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Cri-Me-a-River! Crimean Gold in the Crosshairs of Geopolitics

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COVER: *Armband* (Scythian, 900-100 BC). Gold and glass.

Loaned to the Allard Pierson Museum. Photo: AP Museum. See story on p. 36.

CRI-ME-A-RIVER! CRIMEAN GOLD IN THE CROSSHAIRS OF GEOPOLITICS

EVELIEN CAMPFENS* AND IRINA TARSIS*

INTRODUCTION¹

In February 2014, when the fourth President of Ukraine, Viktor Yanukovich, defected to Russia, an international art exhibition of thirty Andrei Rublev icons loaned to Kiev from Moscow's Central Museum of Ancient Russian Culture and Art was abruptly and prematurely closed,² and the loaned objects hastily returned to Moscow. Due to protests against the Yanukovich government that ultimately led to his ouster, it was deemed unsafe to continue to lend culturally significant Rublev icons to the capital of Ukraine. As fate would have it, the very same month, hundreds of Ukrainian objects — weapons, decorative objects, sculptures (**FIGS. 1-4**) — arrived at the Allard Pierson Museum in Amsterdam (the "AP Museum") for the second leg of a touring exhibition entitled *Crimea: The Golden Island in the*

Black Sea (**FIG. 5**). Comprised of more than 500 archaeological objects, the loans came from five Ukrainian institutions, four of which are in Crimea.³ Originally scheduled from February to May 2014, the loans were extended through August.⁴

“The AP Museum's dilemma—
where should it return the borrowed materials:
to the Ukrainian State that authorized the
loan or to the individual Crimean institutions
that lent their objects ...?”

The political unrest that prompted Yanukovich to flee Ukraine was soon followed by Russian intervention in Crimea. Less than halfway through the AP Museum loan period, Crimea seceded from Ukraine and was annexed by the Russian Federation, an act disavowed by most members of the United Nations. This event unhinged the clear terms of the loan agreement, which stipulated an orderly return of the borrowed Ukrainian artifacts to the participating museums. Thus arose the AP Museum's dilemma. Where should it return the borrowed materials: to the Ukrainian State that authorized the loan or to the individual Crimean

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¹ These gold materials are alternatively referred to as “Scythian Gold” or “Crimean Gold,” a nuanced distinction akin to referencing antiquities removed from the Parthenon by Lord Elgin as either the “Parthenon Marbles” or the “Elgin Marbles.” The Crimean objects are of multicultural origin, however, and are not only Scythian.

² See, for example, “Old Russian icons are taken from Kiev exhibition ahead of schedule to escape the danger of damage,” *Interfax Religion* (February 26, 2014).

³ The five museums are: The National Museum of History of Ukraine (Kiev), the Central Museum of Tavrida (Simferopol), the Kerch Historical and Cultural Preserve (Kerch), the Bakhchisaray History and Culture State Preserve of the Republic of Crimea (Bakhchisaray), and the National Preserve of Tauric Chersonesos (Sevastopol).

⁴ See 2.4, Amsterdam District Court, 14 December 2016, case number HA ZA 14-1179/ECLI:NL:RBAMS:2016:8264.



FIGURE 1. *Sword and Scabbard* (Scythian, 900 -100 BC). Gold. Loaned to the Allard Pierson Museum.



FIGURE 2. *Dolphin* (Scythian, 900-100 BC). Gold and rock crystal. Loaned to the Allard Pierson Museum.



FIGURE 3. *Brooch* (Scythian, 900-100 BC). Gold gemstone and green glass. Loaned to the Allard Pierson Museum.



FIGURE 4. *Helmet* (Scythian, 900-100 BC). Gold. Loaned to the Allard Pierson Museum.

All Photos Courtesy AP Museum.

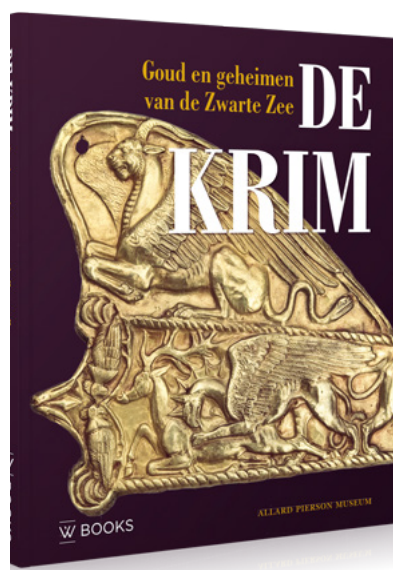


FIGURE 5. Cover of the Allard Pierson Museum's exhibition catalogue for *Crimea: The Golden Island in the Black Sea*.

institutions that lent their objects to the show?

The international dispute was further complicated by tragic events in the territory of Ukraine – the military operations, the devastation in war-affected areas, and the more than 1.4 million internally displaced persons. Not the least of these tragedies was the downing of a Malaysian jetliner flying over Ukraine on July 17, 2014. Having departed from Amsterdam on its way to Kuala Lumpur,

the plane was shot down together with all 298 passengers and crew on board—many of whom were of Dutch nationality.⁵

In August 2014 the exhibition in Amsterdam came to an end, and 19 of the more than 500 borrowed artifacts were returned to the museum in Kiev, as these were not contested.⁶ The objects from the four museums in Crimea, however, remained in Amsterdam due to opposing claims, and the standstill was brought to court in The Netherlands for adjudication.⁷ Parties to the court case were the four Crimean museums (hereinafter the “Crimean Museums”), the State of Ukraine and the University of Amsterdam (acting on behalf of the AP Museum). Ultimately, on December 14, 2016, the

Amsterdam District Court rendered a decision as to how the AP Museum ought to handle the Crimean loans: they would be returned to Ukraine.⁸ In January 2017, that ruling was appealed. While the artifacts remain in storage in Amsterdam pending the outcome of the appeal, this case offers a wealth of political, legal and ethical dilemmas for experts in the field of cultural property disputes. The District Court verdict illustrates the central role of state authorities in the context of international art loans and the 1970 UNESCO Convention.

BACKGROUND

Present-day Ukraine declared its independence in 1991⁹ following the collapse of the Union of Soviet Socialist Republics, a.k.a. the Soviet Union, a geopolitical experiment that lasted for 70 years. The history and cultural patrimony of Ukraine is, itself, a hotly contested subject, due in great part to the ever-changing borders and sovereignty of its different parts¹⁰ (FIG. 6). It is telling that the national anthem begins with less than enthusiastic lyrics, “The glory and the freedom of Ukraine has not yet died/*Shche ne vmerly Ukrainy ni slava ni volya*.” Until the Mongolian invasion in the 13th century, Kievan Rus’, with the seat of power in Kiev, was the center of East Slavic culture and the strongest of the Slavic principalities. Later, parts of present day Ukraine were dominated or annexed by the Kingdom of Poland, Duchy of Lithuania, Crimean Khanate, Ottoman Empire, Kingdom of Hungary, Russian Empire, and the Czechoslovak Republic. In the 20th century, Ukraine’s formation was marked by multiple declarations of independence, including those in 1917, 1941, and 1990-91.

Ukraine’s control over Crimea, a land mass situated on the coast of the Black Sea, arose relatively recently under peculiar circumstances. Like Ukraine, Crimea has changed hands as a strategically important asset since ancient times. Having

⁵ See S.C. Res. 2166, U.N. Doc. SC/11483 (July 21, 2014) and Draft S.C. Res., U.N. Doc. S/2015/562 (July 15, 2015) – vetoed by Russia – in relation to the downing of Malaysia Airlines flight MH17.

⁶ Nina Siegal, “Artifacts from Crimean Museums Are Held Hostage by Politics,” *New York Times* (Aug 17, 2015).

⁷ For intervention by the Dutch State, see an earlier ruling in the case: 8 April 2015 [Amsterdam District Court, case number HA ZA 14-1179/ ECLI:NL:RBAMS:2015:2000]. At the same time, private activists were launching campaigns, such as one hosted on the website Change.org entitled “Return Scythian gold to Crimea! Laat het Scythian gold terugkeren naar De Krim” to appeal to the court of public opinion for the desired outcome. The creator of the Change.org campaign sought to get 1,000 signatures to support the message of returning the Scythian gold to Crimea, but only managed to collect 535.

⁸ Cited *supra* fn 4.

⁹ “The Transfer of the Crimea to the Ukraine,” *International Committee for Crimea* (July 2005), available at <http://www.iccrimea.org/historical/crimeatransfer.html> (last visited March 25, 2017).

¹⁰ Adam Taylor, “To understand Crimea, take a look back at its complicated history,” *The Washington Post* (February 27, 2014).

at one point or another been controlled by the Greeks, the Persians, the Romans, the Byzantine Empire, and the Ottomans, Crimea was annexed in 1783 by the Russian Empire. Soon after the Empire's collapse following the 1917 Russian Revolution, Crimea became an autonomous republic. In 1945, it was made a province of the Russian Soviet Federative Socialist Republic (SFSR) within the Soviet Union.

Nine years later, in 1954, Nikita Khrushchev decreed a transfer of Crimea from the Russian SFSR to the Ukrainian SFSR for economic and geographic reasons, as the Crimean peninsula was "a natural extension of the southern Ukrainian steppes."¹¹ Ironically, the transfer aimed to bolster the brotherly love and friendship between Russians and Ukrainians, which, at the time, few could have anticipated would turn hostile. Nor could anyone have envisioned the collapse of the Soviet Union. In 1991, the Autonomous Republic of Crimea became a part of the newly independent Ukraine.

In 1970, members of the United Nations signed a number of international treaties declaring the principles of friendly relations and cooperation among states, including the provision that a State shall not acquire territories of another Member State through the use of threats or force.¹² In 1994, Ukraine was granted assurance with the Treaty on the Non-Proliferation of Nuclear Weapons confirming the "unity and territorial integrity of Ukraine within its internationally recognized borders" in exchange for reduction and limitation of its nuclear arsenal and disarmament.¹³

¹¹ *Bulletin of the Institute for the Study of the History and Culture of the USSR* (Munich), Vol. 1, no. 1, April 1954, pp. 30-33.

¹² UN Resolution A/RES/25/2625. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Oct. 24, 1970).

¹³ UN General Assembly Resolution A/RES/68/263. Territorial integrity of Ukraine (Apr. 1, 2014); UN General Assembly Letter A/49/676. Letter dated 17 November 1994 from the Permanent Representative of Ukraine addressed to the Secretary-General (Nov. 17, 1994).



FIGURE 6. Map showing Ukraine and Crimea in relation to Russia.

THE SCYTHIANS

The Scythians were ancient nomadic peoples who inhabited the central Eurasian steppes from the 9th to 1st century BC.¹⁴ Displaced by the Sarmatians starting in the 3rd century BC, they were forced to inhabit coastal areas of the Black Sea and Crimea. It was supposedly the Scythian king Saitaphernes who founded the new capital Neapolis Scythica near present-day Simferopol. The city was sacked in the 3rd century BC, leading to the extinction of late Scythian culture. In 9 AD, Ovid referred to the Black Sea as the "Scythian Sea."¹⁵ Later dominant cultures in Crimea were influenced by the Scythians.

The Crimean peninsula, which is rich in archaeological sites, has many Scythian burial mounds, called kurgans. These contain weapons, jewelry, vessels for the afterlife, and numerous ceremonial objects. The first archaeological excavations of Scythian antiquities in Southern Russia and Ukraine date back to

¹⁴ See, David Braund, *Scythians and Greeks: Cultural Interaction in Scythia, Athens and the Early Roman Empire* (Exeter: University of Exeter Press, 2007).

¹⁵ Renate Rolle, *The World of the Scythians* (University of California Press, 1st English ed., 1989), p. 134.

1763.¹⁶ In Crimea, Paul Du Brux discovered a stone burial chamber in the early 19th century, the contents of which were transported to St. Petersburg.¹⁷ In the Soviet Union, “excavations and archaeological expeditions [were] generally the province of the central institutions of the Academy of Science in the main cities in the Soviet republics,” with “the centre for modern research into the Scythians [being] Kiev.”¹⁸

THE EXHIBITION

In the early 2010s, museum administrators and curators in Germany, The Netherlands, and Ukraine began planning an international art exhibition to showcase Scythian, Greek, and Goth treasures and other objects from Crimea’s rich history. The exhibition, *Crimea: The Golden Island in the Black Sea*, at the AP Museum would, as already noted, include more than 500 artifacts. Its alternate name, *The Crimea: Greeks, Scythians and Goths at the Black Sea*, better described the objects, which the AP Museum’s January 2014 press release said “reveal the rich history of the peninsula colonized by the Greeks since the seventh century BC. The Crimea and the Black Sea were and remain an important crossroads between Europe and Asia.” The loaned artifacts are testimony to the various civilizations the region has known. A Chinese lacquer box dating from the Han dynasty, for example, attests to Crimea’s position as part of the Silk Road.¹⁹

LOAN AGREEMENTS AND EXPORT LICENSES

To arrange for the loan of the objects from Ukraine to Bonn (from July 2013) and to Amsterdam in 2014,

agreements were finalized in the spring of 2013, months before any unrest in Kiev. The parties to the agreements were the representatives of the AP Museum and the Landesmuseum on one side, and their counterparts at the five Ukrainian museums – the one in Kiev and four in Crimea – on the other.²⁰ The loan agreements stipulate that the AP Museum would return the loaned materials to each of the five museums in a timely manner “after the expiration of the term of the temporary storage for the purpose of demonstration.”²¹

The Crimean Museums rely on this stipulation to advance their claim for return of their artifacts to the museums. The interests of Ukraine surface in the loan agreements in the reference to the objects as part of the “Museum Fund of Ukraine” and a reminder that the parties “realize that the exhibits of the exhibition are the property of Ukraine and world civilization and shall take all possible measures to avoid their loss and damage.”²²

The Ukrainian executive branch of the government, not being a party to the agreements, approved the loans by signing export licenses in 2013 and an extension authorization in 2014.²³

GEOPOLITICAL EVENTS 2014

The exhibition at the AP Museum coincided with unforeseen geopolitical events. The Amsterdam court summarized them as follows:

“On 6 March 2014, the Autonomous Republic of Crimea (ARC) agreed on the secession from Ukraine and accession to the Russian Federation. On 16 March 2014, the ARC held a referendum and voters in Crimea were in favor of accession to the Russian Federation. On 18 March 2014 the ARC and Sevastopol became part of the Russian Federation.”²⁴

¹⁶ Ellen D. Reeder and Esther Jacobson, *Scythian gold: treasures from ancient Ukraine* (Los Angeles County Museum of Art, Walters Art Gallery) (1999) and Pavel Dolukhanov, *The Early Slavs: Eastern Europe from the Initial Settlement to the Kievan Rus* (Routledge, 1st ed.) (June 27, 1996).

¹⁷ *A Dictionary of Archaeology*. Edited by Ian Shaw and Robert Jameson (London: Blackwell Publishers, 2002).

¹⁸ Rolle, *op. cit.*, p. 9.

¹⁹ Allard Pierson Museum Series, *De Krim: Goud en geheimen van de Zwarte Zee* (W Books, 2014), p. 95.

²⁰ Rechtbank Amsterdam, [Amsterdam District Court], C/13/577586 / HA ZA 14-1179 [ECLI:NL:RBAMS:2016:8264] 14 December 2016, hereafter “Verdict.”

²¹ *Id.* Verdict at 2.2 and 2.8.

²² *Id.* Verdict 3.4; Art. 7.1 of the Loan Agreements.

²³ *Id.* Verdict at 2.3 and 2.4.

²⁴ *Id.* Verdict 2.5.

The secession of Crimea, however, was not recognized by most other nation states, including The Netherlands.²⁵ More importantly, Ukraine took the position that Crimea was temporarily occupied rather than permanently annexed.²⁶ The United States and the European Union placed multiple economic sanctions on Russia “for violating the sovereignty and territorial integrity of Ukraine.”²⁷

COMPETING CLAIMS

After the exhibition period ended, the AP Museum was confronted with two competing demands for return of the objects: Ukraine on the one hand and the Crimean Museums on the other. As early as March 2014, the four Crimean museums began insisting in writing that the AP Museum return all objects to the lending institutions as stipulated in the loan agreements.²⁸ That same month, the Ministry of Culture of Ukraine requested an early return of the Crimean treasures to the State of Ukraine, saying that Ukraine was working on the return of all artifacts that belonged to the State Museum Fund as being “national treasures and an integral part of the cultural heritage of Ukraine protected by law.”²⁹

By July 2014, the AP Museum suspended its obligations under the loan agreement to return the objects to the four Crimean museums, and, instead, adopted a position that as a bailee it had no interest in the Crimean treasures and simply wanted to return the artifacts to the entitled party, but that it did not want to be held liable

for breach of contract or damages claimed by the other party.³⁰ This position was consistent with the AP Museum’s decision to return objects that had been borrowed from the National Museum of History of Ukraine in Kiev after the termination of the exhibition on the 31st of August, 2014.³¹

As a resolution could not be reached,³² the four Crimean museums initiated legal action against the AP Museum and filed suit in the District Court of Amsterdam on November 19, 2014. Ukraine’s request to intervene was granted by the Amsterdam District Court a few months later, on April 8.³³

At that point, the Dutch State also tried to intervene, requesting to be admitted as a party to the litigation in order to prevent the Crimean treasures from being returned to the Crimean Museums. This request was denied on grounds that the Dutch State lacked specific interest in the outcome.³⁴

Despite speculations to the contrary, the Russian Federation did not enter the debate.³⁵

IMMUNITY FROM SEIZURE

One may ask, were there no immunity from seizure arrangements with the Dutch State? In The

²⁵ Resolutions by the Security Council stating the illegality of the events were vetoed by Russia; G.A. Res. 68/262, U.N. Doc. A/RES/68/262 (March 27, 2014) underlines the Territorial integrity of Ukraine.

²⁶ Law of Ukraine “On Securing the Rights and Freedoms of Citizens and Legal Regime on the Temporarily Occupied Territory of Ukraine,” No. 1207-VII (April 15, 2014). See also M. Nudelman, “Who Owns the Scythian Gold? The Legal and Moral Implications of Ukraine and Crimea’s Cultural Dispute,” *Fordham International Law Journal*, Vol. 38, 2016, pp. 1261-1297, at 1276, 1283.

²⁷ Ukraine and Russia Sanctions, U.S. Department of State, Department of the Treasury, Executive Order 13660, March 6, 2014, and “EU sanctions against Russia over Ukraine crisis,” *European Union Newsroom*, Highlights.

²⁸ Verdict 2.9.

²⁹ Verdict 2.6.

³⁰ Verdict 2.10, 3.7, 3.8.

³¹ Verdict 2.11.

³² Two meetings were held in Amsterdam in September and October of 2014: one between representatives of the Allard Pierson and the Crimean Museums, and another meeting between representatives of the Allard Pierson and government officials from Ukraine. Verdict 2.12.

³³ Rechtbank Amsterdam, [Amsterdam District Court] [ECLI:NL:RBAMS:2015:2000], 8 April 2015.

³⁴ *Ibid.* 4.6 and 5.4. According to the Court, the interest of the Dutch State “to see that its international obligations would not be jeopardized” could be better served by the right to a hearing as provided for by Art. 44 Rv [Dutch Code of Civil Procedure].

³⁵ Given the fact that Russian museums contain collections that are not always endemic to the geographic contours of the country, and, more specifically, include hundreds of valuable Ukrainian artifacts displaced in the course of the early 20th century, any argument in favor of returning cultural objects to the place of origin would surely backfire if made by the Russian Federation. See, for example, the 1998 report about artifacts lent to Moscow from Kiev for a 1938 exhibition where multiple objects from the St. Michael’s Golden-Domed Monastery failed to be returned, one of which is currently on display at the Tretyakov State Gallery in Moscow. Source: S. Kot, U. Koreniuk, and T. Sebta, “Regarding restitution to Ukraine cultural heritage from Mikhailovskii Zlatoverkovyi Sober presently located in museums of the Russian Federation” (Kiev, 1998).

Netherlands, this can be arranged by so-called “letters of comfort,” documents issued by the Ministry of Foreign Affairs that aim to provide some degree of immunity from seizure for cultural property from foreign states in the event of international loans. More specifically, such letters explain that, “the Government of The Netherlands will do everything that is legally within its power to ensure that the art object loaned by the foreign State will not be encumbered at any time while it is located on Dutch territory.”³⁶ In the present case, such letters appear to have been issued; however, they did not play any role, as the objects were never seized. Although such “letters of comfort” may provide (some) protection, they do not provide immunity from lawsuits, at least not in the Dutch situation.³⁷

THE LEGAL ARGUMENTS AND COURT RULING

The opposing parties based their claims for the return of the objects on: (i) obligations stated in the loan agreements; on (ii) ownership/title; on (iii) the 1970 UNESCO Convention³⁸; and on (iv) ethical principles—existing cultural-historical links and the integrity of museum collections.

Ukraine claimed legal ownership over the loaned objects on the basis of Ukrainian law, which deems archaeological objects “state property.” It relied on the 1970 UNESCO Convention for the international return claim. The Crimean Museums based their claim for the return of the objects on the loan

“The AP Museum suspended its obligations under the loan agreement to return the objects to the four Crimean museums. ... The museums filed suit in the District Court of Amsterdam on November 19, 2014. Ukraine's request to intervene was granted ... a few months later.”

agreement and on their rights of operational management. In their view, this right is stronger than the “bare” ownership rights Ukraine may have, taking into account the close cultural-historical ties of the objects with the territory and people of Crimea, as well as the principle of the integrity of museum collections. The Crimean institutions, in other words, argued that they are the “genuine home” of the archaeological findings as they were discovered and preserved there over time.

The three-judge panel of the civil chamber of the Amsterdam District Court needed a little over two years to render its verdict.³⁹ On December 14, 2016, the Court held in favor of Ukraine and against the Crimean Museums (**FIG. 7**). The following issues were addressed in the verdict:

- The obligations imposed by the loan agreement
- Who is legally entitled to the collection(s)?
- How does the 1970 UNESCO Convention apply?

Issue 1: The Loan Agreements

One of the questions presented to the Court was whether the AP Museum was bound by obligations in the loan agreement as to the “*timely return of the exhibits to the museum*” given the change in circumstances in Ukraine. The loan agreements clearly spelled out an obligation to return the objects to their specific lending museums. That said, the choice of law clause in the loan agreement made Ukrainian law determinative, and according to Ukrainian Law article 652 CCU, any agreement can be terminated by the contracting parties in case of a “material change in circumstances.”⁴⁰

³⁶ The Dutch system follows the 2004 U.N. *Convention on Jurisdictional Immunities of States and their Property*, under which State-owned cultural property enjoys immunity from measures of constraint. See Cultural Heritage Inspectorate, Ministry of Education, Culture and Science, (acc. 21 April 2017.) <https://english.erfgoedinspectie.nl/cultural-goods/temporary-import-of-cultural-goods-for-exhibitions-in-heritage-institutions>.

³⁷ Cf. a United States case, *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322 (D.C. 2007), ruling that foreign states lending art to the United States were not *per se* immune from jurisdiction, even if the loaned objects were precluded from seizure. In 2016, however, President Obama signed into law the The Foreign Cultural Exchange Jurisdictional Immunity Clarification Act (FCEJCA), or Art Museum Amendment, narrowing the expropriation exception in the FSIA to provide greater immunity from suit for foreign states lending artworks to the United States for temporary exhibit.

³⁸ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, 14 November 1970.

³⁹ Starting from the writ of 19 November 2014 (and headed by Mr. R.A. Dudok van Heel).

⁴⁰ Verdict 4.24, 4.25.

A similar provision can be found in Dutch law.

The Amsterdam court ruled that the Crimean annexation was a “material change in circumstances,” a change justifying the termination of the AP Museum’s contractual obligations.⁴¹ The court dissolved the loan agreement and found that the AP Museum was within its rights *not* to return the artifacts to the Crimean Museums.

Issue 2: Legal Title

On the matter of legal title to the objects, there is, as expected, a difference of opinion between Ukraine and the Crimean Museums, despite the fact that it is uncontested that the loaned artifacts are listed in the museum registry of Ukraine. Ukraine bases its claim on a February 2, 2000 Decree designating the collections of the four Crimean museums as Ukrainian State property.⁴² More generally, Ukraine invoked Ukrainian laws vesting ownership of all archaeological finds in the state; for example, the 2004 Law of Ukraine on Protection of Archaeological Heritage.⁴³ Underlining this argument is the premise that the secession of Crimea is irrelevant to the legal status of Ukrainian-registered cultural objects.

The Crimean Museums, on the other hand, argue that the matter is more complex; the Autonomous Republic of Crimea (ARC), not Ukraine, should be considered the owner of the majority of the loaned objects.⁴⁴ The ARC has had autonomous status since the foundation of Ukraine in the early 1990s.

Moreover, according to the 1996 version of the Ukrainian Constitution, ARC has rights to autonomously administer its possessions and keep and use its historical objects. Given that three of the four Crimean Museums were apparently founded by ARC independently, the Crimean Museums believe the ARC should be considered the legal owner of the objects of all but the Sevastopol museum, which was founded by Ukraine. Further, they maintain that the “bare ownership right” to the objects by Ukraine is superseded by the superior rights of the Crimean Museums due to their rights of “operational management.” Under the previous version of the Ukrainian law, and until May 2014, the Crimean Museums enjoyed certain (*in rem*) rights known as “operational management rights” to the objects in their care. Following the annexation of Crimea, the Ukrainian Ministry of Culture transferred the operational management right in Crimean-based Ukrainian national patrimony to the National Historical Museum of Ukraine.⁴⁵ The Crimean Museums contest the legality of this transfer.⁴⁶

The Amsterdam Court in its December ruling did not reach a decision regarding the *ownership* of the Crimean treasures. Instead, it limited itself to the question as to whom the AP Museum was obliged to return the objects on the basis of the Dutch Heritage Act 2016 – the law implementing the 1970 UNESCO Convention in the Netherlands.⁴⁷ Questions as to ownership, on the other hand, should be decided, according to the Verdict, upon the return of cultural objects to the State from which they came, as will be elaborated upon below.⁴⁸

⁴¹ Verdict 4.27.

⁴² Decree on the basis of Art. 15 para. 3 of the Law of Ukraine on Museum and Museum Affairs of 29 June 1995. See: Verdict, 3.4

⁴³ Under the heading of “RIGHTS AND DUTIES OF ARCHAEOLOGICAL HERITAGE RESEARCHERS” Article 18 reads: “Finds, received in the result of archaeological research (immovable and movable items, which were connected with the object of archaeological heritage and discovered and documented during archaeological research) are the [sic] state property. Law of Ukraine on Protection of Archaeological Heritage (*Vidomosti of Verkhovna Rada* (VVR), 2004, No. 26, p. 361), UNESCO Database of National Cultural Heritage Laws: <http://www.unesco.org/culture/natlaws>. Moreover, although not mentioned in the 2016 verdict, the *Law of Ukraine on Protection of Cultural Heritage of 2000*, Art. 17, clarifies that all “archaeological finds” are state property. (*Vidomosti of Verkhovna Rada* (VVR), 2000, No. 39, p. 333); See: UNESCO Database of National Cultural Heritage Laws (acc. April 1, 2017).

⁴⁴ Verdict 3.2.

⁴⁵ Per Order No. 292 *On Transfer of Museum Objects to the National Historical Museum of Ukraine* of May 13, 2014. Verdict 2.7.

⁴⁶ Verdict 3.2.

⁴⁷ The Dutch Heritage Act 2016 (officially “Act of December 9, 2015, Relating to the Combining and Amendment of Rules Regarding Cultural Heritage”), supersedes the earlier Implementation Act of 2007. It applies from 1 July 2016 on; it has not changed regarding the relevant provisions of the Verdict. Available on IFAR’s Art Law & Cultural Property Database. www.ifar.org/art_law.php. Hereafter “Dutch Heritage Act.”

⁴⁸ The court rules that on the basis of Art. 1012 RV (Dutch Code of Civil Procedure) legal ownership of a cultural object shall be determined upon return of the cultural object in the country that requested its return by its national laws. Verdict. 4.17.

Not insignificantly, the Russian legislators passed a new law on February 4, 2015, which states that museum collections in Crimea are to be included in the national museum registry of the Russian Federation.⁴⁹

Issue 3: The 1970 UNESCO Convention

Ukraine as well as the Netherlands (and Russia) are State Parties to the 1970 UNESCO Convention and implemented its principles, albeit in different ways. The Convention is non-self executing; it needs to be implemented in domestic law, which in the Netherlands took effect with the *Heritage Act*.

The aim of the 1970 UNESCO Convention, to which 132 countries belong as of June 2017, was to attain a minimum level of uniform protection against the illicit trafficking of cultural objects and international cooperation and solidarity in doing so.⁵⁰ Its rationale, stated in Article 2, is the recognition of the “illicit import, export and transfer of ownership of cultural property” as “one of the main causes of the impoverishment of the cultural heritage of the countries of origin”.⁵¹ The Convention’s pillars are:

- Adopting protective measures, such as creating national inventories of cultural property (Art. 5). (The Museum Fund in Ukraine, for example);
- Control of the movement of cultural property through a system of export certificates and laws prohibiting the import of stolen objects (Art. 6-9). (As Ukraine issued temporary export licenses with regard to the Crimean treasures.)
- The interstate return of illicitly transferred cultural property (Art. 7).

⁴⁹ Russian Federal Law (Feb. 12, 2015) No. 9-FZ “On regulation of relations in the matter of culture and tourism as related to the annexation of the Republic of Crimea to the Russian Federation. ...”

⁵⁰ Irini A. Stamatoudi, *Cultural Property Law and Restitution: A Commentary to International Conventions and European Union Law* 33 (Edward Elgar Publ., 2011).

⁵¹ UNESCO 1970, Art. 2.

UNLAWFUL TRANSFER?

The provisions of the 1970 UNESCO Convention are notoriously vague and various interpretations can co-exist, such as what exactly falls under the definition of “illicit” import, export or transfer.⁵² This is important, as the return request of Ukraine was based on the argument that the unlawfulness of the situation is created by the non-return after expiration of the export licenses, while the way the objects entered The Netherlands was perfectly legal.

Under Ukraine’s implementing legislation for the UNESCO Convention, the expiration of an export license is deemed “illicit.”⁵³ The applicable provisions of the Dutch Heritage Act, however, (Article 6.7) make the illicit *import* the sole prerequisite for return: “The return of cultural property imported into The Netherlands in breach of the prohibition as referred to in Section 6.3 may be claimed (...) by proceedings brought by the State Party from which the property originates or by the party with valid title to such property.”⁵⁴

In its December 2016 decision, the Amsterdam District court concluded on this point that the term “illicit import” in the Dutch Heritage Act should be interpreted broadly and in such a way as to include a situation where the illegality is created by the non-return after the expiration of the loan contract or export licences. To come to this interpretation, the court argued that to exclude a situation like the present would be contrary to the aim of the 1970

⁵² E.g. P. J. O’Keefe, *Commentary on the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (Leicester Institute of Art and Law, 2007). I. Stamatoudi, *op. cit.*, 2011.

⁵³ Law of Ukraine on Exportation, importation and restitution of cultural values, Art. 23 (Vidomosti Verkhovna Rada (...), 1999, No. 48, p. 405): “Those cultural values, which were temporarily exported from Ukraine and were not returned in the period provided by the contract, are considered unlawfully exported.”

⁵⁴ Act of 9 December 2015 Relating to the Combining and Amendment of Rules Regarding Cultural Heritage (Dutch Heritage Act) (December 9, 2015). Article 6.7. Article 6.3 reads: “It is prohibited to import into The Netherlands cultural property which: a) has been removed from the territory of a State Party and is in breach of the provisions adopted by that State Party, in accordance with the objectives of the 1970 UNESCO Convention in respect of the export of cultural property from that State Party or the transfer of ownership of cultural property, or b) has been unlawfully appropriated in a State Party.”

Convention.⁵⁵ In addition, the court drew inspiration from the 2014 European Union Directive on unlawfully removed cultural objects,⁵⁶ and the 1995 UNIDROIT Convention,⁵⁷ both of which explicitly include in their definition of “unlawfully removed” cultural objects, objects that were “not returned at the end of a period of lawful temporary removal.”

In doing so the court confirmed – although implicitly⁵⁸ – the view that the *lex originis* should be decisive: the country of origin’s domestic law determines the legal status of the object; “illicit export” means that the object should be seen as “illicitly imported” in other countries, creating a sufficient basis for return claims under the UNESCO system.⁵⁹ In the present case, this means that the non-return of the artifacts after the lapse of the loan agreement – illicit export under

Ukrainian law – creates a situation of “illicit import” within the meaning of the Dutch Heritage Act.

RETURN CLAIM?

The next question – of crucial importance – is who can rightfully claim the return of cultural objects that are unlawfully retained in the Netherlands? On this point, Article 6.7 of the Dutch Heritage Act states that return may be claimed by “the State Party from which the property originates or by the party with valid title to such property,” seemingly facilitating return claims by non-State Parties. The Dutch court, however, dismissed this view, ruling that only States can claim return of cultural objects; the question of title and ownership should be decided upon *after* their return in Ukraine. For this, the court invoked Article 1012 of the Dutch Code of Civil Procedure – implementing the 2014 EU Directive – stating that “ownership of the cultural object that is subject to a return request by a State Party will be decided upon after return by the national laws of the state that claimed for its return.”⁶⁰

Thus, according to the court, only the claim for the return of the objects by the State of Ukraine can be acknowledged and claims by non-state rights-holders, like museums or the Autonomous Republic of Crimea, do not have standing.⁶¹ In other words, that the system of international return of illicitly transferred cultural objects as envisaged by the 1970 UNESCO Convention is an interstate affair based on cooperation between national authorities and aimed at the protection of *national* collections.

⁵⁵ See Art. 2, *supra*. Not that the 1970 UNESCO itself provides much clarity by stating in Article 7 in very general terms that “State Parties undertake, at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported, [...]”. The court relied, however, for the interpretation of the 1970 Convention on the scholarly opinion of P.J. O’Keefe (2007), *supra*, and L.P.C. Belder’s doctoral thesis “The Legal protection of cultural heritage in international law and its implementation in Dutch Law” (2014, not published).

⁵⁶ Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 relating to the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012, states in Art. 2: “unlawfully removed from the territory of a Member State” means: (a) removed from the territory of a Member State in breach of its rules on the protection of national treasures or in breach of Regulation (EC) No 116/2009; or (b) not returned at the end of a period of lawful temporary removal or any breach of another condition governing such temporary removal.

⁵⁷ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects Art. 5.2 (2), June 24, 1995 “A cultural object which has been temporarily exported from the territory of the requesting State, for purposes such as exhibition, research or restoration, under a permit issued according to its law regulating its export for the purpose of protecting its cultural heritage and not returned in accordance with the terms of that permit shall be deemed to have been illegally exported.” The Netherlands signed but did not ratify the Convention; Ukraine is not a signatory.

⁵⁸ The verdict at 4.15 reads “(I)t is not without importance that according to Ukrainian law [...] objects will be deemed illegally exported if they have not returned after the lapse of time limits mentioned in export licenses” ...

⁵⁹ This seems, at present, a generally accepted view: e.g. P.J. O’Keefe (2007), I. Stamatoudi (2011); and is in line with the Operational Guidelines for the implementation of the 1970 Convention, adopted at the third meeting of the States Parties on 18-20 May 2015 (Resolution (nr. 26)).

⁶⁰ Art. 1012 Rv [Dutch Code of Civil Procedure] implements Art. 13 of the 2014 EU Regulation discussed above [NB the verdict states Art. 12 which must be a mistake]. However, it differs slightly from the EU provision that reads: “Ownership of the cultural object after return shall be governed by the law of the requesting Member State.”

⁶¹ Verdict 4.8, 4.16, 4.17.

THE VERDICT

In its 14 December 2016 decision (**FIG. 7**), the District Court sided with Ukraine and ruled the following:

- the loan agreement between the Crimean Museums and the AP Museum is dissolved;
- the AP Museum shall transfer the loaned objects to the National Historical Museum of Ukraine in Kiev in its capacity as custodian of the Crimean objects designated by the Ukraine State;
- pending an appeal, the artifacts shall remain in storage at the AP Museum;
- Ukraine shall pay storage and insurance costs to the AP Museum.⁶²

As expected, and as noted above, in January 2017, the Crimean Museums filed an appeal.⁶³

ROAD(S) NOT TAKEN

The Dutch verdict makes clear that the legal framework, based on the 1970 UNESCO Convention, does not address issues that are at the heart of the present case, such as partition of a country or disconnect between the territorial or cultural-historical link of the object to (groups of) people(s), as *that* legal framework is based on the notion that the national state is the key “rights holder” to cultural heritage where it concerns claims for return. Most of the time, this will work efficiently but, sometimes, it may be to the detriment of other interests, like groups who do not feel (anymore) represented by their national government. Interestingly, and perhaps exactly because of this “gap” in the traditional model, a parallel system of soft-law instruments signals another trend, of acknowledgement of (group or individual) rights of non-state actors to their cultural heritage.⁶⁴

⁶² Verdict, 4.20 and 5.

⁶³ *Crimean Museums Appeal Court Ruling Returning Scythian Gold To Kiev*, Radio Free Europe Radio Liberty (Jan. 26, 2017) confirmed by attorney G.J. van den Bergh by email to the author.

⁶⁴ E.g. rights of indigenous peoples to their lost cultural heritage (rights based on restitution provisions in the *United Nations Declaration on the Rights of Indigenous Peoples* (UN GA Res. 61/295, September 2007), and rights of victims of the Holocaust to works of art confiscated by national government agents based on the so-called *Washington Conference Principles* of 1998, promoting “fair and just” solutions and ADR methods for solving ownership issues, reproduced in E. Campfens (ed.) *Fair and Just Solutions, Alternatives to litigation in Nazi-looted Art Disputes: Status Quo and New Developments*, (The Hague Eleven Publishers), (2014).

“In its 14 December 2016 decision, the District Court sided with Ukraine. As expected, ... in January 2017, the Crimean Museums filed an appeal.”

Whether litigation in the present case can lead to a lasting or “fair” solution remains to be seen. Within the context of cultural heritage claims, adversarial litigation procedures are generally considered a last option, only to be entered into after good-faith negotiations and Alternative Dispute Resolution methods are exhausted, and precisely *because* of the non-legal (cultural, historical and other) aspects that are at stake. On this point, the “Operational Guidelines” to the 1970 UNESCO Convention, adopted in May 2015, explain that:

*“The Convention does not attempt to establish priorities where more than one State may regard a cultural object as part of its cultural heritage. Competing claims to such items, if they cannot be settled by negotiations between the States or their relevant institutions ... should be regulated by out of court resolution mechanisms, such as mediation ... or good offices, or by arbitration. There is no strong tradition for the judicial settlement of such differences in cultural matters. State practice would suggest a preference for mechanisms that allow consideration for legal, as well as cultural, historical and other relevant factors.”*⁶⁵

A preference for a non-formalistic approach can also be found in the proposal for “Guiding Principles Relating to the Succession of States in respect of Tangible Cultural Heritage”.⁶⁶ If not directly, then surely of indirect interest to the present case, this proposal by scholar Andrzej Jakubowski promotes equitable principles and alternative methods for dispute resolution regarding cultural heritage

⁶⁵ The Operational Guidelines for the implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO, Paris, 1970), adopted at the third meeting of the States Parties on 18-20 May 2015 (Resolution3.MSP.11), nr. 26. In the same sense, the International Law Association advises ADR methods for resolving cultural heritage disputes in its “Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material,” reproduced by J.A.R. Nafziger in an article by that name in: 8 Chi. J. Int’l L. 147 (2007-2008).

⁶⁶ A. Jakubowski, *State Succession in Cultural Property* (Oxford University Press) (August 4, 2015), Annex.

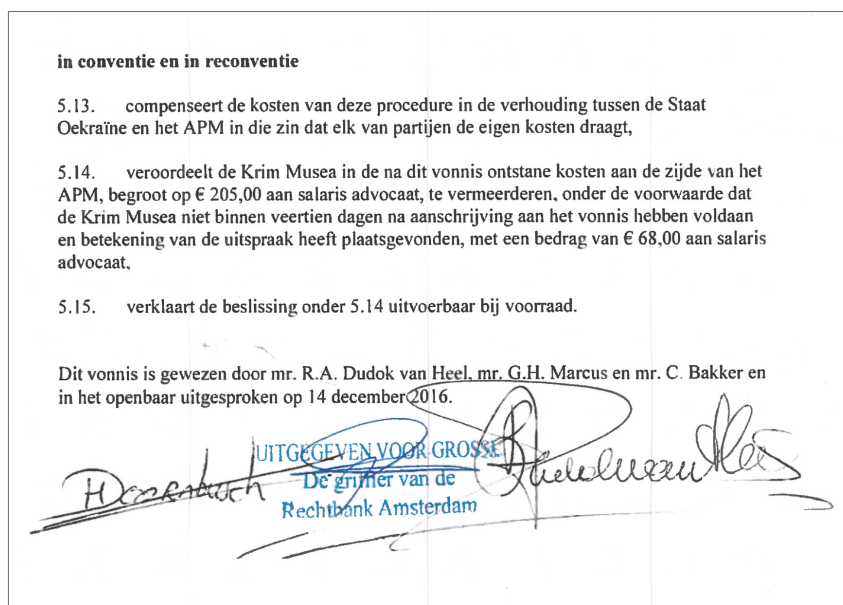


FIGURE 7. The Amsterdam District Court's December 14, 2016 decision. Image: Maarten Sanders.

disputes in the event of changing borders of a national state, for example as a result of dissolution of a state or war.⁶⁷ With regard to the settlement of disputes the draft proposes: *"In case of disagreement, the States ... are encouraged to bring their disputes before impartial arbitration or mediation commissions. The expert assistance of UNESCO is strongly recommended."*

In other words, a non-legalistic approach, as advocated in soft-law instruments for dispute resolution, is a road *not* taken in this case, as of yet.

And where, one might ask, does the 1954 Hague Convention and its Protocols fit in, given the fact that *that* Convention and its Protocols are specifically aimed at situations of armed conflict and occupation?⁶⁸ According to the First Protocol, States should take into custody cultural property

⁶⁷ In the first Principle the scope is being defined as *"to provide general guidance for bilateral or multilateral interstate negotiations in order to facilitate the conclusion of agreements related to movable and immovable cultural property, following succession of States."* Under 1 (d) it clarifies to aim at situations like the present, being *"the property, which is situated in the territory to which the succession of States relates, or having originated from said territory, was displaced to a different location by the predecessor State."*

⁶⁸ [Hague] Convention for the Protection of Cultural Property in the Event of Armed Conflict, First Protocol (ratified by The Netherlands, Ukraine as well as the Russian Federation), May 1954.

from occupied territories for safe-keeping and until the situation has stabilized, and cultural property "shall never be retained as war reparations"; therefore, it should not be used as hostage in a conflict. Such principles would seem to fit the present dispute.

CONCLUSION

Undeterred by the pending appellate decision regarding the Crimean artifacts loaned to the AP Museum, the British Museum recently announced its

plans to exhibit "Scythians: Warriors of Ancient Siberia" in September 2017. The materials intended for display in London, excavated from the Scythian tombs in Siberia and Kazakhstan, will be loaned primarily from the State Hermitage Museum in St Petersburg.⁶⁹

Law students quickly learn that hard cases make for bad law. For the time being, the Russian Federation seems to have a firm hold on the Crimean peninsula. The viscerally satisfying solution may be to keep the Scythian gold that was lent to Amsterdam away from Russian control, although this result comes at the expense of severing the cultural-historical link between the objects and their place of origin (Crimea).

Archaeologists involved in ongoing excavations in Crimea and the study of the artifacts, however, have lamented the Amsterdam District Court's decision to return the Scythian artifacts to Kiev. The Russian Minister of Culture, too, denounced the ruling, observing that it "grossly violates the principles of international exchanges between museums and the right of the people of Crimea to

⁶⁹ Press Release, "The British Museum Forthcoming Exhibitions 2017" [Spring 2017].

have access to their own cultural heritage.”⁷⁰ If the December 2016 ruling is upheld by the appeal court, Ukraine will be entitled to receive the Crimean gold from the AP Museum. But, is this the right course of action? Should not the antagonism between politicians and the nationalism fueled by Russian and Ukrainian propaganda yield to higher ethical considerations?

According to the Code of Ethics of the International Council of Museums (“ICOM”), to which the Dutch, Ukrainian and Russian museums subscribe, museum collections worldwide are repositories and stewards of the public cultural heritage and, as such, “have a special position in law, which makes them protected by international legislation.”⁷¹ The outcome of the case in Amsterdam involving the Crimean loans as it now stands makes it unclear whether museum collections are indeed protected, and by what standards?

The treasures from Crimea have a permanent bond with the place where they were created, excavated and displayed, as do other treasures excavated from Crimea and now stored in the State Hermitage Museum (Russia) or elsewhere in the world. Whether it is a long-term loan, joint custody arrangement, or an exchange of property belonging to Ukraine but held in Russian Museums, the authors of this article believe that some kind of fair “post-judicial resolution” is in order

⁷⁰ “Crimean gold must go back to Ukraine, says Dutch court,” *BBC News Europe* (December 14, 2016), available at <http://www.bbc.com/news/world-europe-38314491>.

⁷¹ International Council of Museums, “The ICOM Code of Ethics for Museums” (2004).

Russia may have Crimea, but it can't have this ancient Scythian gold

By Andrew Roth December 14, 2016



FIGURE 8. Headline from Andrew Roth's article in *The Washington Post*.

to allow the Crimean treasures to remain in the Crimean Museums.

Despite the momentary gratification of headlines like, “Russia may have Crimea, but it can’t have this ancient Scythian gold”⁷² (FIG. 8), the 2016 December decision leaves many questions unanswered. Who is the true owner of the gold and cultural heritage at the heart of the Amsterdam dispute? Will Ukraine, if ultimately victorious, be able to reach a fair and just decision as to the final location of the artifacts—one untainted by the injustice and loss it has suffered over the course of its long and complicated history? Was the decision to go to court admirable or deplorable? Is this matter, *au fond*, a dispute that can be solved by adversarial court proceedings?

⁷² Andrew Roth, “Russia may have Crimea, but it can’t have this ancient Scythian gold,” *The Washington Post* (December 14, 2016).

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