

Legislative and policy framework

International policy framework

The two best known international agreements regarding the theft and illicit trafficking of cultural goods are the *1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* and the *1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*. South Africa is a state party to the UNESCO Convention, but not to the UNIDROIT Convention.

The 1970 UNESCO Convention requires state parties to:

- Adopt protection measures in their territories (art 5):
 - Elaborate appropriate national legislation
 - Establish national services for the protection of cultural heritage
 - Promote museums, libraries and archives
 - Establish National Inventories
 - Encourage adoption of codes of conduct for dealers in cultural property
 - Implement educational programmes to develop respect for cultural heritage
- Control movement of cultural property (art 6 to 9):
 - Introduce a system of export certificates or permits
 - Prohibit export of cultural property unless it is accompanied by an export certificate/permit
 - Prevent museums from buying objects exported from another State Party without an export certificate
 - Prohibit the import of objects stolen from museums, religious institutions or public monuments
 - Penal sanctions to be imposed on any person contravening these prohibitions
 - Emergency import bans may be adopted when the cultural heritage of a State Party is seriously endangered by intense looting of archaeological and ethnological artefacts
 - Require art dealers to maintain a register of the exact origin of each object they purchase
- Return of stolen cultural property (art 7)
 - At the request of the State Party of origin, another State Party will seize and return cultural property on its territory stolen from a museum, religious institution or public monument
 - The request has to be made through diplomatic channels
 - The object has to be documented as being part of the inventory of the institution
 - The requesting State has to pay just compensation to an owner who has purchased the object in good faith or holds a title which is valid according to national law
 - The requesting State has to provide all the evidence to support its claim.

(Source: UNESCO 2011. *The fight against the illicit trafficking of cultural objects. The 1970 Convention: Past and Future, information kit*).

Most of the requirements to State Parties have been incorporated in the *National Heritage Resources Act (Act 25 of 1999)* while the *Second Hand Goods Act (Act 6 of 2009)* also includes some of the provisions. These two acts are discussed in the next section.

Although South Africa is not a State Party to the 1995 UNIDROIT Convention, the Convention does raise important issues that can be accommodated in local policy and legislation. The UNIDROIT Convention aims to broaden the provisions of the 1970 UNESCO Convention to include objects in private collections and to regulate the activities of private individuals. Claims against a collector or collection are made through the courts of the country where the objects have been exported to. The UNIDROIT Convention also provides protection to the innocent purchaser of illegally exported or excavated objects.

The International Council of Museums (ICOM) is very active in the fight against the illegal excavation as well as the import and export of cultural property. According to the ICOM website (icom.museum) illicit traffic in cultural goods ranks third in the listing of criminal activities worldwide, following drug and arms trafficking.

ICOM encourages museums to be active players in the fight against illicit traffic and should adopt rules in terms of the acquisition and transfer of collections, according to The *ICOM Code of Ethics for Museums*. The ICOM Code of Ethics confirms the principle in Section 2 that:

“Museums have the duty to acquire, preserve and promote their collections as a contribution to safeguarding the natural, cultural and scientific heritage. Their collections are a significant public inheritance, have a special position in law and are protected by international legislation. Inherent in this trust is the notion of stewardship that includes rightful ownership, permanence, documentation, accessibility and responsible disposal. “

The ICOM Code of Ethics stipulates that “Every member of the museum profession should be conversant with the relevant international national and local legislation ...” Managers of public and private collections can assist the fight against cultural crime by keeping inventories of their collections. ICOM recommends the use of Object ID (<http://archives.icom.museum/object-id/>). They also disseminate information regarding threatened collections such as the Red Lists of threatened heritage.

Downloads:

1970 UNESCO Convention

1995 UNIDROIT Convention

ICOM Code of Ethics

International Code of Ethics for Dealers in Cultural Property

South African legislation

South African Heritage Resources Act (Act 25 of 1999,

The *South African Heritage Resources Act (Act 25 of 1999)*, also known as NHRA (Act 25 of 1999) is the key legislation in protecting South African heritage resources and defining cultural crime. It is aligned with the requirements of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of which South Africa is a state party.

NHRA (Act 25 of 1999) defines the national estate in section 3. In order to describe illicit trafficking and theft of heritage objects, the focus in this website is on movable objects only as defined in section 3(i), namely:

- i. Objects recovered from the soil or waters of South Africa, including archaeological and palaeontological objects and material, meteorites and rare geological specimens;*
- ii. Objects to which oral traditions are attached or which are associated with living heritage;*
- iii. Ethnographic art and objects;*
- iv. Military objects;*
- v. Objects of decorative or fine art;*
- vi. Objects of scientific or technological interest;*
- vii. Books, records, documents, photographic positives and negatives, graphic, film or video material or sound recordings, excluding those that are public records as defined in section 1 (xiv) of the National Archives of South Act, 1996 (Act No.43 of 1996).*

Section 32 mandates SAHRA (The South Africa Heritage Resources Agency) as the custodian of South Africa's national estate, including heritage objects. In addition, SAHRA is the government agency that ensures that South African honour its national and international obligations in terms of the 1970 UNESCO Convention. This means that SAHRA;

- Manage the national estate, including granting permits for the export and import of heritage objects;
- Declare objects as heritage objects;
- Promulgate regulations to protect heritage objects; and
- Co-operative governance regarding the export and import of heritage objects. Police and custom officials are designated heritage inspectors.

SAHRA is also responsible for creating a National Inventory of the national estate.

According to section 32(1) of the NHRA (Act 25 of 1999) SAHRA can declare the following as.

An object or collection of objects, or a type of object or list of objects, whether specific or generic, that is part of the national estate and the export of which SAHRA deems it necessary to control, may be declared a heritage object, including -

- a) Objects recovered from the soil or waters of South Africa, including archaeological and palaeontological objects and material, meteorites and rare geological specimens*
- b) Visual art objects*
- c) Military objects*
- d) Objects to which oral traditions are attached or which are associated with living heritage*
- e) Ethnographic art and objects*
- f) Military objects*
- g) Objects of decorative or fine art*
- h) Objects of scientific or technological interest*
- i) Books, records, documents, photographic positives and negatives, graphic, film or video material or sound recordings, excluding those that are public records as defined in section 1 (xiv) of the National Archives of South Act, 1996 (Act No.43 of 1996)*

Even if an object of the above types has not been declared a heritage object, it enjoys general protection under the NHRA (Act 25 of 1999) depending on age and association with a person or event in the history of the South Africa. Please note that the following also enjoy general protection:

- Archaeological artefacts including rock art younger than 100 years
- Wrecks, vessels and aircraft found on South African soil or waters younger than 60 years.

According to the NHRA (Act 25 of 1999) the following constitutes cultural crime and is a punishable offence:

- Export heritage or protected objects without a permit.
- Demolition of a structure older than 60 years without a permit (section 35(2))
- Excavate or remove objects from an archaeological or palaeontological site (section 35(3)(4))
- Excavate or remove meteorites without a permit (section 35(3)(4))
- Disturb, damage or destroy a grave or burial ground protected by SAHRA or a provincial heritage resource authority (PHRA) without a permit (Section 36)

Second Hand Goods Act (Act 6 of 2009)

The Second Hands Goods Act (Act 6 of 2009) is applicable to all people “who carries on a business of dealing in second-hand goods, and includes a scrap metal dealer and pawnbroker”. Second hand goods are defined as “goods which have been in use by a person other than the manufacturer or producer in the course of business, but does not include goods with a value less than R100.” Second hand goods can include objects protected in terms of the NHRA (Act 25 of 1999).

Section 21 of the Act requires dealers to keep a detailed register in a prescribed form of the identity of the person from whom the second-hand goods have been acquired as well as the person who acquire the goods from the dealer. Section 22 requires the dealer to inform the police if there is any reasonable grounds that:

- The particulars of the person provided to the dealer are false;
- The goods have been stolen; or
- The appearance of the goods has been tampered with in order to conceal the identity of the item.

The Act therefore obligates the dealer to show due diligence in terms of the provenance of an object.

Downloads:

NHRA Act

Second Hand Goods Act