration. The Declaration highlights the importance of safeguarding both tangible and intangible heritage in their own right, taking into account their interdependence but also their distinctive characters. The Declaration is available online at: http://portal.unesco.org/culture/en/ev.php-URL_ID=23863&URL_DO=DO_TOPIC&URL_SECTION=201.html (Last visited 1 May 2008).

into account their interdependence but also their distinctive characters.⁴ Also, the Convention for the Safeguarding of the Intangible Cultural Heritage recognises the interdependence between intangible and tangible cultural heritage.⁵

Except for the Yamato Declaration and the Convention on the Protection of Intangible Cultural Heritage, the international legal instruments dealing with the protection of cultural heritage are based upon the classical compartmentalised approach of protecting the cultural heritage. Before the ongoing shift in the perception of what constitutes cultural heritage can work through in the legal instruments, the current state of protection first has to be studied from the integrated and community-oriented approach.

The present report on the protection of cultural heritage in the Netherlands is the outcome of one of the first projects studying national protection regimes for cultural heritage from a more integrated and community-oriented approach. It has been prepared for the upcoming Conference of the International Academy of Comparative Law on “The impact of Uniform Law in National Law – Limits and Possibilities”.⁶ One of the Conference’s sessions is dedicated to the protection and preservation of cultural heritage. In order to allow for a “better understanding of the changing nature of the protection of cultural heritage”, the session’s General Reporter Professor Kono, commissioned reports on the national protection of cultural heritage from various countries. In order to allow for the greatest comparability between the country reports, a questionnaire consisting of some thirty questions was prepared by the General Reporter and was made available to the national reporters. The questions seek to bring forward integration aspects, as well as the degree of community involvement in the protection of cultural heritage in the different countries subject to analysis.

But for these introductory remarks, followed by a short introduction to the Dutch legal system, as well as an additional overview of the international and national instruments that are relevant for the protection of cultural heritage in the Netherlands, this report follows the questionnaire.⁷ The questionnaire opened with five questions on the general character of the national system of protecting cultural heritage, the answer to which relied on the findings to the subsequent more specific questions. In following the structure and focus of the questionnaire the report will be of greatest use to other national reporters, respectively scholars interested in a comparative analysis of the protection of cultural heritage.

2. General Issues

2.1. The Categories of Cultural Heritage under Dutch Law

If one understands the classical method of protecting cultural heritage as the co-existence of several isolated protection regimes applicable to only one category of cultural heritage (either tangible or intangible cultural heritage, movable or immovable) or one specific context of cultural heritage (either protection in times of war or in times of peace, either cultural heritage located on land or underwater, either legally or illegally acquired) the protection of cultural

⁴ Yamato Declaration on Integrated Approaches for Safeguarding Tangible and Intangible Cultural Heritage’. The Declaration is available online at: http://portal.unesco.org/culture/en/ev.php-URL_ID=23863&URL_DO=DO_TOPIC&URL_SECTION=201.html (Last visited 1 May 2008).

⁵ See Article 2(1) of the Convention. The Convention is available online at: <http://www.unesco.org/culture/ich/index.php?pg=00006> (Last visited 1 May 2008).

⁶ Mexico City 13.-15.11.2008 “The impact of Uniform Law in National Law. Limits and Possibilities”. See for more information on the programme: <http://www.congresointernacionalderechouniforme.com/lang1/program.html>.

⁷ Since submitting the questionnaire to Professor Kono in spring 2008, some minor details have been changed or added in the text.

heritage available under Dutch law is to a great extent structured along these classical lines. In the following paragraphs, the categorisation of cultural heritage under Dutch law will be sketched. Subsequently, an overview of the relevant international conventions, European instruments and national laws will be given.

In the first place, the Dutch legal system strictly distinguishes between the protection of intangible cultural heritage on the one hand and the protection of tangible cultural heritage (immovables and movables) on the other. While national laws have been introduced to protect objects that qualify as Dutch cultural heritage against destruction or removal from Dutch territory, the protection of intangible cultural heritage is not law-based. On the contrary, while both immovable and movable cultural heritage is essentially protected by designation as Dutch cultural heritage and entry into national inventories, such an approach is rejected for the protection of intangible cultural heritage. Instead, the Dutch system protects intangible cultural heritage indirectly by supporting museums and research institutes dedicated to studying and imparting intangible cultural heritage.

Within the category of tangible cultural heritage, the Dutch legal system consists of two separate regimes for the protection of immovable and movable cultural heritage.⁸ The divergence between the two regimes goes to such lengths that it leads to problems in the protection of one particular category of cultural heritage: collections of movable cultural-historical objects that are in themselves not relevant enough to enjoy protection under the Dutch Act on the protection of movable cultural heritage, but that possess cultural-historical relevance if preserved in their original location. These collections that derive their relevance from their *in situ* preservation are referred to as ensembles.⁹ The difficulties in protecting ensembles has repeatedly been criticised by actors involved in the protection of cultural heritage and is a direct consequence of the strict separation between the protective regimes for movable objects on the one hand and immovables on the other.¹⁰

There is one exception to the organisation of the protection of Dutch cultural heritage in separate regimes and in accordance with the classical lines: in as far as the protection of underwater cultural heritage is concerned, both immovable and movable, no separate regime exists. Instead, the protection of underwater cultural heritage relies on the same act that provides for the protection of immovable cultural heritage on the mainland (and in the ground). Further to the separation of the protective regimes according to the cultural object at hand, with the exception of underwater cultural heritage, the Dutch legal system also differs between the protection of cultural objects in times of war and in times of peace.

8 Cf.: Vlies I.C.v.d., *De kunst en het recht: over algemene publiekrechtelijke regels met betrekking tot kunst*, 2005, p. 55.

9 Werkgroep Onroerend/roerend, *Van Object naar Samenhang - De instandhouding van ensembles van onroerend en roerend cultureel erfgoed*, 2004.

10 Ibid., p. 9; Raad voor Cultuur, Letter to State Secretary of Culture with subject "criteria WBC" Reference wbc-98.7435/1 1998.

2.2. Overview of the Most Relevant Legal Instruments for the Protection of Cultural Heritage in the Netherlands¹¹

2.2.1. International Standard-setting Instruments to which the Netherlands is a State Party

2.2.1.1. Protection of Cultural Heritage in Times of War

- Convention (IV) respecting the Laws and Customs of War on Land (The Hague, 18 October 1907) – ratified by the Netherlands on 27.11.1909.
- Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) – ratified by the Netherlands 1958.¹²
- (First) Protocol for the Protection of Cultural Property in the Event of Armed Conflict (1954) ratified by the Netherlands 1958.¹³
- (Second) Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999) acceptance by the Netherlands in 2007.¹⁴
- (Second) Protocol for the Protection of Cultural Property in the Event of Armed Conflict (1999) – Ratified by the Netherlands in 2007¹⁵

2.2.1.2. Protection of Cultural Heritage in Times of Peace

- Berne Convention for the Protection of Literary and Artistic Works November 1, 1912 – ratified by the Netherlands in two steps in 1974 and 1985¹⁶
- 1972 UNESCO Convention on the Protection of World Cultural and Natural Heritage – Accession by the Netherlands in 1992.¹⁷

¹¹ All legal instruments are available on the Internet. Dutch statues and regulations can be accessed via: www.wetten.nl. The relevant conventions, EC Regulations and Directive, and Dutch Acts and decrees are also available in paper version: Klomp R.J.Q. (ed.), *Kunst en Recht 2007/2010*, (2007) (in Dutch).

¹² Wet van 16 juli 1958 Stb. 1985, 356, houdende goedkeuring van het op 14 mei 1954 te 's- Gravenhage ondertekende Verdrag (...) en van het op 14 mei 1954 ondertekende Protocol.

¹³ Wet van 16 juli 1958 Stb. 1985, 356, houdende goedkeuring van het op 14 mei 1954 te 's- Gravenhage ondertekende Verdrag (...) en van het op 14 mei 1954 ondertekende Protocol.

¹⁴ See: Letter of the Minister of Foreign Affairs dated 21 November 2006, Tweede Protocol bij het Verdrag van 's-Gravenhage van 1954 inzake de bescherming van culturele goederen in geval van een gewapend conflict; 's-Gravenhage, 26 maart 1999 (Trb. 2005, 279), 30 894, No. 1, p. 7.

¹⁵ See: Letter of the Minister of Foreign Affairs dated 21 November 2006, Tweede Protocol bij het Verdrag van 's-Gravenhage van 1954 inzake de bescherming van culturele goederen in geval van een gewapend conflict; 's-Gravenhage, 26 maart 1999 (Trb. 2005, 279), 30 894, No. 1.

¹⁶ Ratification of Articles 22-38 both for the Dutch territory in Europe, as well as the Netherlands Antilles and Aruba on 9 October 1974. Ratification of Articles 1-21 for the Dutch territory in Europe followed on 24 October 1985.

¹⁷ The Netherlands ratified the convention in 1992 and since then nominated six sites as world heritage. No natural sites have so far been designated but in January 2008 the Government of the Netherlands and of Germany submitted a joint application for the nomination of the Wadden Sea as World Heritage. See for the current list and sites: <http://www.werelderfgoed.nl/pages/en.php>. See on the nomination of the Wadden Sea: <http://www.waddenzeewerelderfgoed.nl/index.php?id=45>. See for an analysis of the selection and designation procedure in the Netherlands: Aa B.J.M.v.d., *Preserving the heritage of humanity? Obtaining world heritage status and the impacts of listing*, 2005, pp. 46-48. Available online at: <http://dissertations.ub.rug.nl/FILES/faculties/rw/2005/b.j.m.van.der.aa/c3.pdf>.

2.2.2. International Standard-setting Instruments whose Ratification and Implementation Are Pending (Both Relevant for the Protection of Cultural Heritage in Times of Peace)

- UNESCO Convention on Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property (1970)¹⁸
- UNESCO Convention on the protection of the diversity of cultural contents and artistic expressions.¹⁹

2.2.3. Instruments of the Council of Europe on the Protection of Cultural Heritage in Times of Peace

- Convention for the Protection of the Architectural Heritage (Granada, 1985) – The Netherlands is state party since 1994²⁰
- Convention for the Protection of the Archaeological Heritage (revised) (Valletta, 1992) – ratified by the Netherlands in 1998.²¹
- European Charter for Regional or Minority Languages Strasbourg, 5.XI.1992 – ratified by the Netherlands in 1996

2.2.4. European Community instruments on the protection of cultural heritage in times of peace

- Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State.
- Council Regulation (EEC) N° 3911/92 of 9 December 1992 on the export of cultural goods.
- Council Regulation (EC) No 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation (EC) No 2465/96²²

2.2.5. The National Rules Discussed in this Report (with English Translation)²³

2.2.5.1. Immovables Tangible Cultural Heritage

- *Monumentenwet* – Monuments Act²⁴

¹⁸ The Act ratifying and implementing the Unesco Convention has been passed by the House of Representatives and is currently pending confirmation by the Senate. The current state of affairs can be followed online at: <http://www.minocw.nl/actueel/wetgevingskalenders/43/Goedkeuringswet-UNESCOoverdrag-1970-31-256.html> (last visited 18.09.08).

¹⁹ See: <http://www.minocw.nl/documenten/31099a1.pdf> for a letter by the Minister of Education, Culture, and Science setting out the Dutch attitude concerning the convention and steps to be taken in ratification and implementation.

²⁰ Ratified by Wet van 25 November 1993, houdende goedkeuring van de op 3 oktober 1985 te Granada.

²¹ Ratified by 26 February 1998 Stb 1998, 196.

²² Based on restrictions from UN Security Council Resolution 1483.

²³ See for a more extended list (in Dutch):

http://www.minocw.nl/documenten/Overzicht_wetten_regelgeving_cultuur_media.pdf. Also relevant for the protection of cultural objects are the *Algemene Wet Bestuursrecht* (AWB) – the General Administrative Law Act – as well as the *Wetboek van Burgerlijke Rechtsvordering* – Code of Civil Procedure (CCP).

²⁴ *Monumentenwet* 1988, Stb. 1988, 638. In 2008 the Monuments Act was amended by the Act on the Management and Care of Archeological Monuments to cater for the implementation of the Valletta Convention (Wet op de Archeologische Monumentenzorg van 21 december 2006 tot wijziging van de *Monumentenwet* 1988 en enkele andere wetten ten behoeve van de archeologische monumentenzorg mede in verband met de implementatie van het Verdrag van Valletta (Wet op de archeologische monumentenzorg).

2.2.5.2. Movable Tangible Cultural Heritage

- *Wet tot behoud van cultuurbezit*²⁵ – Cultural Heritage Preservation Act (in short: CHP Act)
- *Sanctieregeling Irak 2004 II* – Sanction Order Iraq²⁶
- *Wet van 8 maart 2007, houdende regels over inbewaringneming en instelling van een vordering tot teruggave van cultuurgoederen afkomstig uit een tijdens een gewapend conflict bezet gebied (Wet tot teruggave cultuurgoederen afkomstig uit bezet gebied)* – Act on the return of cultural objects removed from occupied territories.

2.3. Coverage Groups of Heritage

The Dutch legal system follows the classical categorisation.

2.4. Community-oriented Approach versus Separate Protective Realms for Tangible and Intangible Cultural Heritage

The Dutch legal system does not favour a community-oriented integrated approach but instead handles tangible and intangible cultural heritage separately. The difference in approach goes that far that rather than having two separate legal regimes of protection, the Dutch system on the protection of cultural heritages is marked by a two tier approach in the protection available. Whereas the protection of tangible cultural heritage is essentially based on a number of international and national binding legal instruments, such legal instruments are absent where intangible cultural heritage is concerned. The latter does not mean that intangible heritage is deemed unworthy of protection. Rather, Dutch experts in the field of intangible heritage and policy-making are critical as to whether legal protection, especially the drafting of inventories, would contribute to the protection of intangible heritage. With change being considered one of the characteristics of cultural heritage experts are afraid that protection would do harm to intangible cultural heritage in artificially conserving it. Consequently, whereas tangible cultural heritage is protected by legally binding instruments seeking their preservation and preventing their removal from the Netherlands, the protection of intangible cultural heritage is predominantly a matter of granting subsidies to museums and research institutions studying and raising awareness of the intangible cultural heritage.

2.5. Categories of Cultural Heritage – Concepts / Definitions

The Dutch legal system for the protection of cultural heritage is of rather recent date compared with other European countries.²⁷ The passiveness of the Dutch government was challenged only at the end of the 19th century when Victor de Steurs published his work '*Holland op zijn smalst*' which one might translate as 'Dutch frugality'.²⁸ De Steurs accused the Dutch government of narrow-mindedness and passiveness in respect of actively protecting cultural property. Until then the absence of a Dutch cultural policy was deeply rooted in the

24 Act of 1 February 1984, Stb. 1984 No. 49.

25 Act of 1 February 1984, Stb. 1984 No. 49.

26 Implementing Council Regulation (EC) No 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation (EC) No 2465/96.

27 See on the history of the emergence of national regimes on the protection of tangible cultural heritage: Odendahl K., *Kulturgüterschutz. Entwicklung, Struktur und Dogmatik eines ebenenübergreifenden Normensystems*, 2005, p. 41.

28 Stuers V.E.L.d., *Holland op zijn smalst, De Gids*, 1873.

Dutch attitude. One of reasons that withheld the Dutch government from introducing binding legislation was that it was considered too great an infringement of property rights. While the publication of de Steurs' accuse and his subsequent work as director of the Government Department for the Arts and Sciences that was set up in reaction to his publication marked a turning point in Dutch cultural policy, it would take several more decades until the first binding laws on the protection of cultural heritage would be adopted. In 1905, Molengraaff still explicitly regretted that Dutch private law "left the protection of souvenirs of history and the arts (...) both movable and immovable to the mercy of the owner".²⁹

It was only after the German occupation during the Second World War that the Dutch Government granted financial support to artistic expressions. While the state aid to the arts and culture was initially intended to be of temporary character only, it would not be abandoned anymore.³⁰ In 1961, the Monuments Acts constituted the first national act on the protection of cultural heritage ever adopted. The Cultural Heritage Preservation Act, which followed in 1984, marked the first act on the protection of movable cultural heritage.

Dutch cultural policy more in general, i.e., including support for the performing arts, visual arts etc next to the protection of cultural heritage is based on two principles: on the one hand Dutch cultural policy is still marked by the Dutch aloofness as expressed by Thorbecke,³¹ which allows only for Government interaction that is limited to the creation of (optimal) conditions for cultural expressions. On the other hand, Dutch cultural policy is motivated by the intent to contribute to the realisation of greater political aims. Depending on the actual political climate the aims range from cultivating the citizen, contributing to the latter's refinement or the development of the people more in general, emphasising national awareness or contributing to wellness, education or the awareness and appreciation of a multicultural society.³²

To date, Dutch law grants specific protection to cultural objects of immovable character, as well as of movable character, provided they fulfil the criteria as outlined below that seek to single out those objects of particular relevance for the Dutch cultural heritage from the great mass of cultural objects. As for the category of intangible cultural heritage, whose protection is not legally regulated, a definition as it emerged from academic debate will be given.

²⁹ Molengraaff W.L.P.A., *Enige beschouwingen over de bewaring van gedenkstukken van geschiedenis en kunst in het buitenland en hier te lande, in het bijzonder over de daaromtrent bestaande wettelijke bepalingen*, 1905, p. 1.

³⁰ Smithuijsen C., *et al.*, "The Netherlands", 2005, in Europe/ERICarts C.o. (ed.) *Compendium of Cultural Policies and Trends in Europe, 6th Edition* (available online at: <http://www.culturalpolicies.net/preview/netherlands.php?aid=1> (last visited 26 February 2008), section1: Historical perspective: cultural policies and instruments.

³¹ One of the principles that shaped and still to some extent shapes Dutch cultural policy is the Thorbecke principle. According to this principle named after its author "(...) the government may make no judgement of the science and the arts". Thorbecke, who lived in the 19th century, was one of the most important Dutch politicians. His statement that became known as the Thorbecke principle stems from the time that he was Minister of Internal Affairs. Handelingen Tweede Kamer, 1862/1862, Verslag p. 36. See further on current perception of the Thorbecke principle: Lubina K.R.M., "De cultuurnotaprocedure in analyse. Literatuur over juridisering en regulering rondom de cultuurnotaprocedure", 2004, in Smithuijsen C. / Vlies I.C.v.d. (eds.), *Gepaste Afstand - De 'cultuurnotaprocedure' tussen de kunst, het recht en het openbaar bestuur*.

³² Pots R., *Cultuur, koningen en democraten: Overheid & cultuur in Nederland*, 2000, pp. 419-420.

The concept of immovable cultural heritage is outlined in the Monuments Act.³³ Immovable objects that are granted specific protection are referred to as (protected) monuments. Monuments are defined by the Monuments Act as “objects that have been created at least fifty years ago and that are of public interest due to their beauty, their scientific/academic relevance or to their cultural-historical value” (Article 1(b) sub 1).³⁴ What is striking about the definition is that it does not mention the immovability of an object. Read out of its context, the definition could very well be applied to movable objects. The indistinctness of the article has two reasons, a historical one and a legal-technical one. When the Act was drafted in the 1950s, the need to distinguish immovable from movable property did not exist (yet) in the absence of any rules on the protection of movable cultural heritage.³⁵ Later on, the use of term “object”, rather than a term implying immovability, was confirmed as the act not only applied to monuments in the common parlance but also to archaeological objects for as long as they remain in the ground.³⁶ In order to enjoy protection under the Monuments Act, objects in the ground and above must have been created by men. The Monuments Act does not apply to organic objects.³⁷

Movable cultural objects of national cultural relevance are defined under the Cultural Heritage Preservation Act³⁸ as movable objects of particular cultural-historical or scientific value that must be considered as irreplaceable and indispensable for Dutch cultural heritage (Article 2). The criterion of indispensability is further outlined in the act as fulfilling a symbolic function, a “linking function” or a “reference function”.³⁹ Different from the Monuments Act, the Cultural Heritage Preservation Act does not employ the term “beauty”, nor does it set a minimum time lag that must have passed since an object’s creation.

Different from tangible cultural heritage, Dutch law is quiet on the protection of intangible cultural heritage. While it does protect minority languages, as one form of intangible cultural heritage, Dutch law does not contain a definition or description of the concept of intangible cultural heritage. According to the definition of one academic scholar that has received general support in the academic debate, intangible cultural heritage consists of three components: first, it is something transmittable, ranging from a past performance, via an experience, idea, custom, spatial element, building or artefact, to a set of these. Second, one can only speak of (intangible) cultural heritage provided that a human group exists that is able and ready to recognize these objects as a coherent unit, to transmit and to receive them.

33 In 2008 the Monuments Act was amended by the Act on the Management and Care of Archeological Monuments to cater for the implementation of the Valetta Convention (Wet op de Archeologische Monumentenzorg van 21 december 2006 tot wijziging van de Monumentenwet 1988 en enkele andere wetten ten behoeve van de archeologische monumentenzorg mede in verband met de implementatie van het Verdrag van Valletta (Wet op de archeologische monumentenzorg).

33 Act of 1 February 1984, Stb. 1984 No. 49.

34 Article 1(b) sub 1 reads in Dutch: “In deze wet en de daarop berustende bepalingen wordt verstaan onder monumenten: alle vóór tenminste vijftig jaar vervaardigde zaken welke van algemeen belang zijn wegens hun schoonheid, hun betekenis voor de wetenschap of hun cultuurhistorische waarde”.

35 Kamerstukken II 1959-1960; 4115, no. 5 p. 2. See on the regulation of movable cultural heritage, in particular the introduction of the 1984 Cultural Heritage Preservation Act below at Section 3.2.1.

36 Kamerstukken II 1959-1960; 4115, no. 5 p. 2.

37 Meihuizen Y. / Koelwijn F., *Een monument beheren, onderhouden en handhaven: overzicht van de Monumentenwet en de monumentenzorg voor ambtenaren, architecten en eigenaren*, 2006, p. 27. It should be pointed out that while a park can be designated as a monument under the Act, it is for cultural-historical reasons rather than its esthetic beauty: Kamerstukken II 1986-1987, 19881 nr 3, p. 12-13.

38 Act of 1 February 1984, Stb. 1984 No. 49.

39 Article 2(3).

Third, there must be a set of values linking the object inherited from the past to a future use, in a sense of meaningful continuity or equally meaningful change.⁴⁰

2.6. Communities as Holders of Rights over Elements of Cultural Property?

In order to understand the protection of cultural heritage provided by the Dutch legal system and the role accorded therein to communities, groups or individuals, the relevance of property rights must be taken into account. The Dutch legal system for the protection of cultural heritage is of rather recent date compared with other European countries.⁴¹ The first national act on the protection of cultural heritage was the 1961 Monuments Act. The first act on the protection of movable cultural heritage, the Cultural Heritage Preservation Act, dates only from 1984. One of reasons that withheld the Dutch government from introducing binding legislation earlier was that it was considered too great an infringement of property rights. The respect of property rights is one of the characteristics of the Dutch approach to cultural heritage. While the balance between the relevance of protecting cultural heritage on one hand and of non-interference with property rights on the other, has been tipped to allow for the protection of cultural heritage, tangible cultural heritage is primarily considered someone's property and only in second instance as cultural heritage. Hence, rather than starting with the perception that an object belongs to Dutch national heritage and then looking into whether the legal system has a regime for granting rights over elements of cultural property or heritage to communities, groups or individuals, as stipulated by the question, the Dutch system starts with the recognition of existing property rights but may limit the rights in accordance with the law to cater for the protection of cultural heritage.

The relevance of property rights also works through in respect of the involvement of communities and groups in the protection of Dutch cultural heritage. Only those groups or communities that have legal personality can play an active role in the protection of cultural heritage in the Netherlands. Legal personality is dealt with in Book 2 of the Dutch Civil Code (hereafter DCC). The following legal persons are recognised under Dutch private law: associations, co-operatives, mutual insurance societies, companies limited by shares, private companies, the *societas europaea*, and foundations.⁴² While each of these legal personalities has their own characteristics and specific legal requirements, the following requirements apply to all of them.

The legal person has to be incorporated by an instrument signed by a notary. The deed of incorporation must contain the articles of association. The articles must state the objective of the legal person. The legal person must be registered in the register of commerce.⁴³

Legal persons are equal to natural persons under Dutch patrimonial law, i.e., they can have property rights and obligations. Communities, groups and individuals are therefore involved in the protection of cultural heritage first and foremost as owners rather than as "holders" and it is the general rules of property law, rather than aspects such as "closest cultural link" that determine who is involved in the protection of cultural heritage.

40 Frijhoff W., "Cultural Heritage in the Making: Europe's Past and its future Identity", 2005, in Vos J.v.d. (ed.) *The Humanities in the European Reserach Area - International Conference Amsterdam, The Netherlands 2 September 2004*.

41 See on the history of the emergence of national regimes on the protection of tangible cultural heritage: Odendahl K., *Kulturgüterschutz. Entwicklung, Struktur und Dogmatik eines ebenenübergreifenden Normensystems*, 2005, p. 41.

42 Chorus J.M.J., *et al.* (eds.), *Introduction to Dutch Law*, (1999), p. 169.

43 *Ibid.*, pp. 169-171.

3. Tangible Cultural Heritage

3.1. Immovables

3.1.1. The Legal System for the Protection of Immovable Cultural Heritage

The Dutch legal system arrives at the protection of culturally significant immovables by declaring them to be cultural heritage under the provisions of the Monuments Act.⁴⁴ More precisely, protection under the Monuments Act is achieved by granting immovable objects the status of a protected monument. Not only monuments as understood in habitual language use can be granted protection. Protection is also available to so-called archaeological monuments, as well as city- and village views.⁴⁵ While the Netherlands has ratified the 1972 UNESCO Convention on World Heritage and nominated at least one landscape⁴⁶ for the World Heritage List, Dutch national Law does not know or protect the notion of “cultural landscapes” comparable to the 1972 Convention as such. According to the National Service for Archaeology, Cultural Landscape and Built Heritage (RACM), the protection of cultural landscapes is in development.⁴⁷ Meanwhile cultural landscapes can to a certain extent be protected by the Monuments Act provided they qualify as man-built structures. The definition of man-built structure is, however, broad, including, e.g., parks.⁴⁸

Another law granting protection to landscapes under Dutch Law is the Law on “Natural Beauty” (*Natuurschoonwet*).⁴⁹ Different from what the title might suggest the protection under the Law on “Natural Beauty” is only available to country estates that must fulfil a range of criteria.⁵⁰

The Dutch regime for the protection of immovable cultural heritage as currently in force splits in two stages: the initial procedure granting an object the status of protected monument on one hand and its subsequent management and care on the other. The dichotomy works through in the competent authority. Regarding the first stage, i.e., the designation of immovable objects as monuments, it is the Minister of Education, Culture and Science (hereafter: ‘the Minister’) is the competent authority.⁵¹ His/Her task has been mandated to the National Service for Archaeology, Cultural Landscape and Built Heritage (RACM), which is part of the Ministry of Education, Culture and Science and operates under the direct responsibility of the Minister.⁵² The first stage ends with the entry of the immovable object as protected monument in a special register, the *Monumentenregister*⁵³ as outlined in Article 6

44 Monumentenwet 1988, Stb. 1988, 638.

45 The different categories of (im-) movable objects that fall under the scope of protection of the Monuments Act and the respective criteria for the designation procedure are outlined in the Section 3.1.2.

46 <http://www.werelderfgoed.nl/pages/en/the-beemster.php>.

47 Telephonic inquiry with Rijksdienst voor Archeologie, Cultuurlandschap en Monumenten on 26 June 2008.

48 Meihuizen Y. / Koelwijn F., Een monument beheren, onderhouden en handhaven: overzicht van de Monumentenwet en de monumentenzorg voor ambtenaren, architecten en eigenaren, 2006, p. 27. It should be pointed out that while a park can be designated as a monument under the Act, it is for cultural-historical reasons rather than its esthetic beauty: Kamrstukken II 1986-1987, 19881 nr 3, p. 12-13.

49 Natuurschoonwet 1928

50 See further on the Law on “Natural Beauty” (*Natuurschoonwet*) and the availability of tax breaks for owners of country estates: Kavelaars P., *Natuurschoon en rijksmonumenten*, 2006.

51 Article 3(1) of the Monuments Act 1998.

52 The National Service for Archaeology, Cultural Landscape and Built Heritage (RACM) was founded in 2006 as a merger of the former Netherlands Department for Conservation (RDMZ), the National Service for Archaeological Heritage (ROB), and the Netherlands Institute for Ship and Underwater Archaeology (NISA).

53 *Monumentenregister*. An electronic version of the register is included in the so-called object database. The database which is not publicly accessible also holds information on past functions of a monument. Interested

of the Monuments Act. At that point, protection becomes definitive. There is only one level of protection. The designation of a building as monument is also written down in the land register. This is, however, not the case for sculptures.

The granting of the status of immovable cultural heritage under Dutch law may be requested by any “interested party” (Article 3 of the Monuments Act). While the Minister is not obliged to meet the request, the designation procedure does grant certain rights to parties that are considered as “interested parties”.⁵⁴ The crucial question is hence who qualifies as “interested party”. The answer to this question is provided by the General Administrative Law Act (Awb) whose relevance for the designation procedure under the Monuments Act is further explained in Section 3.1.5 below.

The second stage of the protective regime is essentially about the care and management of the protected monuments. Care and management are decentralised in that the competent authorities are the lower public authorities.⁵⁵ There is one exception to the general dichotomy between designation by the Minister and subsequent care and managements by lower public authorities. Concerning sites holding archaeological objects, both designation and management are the responsibility of the Minister.⁵⁶

As administrative activities, both the activities of the Minister and of the lower authorities have to abide by the Awb.⁵⁷ It provides public authorities with (legal) instruments to fulfil their tasks, while at the same time regulating their activities and granting protection to citizen against public authorities.⁵⁸ As for the relation between the Monuments Act and the Awb, the latter act serves as *lex generalis* and determines the minimum requirements public authorities have to observe in their work.

3.1.2. What Qualifies as Immovable Cultural Heritage – The Relevant Criteria

Before looking at the criteria used by the Monuments Act to declare an immovable property as cultural heritage, it is important to realise that there are different categories of protected immovable objects: monuments, sites holding archaeological monuments as well as city- and village views. In the subsequent paragraphs, first the criteria for monuments will be

parties can contact the National Service for Archaeology, Cultural Landscape and Built Heritage (RACM) for information from the database.

⁵⁴ Article 3(1) of the Monuments Act 1998. In 2000, the Minister had published policy rules regarding the taking into consideration of individual requests. From a practical point of view and against the background of the work of the projects inventorying and selecting monuments for protection, which started with the oldest monuments and worked its way towards current times, the rules clearly indicated that the Minister did not think it necessary to (re-)consider immovables dating from before 1940. (See: 25-02-2000, Staatscourant 2000, 39, p. 19, Document 14 februari 2000/WJZ/2000/7200 (8083)). In 2007, the Minister published new policy rules on 13 juni 2007, no. WJZ/2007/17812 (8204) 2007). The new policy rules set a rather high threshold for objects to be designated as protected monument. For instance, further to the criteria of the Monuments Act, the structure must be considered to belong to the 100 most relevant structures not yet registered under the act.

⁵⁵ In this respect the 1988 Monuments Act differs from the 1961 Monuments Act. The latter was characterised by a centralistic approach in that both the designation and management of monuments were in the hands of the central government. Due to rising criticism to the centralist administration and in line with the general trend towards decentralisation in the 1980s, the involvement of lower administrative authorities was extended when the Monuments Act was amended. Meihuizen Y. / Koelwijn F., *Een monument beheren, onderhouden en handhaven: overzicht van de Monumentenwet en de monumentenzorg voor ambtenaren, architecten en eigenaren*, 2006, p. 21. See further on the decentralisation in the policy field of culture: Kuypers P., “Decentralisatie, kunst en cultuurbeleid”, 2003, in Boekmanstichting (ed.) *Kunst en De Regulering*.

⁵⁶ Maarleveld T., *Archaeological heritage management in Dutch waters: exploratory studies*, 1998, p. 168-169.

⁵⁷ See, e.g., Article 14a of the Monuments Act.

⁵⁸ Wijk H.D.v., et al., *Hoofdstukken van bestuursrecht*, 2005, p. 1. See Section 5 on the position, role and involvement of communities, groups or relevant non-governmental organizations in the process of declaring immovable property.

elaborated upon before looking into archaeological monuments and city- and village views.

Monuments are defined by the Monuments Act as “objects that have been created at least fifty years ago and that are of public interest due to their beauty, their scientific/academic relevance or to their cultural-historical value” (Article 1(b) sub 1).⁵⁹ According to the explanatory memorandum of the Act, the term “objects” has been chosen rather than a term implying the immovability of an object as the scope of the Act comprises not only monuments in the common parlance but also archaeological objects in the ground.⁶⁰ Furthermore, when the Act was drafted in the 1950s, the need to distinguish immovable from movable property did not exist as movable cultural heritage had not yet been regulated.⁶¹ Protection under the Monuments Act is available to man-built structures and objects only. Organic objects, such as old trees can only be protected as part of a built structure, such as a park.⁶² The fifty year period as time lag between an object’s creation and the decision on the granting of protection is meant to allow for greater objectivity in the appreciation of the object’s beauty or relevance.⁶³

Further to allowing time to speak a verdict on more or less subjective terms such as beauty/relevance for science/possessing cultural-historical value, a number of factors have been explicated in case-law. The following aspects have been repeatedly put forward as factors of relevance for the granting of protection to an immovable object: age, art historical relevance, specific architectural features, whether it concerns a unique object or whether there exist several versions of it, the location and function the object had in the past, as well as its current function.⁶⁴ The factors listed can be split in two groups: in one category, there are qualitative factors, such as age, art historical relevance, specific architectural features, as well as the function an object once had and still fulfils. These factors are neither strictly complementary nor alternative in assessing whether or not an object qualifies for protection. Rather, these factors are taken into account in the respective case-by-case analysis. The other category consists of quantitative factors, which must logically be understood as factors of secondary or balancing value: only if an object qualifies for protection due to its age and beauty or scientific or cultural-historical value does it make sense to square it with the number of other versions available. Decay has also been identified as a (negative) factor in deciding upon (the continuance of) protection and falls into the second category of quantitative factors.

While intangible values such as religion or folklore are not explicitly recognised as factors in the determination process for immovable cultural heritage, they play a role in determining an object’s (art) historical relevance.

59 Article 1(b) sub 1 reads in Dutch: “In deze wet en de daarop berustende bepalingen wordt verstaan onder monumenten: alle vóór tenminste vijftig jaar vervaardigde zaken welke van algemeen belang zijn wegens hun schoonheid, hun betekenis voor de wetenschap of hun cultuurhistorische waarde”.

60 Kamerstukken II 1959-1960; 4115, no. 5 p. 2.

61 Kamerstukken II 1959-1960; 4115, no. 5 p. 2. See on the regulation of movable cultural heritage, in particular the introduction of the 1984 Cultural Heritage Preservation Act below at Section 3.2.1.

62 Meihuizen Y. / Koelwijn F., *Een monument beheren, onderhouden en handhaven: overzicht van de Monumentenwet en de monumentenzorg voor ambtenaren, architecten en eigenaren*, 2006, p. 27. It should be pointed out that while a park can be designated as a monument under the Act, it is for cultural-historical reasons rather than its esthetic beauty: Kamerstukken II 1986-1987, 19881 nr 3, p. 12-13.

63 Kamerstukken II 1986-87; 19881 no 3 p. 14; Kamerstukken II 1986-1987, 19881 nr 3, p. 12-13.

64 AB 1977/228, Koninklijk Besluit van 16 september 1976 no. 29; AB 1982/443, Koninklijk Besluit van 28 april 1982 nr 25; AB 1982/225, Koninklijk Besluit van 4 februari 1982 no. 8; AB 1985/268, Koninklijk Besluit van 14 februari 1985 no. 176; AB 1983/365, Koninklijk Besluit van 9 maart 1983 no. 22.

While the criterion of authenticity is not explicitly mentioned in the definition of Article 1(b) sub 1, it does underlie the Monuments Act. After all, the *raison d'être* of the Monuments Act is to preserve certain objects for future generations.⁶⁵ Authenticity has been mentioned explicitly in a court case on the refusal to designate a building as protected monument.⁶⁶ The fact that several “much better and more sound buildings in the sense of authentic buildings” existed was one of the reasons to deny the object special protection. This does not mean that protection is necessarily withheld from objects that have been restored or whose substance has been partly replaced. In 1992, a smoke stack was designated as a protected monument. It dated from 1895 but substantial parts had been destroyed during the Second World War. Only the base and the lowest part of the original stack had been preserved. After the war, a new stack was added on top of the authentic part, outmeasuring it by 4/5th of its entire length. Regardless of this ratio and the fact that the new part did not meet the fifty years criterion, the decision to designate the stack as protected monument was upheld.⁶⁷ In conclusion, while authenticity is an important factor and underlies the Monuments Act, it takes effect in particular in situations where there is more than one potentially protectable object.

Just like the Monuments Act does not explicitly refer to authenticity, it does not stress an object's “importance to the cultural heritage of humankind”. However, the explanatory memorandum of the Monuments Act when introduced in 1961 did explicitly refer to: “the community's right to the preservation of the wealth in monuments being cultural heritage”.⁶⁸ Furthermore, as will be outlined in response to the next question (B.3), the relevance of cultural heritage for humankind brought about a significant change for the allocation of ownership rights to excavated (archaeological) objects in the implementation of the Valetta Convention into the Monuments Act.⁶⁹

As stipulated above, the Monuments Act not only grants protection to monuments and immovable objects whose criteria of designation have been discussed in the previous paragraphs. It is also relevant to sites holding archaeological monuments as well as city- and village views. However, they are granted protection by virtue of containing at least one monument.

65 Cf.: Geurts J.G. / van Niftrik, *Monumentenwet 1988: wet van 23 december 1988*, Stb. 1988, 638, tot vervanging van de *Monumentenwet met aantekeningen, uitvoeringsbesluiten, alfabetisch register en verdere bijvoegsels*, 2001, p. 15 & 17. See in this respect also the website of the Ministry of Education, Culture and Science, which holds information on the Minister's envisaged plan to modernize the system of monument care as announced on 31 May 2007. One of the Minister's interests is to put less emphasis on authenticity as such in exchange for stressing the continuity in history:
<http://www.minocw.nl/moderniseringmonumentenzorg/916/Accenten-project-modernisering-monumentenzorg.html#>.

66 AB 1983/365, Koninklijk Besluit van 9 maart 1983 no. 22.

67 AB 1998/259, 24 maart 1998.

68 Geurts J.G. / van Niftrik, *Monumentenwet 1988: wet van 23 december 1988*, Stb. 1988, 638, tot vervanging van de *Monumentenwet met aantekeningen, uitvoeringsbesluiten, alfabetisch register en verdere bijvoegsels*, 2001, p. 17.

69 See: Section 3.1.3.

As far as sites holding archaeological monuments are concerned, the protective regime has been amended recently with the implementation of the 1992 Valetta Convention.⁷⁰ For a site to be considered for protection it must be of general relevance by virtue of the (expected) presence of archaeological monuments. Archaeological monuments are objects of archaeological relevance that have yet to be excavated.⁷¹ They can also be situated underwater. In anticipation of a question concerning the protection of underwater cultural heritage (B.7) it should be mentioned that while the Act does not explicitly state so, its explanatory memorandum clarifies that underwater sites holding shipwrecks and other maritime heritage can qualify as (archaeological) monuments in the sense of Article 1(b) sub 2 in conjunction with Article 1(c).⁷² Archaeological objects found during excavation works either underwater or on land from a site designated for protection under the Monuments Act do not fall under the general regime of treasure trove or the general law of finds.⁷³ Instead, archaeological monuments excavated from sites protected under the Monuments Act automatically become the property of the public authority under whose territory the protected site falls.⁷⁴

One fundamental problem with the protection of archaeological objects yet to be excavated is the fact that their existence in the ground is often not known. Against this background a system of “indicative maps of archaeological value”⁷⁵ has been set up. Each municipality has to classify its territory in accordance with the scale introduced by this indicative map. The probability that a certain area contains archaeological monuments is indicated as high, moderate, low or very low.⁷⁶ The classification of the indicative map allows for a more concise designation of protected sites.

Finally, the Monuments Act grants protection to city- and village views. According to Article 1(d), city and village views are groups of immovable objects which include at least one protected monument. On top of that, the group of immovables must be of public interest due to its beauty, internal coherence (spatial or structural), or its scientific or cultural historical value. With respect to city and village views, it is not the Minister of Culture but instead the Minister of Housing, Spatial Planning and Environment who grants protection (Article 35).

70 Wet op de Archeologische Monumentenzorg: Wet van 21 December 2006 tot wijziging van de Monumentenwet 1988 en enkele andere wetten ten behoeve van de archeologische monumentenzorg mede in verband met de implementatie van het Verdrag van Valletta, Stb. 2007, 42. The reader should bear in mind that further to the national regime of protection, there exist municipal and provincial regulations of monuments which will not be elaborated upon in this report as it would exceed its scope. The first national Dutch regulation dates from 1961: Act of 22 June 1961, Monuments Act (Monumentenwet), Stb. 1961/200. Even if one takes the 1939 temporary, non-binding “List of Dutch Monuments of the History and the Arts” into account, protection of immovable cultural heritage started rather late, compared with other European Countries. See for a listing of different national acts dealing with the protection of monuments: Odendahl K., *Kulturgüterschutz. Entwicklung, Struktur und Dogmatik eines ebenenübergreifenden Normensystems*, 2005, p. 41. See further on the history of the Act: Meihuizen Y. / Koelwijn F., *Een monument beheren, onderhouden en handhaven: overzicht van de Monumentenwet en de monumentenzorg voor ambtenaren, architecten en eigenaren*, 2006, p. 20.

71 See Section 3.1.3. on protection granted to archaeological objects subsequent to their excavation.

72 Kamerstukken II 1986-1987, 19881, no 3, pp. 10-11 and Kamerstukken II 1987-1988, 19881, no 6, p. 25. See further on the protection of underwater cultural heritage: section 3.1.6.

73 See further on the rule of treasure trove and the law of finds: 3.2.3. Application of property law to movable cultural heritage.

74 See further section 3.1.3 on the allocation of ownership rights to excavated archaeological objects.

75 *Indicatieve Kaart van Archeologische Waarden Uitgangspunt (IKAW)*.

76 See further on the indicative map: http://www.racm.nl/content/xml_racm/pd_ikaw.xml.asp.

Today, some 51.000 monuments, 150 archaeological monuments and 350 city- and village views have fulfilled the criteria of the Monuments Act and have been granted protection.⁷⁷

Before addressing the protection granted under Dutch national law for objects that have been designated under the Monuments Act, a few words must be said on the relevance of the 1972 UNESCO Convention on the Protection of World Cultural and Natural Heritage for the Netherlands. The Netherlands became a State Party to the Convention in 1992 by accession. Immediately after accession, a tentative list of “Dutch Cultural and Natural Heritage” was prepared by the Dutch branch of ICOMOS, the Dutch Council for Culture (Raad voor Cultuur) and a provisional Project Group for Industrial Heritage (Projectgroep Industrieel Erfgoed, PIE). The tentative list contained some thirty sites which had been chosen without little consideration of the criteria of the 1972 UNESCO Convention.⁷⁸ The tentative List and therefore also the nominations for the World Heritage List focus on four themes: ‘The Netherlands – Land of Water’, the ‘Republic in the 17th century’, the ‘Dutch contribution to the Modern Movement in international architecture at the beginning of the 20th century (Modern Movement)’ and ‘Archaeology’.⁷⁹ For the final list then, the tentative list was held against the criteria of the 1972 UNESCO Convention. Seven sites were finally nominated (six in the Netherlands and one in the Netherlands Antilles).

There seems to be little interdependency between protection under Dutch national law (the Monuments Act) and the 1972 UNESCO Convention. In any event, Dutch law has not taken over the idea of “buffer zone” surrounding protectable objects. Also, integrity, as listed in the 1972 Operational Guidelines to the World Heritage Convention has so far not been recognised as criterion for the determination of Dutch immovable cultural heritage.

3.1.3. Protective Measures for Immovable Cultural Heritage

Measures available under the Monuments Act for the protection of immovables include the following: outright prohibition of certain activities, a licensing system – with the possibility to make licenses subject to further conditions, the adoption of zoning plans, the designation of an area as archaeological area of interest, as well as subsidies. While Article 30 and 31 of the Monuments Act grant the Minister the possibility of taking ‘enforcement action’ in the sense of Article 5:21 of the Awb,⁸⁰ these actions can only be taken in case an obligation of the Monuments Act has been breached. The Monuments Act does not, however, impose a positive duty on the owner to maintain a designated monument. Hence, if the owner neglects his property, the Minister cannot take to enforcement actions. Only in as far as subsidies have been received by an owner can he be called to account by the Dutch State. In all cases if the owner of a monument neglects his property, little can be done about it.⁸¹ The Dutch State cannot under any circumstances expropriate the owner. Also, there is no pre-emption right with regard to immovable cultural heritage under Dutch law.

⁷⁷ <http://www.racm.nl/content/rubriek-n6-1.asp?toc=n6-1>. On 20 February 2008, the Council for Culture gave positive advice to the Minister of Culture for the designation of 99 monuments built in the period 1940-1958.

⁷⁸ Aa B.J.M.v.d., *Preserving the heritage of humanity? Obtaining world heritage status and the impacts of listing*, 2005, p. 47.

⁷⁹ See further: <http://www.werelderfgoed.nl/pages/en/world-heritage-in-the-netherlands/themes.php>.

⁸⁰ Enforcement action is defined by Article 5:21 of the Awb as meaning “physical acts taken by or on behalf of an administrative authority against what has been or is being done, kept or omitted in breach of obligations laid down by or pursuant to any statutory regulations”.

⁸¹ Alphen C.v., et al., *Raakvlakken RO - Relaties met andere wetten*, 2005, p. 110. In as far as archaeological monuments are concerned, i.e., sites holding archaeological objects, Article 56 of the Act allows the Minister to take measures to interrupt activities that (may) harm the site.

Below, the different measures seeking to protect immovable cultural heritage (including archaeological objects in the ground) will be elaborated upon. As far as outright prohibitions are concerned, Article 11 of the Monuments Act bans damaging or destroying a protected monument. The scope of *ratione personae* of Article 11 applies to all persons, including a monument's owner.

While damaging and destroying a protected monument is not allowed under any circumstances the following activities are permitted, provided they are performed (in agreement) with a license: demolishing them, interfering with them, moving or changing them (Article 11 (a)). The same applies to restoring monuments, using them or letting others use them in a manner that mars or endangers the monuments (Article 11 (b)). The granting of a licence may be subject to further conditions in the interest of the care for the monuments (Article 19).⁸²

As for city- and village views, which are protected under the Monuments Act by virtue of containing at least one protected monument, a license is also required for the (partial) demolition of any other building in the protected area (Article 37). The granting of such a license may be subject to further conditions (Article 37(4)).

As outlined in the answer to the previous question (A.2), the management of protected immovable cultural heritage, which includes the granting of licenses, is the task of the lower public authorities. Licenses as required for the activities described in Articles 11 and 37 are to be granted by the Mayor and Aldermen (Article 12).⁸³

Monuments outside of the territory of a municipality (Article 13), as well as sites holding archaeological monuments, fall under the authority of the Minister.⁸⁴ As far as the licensing in the interest of sites holding archaeological objects (i.e., archaeological monuments) is concerned, Article 19 explicates that the Minister may issue a license subject to the following conditions: the taking of technical measures that allow for continued in situ preservation, the duty to arrange for excavations, and the duty to allow expert supervision for activities interfering with the ground. Excavation activities may only be performed in agreement with a license (Article 45 (3)), the granting of which depends on the qualification of the person seeking the license. (Article 45(1) and (2)). Throughout the excavation works, the progress is closely monitored (Article 46) and the permit may be withdrawn if the work falls short of the set conditions (Article 47). By subjecting excavation works to a strict licensing and monitoring regime, the Minister can not only decide which sites are to be excavated (and which objects are preserved in situ), he or she can also exercise quality control of the excavations.⁸⁵

Violations of the Monuments Act are prosecuted under criminal law. Depending on the *mens rea*, one can be prosecuted for having committed an offence or crime.⁸⁶

Further to prohibitions and the licensing of certain activities, possibly linked to certain conditions, as well as the deterrent function of the criminal law, the protection of immovable cultural heritage depends to a great extent on the adoption of zoning plans. While zoning plans as such do not have the function to protect immovable cultural heritage, they can help to enforce binding obligations as provided for in the Monuments Act (the so-called normative

82 In this respect Article 3:3 of the Awb on *détournement de pouvoir* is also relevant: "An administrative authority shall not use the power to make an order for a purpose other than that for which it was conferred".

83 As an exception to this main rule, requests for licenses concerning monuments situated outside the territory of a municipality are to be made to the Minister of Culture (Article 13 juncto Article 14 (2) Monuments Act).

84 Maarleveld T., *Archaeological heritage management in Dutch waters: exploratory studies*, 1998, p. 168-169.

85 Cf.: Article 45(2). On top of that the Minister can make the granting of a license subject to living up to certain conditions (Article 45(3)).

86 Articles 61 and 62 of the Monuments Act.

function of zoning plans).⁸⁷ In the past, there were some doubts regarding whether and in how far a municipality – in setting out new zoning plans – could take existing protected monuments into consideration, as well as monuments having the potential to be accorded the status of protected monument.⁸⁸ These doubts have been removed with Article 38a Monuments Act, which was introduced in the context of the implementation of the Valetta Convention. Article 38a formulates a duty for the city council to take existing or potential monuments into account when adopting new zoning plans as outlined in Article 10 of the Spatial Planning Act. There is no obligation to amend existing zoning plans. Article 39 and Article 40 of the Monuments Act provide for further regulations that may be included in a zoning plan.

Zoning plans are also of great relevance in the protection of urban and village landscapes. Article 36 explicitly requires the city council to adopt zoning plans for the protection of village and city views.

The Monuments Act also recognizes subsidy as a tool contributing to the protection of monuments. Articles 34 and 34a of the Monument Act stipulate that the Minister of Culture can grant subsidies for the conservation of designated monuments.⁸⁹

As stipulated above, the Monuments Act also applies to (movable) objects of archaeological interest in the ground. Protection prior to excavation is granted by protecting the site / grounds where the archaeological objects are contained. While they remain movable objects, it is their position in the ground that allows the Monuments Act to foresee in their protection. With their excavation, these archaeological objects are exposed to the additional threats to movable objects when compared with immovable objects, in particular the risk of being (illegally) removed or transferred or even being stolen. In order to counteract this threat of loosing valuable information to the private market, Article 50 of the Monuments Act serves as a *lex specialis* to the rules on treasure trove (as well as the general law of finds) that apply to any territory not granted protection under the Monuments Act⁹⁰ by according ownership of objects excavated from a site (holding monuments) protected under the Monuments Act to the public authority.⁹¹ If excavated within the territory of a municipality, it is the city or province that acquires the property rights, depending on whether the former maintains a depot in the sense of Article 51(2) of the Act. In case the excavations took place outside of the territory of a municipality, property is accorded to the State.⁹² Neither the excavator, nor the owner of the site receives any indemnity as it had been the case in the past.⁹³ The indemnity was abolished

87 Cf.: Werkgroep Onroerend/roerend, *Van Object naar Samenhang - De instandhouding van ensembles van onroerend en roerend cultureel erfgoed*, 2004, pp. 21-22.

88 Cf.: Haase N.L.J., *De invloed van de Monumentenwet op het bestemmingsplan*, 2004 (now outdated).

89 In accordance with Article 34 (3) the regime on the granting of subsidies has been further outlined in a decree (Besluit rijkssubsidiëring instandhouding monumenten).

⁹⁰ See section 3.2.3. for an explanation of the Dutch rule on treasure trove.

91 Article 1(h) of the Monuments Act defines the activity of excavating as the undertaking of activities with the aim to discover or reserach monuments, which result in interference with the ground. Objects excavated from sites protected under the Monuments Act for holding monuments are not automatically protected by the Cultural Heritage Protection Act discussed further below.

92 The reference to the state must be seen as a safety clause which is of particular relevance for underwater cultural heritage; the management of which is in the hands of the National Service for Archaeology, Cultural Landscape and Built Heritage (RACM). Salomons A.F., *Nieuwe regels omtrent de eigendom van roerende monumenten ingevolge de Wet op de Archeologische Monumentenzorg*, *Weekblad voor Privaatrecht, Notariaat en Registratie*, 2007, p. 615.

93 In this respect, the current Monuments Act differs significantly from the pre-1988 regime resp. the regime prior tot the implementation of the Valetta Convention: until 1988, the excavator was awarded full ownership of the excavated object(s) but had to compensate the site's owner with 50% of the value. Given that in practice only governmental and academic institutions were authorised to excavate, as pointed out by Maarleveld T., "The

with the implementation of the Valetta Convention as it was considered “contrary to the internationally shared perception that archaeological cultural heritage is the heritage of humankind and hence of all of us”.⁹⁴

3.1.4. Effects on Proprietary Rights

Ownership is the predominant concept in Dutch property law. Article 5:1 DCC characterizes ownership as the “most comprehensive right which a person can have in a thing”. Despite being the most comprehensive right, ownership is never unlimited as is stressed by paragraph 2 of the article according to which “the owner of a thing is entitled to do with it as he or she pleases provided that he or she does not infringe against statutory restrictions or the rights of third parties.”⁹⁵ In addition to these two sources of limitations to the right to property, limitations can originate from unwritten rules. With regard to the rights of the owner of a monument, limitations will first and foremost originate from other statutes, in particular the Monuments Act.

In the previous section, the protection measures available for immovable cultural heritage were elaborated upon. The measures range from outright prohibitions of certain activities, to making other activities subject to a range of conditions, to the reinforcement of prohibitions through zoning plans. The measures can mean a significant limitation to an owner’s proprietary rights.⁹⁶ Furthermore, the protection granted to monuments can also negatively affect the proprietary rights to neighbouring immovables.

The outright prohibition to damage or destroy a monument as stated by Article 11(1) Monuments Act limits the rights of the owner to “do with it as he or she pleases”. However, as the restriction of his property rights is provided for in the law, i.e., Article 11 of the Monuments Act, the restriction has been held necessary by the legislature to ensure the protection of these monuments. Further to the property rights of the owner, Article 11(1) may also limit the rights of others, e.g., owners of buildings or land adjacent to the protected monument. In how far Article 11 can have such external effect has not yet been established.⁹⁷

Netherlands”, 2006, in Dromgoole S. (ed.) *The protection of the underwater cultural heritage: national perspectives in light of the UNESCO Convention 2001*, p. 177 the difference between the pre- and post- 1988 regime is smaller than the letter of the law suggests. The position of the site’s owner did, however, change significantly with the implementation of the Valetta Convention which abolished the owner’s right to receive indemnity corresponding to 50% of the object’s value as outlined in (old) Article 43 (3) Monuments Act. Salomons A.F., Nieuwe regels omtrent de eigendom van roerende monumenten ingevolge de Wet op de Archeologische Monumentenzorg, *Weekblad voor Privaatrecht, Notariaat en Registratie*, 2007, pp. 616-618. 94 Salomons A.F., Nieuwe regels omtrent de eigendom van roerende monumenten ingevolge de Wet op de Archeologische Monumentenzorg, *Weekblad voor Privaatrecht, Notariaat en Registratie*, 2007, p. 618. The law is more favourable to the landowner when the objects concerned are found not by planned excavations but by mere chance and luck. In this case, the general rules on finders’ rights (Articles 5:5-12 DCC) or treasure trove (Article 5:13 DCC) apply which will be elaborated upon in section 3.2.3 on the application of property law to movable cultural heritage and the duties that arise from finding a precious precious artefact.

95 Translation based on: Haanappel P.P.C. / MacKaay E., *Nieuw Nederlands Burgerlijk Wetboek: het vermogensrecht (zakenrecht, verbintenissenrecht en bijzondere overeenkomsten) / New Netherlands Civil Code: patrimonial law (property, obligations and special contracts)*, 1990, p. 3. In Dutch, Artikel 5:1 (2) DCC reads: Het staat de eigenaar met uitsluiting van een ieder vrij van de zaak gebruik te maken, mits dit gebruik niet strijdt met rechten van anderen en de op wettelijke voorschriften en regels van ongeschreven recht gegronde beperkingen daarbij in acht worden genomen.

96 See the explanations in the previous section, in particular Articles 11, 19, 37 and 45 of the Act. See also: Alphen C.v., et al., *Raakvlakken RO - Relaties met andere wetten*, 2005, p. 111.

97 Peters T., *Verstrekkende monumentenbescherming: de relatie tussen der herziene Woningwet en Monumentenwet 1988 bij de bescherming van monumenten*, BR, 2003; Alphen C.v., et al., *Raakvlakken RO - Relaties met andere wetten*, 2005, p. 111.

Dutch legal doctrine does, however, favour external effect for monuments.⁹⁸

Dutch Law does not know any limitations on the sale/transfer of ownership of immovable cultural heritage.

As for urban and village views, Article 37 of the Monuments Act explicitly states that the protection of the designated monument can affect the property rights of the owners of any other building included in the zone designated as protected urban and village view accordance with Article 35 of the Monuments Act. No building in the zone may be (partially) demolished without a license. This is an additional limitation to proprietors' rights next to limitations that may arise from the zoning plan.

The licensing system put in place by the Monuments Act for a number of activities as such limits the rights of proprietors. Furthermore, licenses may be subject to further conditions.

There are however several mechanisms to counterbalance the restrictions of property rights to protected monuments. This section will only take into consideration instruments available once an object has been granted protection under the Monument Act. As for procedural guarantees for the owner and other interested parties, the reader may be referred to section 3.1.5. The Monuments Act provides for indemnifications in Articles 22, 42 and 59.

Article 22 introduces the duty to grant a reasonable compensation in case an applicant is denied a license required for a specific activity by Article 11. The same applies if he or she suffers a loss due to the conditions linked to the license, provided that it is not reasonable for the applicant to carry the loss. It is respectively the Minister or Mayor and Aldermen who decide upon the granting of the compensation and the amount to be paid. The compensation has to be reasonable and an independent committee especially established for the purpose of assessing such losses must be consulted (Article 23 Monuments Act). The decision granting / denying compensation may be appealed directly in court.⁹⁹

The Monuments Act also grants a reasonable indemnification in case the following licenses are denied for reasons of archaeological monument care: a demolition permit (Article 37(1) Monuments Act), a building permit as outlined in Article 44(1) of the Housing Act, a planning permission as outlined in Article 14 of the Act Spatial Planning respectively if dispensation in accordance with Articles 15, 17 or 19 of the same Act is withheld. Indemnification is also granted if the loss suffered results from the conditions to which a granted license is subjected to (Article 42).

The Monuments Act also foresees reasonable indemnification for loss suffered due to specific measures taken for the protection of archaeological monuments (Article 58). The measures can consist of interrupting activities initiated by the right holder (preventive measures or measures limiting the damages), as well as measures taken to support archaeological research: In case of activities damaging or threatening to damage archaeological monuments, the Minister may order the interruption of these activities (Article 56). When archaeological research is conducted, the Minister may impose on the right holder that he or she must tolerate certain activities, such as access to the site and excavation works (Article 57).

98 Peters T., *Verstrekkende monumentenbescherming: de relatie tussen der herziene Woningwet en Monumentenwet 1988 bij de bescherming van monumenten*, BR, 2003; Alphen C.v., et al., *Raakvlakken RO - Relaties met andere wetten*, 2005, p. 111. As far as sites protected under the Nature Conservation Act 1998 are concerned, external effect is recognized in the Act.

99 See Article 29 of the Monuments Act juncto Article 7:1 Awb according to which the applicant does not have to first raise an objection against the administrative decision with the administrative authority before appealing to courts. See section 7 and 8 of the Awb on the taking of legal action against the government.

3.1.5. Involvement of Communities in Designating Immovable Cultural Heritage

As far as the declaration of immovable property as cultural heritage is concerned, Article 3 explicitly states that any interested party can address the Minister of Culture with the request to grant protection to an immovable property under the Monuments Act. While the Minister is not obliged to meet the request, the designation procedure does grant certain rights to parties that are considered as “interested parties”.¹⁰⁰ The crucial question is hence who qualifies as “interested party”.

Before elaborating on the question who qualifies as interested party, the Awb and its relevance for the designation procedure under the Monuments Act must be introduced.¹⁰¹ The Awb contains the general administrative rules governing the relationship between the government and individuals, how government orders (such as the designation of an object as protected under the Monuments Act) must be effected and how individuals can object to such orders. It is first and foremost an act that seeks to guarantee that the public administration takes due care in its activities.¹⁰² The rules and principles laid down in the Awb must be considered as minimum standards that can be extended by more specific acts but that cannot be undermined.¹⁰³

With respect to the subject addressed here, the Awb is relevant, in addition to the Monuments Act, for the determination of who qualifies as an interested party. Once the concept of interested party has been outlined and illustrated by case-law, the protection available to an interested party's interests under the Awb will be addressed.

According to Article 3 of the Monuments Act, interested parties are in the first place the persons registered in the land register as owners or as having a limited right *in rem*, as well as the creditor of a mortgage. Under the Awb, in particular Article 1:2, an interested party means a person or legal entity whose interest is directly affected by an order. As for an owner of an immovable object, as well as the holder of a limited right (e.g., servitude or usufruct) or the creditor of a mortgage, it is clear that their interests are directly affected by an order designating the property as protected monument. The Council of State has repeatedly confirmed in its case-law that owners and other parties who have a right *in rem* to the immovable property must be considered as interested parties of decisions about whether or not to designate an object as a monument.¹⁰⁴ Consequently, and in particular for private individuals, the crucial question is whether a person possesses a right *in rem* to the immovable property.

100 Article 3(1) of the Monuments Act 1998. In 2000, the Minister had published policy rules regarding the taking into consideration of individual requests. From a practical point of view and against the background of the work of the projects inventorying and selecting monuments for protection, which started with the oldest monuments and worked its way towards current times, the rules clearly indicated that the Minister did not think it necessary to (re-)consider immovables dating from before 1940. (See: 25-02-2000, Staatscourant 2000, 39, p. 19, Document 14 februari 2000/WJZ/2000/7200 (8083)). In 2007, the Minister published new policy rules on 13 juni 2007, no. WJZ/2007/17812 (8204) 2007). The new policy rules set a rather high threshold for objects to be designated as protected monument. For instance, further to the criteria of the Monuments Act, the structure must be considered to belong to the 100 most relevant structures not yet registered under the act.

101 The scope of this report does not allow for an in-depth discussion of the Awb. Instead readers are referred to the following literature: Schilder A.E. / Brouwer J.G., A survey of Dutch administrative law, 1998 instead of many others written in the Dutch language.

102 Simon H.J., *Handboek Bestuurs(rechts)recht volgens de AWB*, 1997, p. 7.

103 *Ibid.*

104 Judgement of Council of State of 3 September 2003, LJV AI1758, zaaknummer 200205030.

This was also the line taken in 2006 by the District Court in s'-Hertogenbosch in the following case concerning the question of who qualifies as an interested party concerning the designation of a grave as monument in the sense of the Monuments Act 1988. In the past, it had been general practice that only the owner of a graveyard qualified as interested party. A relative of the deceased person buried on the graveyard was not considered as interested party.¹⁰⁵ This practice was challenged by a grandson who wanted to pay a last tribute to his grandfather by nominating the latter's grave stone for protection under the Monuments Act 1988. In the first place, and in accordance with the policy as had been followed for decades, his nomination was not taken into consideration, as the grandson was not the owner of the graveyard. The grandson raised an objection with the administrative authority against the decision not to consider his request. As logic step under the system of the Awb, but nevertheless wrong on the merits as later confirmed by the Council of State, the grandson's objection was declared inadmissible.¹⁰⁶ The grandson subsequently lodged an appeal with the district court against the latter decision. The court held that given the grandson must be considered as a right holder regarding the grave stone and given the fact that rights as outlined in the Dutch Act on the Disposal of the Dead must be considered as rights *in rem*, the grandson qualifies as a party having a right *in rem* to the immovable property concerned and hence must be considered as an interested party of the decision about whether or not to designate his grandfather's grave as a monument.¹⁰⁷ Hence, due to the fact that descendants have some rights to the grave of a deceased family member, and despite this right not being registered in the land register, they qualify as interested party in the sense of the Monuments Act.

While the above case focused on the legal qualification of the relationship a descendant has with the grave of a family member, it nevertheless clarified that a person's right to an immovable object does not necessarily need to be registered in the land register. Regardless of that, the definition of interested party is still essentially based on the existence of a right *in rem*.

With respect to legal entities such as foundations or corporations paragraph 3 of Article 1:2 of the Awb broadens the understanding of interested party. As far as legal entities are concerned "directly affected interest" as outlined in paragraph 1 of Article 1:2 can be both "private interests", as well as "general and collective interests which they particularly represent in accordance with their objects and as evidenced by their actual activities".¹⁰⁸ The different layers of directly affected interests can be illustrated by the following example: with respect to the designation of a monumental building as protected monument, a legal foundation not only qualifies as interested party if it owned the house ("private interest"), but also if its mission statement/ articles of association stated the preservation of the building/ kind of buildings as an explicit aim ("general and collective interest").¹⁰⁹ However, while legal entities can qualify as interested party despite not being the owner of an object or possessing another legal right *in rem*, their entitlement to the status of interested party is not unlimited.

105 http://www.racm.nl/content/documenten%5Cracm%20nieuwsbrief_2_07.pdf (last visited 27 June 2008).

106 Article 1:5 juncto Article 1:3 Awb.

107 Judgement of the District Court of s'-Hertogenbosch of 27 January 2006, AWB 05/2175. See further for a discussion of the case: Bok L. / Valkenburcht M., *Eerbetoon aan Opa*, Nieuwsbrief Rijksdienst voor Archeologie, Cultuurlandschap en Monumenten, 2006.

108 See also the case law: VzAR 11 augustus 1976, Gst. 6417; AR 10 februari 1978, AB 1979, 17, Milieugroep Venray.

109 See the following case concerning a corporate entity that was "privately affected": VzAR 27 februari 1986, tB/S 40.

In the first place, it is important to note that the entity/ interest group must have corporate personality in order to be considered in the first place. The requirement to have corporate personality is a necessary (but not sufficient) condition for being considered as an interested party.¹¹⁰ Also, given the phrasing of Article 1:2 paragraph 3 Awb, which speaks of “(...) interests the legal entity particularly represents (...)”, the objectives of a legal entity may not be too broad as it will otherwise not be considered as representing the relevant interest(s) particularly.¹¹¹

In conclusion to the question who qualifies as interested party concerning the designation of an immovable object as a monument it can be stated that both individual persons as well as groups can come into the ambit of interested party. While a private individual must have a right *in rem* in the property concerned, this is not necessarily the case for (interest) groups. The latter must have corporate personality as a necessary condition and their interest can manifest itself either in a right *in rem* or in the interest “it particularly represents”.¹¹²

A person or entity that qualifies as interested person in the sense of the Monuments Act and the Awb enjoys the following protection under the Awb in case the Minister of Culture does not follow the request to grant protection to an immovable building as outlined in Article 3 of the Monuments Act. The negative decision (as well as a positive decision) concerning the monument status of an immovable cultural object in the sense of the Monuments Act qualifies as an administrative decision (*beschikking*) in the sense of Article 1:3 sub 2 of the Awb. As a consequence, the interested party is granted legal protection under the Awb in that he or she can raise an objection against the administrative decision with the administrative authority and can subsequently lodge an appeal against it with the administrative law section of the district court.¹¹³ This legal protection is not available to parties not being recognized as interested party.

Also, interested parties, both in favour and against the designation as protected monument, are granted the right to be heard by the Mayor and Aldermen.¹¹⁴ The duty to inform interested parties about the intention to grant protection to an object is incumbent on the Minister.¹¹⁵ With regards to religious monuments, the Monuments Act grants a more active role to the owner of the building than to owners of non-religious buildings. Owners of religious buildings must not only be granted the possibility to be heard, but must be consulted. Article 2(1) of the Monuments Act stipulates that without such consultation, no decision on the designation of these monuments can be taken. Religious monuments are defined by Article 1 (e) as immovable monuments that are the property of a religious denomination, (...) or of another spiritual organisation and that are exclusively or predominantly used for joint practise of the confession or philosophy of life. Hence, while the literal phrasing of the Article in Dutch suggests that protection is only granted to ecclesiastical monuments rather than religious monuments more in general, this extra procedural protection is granted to monuments serving any religion.¹¹⁶ The additional protection granted to religious monuments

110 Judgement of Council of State of 25 June 2003, LJN AH8637, 200202381/1. Simon H.J., *Handboek Bestuurs(proces)recht volgens de AWB*, 1997, p. 38. See further on the position of the stakeholder: Poorter J.C.A.d., *De belanghebbende: een onderzoek naar de betekenis van het belanghebbende-begrip in het bestuurs(proces)recht*, 2003.

111 ABRS 16 January 1996, Gst. 7039; Pres. Rb. Amsterdam 8 September 1995, JB 1996/25.

112 Judgement of Council of State of 3 September 2003, LJN AI1758, zaaknummer 200205030.

113 See section 7 and 8 of the Awb on the taking of legal action against the government.

114 Article 3(4) of the Monuments Act 1998 and Article 3:13 Awb.

115 Article 3(3) of the Monuments Act 1998.

116 The freedom of religion as granted in the Dutch Constitution in Article 6 also works through in the management of protected monuments (Article 18 of the Monuments Act) as outlined further below.

also deviates to some extent from the management of protected monuments of non religious character in that it grants the owner a veto right for decisions taken in accordance with Articles 16 and 17 of the Monuments Act in as far as the decision affects substantial interests of a religious or spiritual belief (Article 18).

The management, preservation and possession of protected monuments are shared between an object's owner and the Mayor and Aldermen as authorised (lower) public authority. The management and preservation must be accordance with the provisions of the Monuments Act. Article 14a of the Monuments Act declares the Awb, in particular section 3.4 of the Act applicable to the procedure for seeking and granting licenses as outlined in Article 11. As for parties not qualifying as interested party in the sense of the Monuments Act in conjunction with the Awb, Article 14a(2) stipulates that they may present their views on the management. However, there is no further formal involvement of parties not being the owner of a monument or the lower administrative authorities in the management of protected monuments.

Compliance with the Monuments Act is monitored by the Monuments division of the State Inspectorate for Cultural Heritage, which is part of the Ministry of Education, Culture and Science.¹¹⁷ Further to monitoring the registration of monuments and protected areas at national level, overseeing spatial policy relating to protected areas and the maintenance of national monuments, as well as supervising the issuing of permits by municipalities concerning the altering or restoration of (national) monuments, the Monuments division also supervises the private parties involved (as interested parties), specifically in the area of management and use of the monuments.¹¹⁸

3.1.6. Precautionary Measures for Armed Conflicts

There is no generally accepted definition of armed conflict in Dutch Law. The Dutch legislator and judge rely upon the definitions of the Geneva Conventions and their Additional Protocols.¹¹⁹

As state party to the following international instruments relevant for the protection of cultural heritage in the event of armed conflict the Netherlands is legally obliged to take precautionary measures concerning (immovable) cultural heritage located in hostile territory as well as on Dutch territory: the 1899 and 1907 Convention (IV) respecting the Laws and Customs of War on Land,¹²⁰ the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), as well as its (First) Protocol¹²¹ and (Second) Protocol.¹²²

117 In its current form, the State Inspectorate exists since 1 November 2005. Before that date, the management of the different aspects of cultural heritage was split amongst four national services (National Service for the Management of Archaeology, The National Service for the Inspection of national archives, the National inspection for movable cultural heritage and the National Service for the care of monuments).

118 Part of the Inspectorate's website is available in English at: <http://www.erfgoedinspectie.nl/page/english/home> (last visited 27 March 2008).

119 E.g when the Dutch Parliament discussed the Act relating to serious violations of international humanitarian law (Act international crimes) it was explicitly stated that no definition of armed conflict would be provided. However, it was stated that the question whether or not a situation qualified as armed conflict was to be assessed on factual grounds. The analysis must take into consideration the kind and extent of the hostilities, their underlying aims, as well as the (legal) ground on which the hostilities are based. Explanatory Memorandum, Wet internationale misdrijven, Kamerstukken II 2001/2002 28337, no. 3, pp. 12-13.

120 Ratified by the Netherlands on 27.11.1909.

121 Wet van 16 juli 1958 Stb. 1985, 356, houdende goedkeuring van het op 14 mei 1954 te 's- Gravenhage ondertekende Verdrag (...) en van het op 14 mei 1954 ondertekende Protocol.

122 http://portal.unesco.org/en/ev.php-URL_ID=15207&URL_DO=DO_TOPIC&URL_SECTION=201.html#STATE_PARTIES (last visited 27 March 2008).

Given the Dutch monist approach in respect of the effect of international treaties¹²³ (provisions of) treaties, which may be binding by virtue of their contents shall become binding after they have been published and do not need to be converted into national law. In case of a conflict between an international provision and Dutch statutory regulations, the latter are not applicable.¹²⁴ This is not the case for provisions that leave a certain margin of appreciation to state authorities. These provisions must first be concerted into national law before they can be relied upon in front of the court.¹²⁵ In respect of the 1954 Convention and its two protocols, only the First Protocol needed to be concerted into national law as its provisions left a certain margin of appreciation to state authorities and affected the rights and duties of Dutch citizen.¹²⁶

While the obligations go further than the taking of precautionary measures and apply not only to immovable cultural heritage but extend to movable cultural heritage,¹²⁷ this section will focus on precautionary measures aimed at the protection of immovable cultural heritage.¹²⁸ As for the protection of movable cultural heritage in the event of armed conflict, the reader may be referred to the answer to question B.6.¹²⁹

In order to fulfil its obligation under Articles 1 of the 1907 Convention (IV) respecting the Laws and Customs of War on Land in conjunction with Articles 27 and 56 of the Regulation annexed to it, as well as Article 7 of the 1954 The Hague Convention, the Royal Netherlands Army has taken a number of measures to train their military personal on how to deal with cultural heritage during armed conflict both in enemy and national territory: its Army Doctrine on Combat Operations, includes a section on the protection of cultural heritage.¹³⁰ Furthermore, in line with Article 7(2) of the 1954 Hague Convention, the Royal

123 Article 93 Dutch Constitution.

124 Article 94 Dutch Constitution.

125 See in this respect section 3.1.6. on the protection of movable cultural heritage in armed conflict, in particular the case in which the autocephalous Greek Orthodox Church of Cyprus could not recover four icons as the Netherlands had failed to implement Article 1.4 of the (First) Protocol for the Protection of Cultural Property in the Event of Armed Conflict (1954).

¹²⁶ See section 3.1.6 on the discussion of the Dutch implementation of the First Protocol by the 'Act on the Return of Cultural Objects removed from Occupied Territories' (Wet van 8 maart 2007, houdende regels over inbewaringneming en instelling van een vordering tot teruggave van cultuurogoderen afkomstig uit en tijdens een gewapend conflict bezet gebied).

127 See in particular the Articles 56 and 46 of the 1907 Convention (IV) respecting the Laws and Customs of War on Land) on public respectively private property.

128 See for an analysis of the obligations of state parties more in general: Bos A., The Importance of the 1899, 1907 and 1999 Hague Conferences for the Legal Protection of Cultural Property in the Event of Armed Conflict, *Museum International*, 2005; Hladík J., The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the notion of military necessity, *Revue Internationale de la Croix-Rouge*, 1999; Kastenbergh J., E., The Legal Regime for Protecting Cultural Property During Armed Conflict, *The Air Force Law Review*, 1997; Nahlik S.E., On some deficiencies of the Hague Convention of the Protection of Cultural Property in the event of Armed Conflict, *Annuaire de l'Association des Anciens Auditeurs de l'Académie de La Haye*, 1974; Prott L., V., "The Protocol to the Convention for the Protection of Cultural Property in the event of armed Conflict (The Hague Convention) 1954", 1996, in Briat M., & Freedberg, Judith, A. (eds.), *Legal aspects of International Trade in Art*; Toman J., The Protection of Cultural Property in the Event of Armed Conflict, 1996.

129 Section 3.1.6. also discusses the legal regime recently introduced for the return of cultural objects removed from occupied territories and the protection available for cultural objects removed from Iraq after 6 August 1990.

130 Royal Netherlands Army, Combat Operations - Army Doctrine Publication II Part B: Combat Operations against a regular Enemy Force, (available online at:

http://www.landmacht.nl/organisatie/taken/militaire_doctrine.aspx), (last visited 27 July 2008): "(...) The protection of important cultural items is particularly significant. The Geneva Conventions can play a vital role in this respect, something which places demands on the civilmilitary coordination" (p. 189); "An attack in a built-up area usually gives rise to prolonged combat actions with heavy losses. As much combat support as possible

Netherlands Army operates a section dedicated to preparing military personal on how to deal with cultural heritage during armed conflict both in enemy and national territory.¹³¹

As far as precautionary measures for the protection of immovable cultural heritage in Dutch territory is concerned, Article 27 of the Convention (IV) respecting the Laws and Customs of War on Land, as well as Article 3 and Article 16 of the 1954 Hague Convention, and Article 5 of the Second Protocol oblige the State Parties to take the appropriate measure (in times of peace) for the foreseeable effects of an armed conflict. One such measure is the identification and marking of buildings as referred to in Article 27 of the 1907 Convention,¹³² as well as in Article 8 of the 1954 Hague Convention and Article 13 of the annexed Regulation. In the Netherlands, the identification of immovable cultural property to fall under the special protection regime of the Conventions was done in cooperation between the then Ministry of Culture, Social Wellbeing and Recreation (now: Ministry of Education, Culture and Science) and the then National Service for Monument Care (now RACM).¹³³ In first instances some 100 monuments were granted special protection and were marked with the symbol of the “Blue Shield”¹³⁴.

The Netherlands has integrated the preventive protection of cultural objects against its endangerment in times of war in the general regime for the protection of cultural heritage against calamities. The respective responsibilities are shared between the national, provincial and local authorities as (partly) laid down in the Act on the Improvement of Disaster Relief.

must be provided. Freedom of action is limited by the need to spare the civilian population and objects of cultural value” (p. 244). As far as the territory of a hostile nation is concerned Article 1 of the 1907 Convention (IV) respecting the Laws and Customs of War on Land obliges the state parties to issue instructions to their armed land forces that is in conformity with the ‘Regulations respecting the laws and customs of war on land’ as annexed to the Convention. Article 27 of the 1907 Convention (IV) respecting the Laws and Customs of War on Land holds that during hostilities “all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments (...) provided they are not being used at the time for military purposes.” With respect to a foreign military rule over hostile territory, Article 56 stipulates that “[t]he property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings”. Further to the 1907 Convention (IV) respecting the Laws and Customs of War on Land, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict in its Article 7 requires state parties to “introduce in time of peace into their military regulations or instructions such provisions as may ensure observance of the (...) Convention, and to foster in the members of their armed forces a spirit of respect for the culture and cultural property of all peoples”.

131 The ‘Sectie Cultuurhistorische Achtergronden en Informatie’: in English: Division on Cultural-Historical Background and Information. See:

http://www.landmacht.nl/organisatie/Eenheden/Ondersteuningsgroep_CLAS/index.aspx. See further on special units of / working together with the Royal Netherlands Army on the protection of cultural objects in times of war: http://www.landmacht.nl/organisatie/taken/Internationale_taken/Cimic/Organisatie_CIMIC.aspx and http://www.mindef.nl/actueel/parlement/kamervragen/2004/2/20040625_erfgoedirak.aspx (last visited 27 March 2008).

132 Article 27 is relevant not only to immovable cultural heritage, but refers to “buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected”. It is important to note that the protection cannot be upheld in case the buildings are used for military purposes, as stressed by Article 27, as well as Article 23(5) of the Convention.

133 The old regime is outlined in: Ministerie van Welzijn V.e.C., *Cultuurbescherming in buitengewone Omstandigheden*, 1991.

134 See Articles 15 and 16 of the 1954 Hague Convention. Telephonic inquiry on 7 April 2008 with Jan Willem van Beusekom from “Erfgoed Nederland” and Benedict Goes from Icomos Nederland.

According to the Act, which entered into force in July 2004, the protection of cultural property must become an integral part of the local plans on disaster relief.¹³⁵

In 2000, Blue Shield Nederland was founded as a non-governmental organization focusing on the protection of Dutch cultural heritage against the threats caused by natural disasters, molest and military actions, and on the coordination of national and international help.¹³⁶ In 2003, the Cultural Emergency Response (CER) programme was founded by the Prins Claus Fonds. The programme seeks to grant “first aid” to cultural heritage damaged or destroyed by human or natural catastrophes. The predominant aim is to stabilize the situation, the prevention of further damage and loss and basic restorations.¹³⁷

3.1.7. Immovable Underwater Cultural Heritage

Despite the great relevance of maritime commerce in Dutch history, there is no significant tradition of protecting underwater cultural heritage.¹³⁸ When the UNESCO Convention on the Protection of the Underwater Cultural Heritage was voted upon by the plenary session of the 31st General Conference of UNESCO, the Netherlands abstained from voting. It did, however, declare that it would look into the possibilities of joining the Convention.¹³⁹ This does not mean that the protection of cultural heritage located underwater is not regulated. However, no specific regulation on underwater cultural heritage exists. Instead, in response to the intensification of underwater activities in the 1970s and 1980s due to more advanced techniques, the protection of underwater cultural heritage was brought under the scope of the 1988 Monuments Act.¹⁴⁰

As outlined above in Section 2.1., the Monuments act regulates the protection of different categories of protected (immovable) objects. The protection of maritime heritage is subsumed under the protection of archaeological monuments, i.e., the protection of sites holding monuments rather than the protection of monuments as such. Article 47a of the Monuments Act declares Articles 45-47 of the same Act applicable to the contiguous zone as outlined in Article 1 of the Act establishing a contiguous zone for the Kingdom.¹⁴¹ The article defines the contiguous zone as “the zone outside of and contiguous to the Kingdom’s territorial sea, which may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured”.

Article 45(1) of the Monuments Act prohibits any excavations conducted without or deviating from the license granted by the Minister. The granting of such a license depends on the expertise of the person wishing to excavate and can be made subject to certain conditions (Article 45 (2)-(3)). Article 46 imposes a far-reaching duty to report on the progress of the excavations on the holder of the permit. In case the holder of the permit does not live up to the

135 See: Letter of the Minister of Foreign Affairs dated 21 November 2006, Tweede Protocol bij het Verdrag van ‘s-Gravenhage van 1954 inzake de bescherming van culturele goederen in geval van een gewapend conflict; ‘s-Gravenhage, 26 maart 1999 (Trb. 2005, 279), 30 894, No. 1, p. 7.

136 <http://www.blueshield.nl/index.en.html> (last visited 27 March 2008).

137 http://www.princeclausfund.org/en/what_we_do/cer/index.shtml (last visited 27 March 2008).

138 Maarleveld T., “The Netherlands”, 2006, in Dromgoole S. (ed.) *The protection of the underwater cultural heritage: national perspectives in light of the UNESCO Convention 2001*, p. 161.

139 Ibid., p. 162. The Netherlands is a State Party to the United Nations Convention on the Law of the Sea (UNCLOS) and has its maritime zones categorised in accordance with UNCLOS. While the Dutch territorial waters originally extend only 3 nautical miles from the baseline, it was extended to 12 nautical miles in 1985 by legal act (Stb. 1985, 129). See further: Kooijmans P.H., *Internationaal Publiekrecht in Vogelvlucht*, 2002, p. 47.

140 Maarleveld T., *Archaeological heritage management in Dutch waters: exploratory studies*, 1998, p. 169. Kamerstukken II 1986-1987, 19881 nr 3 pp. 10-11; Kamerstukken II 1987-1988, 19881, nr 6 p. 25

141 Rijkswet van 28 april 2005 tot instelling van een aansluitende zone van het Koninkrijk (Rijkswet instelling aansluitende zone), Stb. 2005, 387.

conditions, or in case his expertise is no longer warranted, the permit can be withdrawn (Article 47).

In accordance with Article 50 of the Monuments and Historical Buildings Act ownership of the excavated underwater cultural heritage falls into the hands of the State.¹⁴²

Since 2006, the management of underwater cultural heritage is one of the tasks of the National Service for Archaeology, Cultural Landscape and Built Heritage (RACM). RACM was set up in 2006 as a merger of the former Netherlands Department for Conservation (RDMZ), the National Service for Archaeological Heritage (ROB), and the Netherlands Institute for Ship and Underwater Archaeology (NISA).¹⁴³ As a government agency, RACM is part of the Ministry of Education, Culture and Science and operates under the direct responsibility of the Minister.¹⁴⁴ RACM is currently also involved in a European project on Managing Cultural Heritage Underwater.¹⁴⁵

3.2. Movable

3.2.1. Criteria for Designating Movable Cultural Heritage

The Dutch legal system on the protection of cultural heritage makes a strict distinction between the protection of immovable cultural property as outlined above and movable cultural property.¹⁴⁶ The protection of movable cultural objects became subject of regulations only after the first national regulation of immovable cultural objects had been adopted. The belief of the Dutch government that it was unnecessary to grant specific protection to movable cultural objects, and that it would mean a too great infringement of the owners' rights as well as administrative burden, changed only in the beginning of the 1980s.¹⁴⁷

In 1984, the Cultural Heritage Preservation Act (*Wet tot behoud cultuurbezit*) (hereinafter: "the CHP Act") entered into force.¹⁴⁸ Since then, the applicable rules on the protection of Dutch movable cultural property have been revised several times. The most notable amendments were made in 1995 in order to bring the CHP Act in accordance with European Community Law.¹⁴⁹

The main goal of the CHP Act is to prevent the loss of objects that are significant to Dutch cultural history in the sense of losing access to the objects through export.¹⁵⁰ Given that the danger of unknowingly and unwittingly losing such objects is particularly eminent for objects in private collections, the CHP Act applies first and foremost to privately owned objects. Objects from public collections are considered to be protected by their inclusion in a public collection.

142 Salomons A.F., *Nieuwe regels omtrent de eigendom van roerende monumenten ingevolge de Wet op de Archeologische Monumentenzorg*, *Weekblad voor Privaatrecht, Notariaat en Registratie*, 2007, p. 615; Explanatory Memorandum, kamerstukken II, 2003/04, 29259, no. 3, p. 24.

143 Maarleveld T., *Archaeological heritage management in Dutch waters: exploratory studies*, 1998, pp. 166-167.

144 http://www.racm.nl/content-en/xml_racm/engels_intro.xml.asp (last visited 27 March 2008).

145 See for more information the project's website at: www.machuproject.eu.

146 An exception are movable cultural objects prior and subsequent to their excavations that are governed by the Monuments Act. See section 3.1.2. The strict restriction has been criticised in particular with regards to so-called ensembles consisting both of immovable and movable objects. See further section 3.1.1. and the report by the Werkgroep Onroerend/roerend, *Van Object naar Samenhang - De instandhouding van ensembles van onroerend en roerend cultureel erfgoed*, 2004.

147 Kamerstukken II 1959/1960 4115 no 5, p. 2.

148 *Wet tot behoud van cultuurbezit*, Act of 1 February 1984, Stb. 1984 No. 49.

149 See below at sub-section 3.2.4.2.

150 Article 7.

In order to grant specific protection to objects from private collections against their export, the CHP Act employs a list system rather than a set of criteria against which all exports above a certain value need to be checked, as it is the case in the United Kingdom.¹⁵¹ In fact, the choice for protecting a given set of objects only, rather than employing an open-ended regime, has been qualified as a cornerstone of the Dutch system of protecting its cultural heritage. Working with a set and known number of objects has the advantage of allowing for greater legal security and visibility. The disadvantage of a set list consists in lesser flexibility and capacity to act or put differently, the increased need to screen cultural objects prior to an envisaged export.¹⁵² Currently, 270 individual objects and 31 collections are listed in the specific inventory to be maintained by the Minister under the CHP Act (the so-called Cultural Heritage Protection list).¹⁵³ The inventory knows only one level of protection. No public electronic inventory of the list exists but a copy of the list can be obtained from the State Inspectorate on Cultural Heritage. The Dutch State Inspectorate for Cultural Heritage estimates that the total number of single objects plus objects from the designated collections amounts to 60.000-70.000 objects.¹⁵⁴ This number is, however, not representative for the overall number of objects considered relevant for the Dutch Cultural Heritage given that it refers only to objects and collections in private hands.

Publicly owned movable cultural objects cannot be found on the list, but in the 'inventories of the respective institutions. State owned collections are supervised by the State Inspectorate for Cultural Heritage. The foundation for Ecclesiastical cultural objects *has made an inventory of ecclesiastical objects in the Netherlands.*'¹⁵⁵

A precondition for designation of an object under the CHP Act is that it is located in the Netherlands. While the nationality of the owner is irrelevant, there are some exceptions in order not to interfere with the fundamental EU principle of free movement of persons or to discourage loans. The Minister can issue a guarantee to an owner of a cultural object moving to the Netherlands for a limited period only that the object will not be designated as protected under the CHP Act.¹⁵⁶ The same applies to cultural objects owned by a person living outside of the Netherlands that are given in loan for an exhibition in the Netherlands.

Provided that none of the above exceptions apply, an object must be deemed both irreplaceable and indispensable for Dutch cultural heritage in order to qualify for protection under the scope of the CHP Act.¹⁵⁷ Hence, not every object of cultural-historical value is included on the list of protected objects. Instead, only if there are no similar objects present in the Netherlands¹⁵⁸ (the criterion of irreplaceability) and if the object fulfils one of the

¹⁵¹ During the evaluation of the Cultural Heritage Preservation Act, the State Secretary of Culture explicitly referred to the English system according to which each export of an object older than fifty years and above a certain value must be checked against the so-called Waverly criteria. See further: *Memorie van Toelichting*, 27 812, no. 3, pp. 3-4, para 4.

¹⁵² See further below on the emergency procedure granted to the Minister of Culture in case of an envisaged export of cultural heritage value but not yet registered under the CHP Act.

¹⁵³ Article 3c. See for the discussion in parliament: *Memorie van Toelichting*, 27 812, no. 3, pp. 19-20.

¹⁵⁴ Source: Email from Margot Llompart, Ministerie van Onderwijs, Cultuur en Wetenschap dated 11.9.2008 on file with the author.

¹⁵⁵ *Idem*.

¹⁵⁶ Article 5. The requirement that an object is located in the Netherlands, as well as the position of the owner was discussed in a case concerning a mechanical street organ 'De Lekkerkerker'. Unpublished case AR 28 December 1993. Excerpts of the case reproduced in: Sjouke P.S., *Wet tot behoud van cultuurbezit* / P.S. Sjouke, 2007, pp. 75-76.

¹⁵⁷ Article 2.

¹⁵⁸ Article 2(2).

following functions stipulating indispensability will it be protected under the Act: a symbolic function, a “linking function” or a “reference function”.¹⁵⁹

An object has a symbolic function if it serves as memory of historically important persons or events.¹⁶⁰ Examples are the “Portrait of Jan Six” by Rembrandt and the decorated furniture in the castle of Amerongen, which was a present by *stadholder* (vice-regent) Willem III. The other two (alternative) criteria for judging indispensability are formulated rather cryptically and are partly overlapping: a “linking function” (in Dutch: *schakelfunctie*) is explained as the “functioning of an object or collection as an essential element in a development that is of great importance for the exercise of scholarly work, including the science of culture.”¹⁶¹ An object is considered to have a “reference function” (in Dutch: *ijkfunctie*) if it “served as starting point for the development for other scientific or artistic objects.”¹⁶²

Unfortunately, the exact scope of the second or third functions is nowhere elaborated upon – neither in the legislative history nor have they been discussed in case law. While the criteria were discussed during an evaluation of the CHP Act in 1998/1999, no further light was shed on the meaning of the “linking function” or the “reference function”. Instead more stress was put on discussing the merits of including additional cumulative / supportive criteria to the CHP Act. In the end, the Council for Culture as the main advisory body for the Dutch Government on cultural policy matters confirmed the existing criteria of the CHP Act and held that there was no need to introduce further criteria such as “artistic value” or “presenting value”.¹⁶³

In case an object fulfils the criterion of irreplaceability, and one of the three criteria stipulating its indispensability, it can be designated as a protected object under the CHP Act.¹⁶⁴ While any citizen can suggest the granting of protection to an object by writing a letter to the Ministry of Education, Culture and Science, it is the Minister of Culture, advised by the Netherlands’ Council for Culture who decides whether protection is granted or not.¹⁶⁵

Compared with the U.K. system under which all objects above a certain threshold have to be judged by the Waverly criteria, the Dutch system as outlined above is rather inflexible and not apt to quickly react to potential exports of not yet registered but nevertheless relevant objects for Dutch cultural heritage. For this reason, an emergency procedure has been introduced.¹⁶⁶ According to this procedure, the Minister can bring an object under the protection of the Act without first having to seek the advice of the Council for Culture. The advice of the Council for Culture must, however, be sought directly afterwards. Once an object has been designated as a protected object it keeps this status, unless /until its declassification by the Minister of Culture.¹⁶⁷

159 Article 2(3).

160 Article 2(3)(a).

161 Article 2(3)(b). See also: *Memorie van Toelichting*, 27812, no. 3, p. 8, para. 7.

162 Article 2(3)(c). See also: *Memorie van Toelichting*, 27812, no. 3, p. 8, para. 7.

163 See also: *Memorie van Toelichting*, 27812, no. 3, pp. 8-9, para. 7. “Artistic value” and “presenting value” as additional criteria were rejected for they were too difficult to define and their evaluation would depend too much on subjective factors and the *zeitgeist*.

164 Article 1.

165 Article 2(1) for single objects & Article 3 in respect of collections junto Article 3c specifying the registration of the objects in the list. See above, in the section on immovable cultural heritage for a short explanation on the Council for Culture.

166 Article 3a.

167 Article 3d(2).

The Minister's decision to grant, to deny or to withdraw an object protection under the CHP Act qualifies as an order under the Awb.¹⁶⁸ This Act regulates the activities of public authorities.¹⁶⁹ Not only does it provide public authorities with (legal) instruments to fulfil their administrative tasks, it also grants protection to citizen against the activities of public authorities.¹⁷⁰ As an interested party in the sense of the Awb, the owner of an object can take legal action against an order he or she disagrees with. As first step, he or she must register an objection with the special commission of the Ministry of Education, Culture and Science. Against the decision of the commission, the owner can lodge an appeal with the administrative law section of the district court.¹⁷¹

As stipulated above, the main ratio of the CHP Act is to prevent the export of a protected object or collection. In order to achieve this, the CHP Act makes any transfer in property or relocation, even within the Netherlands, subject to noticing the inspector appointed by the Minister to oversee compliance with the Act.¹⁷² Since the merger of four (sub-) organs of the Ministry of Education, Culture and Science in 2005, the task of inspector is fulfilled by the State Inspectorate for Cultural Heritage. In as far as transfers and sales within The Netherlands are concerned; the original owner's obligation is limited to communicating the sale, as well as the name and address of the new owner to the State Inspectorate. There is no obligation of doing so prior to the sale. This is different when the object is taken abroad regardless of whether it is only temporarily (e.g., exhibition) or permanently for sale. In this case, the notification must be done prior to transferring the object. For cases involving an object's export only the Minister can grant permission.

Not notifying the State about a transfer qualifies as an economic crime¹⁷³ and can be prosecuted under Criminal Law. Not notifying the Minister does not as such affect the transfer of property, irrespective of the state of mind of any of the two parties. There is no provision in the CHP Act that renders a sale or transfer abroad invalid. However, if the object has been sold or transferred to another EU Member State, the Netherlands can initiate proceedings for the object's return under Directive 93/7/EEC.¹⁷⁴

168 Wet algemeen Bestuursrecht, in particular Article 1:3(1) AWB according to which an order is defined as: a written ruling of an administrative authority constituting a juristic act under public law. See for a short explanation of the Dutch administrative law in English: <http://www.rechtspraak.nl/Information+in+English/The+structure+of+the+judiciary+system/Administrative+law/> (Last visited: 24 March 2008).

169 See, e.g., Article 14a of the Monuments Act.

170 Wijk H.D.v., et al., *Hoofdstukken van bestuursrecht*, 2005, p. 1. See section 5 on the position, role and involvement of communities, groups or relevant non-governmental organizations in the process of declaring immovable property.

171 Article 1:5 of the Awb and Chapter 6 of the Act holding General provisions concerning objections and appeals. See for an English translation of the Awb: http://www.justitie.nl/images/Wettekst%20Awb%20Engelse%20Versie_tcm34-2121.pdf (Last visited: 24 March 2008). There has been one of appeal against the denial of the Minister of Culture (then the State Secretary of Culture) to grant protection to a collection of paintings and drawings allegedly by Van Gogh: ARRvS 10 September 2003, LJN AJ 3289. The court held that given the doubts of the experts from the Van Gogh Museum regarding the authenticity of (some of) objects from the collection, the criteria of "irreplaceability and indispensability" were not fulfilled and there was no need for further looking into the authenticity of the collection as had been alleged by the appealing owner.

172 Article 7 juncto Article 1(f).

173 Article 1(2) of the Wet op de Economische Delicten (WED, 22 juni 1950) WET van 22 juni 1950, houdende vaststelling van regelen voor de opsporing, de vervolging en de berechting van economische delicten. The sanction can range between a maximum of six years in prison and a fine in the fifth category if the violations has been deliberately, to custody for a maximum of a year and a fine of the fourth category (Article 6).

¹⁷⁴ Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State. See further on the Directive section 3.2.4.2.

State Inspectorate and Minister have four weeks to react upon an owner's notice. The Minister can extend the period for another eight weeks. Upon lapse of the four (and if applicable eight) week period, the owner is notified by the State Inspectorate, respectively the Minister as to whether or not the interests protected by the CHP Act stand in the way of his planned movement of his property. In case of an affirmative reaction by the State Inspectorate /Minister, the owner is free to carry out the notified action for a period of a year. In case the Minister denies the export on behalf of a sale abroad, the denial holds at the same time the State's offer to purchase the object.¹⁷⁵ In case the State and the owner cannot agree upon the sales price, the district court of The Hague has jurisdiction to determine the price.¹⁷⁶

One case in which the district court of The Hague was called upon to determine the sales price concerned a painting by Cézanne, *Paysage près d' Aix avec la tour César* had been designated as protected object under the CHP Act in 1985. In 1995, the owner of the painting informed the Minister about his intention to sell the painting abroad. The export was denied on the ground of the painting's importance for the Dutch cultural heritage. The state made an offer to acquire the painting for 6,5 million Dutch Guilders.¹⁷⁷ The owner rejected the price that did not reflect full market value.

When it became evident that the parties could not agree upon a price, the district court in The Hague was called upon (Article 12(2) of the CHP Act). The Court sought expert opinions on the value of the painting and set the price at 15 million Dutch Guilders,¹⁷⁸ more than twice the amount initially offered by the state.¹⁷⁹ As a consequence, the Cézanne was the first painting designated as cultural heritage that could not be acquired by the State. However, before the painting was taken abroad for sale, a private individual acquired the painting and gave it in loan to the Museum Boijmans Van Beuningen in Rotterdam where it still remains today.

Only after the loan had been agreed and the sale had been executed did the Council of Culture learn about the concession granted by the Minister. The latter had agreed to stay the application of the CHP Act for a period of eight years. While the concession was received critically by the Council for Culture, the period of eight years has by now lapsed and with it the threat of selling the painting abroad.¹⁸⁰

From what has been set out above it becomes evident that protection granted to cultural objects designated under the CHP Act first and foremost focuses on protecting the territorial links of the objects with the Netherlands. The CHP Act is less relevant in respect of physical protection / preservation of the designated objects. While the CHP Act provides for subsidies for the restoration of designated objects up to 60% of the restoration costs the owner cannot be forced to restore the object concerned. Further to financial support for the restoration, owners are also granted some advantages in respect of inheritance taxation.

¹⁷⁵ Articles 7, 10 and 12.

¹⁷⁶ Article 12.

¹⁷⁷ Approximately 3,1 million Euro.

¹⁷⁸ Approximately 6,8 million Euro.

¹⁷⁹ District Court of The Hague, 14 January 1998, Prg. 1998, p. 395. Excerpts from the case are published in: Sjouke P.S., *Wet tot behoud van cultuurbezit* / P.S. Sjouke, 2007, p. 86.

¹⁸⁰ Letter by Council for Culture to State Secretary with subject 'Painting Cézanne' dated 1 September 1998. As of today, i.e., after the lapse of the eight years during which the painting was granted not to be listed, the museum still holds the painting in loan. Information received from conservator of the Boijmans Van Beuningen Museum during telephonic inquiry on 24th March 2008.

3.2.2. Involvement of Communities in Designating Movable Cultural Heritage and Management

As outlined above, it is the Minister of Culture, advised by the Netherlands' Council for Culture who decides upon whether or not an object is granted protection.¹⁸¹ While any citizen, community, group or non-governmental organization can suggest the granting of protection to an object by writing a letter to the Ministry of Education, Culture and Science, there is no formal recognition of their involvement in the protection Dutch cultural heritage, unless of course they are involved as the owner of an object once designated by the Minister as worthy of protection. Owners of protected objects have special rights (e.g., to receive subsidies for the restoration of the object) and duties (notifying the Inspectorate about relocations of the object both in and outside the Netherlands) that follow from the designation of the object.

The composition of the Council for Culture does not seek to reflect the composition of the Dutch population, or the interests of particular communities or groups. Instead, as the main advisory body for the department of culture, the Council's members are appointed for both their specialist knowledge, as well as their broad vision on the cultural policy field.

The management and supervision of the Dutch cultural heritage, once designated under the CHP Act is the task of the State Inspectorate for Cultural Heritage (*Erfgoedinspectie*), in particular the Collection division. The Inspectorate, which is part of the Ministry of Education, Culture and Science, monitors the registration, conservation and storage-, as well as risk management of the protected objects. In case an owner wants to move a protected object within the territory of the Netherlands, he or she has to notify the State Inspectorate.¹⁸² Furthermore, the State Inspectorate has been mandated to grant permissions for temporary export of objects on behalf of the Minister. Finally, the State Inspectorate, in cooperation with the Tax Authorities and Customs, oversees the granting of export licences for temporary exports outside of the territory of the European Union in accordance with Council Regulation (EEC) N° 3911/92.¹⁸³

3.2.3. Application of Property Law to Movable Cultural Heritage

Before setting out the Dutch regime applicable to the finding a precious object or an archaeological discovery outside of planned and licensed excavation works it must be stressed that valuable objects in the ground are not considered as component parts of the ground but instead a movable object in and of itself.¹⁸⁴ As a general rule Dutch property law does apply to movable cultural heritage.¹⁸⁵ While movable cultural heritage was never considered to be a *res extra commercium*, the removal of this Roman legal concept from the new DCC excludes all possible doubts.¹⁸⁶ The fact that Dutch property law applies to movable cultural heritage does not mean, however, that it is dealt with in exact the same manner as any other object

181 Article 2(1) for single objects & Article 3 in respect of collections junto Article 3c specifying the registration of the objects in the list. See above, in the section on immovable cultural heritage for a short explanation on the Council for Culture.

182 Article 7 Cultural Heritage Preservation Act.

183 Council Regulation(EEC) N° 3911/92 of 9 December 1992 on the export of cultural goods.

184 Ploeger H.D., *Horizontale splitsing van eigendom*, 1997, p. 14.

185 Maarleveld T., "The Netherlands", 2006, in Dromgoole S. (ed.) *The protection of the underwater cultural heritage: national perspectives in light of the UNESCO Convention 2001*, p. 177.

186 Mijnsen F.H.J., et al., Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht. 3 Goederenrecht. Deel I. Algemeen goederenrecht, 2006, pp. 90-91, para. 96.

(thing) in the sense of Article 2:1 DCC, which defines an object (literally: “thing”)¹⁸⁷ as an “individual, independent corporeal objects that can be susceptible of human control”. As far as the balance struck in Dutch law between the protection of movable cultural heritage on the one hand and legal certainty on the other Section 3.2.4 will discuss the greater protection awarded to movable cultural heritage¹⁸⁸ in the form of longer prescription periods is explained. In this section, the Dutch regime of treasure trove as outlined in Article 5:13 DCC will be elaborated upon.

The Dutch rules on treasure trove are best explained by illustrating it with a real case as tried by the district court of Utrecht:¹⁸⁹ In 2000, the City of Woerden had asked a company specialized in earthworks to unearth a street. During the digging works, not qualifying as licensed archaeological excavation, an employee of the company found a helmet dating from Roman times and subsequently sold it for 6000 Guilders.¹⁹⁰ The city of Woerden tried to recover the helmet, arguing that the employee did not have the right to dispose of the helmet without the city’s consent. According to the city, the employee could not have acquired property of the helmet. The reasoning of the city was incorrect as the helmet had not been found in an area that had been granted protection under the Monuments Act. Consequently, the provisions of the Monuments Act as *lex specialis* to the general rules on treasure trove and the law of finds did not apply to the excavated helmet.

Consequently, the court determined ownership in accordance with Article 5:13 DCC on treasure trove. Article 5:13 DCC holds a specific regime for objects qualifying as “an object of value which has been hidden for so long that the owner can no longer be traced” (Article 5:13(2) DCC) to the general law of finds that applies to non-valuable objects.¹⁹¹ The latter is regulated in Articles 5:5 – 5:12 DCC.¹⁹²

Ownership in the case of a discovered treasure is divided in equal shares between person discovering it and the owner of the immovable or moveable object in which the treasure is found (Article 5:13 (1) DCC). The finder is obliged to report is find promptly to

¹⁸⁷ It is important to realize, especially when reading pre-1992 literature dealing with property rights that with the introduction of the new DCC in 1992, the use of terminology, in particular the relationship between “things” (*zaken*) and “assets” (*goederen*) changed. While under the old DCC “thing” (*zaak*) was the generic term, it become subordinated under the new Civil Code to the term “assets” (*goederen*) that had until 1992 been the subordinate term. See on the change in terminology: Rayar L., *et al.* (eds.), *The Dutch penal code / transl. [from the Dutch]*, (1997), p. xvi; Mijnsen F.H.J. / Haan, *Asser Serie 3 I Goederenrecht*, 2001, p. 42.

¹⁸⁸ Here, movable cultural heritage must be understood as objects designated under the Cultural Heritage Preservation Act, as well as objects from public collections.

¹⁸⁹ District Court Utrecht 5 February 2003, NJ 2003, 211, AF4007.

¹⁹⁰ Approximately 2700 Euro.

¹⁹¹ Forder C., *Treasure Trove in the Netherlands: Article 13 of Book 5 of the New Dutch Civil Code*, *International journal of cultural property*, 1992, p. 413. See further on different understandings on what qualifies as valuable object: Boer J.d., *De schatvinding in het ontwerp B.W. en de Monumentenwet, mede gezien in het licht van haar geschiedenis*, *RM Themis*, 1973, p. 463; Fikkers H., “Wie een leeuw op straat vindt, moet deze niet thuis kunnen houden”, 1992, in Snijders H.J. / Zwitser R. (eds.), *Tot persistit! opstellen aangeboden aan HJ Snijders, ter gelegenheid van zijn afscheid als hoogleraar privaatrecht aan de Erasmus Universiteit Rotterdam*, p. 135; Salomons A.F., *Nieuwe regels omtrent de eigendom van roerende monumenten ingevolge de Wet op de Archeologische Monumentenzorg*, *Weekblad voor Privaatrecht, Notariaat en Registratie*, 2007, pp. 614-615.

¹⁹² As far as non-valuable objects are concerned the finder has to report the find promptly to any local authority (Article 5:5 (1) &(2)). The finder, who complied with the duty to report the find acquired ownership of the object one year after the report (unless recovery of the objects has been sought in the meantime by the rightful owner) (Article 5:6 DCC). In case the rightful owner recovers the object, the finder who has complied with the obligations imposed upon him is entitled according to the circumstances, to a reasonable reward (Article 5:9(2) DCC). See further: Reehuis W.H.M.R. / Heisterkamp A.H.T., *Goederenrecht*, 2006, pp. 404-406; Nieuwenhuis J.H., *et al.*, *Vermogensrecht - Tekst & Commentaar*, 2007, pp. 377-387.

any local authority, in accordance with Article 5:5 (1)(a).¹⁹³ In case that there is uncertainty regarding the (valuable) object's property status (i.e., in case an object might have been hidden for a short while only) the public authority can require custody of the object until the ownership question has been ascertained (Article 5:13 (3) DCC).

In the case of the Roman Helmet the City of Woerden had to swallow the bitter pill that the property rights to the helmet were governed by Article 5:13 DCC and that it had to share ownership rights with the employee who had discovered the helmet. As a consequence, the employee did have the right to dispose of his share ownership with respect to the helmet. Given that there is no action of recovery against a co-proprietor, the City of Woerden could not recover the helmet from the person who acquired half of the property from the employee.

3.2.4. Protection for Movable Cultural Heritage That Has Been Stolen and Is Subject to Illicit Import, Export or Transfer of Ownership

In the following paragraphs the legal protection available under Dutch law for movable cultural property will be outlined. While one will look in vain for a provision under Dutch law declaring the import of objects exported illegally elsewhere illicit, as is the case with the Canadian Cultural Property Export and Import Act,¹⁹⁴ the DCC, the Cultural Heritage Preservation Act (CHP Act), as well as the Code on Civil procedural law provide for a complex system of protection. In fact, different regimes of protection exist under Dutch law, depending on the circumstance of a case. In the first place, one must not oversee the regime as it generally applies in the Netherlands to any (stolen) object. The need to outline this general regime is three-fold: not only is it the regime that governs many cultural objects not being specially protected under the Cultural Heritage Preservation Act (CHP Act). In fact, the majority of cultural objects, such as paintings from private collections are not affected by the CHP Act but fall under the general regime, just like any other movable objects, be it a bicycle or a television set. In the second place, in the absence of Dutch ratifications of international treaties on this matter, in particular the 1970 UNESCO Convention¹⁹⁵ and the 1995 Unidroit Convention, this general regime also applies to cultural objects originating outside of the European Union (provided that Dutch law applies according to the rules private international law).¹⁹⁶ Finally, once the general regime has been outlined, one can better understand the regime applicable to Dutch national treasures and cultural objects unlawfully removed from other EU Member States.

Once the general Dutch regime has been outlined (4.1), in particular at the balance the system strikes between the protection of the interests of a dispossessed owner and legal certainty in property transactions, including the protection of a bona fide third party, the analysis will turn to the protection available in the Netherlands for national treasures

¹⁹³ Article 5:13 (3) DCC.

¹⁹⁴ Cultural Property Export and Import Act (R.S., 1985, c. C-51), section "Foreign Cultural Property", which prohibits the import of cultural property that has been illegally exported from a country with which Canada has a cultural property agreement on illicit traffic, including the 1970 UNESCO Convention.

¹⁹⁵ At the time of writing this report ratification and implementation of the 1970 UNESCO Convention was pending.

¹⁹⁶ Under Dutch private international law, the rule of *lex rei sitae* applies to immovable and movable property. Since the introduction of the Act of 25 February 2008 on conflict rules (Wet van 25 Februari 2008 houdende regeling van het conflictenrecht betreffende het goederenrechtelijke regime met betrekking tot zaken, vordeingsrechten, aandelen en giraal overdraagbare effecten, stb. 2008, 70) the application of the rule of *lex rei sitae* for movable objects has been codified (Art. 2(1)). Prior to the introduction of this act, the application of the *lex rei sitae* rule for movable property was based on unwritten law (see, e.g., District Court Amsterdam 27 November 1932, NJ 1935, p. 657); Rotterdam 4 februari 1999, 44053/ HA ZA 96-2403 NJ kort 1999/37, at para. 5.6.1.; HR 8 May 1998, NJ 1999, 44.

unlawfully removed from other EU Member States (4.2). The choice for jumping directly to the protection available to objects originating outside of Dutch territory before turning to the protection available for Dutch national treasures and objects from Dutch public collections (4.3) is motivated by the fact that the protection of the latter has only been introduced parallel to and inspired by the implementation of Directive 93/7/EEC.¹⁹⁷ This section will conclude with an update on the ratification and implementation of the 1970 UNESCO Convention (4.4).

3.2.4.1. General Regime Applicable to Stolen Objects in the Netherlands: The Right to Recovery, Transfer of Property, and the Protection of Third Buyers under the Dutch Civil Code

The regime that will be outlined in this sub-section applies to stolen cultural objects from private Dutch collections (not listed under the CHP Act), as well as to objects stolen in foreign countries not being EU Member States. To start with, Dutch property law underwent significant changes when the old DCC was amended in the years 1970-1992. The relevant provisions on the protection of stolen cultural objects, or rather the protection of the rights and interest of the original owner of a cultural object and a subsequent bona fide purchaser can be found in Book 3 and 5 of the new DCC.¹⁹⁸ Book 3 on Patrimonial Law in general (Law of Property, Rights and Interests) deals with all patrimonial rights, including property as a specific form of patrimonial rights, whereas Book 5 on real rights focuses on property in particular. Book 5 deals with the substance of proprietary rights and the rights of an owner. According to Article 5:1 DCC, ownership is the “most comprehensive right that a person can have in a thing”. From his property right, the owner derives a number of legal actions. The most important action regarding movable objects is the action of revendication as laid down in Article 5:2 DCC: “The owner of a thing is entitled to revendicate (recover) it from any person who holds it without right”. Due to extinctive prescription, the action to revendicate is no longer available after a lapse of twenty years from the day that a different person from the right holder has taken possession of the property (Article 3:306 DCC in conjunction with Article 3:314(2) DCC). The owner does not lose the right to revendication as such, but his action is barred leaving him with a (moral) claim he or she can no longer enforce. However, in a great number of cases, the original owner will not be able to recover his property due to acquisitive prescription.

The rules on transferring property and the protection of third parties when acquiring a stolen object are laid down in Book 3. The general rule on the transfer of property is provided by Article 3:84 DCC and requires a “delivery pursuant to a valid title by the person who has the right to dispose of the property”. There are hence three requirements that must be met for a valid transfer of property: delivery, valid title and the right to dispose of the object concerned.¹⁹⁹ In case of stolen objects, and in accordance with the *nemo dat* rule, the third

197 Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State.

198 The (new) Dutch Civil Code consists of eight Books, each dealing with a specific subject of private law. Book 1: Individuals and Family; Book 2: Legal Entities; Book 3: Patrimonial Law (Law of Property, Rights and Interests) in general; Book 4: Inheritance/Succession; Book 5: Law of Obligations; Book 6: Contracts, Definitions; Book 7: Specific Contracts I; Book 7(a): Specific Contracts II; Book 8: Movement Resources and Transport. In the notation of specific articles, e.g., Article 3:1 DCC the number before the colon denotes the relevant book, whereas the number after the colon refers to the specific article. In the example of Article 3:1 DCC, we are looking at Article 1 of Book 3 DCC.

199 In case of movable property, delivery is generally achieved by giving the acquirer physical possession of the object. A title must be understood as the legal relationship between the alienator and acquirer that justifies a transfer. The most common title being sale.

requirement, i.e., the right to dispose of an object, is not met. Due to the absence of the right to dispose of the property, the property is not transferred.

The general rule on the transfer of property is, however, compromised by Article 3:86 DCC, which holds a cure to the absence of the right to dispose of a property. According to this article, “a transfer (...) of a movable object (...) despite the alienator’s lack of the right to dispose of the property is valid, provided that the transfer²⁰⁰ is not by gratuitous title and the acquirer acts in good faith”. The requirement that the transfer must not be by gratuitous title does not mean that the acquirer has to pay full market value of the object to be transferred. As far as the requirement of good faith on behalf of the acquirer is concerned, the following aspects should be mentioned: The relevant moment that the acquirer must act in good faith is the moment he or she obtains possession of the object in question. While the DCC does not spell out what constitutes good faith, Article 3:11 sets out when an acquirer is considered not to act in good faith: “Where the good faith of a person is required to give legal effect to something, such person does not act in good faith if he or she knew, or ought to have known given circumstances, of the facts or the law to which is good faith must relate (...)”.²⁰¹ According to Article 3:11 an acquirer is presumed to have acted in good faith. The burden of proof to show that someone did not act in good faith rests upon the party seeking revendication (Article 150 of the Code of Civil Procedure, CCP (*Wetboek van burgerlijke rechtsvordering*)).

In case the acquirer did act in good faith and gave some form of remuneration, he or she acquires property despite the alienator’s missing right to dispose of it. Consequently, the original owner can no longer recover the property.²⁰²

The cure offered by Article 3:86 DCC against the absence of the right to dispose of a property, does not as such apply to cases where the original owner lost his possession of the object involuntarily, i.e., due to theft. In case of stolen objects, the original owner is granted a period of three years to recover his object as held by Article 3:86(3) DCC: “(...) the owner of a moveable object, who has lost his possession though theft, may revendicate it as his property during a period of three years from the day of the theft”. However, even this exception to the exception knows yet another exception that allows immediate transfer of property even of stolen objects. The following requirements, as outlined in Article 3:86(3)(a), must be met for a third purchaser to acquire property of a stolen object: the acquirer must be a natural person not acting in the exercise of a profession or business. The alienator, on the other hand, must be acting in the normal course of his business and must do so in his business premises. If these requirements, further to the requirements of non-gratuitous title and good faith on behalf of the acquirer are fulfilled, property, even of stolen objects, is directly transferred. In such instance, the original owner cannot recover the property.

The legislative history of Article 3:86 DCC reveals that the legislator was predominantly concerned with the protection of (weaker) consumers buying second hand goods. The impression that the legislator did not pay due regard to the possibility of objects in question not being typical second hand goods (e.g., television sets or bicycles) but instead cultural objects and in particular unique and valuable works of art, is reinforced by the fact that one particular group of sales is (again) explicitly exempted by Article 3:86(3)(a): sales by auction. While the property of a stolen painting would be immediately transferred if acquired by a natural person in good faith in an art gallery, this is not the case if the same person had

200 The transfer must be in accordance with Articles 3:90, 3:91 or 3:93 DCC.

201 Article 3:11 DCC.

202 The possibility that the original owner might address the alienator for indemnity should be mentioned here but will not be further elaborated upon given the report’s preoccupation with the protection of the cultural object itself rather than indemnity.

acquired the painting in auction at the Dutch branch of Sotheby's or Christie's. In the latter case, the rule of Article 3:86(3) applies, which allows the original owner to recover his property within a period of 3 years. In case the original owner does not make use of his right to recovery (e.g., as he or she might not know where the object is situated), the good faith buyer in auction, or at an antique market gets full legal title after the lapse of 3 years and in accordance with Article 3:99 DCC on acquisitive prescription by a good faith possessor. The prescription period starts to run on the day after a person different from the right holder took possession of the object (Article 3:101 DCC). Article 3:118 DCC further sets out the good faith as required by Article 3:99: a possessor acts in good faith "when he or she does and may consider him/herself as proper right holder".

However, not only a good faith possessor can get full legal title due to acquisitive prescription. In the Netherlands, even a person not acting in good faith, can eventually become the owner of a stolen good due to acquisition on the grounds of extinctive prescription. The moment in which this form of acquisition becomes possible is linked to the moment the legal action of the original owner has been barred due to the lapse of 20 years (Article 3:306 DCC) and occurs "regardless of whether his possession was in good or bad faith" (Article 3:105 DCC).

Under the old DCC, extinctive prescription, i.e., the barring of the original owner's legal action for recovery was not linked with a provision granting the property to the person possessing it the moment the limitation period had lapsed. The consequence of a legal vacuum in which no one could subsequently acquire full legal title of the object was considered undesirable and hence changed with the introduction of the new DCC.²⁰³ Yet another interesting change concerned the length of the extinctive prescription period. Under the old DCC (Article 2004) the legal action to recovery was barred after the lapse of thirty years from the moment of involuntary loss of the possession. As a consequence of the provisions on extinctive and acquisitive protection under the new DCC even a thief can get full legal title, which is the main reason that the Netherlands is sometimes referred to a thieves' paradise.²⁰⁴ While the statement is based on a correct legal analysis, it must be further qualified: No one will deny that the balance the Dutch legal system strikes between the protection of the interests of a disposed owner and legal certainty in property transactions, including the protection of a bona fide third party is in favour of the latter. On the contrary, the relevance of legal certainty, and hence the need for the legal qualification to follow reality at a given point in time – against the interests of dispossessed owners has been stressed by the Dutch legislator when drafting the new DCC and the consequence of the possibility of a thief becoming the owner of his prey has been accepted.²⁰⁵

In a case before the Dutch Supreme Court (*Hoge Raad*) between the German Land Saxony, as the successor in rights of the former owner and a private individual who had acquired a painting in 1990 in Amsterdam, the Court stressed the relevance of extinctive limitation periods in the light of legal certainty. The Court stated that the fact that the original owner lost his action to recover his painting before he or she was even able to make use of the action (i.e., before he or she learnt about the painting's location) could not outweigh the need

203 Klomp R.J.Q., "Dieven met geduld. Over verkrijgende verjaring te kwader trouw", 2000, in Brand I., et al. (eds.), *Tijd en onzekerheid BW-krant jaarboek 16*, p. 61 with further references.

204 Brunner C.J.H., "Dief wordt eigenaar", 1992, *Quod Licet*, *Bundel aangeboden aan prof mr WM Kleijn ter gelegenheid van zijn afscheid als hoogleraar burgerlijk recht e notarieel recht aan de Rijksuniversiteit te Leiden*, p. 53.

205 Klomp R.J.Q., "Dieven met geduld. Over verkrijgende verjaring te kwader trouw", 2000, in Brand I., et al. (eds.), *Tijd en onzekerheid BW-krant jaarboek 16*, p. 61; *Parl. Gesch.*, Boek 3, Deventer 1981, p. 416.

for legal certainty in judicial matters.²⁰⁶ Since the ruling of this case, which was still tried under the old DCC, the length of the extinctive limitation period has been brought back from 30 years (Article 2004 old DCC) to 20 years with the introduction of the new DCC.

3.2.4.2. Protection Available in the Netherlands for Cultural Objects Removed from Other EU Member States or Contracting Parties to the European Economic Area Agreement – the Dutch Implementation of Directive 93/7/EEC²⁰⁷

In the above sub-section the general protection available for stolen movable objects under Dutch law has been discussed. It became evident that there is little protection available to the original owner of stolen cultural objects in the sense of paintings and other works of art or antiquities from private collections. Cultural objects not considered national treasures, nor belonging to public collections receive the same treatment as any other mass-produced object and, if stolen, their dispossessed owner has little chance to recover his property.

This sub-section focuses on the protection available under Dutch law for a specific category of cultural objects that have been removed unlawfully from the territory of another EU Member State or a contracting party to the European Economic Area Agreement.²⁰⁸ As an EU Member State, the Netherlands was obliged to implement Council Directive 93/7/EEC (hereafter: the Directive),²⁰⁹ which seeks to reconcile the fundamental principle of free movement of (cultural) goods and the protection of objects classified as “national treasures possessing artistic, historic or archaeological value” under national legislation in the sense of Article 30 EC Treaty.²¹⁰

The protection under the Directive is only available for cultural objects in the sense of the directive. According to Article 1(1) of the Directive, there are different requirements for objects from private collections on the one hand and objects from public collections on the other. As far as objects from private collections are concerned, they need to fulfil two cumulative requirements: they need to be classified as ‘national treasures possessing artistic, historic or archaeological value’ in the sense of Article 30 EC Treaty under national legislation.²¹¹ Furthermore, the objects must also fall in one of the categories listed in the Annex of the Directive. Objects from public collections, on the other hand, do not have to fulfil this second requirement. Instead, further to being classified as national treasures, they

206 HR 8 May 1998, 1st Chamber, Nos. 16.546, C97/025; NJ 1999, No. 44, annotated by Th. M. de Boer. See for analysis and discussion of the case: Blom J., *Laying Claim to Long-Lost Art: The Hoge Raad of the Netherlands and the Question of Limitation Periods*, *International journal of cultural property*, 2000.

207 Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State.

208 The Agreement on the European Economic Area entered into force in 1994. Its current relevance, and against the background of the protection of cultural objects is that Norway, Iceland and Liechtenstein are able to participate in the Internal Market, while not assuming the full responsibilities of EU membership. Hence, the protection available to cultural objects originating from EU Member States as discussed in this section, is also available to objects originating in these three countries.

209 Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State. The Dutch Law implementing the Directive, as well as introducing some changes not required under EC Law but rather to organize the internal regime more in accordance with the European level of protection was the *Wet 9 maart 1995, Stb. 145*. Further to amending the Cultural Heritage Preservation Act, it brought about changes in Book 3 of the Dutch Civil Code, the Dutch Code on Civil Procedural Law as well as the Dutch Act on Economic Offences.

210 Article 30 EC Treaty grants an exception to the provisions of Articles 28 and 29, in prohibitions or restrictions on imports, exports or goods in transit justified on grounds of (...)the protection of national treasures possessing artistic, historic or archaeological value (...) that shall not precluded (...).

211 As for the Netherlands, and outlined above in section 3.2.1. the respective legal provisions can be found in the CHP Act.

must be listed in the inventories of museums, archives, libraries or of ecclesiastical institutions in order to qualify as a cultural object in the sense of the Directive.

The Directive introduces domestic obligations in all Member States to return cultural objects illegally removed from another Member State.²¹² In implementing the Directive, Member States had to amend their legislation in order to allow for the return of unlawfully removed objects to a requesting EU Member State. According to Article 1(2) unlawful removal means removal in breach of EEC Regulation No 3911/92, in breach of national laws or that an object is not returned after temporary lawful removal.²¹³ Hence, Member States had to ensure that a removal of a cultural object constituting a national treasure or originating from a public collection is held to be illegal under their own laws.²¹⁴ How the Netherlands implemented the latter requirement will be elaborated in the next sub-section that focuses on the protection of Dutch national treasures and objects from public collections. In order to outline the protection available under Dutch law and in accordance with European Community law for objects unlawfully removed from another EU Member State, it is best to first look at the main articles of the Directive before turning to the Dutch implementation.

Article 2 of the Directive states that cultural objects in the sense of the Directive, which have been unlawfully removed from the territory of a Member State shall be returned in accordance with the procedure provided for in the Directive. We have already seen that the illegality of the removal is determined according to the law of the requesting Member State.²¹⁵ While the definition of cultural objects in the sense of the Directive includes both objects from private and public collections, the Directive does not grant any rights to the private owner of an object. Only an EU Member State can initiate proceedings for an object's return (Article 5). The general obligation of the Directive to return unlawfully removed objects to their Member State of origin is put into (more) concrete terms in Article 7: in particular, it clarifies that the obligation to return unlawfully removed objects is not absolute but is subject to two different kinds of time limits. In the first place, a Member State loses its right to seek return of a cultural object if it does not start return proceeding within one year after becoming aware of the whereabouts of the object and the identity of the possessor / holder. In the second place, Article 7 introduces an absolute time limit irrespective of the knowledge of the Member State seeking a return: after the lapse of thirty years for objects from private collections, and after the lapse of 75 years for public collections a Member State can no longer seek the return of an object, unless the legislation of the Member State in which the object is residing does not know time limits for such proceedings or in case of bi-lateral agreements stating otherwise. Article 8 of the Directive clarifies that there can be no bona fide acquisition of a cultural object in the sense of the Directive. However, Article 9(1) of the Directive takes the interest of a bona fide possessor into account in determining that he or she must be awarded a fair indemnity.

212 Siehr K., *International Art Trade and the Law*, 1993, p. 232.

213 EEC Regulation No 3911/92 introduces an EU wide system of export licenses for the export of cultural goods outside the customs territory of the Community that is further outlined in COMMISSION REGULATION (EEC) No 752/93 of 30 March 1993. The regulation will not be further discussed here, as a breach of the regulation would mean an export outside of EU territory without an export licence. The question as to the return of an object once it has left EU territory is a question of international law, and depends on the countries involved. Given the Netherlands' decision not to ratify the 1995 Unidroit Convention and pending the implementation of the 1970 UNESCO Convention, it would be very difficult for the Netherlands to seek the return of an object once it left EU Territory. For further information on the regulation, the reader may be referred to: *Ibid.*, pp. 226-232.

214 Article 1(2) of the Directive stipulates that "[u]nlawfully removed from the territory of a Member State shall mean: - removed from the territory of a Member State in breach of its rules on the protection of national treasures or in breach of Regulation (EEC) No. 3911/92, or – not returned at the end of a period of lawful temporary removal or any breach of another condition governing such temporary removal".

215 Siehr K., *International Art Trade and the Law*, 1993, p. 236.

Squaring the main obligations under the Directive as outlined in the previous paragraph with the Dutch system on transfer of property prior to the Directive's implementation, in particular the applicable limitation periods and the position of good faith purchasers as explained in the previous paragraph, it becomes evident that the Dutch legislator had to substantially amend its laws (in particular the DCC, the Cultural Heritage Preservation Act, the Code on civil procedural law, as well as the Code on economic offences) to allow for the return of unlawfully removed objects as required by the Directive.²¹⁶ In the following paragraphs, the changes in the DCC as well as in the Code on civil procedural law, and in the Code on Economic offences will be discussed. The changes in the Cultural Heritage Preservation Act are first and foremost relevant for the protection of Dutch national treasures, which will be discussed in the subsequent sub-section.

In the first place, Article 3:310a was introduced into the DCC, which essentially follows the wording of Article 7 of the Directive: the action to recover a cultural object falling under the scope of the directive is barred after the lapse of the period of one year from the day after the requesting EU Member State learnt about its location and the identity of the current possessor. Further to this subjective limitation period, the article implements the longer, absolute limitation periods of Article 7: despite ignorance of the requesting EU Member State that lost the object contrary to its own laws, any claim is barred 30 years from the day the object left its territory (which can, however, be long after the initial theft occurred). For objects from public collections or ecclesial collections, this period has been extended to 75 years. It might not come as a surprise that Dutch law does not provide for an extension of the absolute time limit within which a requesting state must initiate proceedings. As a consequence, the maximum period within which proceedings must be brought ends 30 years after the removal for objects from private collections, and 75 years for objects from public collections respectively. However, in order to ensure that the requesting Member State's action will not be barred earlier than the 30 / 75 years, the Dutch legislator also had to ensure that the normal rules on good faith acquisition and acquisitive prescription would not prevent a return. This was achieved with the introduction of Articles 3:86a DCC. According to its first paragraph, Article 3:86 DCC on the protection of good faith purchasers, cannot be evoked against an EU Member State that seeks the return of a cultural object in accordance with the Directive. Also, Article 3:86a DCC sets out the indemnity to be awarded to a good faith possessor in accordance with Article 9 of the Directive.

While it is generally considered that acquisitive prescription as outlined in 3:99(1) DCC does not apply to national treasures and objects from public / ecclesial collections from an EU Member State, the obligation of Article 8 of the Directive has not been explicitly implemented in the DCC.²¹⁷ The literature discussing the Dutch implementation of the Directive assumes that Article 3:99 does not apply to cultural objects from another EU member state that fall under the scope of application of the directive. However, the DCC does not contain any provision that prevents the application of Art. 3:99 on acquisitive prescription in this case. This lacuna has only recently been discovered and will be remedied in the context of the changes necessary for the implementation of the 1970 UNESCO Convention.

216 See for a critical analysis of the impact of the implementation on the system of the Dutch Civil Code: Bollen C. / Groot G.R., de, *Verknoeit het Europese recht ons Burgerlijk Wetboek?*, *Nederlands Tijdschrift voor Burgerlijk Recht*, 1995.

217 This is particularly strange as Article 3:99(2) explicitly states that the Article 3:99(1) does not apply for objects protected under the CHP Act.

The lacuna was discovered only in the context of preparation for the implementation of the 1970 UNESCO Convention.²¹⁸ While the main aim of the bill for the implementation of the 1970 UNESCO Convention is to amend the Dutch law in accordance with the obligations of the Convention, the bill will also remedy the current lacuna with respect to acquisitive prescription for cases that fall under the scope of the Council Directive. The bill foresees the introduction of a new third paragraph to Article 3:99 DCC that explicitly states that acquisitive prescription by a good faith possessor cannot be evoked against claims as outlined in Article 3:86a DCC.²¹⁹

The Dutch Code on Civil Procedural Law as well as the Dutch Act on Economic Offences were amended to provide for the procedural matters of restitution. The Code on Civil Procedural Law was extended with a section 13 holding five articles (Articles 1008-1012) mapping out the legal process to be followed by the Member State seeking the return of an illegally removed cultural object.

The Netherlands appointed the State Inspectorate for Cultural Heritage (Erfgoedinspectie) as central authority to carry out the tasks provided for in Council Directive 93/7/EEC and in accordance with Articles 3, 4 and 6 of the Directive.²²⁰

3.2.4.3 Exceeding Protection for Dutch National Treasures and Objects from Dutch Public Collections

In the above sub-section, the implementation of European Community law on the protection of national treasures or objects from public collections unlawfully removed from other EU Member States under Dutch law has been discussed. This sub-section turns to the protection available for Dutch national treasures and objects from Dutch public collections. For as long as these objects remain on Dutch territory, European Community law is irrelevant. The relevance of European Community law is triggered only with the unlawful removal of a national treasure or an object from a public collection to another EU Member State. In the latter case, the Netherlands has to request the other EU Member State to return the object in accordance with the Directive as implemented in that state's law. However, in order to allow for the return of objects from public collections (further to national treasures under the Cultural Heritage Preservation Act in the sense of Article 30 EC Treaty²²¹) the Dutch legislator had to ensure that the removal of objects from public collections constituted an unlawful removal in the sense of the Directive. This was achieved by introducing Article 14a to the Cultural Heritage Preservation Act, which bans the export of an object from a Dutch public collection without prior written declaration by the Minister.

218 Advisory Report of the Council of State, *Regeling van het conflictenrecht betreffende het goederenrechtelijke regime met betrekking tot zaken, vorderingsrechten, aandelen en giraal overdraagbare effecten (Wet conflictenrecht goederenrecht)*, 30 876, No. 4, p. 2; Note in reaction to the Report on the Implementation of the UNESCO Convention, *Uitvoering van de op 14 november 1970 te Parijs tot stand gekomen overeenkomst inzake de middelen om de onrechtmatige invoer, uitvoer of eigendomsoverdracht van culturele goederen te verbieden en te verhinderen (Uitvoeringswet UNESCO-verdrag 1970 inzake onrechtmatige invoer, uitvoer of eigendomsoverdracht van cultuurgoederen)*, 31 255, No. 7, p. 11-13.

219 Tweede Kamer, vergaderjaar 2007–2008, *Uitvoering van de op 14 november 1970 te Parijs tot stand gekomen Overeenkomst inzake de middelen om de onrechtmatige invoer, uitvoer of eigendomsoverdracht van culturele goederen te verbieden en te verhinderen (Uitvoeringswet UNESCO-verdrag 1970 inzake onrechtmatige invoer, uitvoer of eigendomsoverdracht van cultuurgoederen)*, Voorstel van wet 31 255, no. 2, sub E.

220 http://www.erfgoedinspectie.nl/page/collecties/regelgeving_bescherming_cultuurgoederen (last visited 27 March 2008).

221 As for objects from Dutch private collections, which enjoy protection under the CHP Act, the reader may be reminded of what is outlined in sections 3.2.1. and 3.2.3. above.

For those cases in which an object that is either listed under the CHP Act or which belongs to a public collection has been moved contrary to the provisions of the Cultural Heritage Preservation Act, or has been stolen, but has left the territory of the Netherlands, the Dutch legislator chose to extent the protection available. The regime resembles to quite an extent the regime available for cultural objects from other Member States, which might not be surprising given that both regimes were introduced at the same time and given the legislator's belief that on top of the direct implementation measures further changes were necessary to arrive at a workable and just regime.²²²

As it is the case for cultural objects from other EU Member States, the application of Article 3:86 DCC as a cure to the absence of a valid title to dispose of an object, has been blocked (Article 3:86a (2) DCC). Hence, no protection is granted to a private individual who (allegedly) acquired the object against the original owner seeking its recovery after theft or loss of possession in violation of the CHP Act.²²³ Due to the registration of the protected objects in the list as required by the CHP Act as well as the inventories in case of public collections, the original owner furthermore profits from a reversed burden of proof against the possessor.²²⁴

Hence, the next relevant question concerns the rules on extinctive and acquisitive prescription under this regime. As far as acquisitive prescription on behalf of a good faith possessor is concerned paragraph 2 of Article 3:99 DCC clearly states that the general rule as outlined in its first paragraph according to which a good faith possessor gets full legal title after uninterrupted possession of three years, does not apply to objects protected under the CHP Act, or from collections in the sense of Article 14a of the CHP Act. Instead, according to Article 3:310b DCC the right to legal action of the original owner lapses five years after the moment he or she learnt about the whereabouts of the missing object and the identity of the current possessor / holder. This subjective prescription rule of five years is complemented with an absolute term of thirty years starting from the day in which a person different from the right holder took possession of the object. Once either of the two extinctive limitation periods has lapsed, the current possessor acquires full legal title, regardless of whether he or she was in good or in bad faith (Article 3:105(1) DCC).

3.2.4.4 The 1970 UNESCO Convention

The Dutch Government is currently working on the ratification and implementation of the Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property into Dutch Law.²²⁵ In 2004 the Dutch Government decided to ratify and implement the Convention. By then, earlier concerns about the ratification had to some extent been removed with the implementation of Council Directive 93/7/EEC.²²⁶ In

222 Bollen C. / Groot G.R., de, *Verknoeit het Europese recht ons Burgerlijk Wetboek?*, *Nederlands Tijdschrift voor Burgerlijk Recht*, 1995, p. 3.

223 Another Article that must be mentioned here is Article 3:88 DCC. According to its second paragraph the protection of its first paragraph for cases that are not covered by Article 3:86 DCC does not apply to objects protected under the Cultural Heritage Preservation Act, or which falls under the scope of Article 14a of the Act. The introduction of this second paragraph is the logic consequence now that Article 3:86a prevents the application of Article 3:86 to these objects. See further, also in respect of Article 3:238(4) DCC: *Ibid.*, p. 3.

224 Normally speaking, the possessor of a object is considered to be the right holder (Article 3:119 DCC).

225 U.N.T.S. No. 11806, vol. 823, p. 231. The 1970 UNESCO Convention is not considered of being self-effecting. Hence, despite its monist approach to international law, the Dutch legal system requires the Convention's implementation into national law to become effective.

226 Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State. See for an analysis of the 1970 UNESCO Convention from the Dutch perspective and discussion of legal obstacles to the implementation: Gimbrère S.P., Tineke, *The Protection of Cultural*

implementing the Directive, the Netherlands had to amend the DCC, the Cultural Heritage Preservation Act, the Code on Civil Procedural Law and the Code on Economic offences.²²⁷ In particular, the applicable limitation periods and the position of a good faith purchaser changed significantly.²²⁸ Hence, with the implementation of the Council Directive, the Dutch legal system for the protection of cultural objects moved towards the system of the UNESCO Convention.²²⁹ The Act ratifying and implementing the Unesco Convention has been passed by the House of Representatives and is currently pending confirmation by the Senate.²³⁰

Until other State Parties to the Convention will be able to claim back cultural objects illegally removed from their territory, the general rules of the DCC apply with their strong protection for a good faith purchaser. Also, the bill implementing the Convention explicitly states that the new regime of protection will apply only to cases in which the cultural object has illegally been removed from the territory of another State Party / stolen from a public collection after the Act implementing the Convention into Dutch Law has entered into force.²³¹ Hence, any illegal removal from the territory of a State Party not being an EU Member State before the entry into force of the implementation Act will fall under the general rules of the DCC with its strong protection of a good faith possessor and extinctive prescription that works even to the benefit of a mala fide possessor.

3.2.5. Special Obligations towards the Community with the Closest Cultural Link?

There is no legally binding obligation for museums, galleries or other institutions to return cultural property or heritage in their possession to the community that has the closest cultural link to such objects. The only form of regulation that is employed to guide and control the activities of museums, galleries or other institutions in relation to tangible cultural property is self-regulation. The Dutch self-regulatory framework consists of the following actors and instruments, which will be outlined in the following paragraphs: the Dutch Museum Association, the Dutch version of the International Council of Museums (ICOM) Code of Professional Ethics for Museums, the ethical committee giving recommendations to the museum sector on the basis of this code (the 'Ethical Code Committee'), and the alternative ethics committee set up by the Members of the 'Foundation of Ethnological Collections in the Netherlands' (the 'Ethnological Ethics Committee').

The Dutch Museum Association dates back to 1926 when it was founded as a body of museum directors. In 2006, it became the umbrella organisation for the museum sector with tasks such as lobbying and development of policies. In 1991, the first Dutch version of the

Property: From Unesco to the European Community with special reference to the Case of the Netherlands, *Netherlands Yearbook of International Law*, 1992.

²²⁷ See above for an elaboration of the Dutch implementation of the Directive.

²²⁸ See in this respect: Bollen C. / Groot G.R., de, *Verknoeit het Europese recht ons Burgerlijk Wetboek?*, *Nederlands Tijdschrift voor Burgerlijk Recht*, 1995.

²²⁹ See: Advies Raad van State en nader Rapport, *Regeling van het conflictenrecht betreffende het goederenrechtelijke regime met betrekking tot zaken, vorderingsrechten, aandelen en giraal overdraagbare effecten (Wet conflictenrecht goederenrecht)*, 30 876, No. 4, p. 2; *Memorie van Toelichting*.

²³⁰ The current state of affairs can be followed online at:

<http://www.minocw.nl/actueel/wetgevingskalenders/43/Goedkeuringswet-UNESCOoverdrag-1970-31-256.html> (last visited 18.09.08).

²³¹ Article 13 of the Bill for the Implementation of the 1970 UNESCO Convention, Tweede Kamer, vergaderjaar 2007–2008, *Uitvoering van de op 14 november 1970 te Parijs tot stand gekomen Overeenkomst inzake de middelen om de onrechtmatige invoer, uitvoer of eigendomsoverdracht van culturele goederen te verbieden en te verhinderen (Uitvoeringswet UNESCO-verdrag 1970 inzake onrechtmatige invoer, uitvoer of eigendomsoverdracht van cultuurgoederen)*, *Voorstel van Wet 31 255*, no. 2.

ICOM Code of Professional Ethics for Museums (hereinafter: the Dutch ICOM Code)²³² had been introduced by the Dutch Museum Association. Since then, the Dutch ICOM Code has been revised several times to incorporate the changes as made in accordance with the international ICOM Code.²³³ The Dutch ICOM Code sets minimum standards of professional practice and performance for museums and their staff, ranging from the housing of the collections, the museum shop, to the responsibilities of the museum staff. There are several provisions on the accession and de-accession of museum objects. As far as the return and restitution of cultural objects are concerned, Articles 6.2 and 6.3 of the Code state that: “Museums should be prepared to initiate dialogues for the return of cultural property to a country or people of origin. This should be undertaken in an impartial manner, based on scientific, professional and humanitarian principles as well as applicable local, national and international legislation, in preference to action at a governmental or political level” (Article 6.2); and “When a country or people of origin seeks the restitution of an object or specimen that can be demonstrated to have been exported or otherwise transferred in violation of the principles of international and national conventions, and shown to be part of that country’s or people’s cultural or natural heritage, the museum concerned should, if legally free to do so, take prompt and responsible steps to co-operate in its return” (Article 6.3).

As these provisions indicate the Dutch Ethical Code is rather reserved in its demands on the museum sector.²³⁴ In the absence of legally binding force, the Dutch ICOM Code’s authority depends on moral pressure. To support obedience to the Dutch ICOM Code, the Dutch museum association has made compliance with the Code a condition of its membership. Also, in 1991, the ‘Ethical Code Committee’²³⁵ was founded to advise museums about the Dutch Ethical Code and to hold their behaviour against the Code. The ‘Ethical Code Committee’ has so far issued eleven recommendations.²³⁶ None of them deal with possible special obligations for museum institutions on the return of cultural property or heritage to the community that has the closest cultural link to such objects.²³⁷

In 2002 a second ethics committee operating in the museum sector was founded to respond to special needs and questions of museums with ethnological collections. This ‘Ethnological Ethics Committee’ was set up by the ‘Foundation of Ethnological Collections in the Netherlands’ which represents eight ethnological.²³⁸ Its task is to advise the Dutch Ethnological Museums on questions regarding human remains, potential illegal objects, and

232 The original ICOM Code was introduced in 1987 by International Council of Museums (ICOM).

233 The last revision took place during 2004-2006 in response to the revised ICOM Code as adopted in Seoul in 2004. The integral text of the code can be found at: http://www.museumvereniging.nl/files/Ethische%20Code%20_versie%2020%20nov%202006_%20_2_.pdf (last visited 27 March 2008).

234 Procedural aspects of de-accessioning are further outlined in a guideline on de-accession: [http://www.icn.nl/Dir003/ICN/CMT/text.nsf/URL/4716DB3F1F95254DC1256FE10041372F/\\$FILE/lamo.pdf](http://www.icn.nl/Dir003/ICN/CMT/text.nsf/URL/4716DB3F1F95254DC1256FE10041372F/$FILE/lamo.pdf) (last visited 27 March 2008).

235 <http://www.museumvereniging.nl/default.aspx?id=337> (last visited 27 March 2008).

236 They can be accessed via: <http://www.museumvereniging.nl/default.aspx?id=327> (last visited 27 March 2008).

237 The reference of Article 6.3 to “principles of international and national conventions” must be understood as referring not only the legally binding international treaties as ratified by the Dutch government, but all existing international legislation. Article 7.2 explicitly refers to the UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention, First Protocol, 1954 and Second Protocol, 1999); UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970); Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973); UN Convention on Biological Diversity (1992); Unidroit Convention on Stolen and Illegally Exported Cultural Objects (1995); UNESCO Convention on the protection of the Underwater Cultural Heritage (2001); UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003).

238 <http://www.svcn.nl/nieuws.asp?identificer=272> (last visited 27 March 2008).

the repatriation of objects or collections.²³⁹ From the recommendations issued so far, e.g., on the return of a Maori head to New Zealand, it appears that the ‘Ethnological Ethics Committee’ applies a higher ethical standard than the ‘Dutch ICOM Code Committee’.

To conclude, there are several actors and instruments of self-regulatory character in the Netherlands, but there are no binding obligations for museums, galleries or other institutions to return cultural property or heritage in their possession to the community that has the closest cultural link to such objects.

3.2.6. Precautionary Measures for Armed Conflict and the Return of Cultural Objects

In the following paragraphs and in response to (part) of the above question(s), I will limit myself to the question regarding the existence of Dutch law allowing for the return of cultural heritage situated in the Netherlands that has been removed from an area engaged under occupation, as well objects removed from Iraq. The former aspect is particularly interesting given the recent entry into force of an Act implementing the (First) Protocol to the Hague Convention.²⁴⁰

As for the other aspects hinted at by the question above, in particular the precautionary measures taken by the Netherlands to protect movable objects in its own territory against the destruction and removal in times of war as well as precautionary measures taken by the Netherlands when engaged in an armed conflict outside its borders / an occupation, the reader may be referred to the answer to question A.6 where the precautionary measures with respect to immovable cultural heritage are discussed.²⁴¹ While the required protection depends on the character of the object, and differs to some extent for movable and immovable objects, there is nevertheless quite some overlap and correspondence in the precautionary measures to be taken.

While the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) (hereinafter: “1954 Hague Convention”) deals with the protection both of immovable and movable cultural objects during armed conflict, the protection of movable cultural heritage is particularly dealt with in its (First) Protocol for the Protection of Cultural Property in the Event of Armed Conflict (1954) (hereinafter: “(First) Protocol to the 1954 Hague Convention”). While the Netherlands ratified the (First) Protocol to the 1954 Hague Convention in 1958, it was not until 1997 that it became evident that it was never implemented into Dutch Law.²⁴² The insight was gained during a court case on the return of cultural objects removed from occupied Cyprus.²⁴³

In 1997, the autocephalous Greek Orthodox Church of Cyprus sought the return of four icons from a Dutch citizen. It was not disputed that the icons had been the property of the Church of Cyprus and had been kept in the Church until the summer of 1974 when the island

239 See: <http://www.svcn.nl/nieuws.asp?identifier=160> (last visited 27 March 2008).

240 Wet van 8 maart 2007, houdende regels over inbewaringneming en instelling van een vordering tot teruggave van cultuurgoederen afkomstig uit een tijdens een gewapend conflict bezet gebied (Wet tot teruggave cultuurgoederen afkomstig uit bezet gebied), Stb. 2007, 123.

241 Furthermore, the reader may be referred to: Prott L., V., “The Protocol to the Convention for the Protection of Cultural Property in the event of armed Conflict (The Hague Convention) 1954”, 1996, in Briat M., & Freedberg, Judith, A. (eds.), *Legal aspects of International Trade in Art*; Bos A., *The Importance of the 1899, 1907 and 1999 Hague Conferences for the Legal Protection of Cultural Property in the Event of Armed Conflict*, *Museum International*, 2005; Toman J., *The Protection of Cultural Property in the Event of Armed Conflict*, 1996.

242 As the provisions of the (First) Protocol to the 1954 Hague Convention cannot be binding by virtue of their contents, they did not become binding after their publication as is the case for provisions of international treaties that can be binding by virtue of their wording (Article 93 Dutch Constitution).

243 Rb. Rotterdam 4 februari 1999, 44053/ HA ZA 96-2403 NJ kort 1999/37.

was invaded by Turkish troops. It was also not disputed that the icons disappeared during the Turkish occupation. At some point in the 1970s, the icons were acquired by a Dutch citizen, Lans, from an art dealer in the Netherlands for 200,000 Dutch Guilders.²⁴⁴

The Church sought a declaration from the Court confirming its rights to property to the icons. The Church supported its property claim with reference to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) and its Protocol. Both, the Convention and the Protocol had been ratified by the Netherlands in 1958.²⁴⁵ According to the Church, Article 1.4 of the Protocol²⁴⁶ prevents a possessor, even in good faith, from getting full legal title to a cultural object whose return is claimed on the grounds of the Protocol.²⁴⁷

The Dutch citizen pleaded that the Church could not rely on the provisions of the Protocol as it did not have direct effect and was not implemented into Dutch law.²⁴⁸ The Court sided with the interpretation of the Dutch defendant in that it held that Article 1.4 of the Protocol was directed only at state parties and did not grant any rights / introduced any duties onto individual persons.²⁴⁹ Consequently, the proprietary title of the Dutch citizen to the icons was to be judged under Dutch law only. In the absence of proof holding otherwise, the Dutch citizen was considered having purchased the icons in good faith and his title was confirmed. Consequently, the Church's claim to ownership of the icons was denied.²⁵⁰

On 11 March 2007, some ten years after the request for the return of the icons was denied in court, the First Protocol has been implemented into Dutch Law by the Act on the Return of Cultural Objects removed from Occupied Territories (hereinafter: "the Act") entered into force.²⁵¹

Article 2 of the Act prohibits the transfer of cultural objects removed from an occupied territory into the Netherlands or to have possession of such objects in the Netherlands. In line with the Protocol, the Act only applies to those cases in which the cultural object has been removed from an occupied territory during the occupation.²⁵² Objects removed prior and past the occupation do not fall under the scope and protection of the Act. Doubts have been voiced as to whether the Act applies to cultural objects that have been removed from a territory under occupation where the occupying state is not a party to the 1954 Hague Convention and its Protocol. The general wording of Article 1(d) of the Act speaks in favour of a broad interpretation of the prohibition, but case law will need to explicate the scope of the Act in this respect.²⁵³

²⁴⁴ Approximately 91.000 Euros.

²⁴⁵ Wet van 16 juli 1958 Stb. 1985, 356, houdende goedkeuring van het op 14 mei 1954 te 's- Gravenhage ondertekende Verdrag (...) en van het op 14 mei 1954 ondertekende Protocol.

²⁴⁶ Article 1.4 reads as follows: The High Contracting Party whose obligation it was to prevent the exportation of cultural property from the territory occupied by it, shall pay an indemnity to the holders in good faith of any cultural property which has to be returned in accordance with the preceding paragraph.

²⁴⁷ Rb. Rotterdam 4 februari 1999, 44053/ HA ZA 96-2403 NJ kort 1999/37, at para. 5.5.1.

²⁴⁸ Rb. Rotterdam 4 februari 1999, 44053/ HA ZA 96-2403 NJ kort 1999/37, at para. 5.5.2.

²⁴⁹ Rb. Rotterdam 4 februari 1999, 44053/ HA ZA 96-2403 NJ kort 1999/37, at para. 5.5.3.

²⁵⁰ The Appeal's Court confirmed the judgment of the District Court in its judgment of 7 March 2002, rolnummer 99/693 (unpublished judgement). See: Memorie van Toelichting, 30 165, no. 3, p. 4.

²⁵¹ Wet van 8 maart 2007, houdende regels over inbewaringneming en instelling van een vordering tot teruggave van cultuurgoederen afkomstig uit een tijdens een gewapend conflict bezet gebied (Wet tot teruggave cultuurgoederen afkomstig uit bezet gebied). According to Article 12 of the Act, it enters into force one day after its official publication.

²⁵² Memorie van Toelichting, 30 165, no. 3, p. 4.

²⁵³ Article 1(d) defines occupied territory as territory that is occupied during an armed conflict on or after 14 January 1959 and that falls under the scope of Article 1 of the (First) Protocol.

Further to the territorial and “political” scope, the temporal scope of application of the Act is crucial in whether or not a state can recover its cultural heritage. There are two temporal aspects that must be taken into consideration: the point in time when a cultural object was removed from an occupied territory and the point in time at which it was brought into the Netherlands or is being owned or possessed in the Netherlands. As far as the first temporal aspect is concerned, the Act applies to all removals of cultural objects from occupied territory since the entry into force of the Protocol on 14 January 1959.²⁵⁴ As far as the time of transfer into the Netherlands or the moment of owning or possessing it is concerned, the Act applies to all cases in which the respective activity occurs or continues to occur after 11 March 2007 when the Act entered into force. While ownership or possession may have started prior to that date, provided that it did not start prior to the entry into force of the Protocol in 1959, it is prohibited only from 11 March 2007 onwards. The date is also crucial for transferring cultural objects removed from an occupied territory into the Netherlands: any transfer after 11 March 2007 is prohibited by Article 2 of the Act.

The burden of proof to show that an object has been removed from an occupied territory during the occupation rests upon the Dutch Minister of Culture. Prior to claiming the object’s restitution in a civil procedure (Article 7(1) of the Act), the Minister will seek to bring the object into his custody (Articles 3-6 of the Act).²⁵⁵ This approach will prevent that objects are brought out of Dutch jurisdiction or disappear once its restitution is sought in court. Noteworthy against the general Dutch limitation periods is the fact that the legal action to seek recovery is not subject to any prescription period (Article 7(5) of the Act). Article 7(2) of the Act ensures that the general rules of the Dutch Code on the protection of good faith purchasers (Article 3:86 DCC as well as Article 3:88 DCC) and the benefit of acquisitive prescription as outlined in 3:99(1) DCC cannot be evoked against the Minister’s legal action.²⁵⁶ In case the court orders the restitution of the object its owner, respectively the possessor will be granted an indemnity. While the Protocol foresees that it is the state party “whose obligation it was to prevent the exportation of cultural property from the territory occupied by it” who will pay the indemnity (Article 1.4), the Dutch implementation imposes this obligation on the Dutch State (Article 7(3) a). Article 7(3) of the Act differs between the indemnification to be received by an owner of cultural property (sub a) and someone who did not acquire full legal title but is a good faith possessor of the object concerned (sub b): while the owner is granted full compensation in case “his” cultural property is returned to the formerly occupied country the good faith possessor is granted a fair reimbursement. The height of the reimbursement is to be determined by the court. As far as the burden of proof is concerned, it is the owner who must prove his legal title and the possessor has to prove that he acted diligently when purchasing the cultural property. In case the possessor is unable to provide all information necessary to trace the alienator from whom he acquired the object, he will not be granted any reimbursement. This requirement, which is codified in Book 3 of the DCC (Article 87(1)), is valid only for purchases done within the three years preceding the request for information. Hence, in cases that fall under the scope of the Dutch Act on the Return of Cultural Objects removed from Occupied Territories, the possessor / owner cannot

254 Article 1(d) of the Act.

255 Articles 3-6 of the Act implement the (First) Protocol’s requirement that state parties take property imported or held in breach of the provisions of the protocol into custody.

256 The implementation follows as far as possible the implementation of EC Council Directive 93/7/EEC as is particularly evident in respect of the balancing of the protection of the cultural objects and the rights of the possessing party and legal security. See further on the implementation of the later into Dutch law: Bollen, C./ Groot G.R., de, *Verknoeit het Europese recht ons Burgerlijk Wetboek?*, *Nederlands Tijdschrift voor Burgerlijk Recht*, 1995.

rely upon the general protection of bona fide as elaborated upon in Section 3.2.4.1. This does mean, however, that bona fide does not play a role at all. Bona fide is crucial in respect of the granting of an indemnity. Only a good faith possessor is awarded an indemnification.

The fact that the Dutch Government has chosen to grant an indemnity to an owner or good faith possessor of a cultural object when the latter has to be returned to the authority from whose territory the object had been removed must be seen against the strong protection of ownership rights and of the position of a good faith purchaser under Dutch law.²⁵⁷

With the entry into force of the Act on the Return of Cultural Objects removed from Occupied Territories the situation of cultural heritage brought into the Netherlands changes significantly. This is true both for recent transfers as well as transfers several decades ago.

This can be well illustrated with the case on the icons removed from Cyprus, which emphasised the need to adopt the Act in the first place. If the Cypriot authorities, rather than the autocephalous Greek Orthodox Church of Cyprus, would now approach the Dutch government with the request to return the icons the Minister would, in all likelihood, seek custody of the icons and claim their restitution in a civil procedure. A condition is of course that the icons are still on Dutch territory. Squaring the facts of the case with the requirements of the Act, in particular its Article 2 shows that the restitution of the icons falls under the scope of the Act: the icons were removed from Cyprus in 1974 during the Turkish occupation, which was not contested when the case was heard in 1999.²⁵⁸ At the time the icons were removed Turkey had become a state party to the (First) Protocol to the Hague Convention, which clears any doubts about the application of the Protocol and hence its Dutch implementation Act.²⁵⁹ While the icons have been brought into the Dutch territory prior to the entry into force of the Dutch Act, it is not required that owning or possessing them started prior to that date (11 March 2007). The Dutch citizen took possession of them in the 1970s, hence after the entry into force of the Protocol²⁶⁰ As owner of the icons, the Dutch citizen would receive an indemnity by the Dutch State in accordance with Article 7(3) a) of the Act.

Further to the Dutch Act on the Return of Cultural Object removed from Occupied Territories the special regime for objects removed from Iraq after 6 August 1990. As Member State of the European Union, the Netherlands implemented Council Regulation (EC) No 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq.²⁶¹ The Dutch implementation Act, the *Sanctieregeling Irak 2004 II*, entered into force on 23 May 2004.²⁶² In line with the Council Regulation and the UN Security Council Resolution, the *Sanctieregeling* prohibits the import of or the introduction into Dutch territory and the dealing in Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific and religious importance that have been illegally removed Iraq after 6 August 1990. Compliance with the *Sanctieregeling* is monitored by the State Inspectorate for Cultural Heritage (*Erfgoedinspectie*).

257 See above at sub-section 3.2.4.1.

258 Rb. Rotterdam 4 februari 1999, 44053/ HA ZA 96-2403 NJ kort 1999/37, at para. 5.3.

259 Turkey became a State Party in December 1965 by accession.

260 Rb. Rotterdam 4 februari 1999, 44053/ HA ZA 96-2403 NJ kort 1999/37, at para. 2.b.

261 Council Regulation (EC) No 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation (EC) No 2465/96. The regulation is based on the UN Security Council Resolution 1483 /2003.

262 *Regeling van de Minister van Buitenlandse Zaken van 11 mei 2004*, no. DJZ/BR/0325-04, houdende specifieke restricties op de economische en financiële betrekkingen met Irak (*Sanctieregeling Irak 2004 II*). The decree is based upon *Wet van 15 februari 1980, tot het treffen van sancties tegen bepaalde staten of gebieden* (*Sanctiewet 1977*).

3.2.7. Movable Underwater Cultural Heritage

The protection of cultural heritage located underwater does not make a distinction between movable and immovable underwater cultural heritage. Both are protected under the Monuments Act and for this reason the reader may be referred to the answer to question A.7.

4. Intangible Cultural Heritage

4.1. Safeguarding Intangible Cultural Heritage

4.1.1. Framework for Safeguarding Intangible Cultural Heritage?

The Netherlands has not ratified the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. The reason for not (yet) doing so are expressed in a letter received by the Ministry of Culture in the context of a consultation procedure on the Convention organised by the National Dutch UNESCO Committee in 2002.²⁶³ The author of the letter was the Meertens Institute KNAW, a research institute for researching and documenting the diversity of language and culture in the Netherlands.²⁶⁴ According to the Meertens Institute, there are academic, ethical, as well as discipline-internal problems with the Convention. Furthermore, protection of intangible cultural heritage is not considered desirable as it would interfere with the dynamics and change that are essential for intangible cultural heritage. This is especially the case for measures guiding, preserving, conserving or revitalising specific aspects of intangible cultural heritage. The attitude that protection, especially in form of inventories (of masterpieces),²⁶⁵ would not do justice to intangible cultural heritage but instead lead to its artificial conservation is a common denominator amongst experts in the Netherlands.²⁶⁶ Some of the experts fear that protection could lead to “cultural ghetto’s” or “islands” isolated from the progression in time – “graveyards hoisting dead cultural heritage”.²⁶⁷

Instead, experts put great emphasis on culture as a living phenomenon with change being an inevitable characteristic.²⁶⁸ Some experts have even denoted a paradigm shift in the approach to study intangible cultural heritage: traditionally, the emphasis in studying (intangible) cultural heritage was put on continuity.²⁶⁹ Currently, the emphasis is put its changes in the intangible cultural heritage, rather than merely continuity. Consequently, with change being difficult to protect, experts stress that protection of intangible cultural heritage lies essentially in stock taking, and in raising awareness.²⁷⁰

In line with the experts’ opinion on the re-appreciation of change rather than continuity, there is no coherent national (legal) framework for the protection of intangible cultural heritage. Instead, protection is realised by ensuring the existence of an infrastructure within which intangible cultural heritage can be studied and experienced. The role of the

263 Muskens G., *Immaterieel cultureel erfgoed in Nederland: rapportage op basis van interviews met 33 deskundigen*, in opdracht van het ministerie van OCW, directie Cultureel Erfgoed, 2005, p. 27.

264 <http://www.meertens.knaw.nl/indexe.html> (in English) (last visited 27 March 2008).

265 See further below at section 4.1.5. asking explicitly on inventories.

266 Stam D. / Verhulst S., *Immaterieel erfgoed in Nederland*, 2006, p. 7; Muskens G., *Immaterieel cultureel erfgoed in Nederland: rapportage op basis van interviews met 33 deskundigen*, in opdracht van het ministerie van OCW, directie Cultureel Erfgoed, 2005, p. 7.

267 Muskens G., *Immaterieel cultureel erfgoed in Nederland: rapportage op basis van interviews met 33 deskundigen*, in opdracht van het ministerie van OCW, directie Cultureel Erfgoed, 2005, p. 12.

268 *Ibid.*, p. 7.

269 *Ibid.*, p. 8.

270 *Ibid.*, p. 27.

government is hence mainly one of providing the necessary funds for this infrastructure.²⁷¹ The cataloguing of intangible cultural heritage as well as raising its profile rests upon the shoulders of museums and scientific and policy making institutions.²⁷²²⁷³

There is, however, one category of intangible cultural heritage that is granted legal protection. As far as languages, or rather minority languages and dialects are concerned; protection goes further than the “caring and sharing” approach. Frisian is recognized by law as a co-official language in the province of Friesland.²⁷⁴ Frisian is recognised in accordance with Chapter III of the European Charter for Regional or Minority Languages, which was ratified by the Netherlands in 1996.²⁷⁵ Two other Dutch dialects, Dutch Low Saxon and Limburgish are recognised under Chapter II of the Charter. Chapter II grants less protection than Chapter III but obliges the government to encourage the use of the dialects.²⁷⁶

4.1.2. Criteria for Intangible Cultural Heritage

Subsequent to what has been outlined in the answer to the previous question it is only logic that no list of criteria has been drafted according to which particular traditional knowledge or cultural expressions are held to qualify as intangible cultural heritage. To get a better understanding of the Dutch approach to intangible cultural heritage, reference can be made to a socio-historical description of what constitutes (intangible) cultural heritage, which is shared by a great number of Dutch experts. According to Frijhoff, there are three components of (intangible) cultural heritage: firstly, it is something transmittable, ranging from a past performance, via an experience, idea, custom, spatial element, building or artefact, to a set of these. Secondly, one can only speak of (intangible) cultural heritage provided there is a human group that is able and ready to recognize these objects as a coherent unit, to transmit and to receive them. Thirdly, there must be a set of values linking the object inherited from the past to a future use, in a sense of meaningful continuity or equally meaningful change.²⁷⁷

While the description of Frijhoff does not refer to authenticity, the relevance of authenticity for the intangible cultural heritage can nevertheless be read in between the lines:²⁷⁸ not only must there be something transmittable – which presupposes the existence of something authentic, it must also be linkable via existing (authentic) values to an active human group. Hence, in comparison with cultural heritage in tangible form, it is authenticity, rather than quality which is of outmost value.

271 *Ibid.*, p. 26.

272 For instance, there are several museums whose mission statement directly or indirectly alludes to the relevance of rising awareness and sharing knowledge of intangible heritage. See, e.g., the mission statement of the open air museum in Arnhem: <http://www.openluchtmuseum.nl/index.php?pid=59> (last visited 27 March 2008). But also the Rijksmuseum in Amsterdam, the Zuiderzeemuseum, the Royal Library, the National Archive, the Navigation Museum. *Ibid.*, p. 13. Also, the Dutch version of the ICOM Code, in accordance with the international ICOM Code states as a principle that museums are responsible for the tangible and intangible natural and cultural heritage (...).

273 As for research centres and other institutions whose fields of research fall within the ambit of /cover the intangible cultural heritage see below at Question C(A)4.

274 Art 2:7 Awb.

275 CETS No. 148

276 See further, in particular on the legal regime concerning the Frisian language: Hemminga P., *Het beleid inzake unieke regionale talen: een onderzoek naar het beleid en de beleidsvorming met betrekking tot een drietal unieke regionale talen: het Fries in Nederland en het Noordfries en Sorbisch in Duitsland*, 2000.

277 Frijhoff W., “Cultural Heritage in the Making: Europe’s Past and its future Identity”, 2005, in Vos J.v.d. (ed.) *The Humanities in the European Reserach Area - International Conference Amsterdam, The Netherlands 2 September 2004*.

278 Muskens G., *Immaterieel cultureel erfgoed in Nederland: rapportage op basis van interviews met 33 deskundigen, in opdracht van het ministerie van OCW, directie Cultureel Erfgoed*, 2005, p. 24.

As far as the relationship of intangible and tangible is concerned, not only does the latter enjoy greater protection in law; but also it is (still) perceived as the dominant form of protecting cultural heritage. This becomes evident from the fact that the need to protect intangible cultural heritage has a negative correlation with the amount of tangible cultural heritage: the less tangible cultural heritage exists, the greater the relevance and need of intangible heritage becomes. As for intangible cultural heritage in the Netherlands there is little tangible evidence of the history of slavery and migration, as well as of so-called poverty cultures as they existed in the 19th and 20th century.²⁷⁹

The supporting function of intangible cultural heritage “filling in the gaps of the tangible cultural heritage” is, however, not written in stone. With respect to a number of aspects of the intangible cultural heritage, the need to protect the intangible cultural heritage has been stressed, despite the existence of tangible cultural heritage. This is in particular the case for the protection of oral traditions, folk culture in general and folklore more in specific, music and song culture, as well as handicrafts.²⁸⁰

Until today the role of intangible cultural heritage in the designation of tangible cultural heritage (both movable and immovable) has not been evaluated. In respect of movable cultural heritage as protected under the Cultural Heritage Preservation Act, intangible cultural heritage might play a role in the evaluation of an object’s indispensability for Dutch cultural heritage. In respect of immovable cultural heritage, intangible cultural heritage could influence the evaluation of the qualitative criteria, first and foremost the evaluation of an object’s (art) historical significance.

4.1.3. Protective Measures for Intangible Cultural Heritage

As general starting point it should be stressed that Dutch experts are pessimistic about the possibility of granting protection to intangible cultural heritage against change and dynamics or against decay or loss.²⁸¹ However, protection is not only thought difficult or impossible (if it wants to do justice to the character of intangible cultural heritage), the idea of drawing up inventories of intangible cultural heritage is generally rejected and thought undesirable.²⁸² By approaching intangible cultural heritage the same way the protection of tangible cultural heritage is approached, experts feel that it is stripped of its defining and authentic characteristics. By forcing it into the jacket of tangible cultural heritage with the latter’s emphasis on master pieces and outstanding artworks intangible cultural heritage is not protected but instead put at risk becoming meaningless.²⁸³ Also, some experts have voiced concern about what has been referred to as the *tertium datur* effect: the fact that the public’s contact with intangible culture heritage will in most cases be mediated by the stocktaking and (re-)presentation and hence experts’ choices.

In the light of the above, the protection of intangible cultural heritage lies essentially in the granting of subsidies by the central government to museums/institutions that aim at the protection of intangible cultural heritage,²⁸⁴ and in the work of the different institutions researching, analysing and bringing to the public attentions of practices of intangible cultural heritage. The following initiatives can be pointed out as recent examples for initiatives aiming at the protection of intangible cultural heritage:

279 Ibid., p. 12.

280 Ibid., p. 18.

281 Ibid., p. 12.

282 Ibid., p. 21.

283 Ibid., p. 22.

284 Compare: Ibid., p. 3.

The publication of the book “Folklore is incomplete past”²⁸⁵ by the Dutch Centre for Folk Culture.²⁸⁶ The book describes thirty regional celebrations against their historical background. The Meertens Institute maintains several databases, e.g., on Dutch folksongs or folktales, and which are publicly accessible via Internet.²⁸⁷ Folksongs and folktales are also currently being researched for the publication of a “Canon with small c” by a Documentation and Research Centre specialized in Folktales.²⁸⁸ To mention one last initiative that builds a bridge to the next question looking into the involvement of communities etc. is the ongoing project by the Dutch Centre for Folk Culture for the drawing up of an inventory of 100 important traditions and rituals.²⁸⁹

4.1.4. Position of Communities in Safeguarding Intangible Cultural Heritage

Two institutes are of great relevance under the Dutch approach of the protection of intangible cultural heritage: the Meertens Institute KNAW, which researches and documents the diversity of language and culture in the Netherlands,²⁹⁰ and the Dutch Centre for Folk Culture, which strives for the preservation and promotion of tangible and intangible cultural heritage²⁹¹.

There are however, many more initiatives, including research positions and centres in universities concerning living cultural heritage, ethnology, world music etc., research institutes,²⁹² provincial centres, museums,²⁹³ and foundations.²⁹⁴

Only recently, the Foundation Oral Culture (*Stichting Vertelcultuur*) was founded.²⁹⁵ Its founding fathers are themselves institutions involved in the protection of cultural heritage, which indicates that the field enjoys a high degree of cooperation, and network spill-overs.²⁹⁶

In addition to these at least to some extent institutionalised initiatives, the input of volunteers and amateur groups is considered of particular relevance for the protection of

285 Spapens P., *Folklore is onvoltooid verleden tijd*, 2005.

286 http://www.volkscultuur.nl/boekenfonds_44.html (last visited 27 March 2008).

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http://www.meertens.knaw.nl/cms/index.php?option=com_content&task=blogcategory&id=0&Itemid=119&lang=en (last visited 27 March 2008).

288 http://www.docvolksverhaal.nl/index.php?option=com_content&task=blogcategory&id=36&Itemid=69 (last visited 27 March 2008).

289 http://www.volkscultuur.nl/enquA%AAte-100-belangrijke-tradities-en-rituelen_62.html (last visited 27 March 2008).

290 <http://www.meertens.knaw.nl/cms/> (last visited 27 March 2008).

291 http://www.volkscultuur.nl/nederlands-centrum-voor-volkscultuur_10.html (last visited 27 March 2008).

Muskens G., *Immaterieel cultureel erfgoed in Nederland: rapportage op basis van interviews met 33 deskundigen*, in opdracht van het ministerie van OCW, directie Cultureel Erfgoed, 2005, p. 25.

292 E.g., the National Institute for the Study of Dutch Slavery and its Legacy, which has been set up in 2003. See further: <http://www.ninsee.nl/> (last visited 27 March 2008).

293 E.g., the Museum Museum Maluku (MUMA). See further:

http://62.41.178.226/wps/portal/muma!/ut/p/c1/04_SB8K8xLLM9MSSzPy8xBz9CP0os3gTL09fCxNDMwMDN2cjAyNjY28Ty0AjI3dLc30_j_zcVP3g1Dz9gmxHRQAsC7wH/d1/d1/L2dJQSEvUUt3QS9ZQnB3LzZfNepJTTg0MTYwMEZDMjAyMzNLNDIRmJhUDU/ (last visited 27 March 2008).

294 E.g., the Foundation Platform for Dutch Folklore, which aims at improving the image of Dutch Folk Culture, especially in the fields of dance and dance music and the knowledge about traditional costumes. See further: <http://www.steigan.net/pnf/indexen.html> (in English) (last visited 27 March 2008).

295 <http://www.vertelcultuur.nl/> (last visited 27 March 2008).

296 The Foundation Oral Culture was set up by the Documentation and Research Centre Folk Tales, the National Storytelling School, the Story Telling Academy, the Dutch Centre for Folk Culture, Profiel Uitgeverij (publisher), Foudation Experience (Beleven), the Foundation for Story Telling and “Tell me”:
<http://www.vertelcultuur.nl/> (last visited 27 March 2008).

intangible cultural heritage.²⁹⁷ This can be explained by the great emphasis Dutch experts put on the existence of (authentic) heritage, as well as the linkage of past with current values.²⁹⁸ Against this background one must assess the position of communities in protecting cultural heritage. While the existence of a human group that recognises a certain expression as (intangible) cultural heritage is crucial,²⁹⁹ there are so far no specific regulations granting specific rights to communities. There is one exception, however, in respect of minority languages. Speakers of minority languages recognised by Dutch law are guaranteed certain rights to speak the minority language. Of course, any interest group, including communities can institutionalise its interest of safeguarding cultural heritage by setting up an organisation with legal personality, e.g., a foundation.

4.1.5. Inventories

As general starting point it should be pointed out that experts share a general rejection of the idea of drawing up inventories of intangible cultural heritage.³⁰⁰ If any inventories were to be made at all, this would not be considered the task of the central government.³⁰¹ Two institutions have taken the initiative of taking stock of Dutch intangible cultural heritage. The Dutch UNESCO Committee has published a report on intangible cultural heritage including eight concrete examples of intangible heritage.³⁰² Another project, still in the making is the drawing up of a top 100 list of intangible cultural heritage by the Dutch Centre for Folk Culture. Everybody is asked to contribute to the list on their website and the final 100 practices will be published in 2009 in commemoration of the Year of Traditions.³⁰³ Further to these two inventories that come closest to the idea of inventories as outlined in Article 12 of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, the Meertens Institute maintains a number of databases, e.g., a Dutch Folksong Database, a Feast Database, a Dutch Folktale Database.³⁰⁴

297 Muskens G., *Immaterieel cultureel erfgoed in Nederland: rapportage op basis van interviews met 33 deskundigen*, in opdracht van het ministerie van OCW, directie Cultureel Erfgoed, 2005, p. 16.

298 See above, answer to question C.1 on the description by Frijhoff: Frijhoff W., "Cultural Heritage in the Making: Europe's Past and its future Identity", 2005, in Vos J.v.d. (ed.) *The Humanities in the European Reserach Area - International Conference Amsterdam*, The Netherlands 2 September 2004.

²⁹⁹ Cf. with the definition provided by Frijhoff above.

300 Muskens G., *Immaterieel cultureel erfgoed in Nederland: rapportage op basis van interviews met 33 deskundigen*, in opdracht van het ministerie van OCW, directie Cultureel Erfgoed, 2005, p. 21.

301 One of the main principles that shapes cultural policy making is the so-called Thorbecke principle. Thorbecke, who lived in the 19th century, was one of the most important Dutch politicians. As Minister of Internal Affairs he or she stated that "(...) the government may make no judgement of the science and the arts". *Handelingen Tweede Kamer, 1862/1862, Verslag p. 36*. See further on current perception of the Thorbecke principle: Lubina K.R.M., "De cultuurnotaprocedure in analyse. Literatuur over juridisering en regulering rondom de cultuurnotaprocedure", 2004, in Smithuijsen C. / Vlies I.C.v.d. (eds.), *Gepaste Afstand - De 'cultuurnotaprocedure' tussen de kunst, het recht en het openbaar bestuur*.

302 Stam D. / Verhulst S., *Immaterieel erfgoed in Nederland*, 2006.

303 http://www.volkscultuur.nl/file_handler/documents/original/view/5/vcberichtenr6pdf.pdf at p. 7 (last visited 27 March 2008). See for appeal to the public to submit traditions:

http://www.volkscultuur.nl/enquA%AAte-100-belangrijke-tradities-en-rituelen_62.html (last visited 27 March 2008).

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http://www.meertens.knaw.nl/cms/index.php?option=com_content&task=blogcategory&id=0&Itemid=119&lang=en (last visited 27 March 2008).

4.1.6. Additional Measures?

The Dutch Centre for Folk Culture is currently preparing a symposium to take stock of current initiatives and to discuss future steps in the protection of cultural heritage and the ratification of the UNESCO Convention.³⁰⁵

4.2. Misappropriation of Traditions

Recently, certain traditional cultural products have become commercially valuable and have even led to the creation of new branches of industry. This has created tension between the communities who preserved these traditions for generations and the companies who want to exploit them commercially. Intangible cultural heritage has been divided into categories such as “traditional knowledge”, “traditional ecological knowledge”, “traditional cultural expression” and “expressions of folklore”. While these groups may partially overlap, they help to identify the different forms of intangible heritage in need of protection.³⁰⁶ The questions below are in regards to the measures taken under national law to prevent the misappropriation of this heritage.

4.2.1. Framework Protection of Traditional Knowledge / Traditional Cultural Expressions

The Dutch legal system does not provide for a specific framework for the protection of traditional knowledge or traditional cultural expression against misappropriation for commercial purposes. At the international level, in particular in the realm of the World Intellectual Property Organization (WIPO), the protection of traditional knowledge and traditional cultural expression is the subject of ongoing debates and non-binding draft provisions.³⁰⁷ No binding legal treaties have been adopted. At the European level, a number of legal instruments have been adopted.³⁰⁸ While these instruments have been implemented into Dutch law respectively have direct effect, protection against the (mis-) appropriation of traditional knowledge or traditional cultural expression must essentially rely upon the general system in place to protect intellectual property rights such as copyrights, neighbouring rights, as well as trademark or patent protection. Given the fact that the question whether or not the general Dutch system of intellectual property rights will arrive a protecting traditional knowledge or traditional cultural expression in a specific case cannot be addressed as this would require a study by itself, I will refrain from introduction the different aspects of intellectual property law further.³⁰⁹ One particular development should, however, be

305 More information available via ncv@volkscultuur.nl or 0031(0)30-2760244.

306 The terms “traditional knowledge” or “traditional ecological knowledge” are often employed in order to refer to knowledge accumulated or genetic biodiversity preserved by communities over generations. These resources may be misappropriated by patenting inventions that incorporate or are based upon them. On the other hand, the terms “traditional cultural expressions” and “expressions of folklore” are used in relation to cultural expressions such as folktales, legends, rock art, rituals, habits or customs, which might be misappropriated by incorporating them into copyrighted works or by using them as trademarks.

307 See: <http://www.wipo.int/tk/en> and

http://www.wipo.int/export/sites/www/tk/en/consultations/draft_provisions/pdf/tce-provisions.pdf (last visited 27 March 2008).

308 European Directive 2004/24 as Regards Traditional Herbal Medicinal Products; European Directive 2006/509 on Traditional Specialities Guaranteed; Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and the designations of origin for agricultural products and foodstuffs.

309 As for an introduction to Dutch intellectual property rights, the reader may be referred to: Frequin M., *Auteursrechtgids voor de Nederlandse praktijk*, 2005; Hesemans D.J., *Auteursrecht*, 2008; Hesemans D.J. / Koninkrijk der Nederlanden., *Wet op de naburige rechten*, 2007; Hugenholtz P.B., *Auteursrecht op informatie: auteursrechtelijke bescherming van feitelijke gegevens en gegevensverzamelingen in Nederland, de Verenigde*

explicitly mentioned for its potential in extending the protection available to traditional cultural expression: the ongoing research into the protection of orphan works. Orphan works are works whose right holder(s) is / are unknown or non-locatable.³¹⁰ The research on how to deal with the impossibility to the author's / right holder's consent might be of relevance also to traditional cultural expression that cannot be linked with individual authors.

4.2.2. Group Rights

The Dutch legal system does not recognize any proprietary rights.

4.2.3. Regulation on Misappropriation of Intangible Cultural Heritage

No legally binding regulations apart from intellectual property rights exist under Dutch law. The author is not aware of the existence of non-binding guidelines or codes of conduct.

4.2.4. Regulations on Recording, Collecting, Archiving or Commercially Exploiting Traditional Cultural Expressions?

But for the general intellectual property rights, especially the 1912 Copyright Act, no regulation or codes of conduct exist in Dutch law in relation to recording, collecting, archiving or commercially exploiting traditional cultural expression. While there is regulation on the keeping of archives, the 1995 Act on Archives, it is not relevant for the protection of traditional cultural expression. Rather, it requires public authorities to take the required care in preserving / destroying their archives. Given that there is no requirement for the Dutch State to record traditional cultural expression, the 1995 Act on Archives can be neglected here.³¹¹

4.2.5. Protection of Sensitive Traditional Cultural Expression

The Dutch legal system does grant protection to sensitive traditional cultural expression against abuse or commercial use by anybody, provided that the activity fulfils the elements of one of the following offences under the Dutch Penal Code: Articles 146, 147, 149, or Article 266.

As the question as to whether or not a particular activity fulfils the elements of the offence can only be addressed on a case-by-case basis, the following paragraphs are limited to introducing the relevant articles.

Article 146 of the Penal Code prohibits the disturbance of a lawful public gathering intended to profess a religion or a belief, or a lawful ceremony for the professing of a religion or a belief, or a lawful funeral service.³¹²

Staten en West-Duitsland. Een rechtsvergelijkend onderzoek, 2005; Lingen N.v., Auteursrecht in hoofdlijnen, 2007; Spoor J.H., et al., Auteursrecht: auteursrecht, naburige rechten en databankenrecht, 2005.

310 See in this respect also the Report on Digital Preservation, Orphan Works and Out-of-Print Works, Selected Implementation Issues of 18 April 2007 by the European Commission. Available at: http://ec.europa.eu/information_society/newsroom/cf/itemlongdetail.cfm?item_id=3366 (last visited 27 March 2008).

311 This does not take away, that archives in themselves constitute cultural heritage. See further: <http://www.erfgoedinspectie.nl/page/english/archives> (last visited 27 March 2008).

312 Article 146 of the Dutch Penal Code states: A person by whom, by creating disorder or by making noise, either a lawful public gathering intended to profess a religion or a belief, or a lawful ceremony for the professing of a religion or a belief, or a lawful funeral service is intentionally disturbed, is liable to a term of imprisonment of not more than two months or a fine of the second category. Rayar L., et al. (eds.), *The Dutch penal code / transl. [from the Dutch]*, (1997).

Article 147 penalises the public offending, either orally or in writing or by image, of religious sensibilities by malign blasphemies; the ridiculing of a minister of religion in the lawful execution of his duties; as well as the making of derogatory statements about objects used for religious celebration at a time and place at which such celebration is lawful.³¹³ As far as malign blasphemy is concerned, the offence is limited to offending the Christian deity; it does not extend to Christian saints and other revered religious figures or non-Christian deities. This first paragraph of Article 147 has been subject to criticism in the light of the Danish cartoons depicting Mohammed and there have been motions both to extend the scope of the offence to include also non-Christian deities and revered religious figures, as well as to abolish the first paragraph in its entirety.³¹⁴ This first paragraph of Article 147 has been subject to criticism in the light of the Danish cartoons depicting Mohammed and there have been motions both to extend the scope of the offence to include also non-Christian deities and revered religious figures, as well as to abolish the first paragraph in its entirety. As far as religious or spiritual sensibilities different from the Christian belief are concerned, Article 266 might serve as a safety net.³¹⁵ The second and third paragraphs of Article 147 apply to any religion.

As for places and monuments, Dutch law prohibits the desecration of grave stones and other symbols and signs on graveyards (Article 149).³¹⁶

Cite as: Katja Lubina, *Protection and Preservation of Cultural Heritage in the Netherlands in the 21st Century*, vol. 13.2 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (May 2009), <<http://www.ejcl.org/132/art132-4.pdf>>.

313 A term of imprisonment of not more than three months or a fine of the second category shall be imposed upon: (1) a person who publicly, either orally or in writing or by image, offends religious sensibilities by malign blasphemies; (2) a person who ridicules a minister of religion in the lawful execution of his duties; (3) a person who makes derogatory statements about objects used for religious celebration at a time and place at which such celebration is lawful.

314 In the context of the Danish cartoons on Mohammed and the film *Fitna* by the Dutch politician Wilders, the government is currently discussing whether or not to extend the scope of Article 147 of the Penal Code to apply also to other religions or whether to get rid of the Article in its entirety.

315 Article 266 reads: 1. Each intentional act of defamation that cannot be characterized as slander or as libelous defamation, committed in public either orally or in writing or by image, or orally against a person in his presence or through other acts, or committed by means of written matter or an image sent or offered, constitutes simple defamation, punishable by a term of not more than three months or a fine of the second category 2. Acts intended to express an opinion about the defense of public interests, and not at the same time designed to cause worse offense in any other way than might be assumed from their purport, are not punishable as simple defamation. Rayar L., et al. (eds.), *The Dutch penal code / transl. [from the Dutch]*, (1997).

316 Article 149 reads: A person who intentionally desecrates a grave, or who intentionally and unlawfully destroys or damages any memorial erected in a cemetery is liable to a term of imprisonment of not more than one year or a fine of the third category. *Ibid.*

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