Cross-border title claims to cultural objects: property or heritage?

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3 The interstate model

ABSTRACT

Chapter 3 analyses the interstate model for claims to lost cultural heritage under the 1954 Hague Convention and the 1970 UNESCO Convention, on the basis of a case example. In the so-called 'Crimean Gold' case 500-or-so archaeological objects from the Crimean Peninsula are at stake that had been sent to the Allard Pierson Museum in Amsterdam for a short-term loan. The period of this exhibition – from February to August of 2014 – coincided with geopolitical events, resulting in the occupation and (de facto) secession of Crimea from the Ukrainian state in March 2014. After the exhibition, the Allard Pierson was confronted with two competing claims to the objects: the Ukrainian state on the one hand and the Crimean museums on the other. Ukraine claims the objects are its national cultural property, whilst the Crimean museums claim return on the basis of the loan agreement and on Crimea being the 'genuine home' of the artefacts. An analysis of the applicable UNESCO treaty system highlights that it does not address issues that are at the heart of the present case, like the division of a country and the cultural-historical interests at the sub-state level. This, because it is based on the notion of a national state as the key 'right holder' to cultural objects. The Crimean Gold case offers a wealth of political, legal and ethical dilemmas. This chapter aims step back from the political context and to focus on aspects relevant to the legal framework for return claims more generally.

The following questions are addressed in this chapter: How does the 'nationality' prong for entitlement to cultural objects in the 1970 UNESCO Convention relate to territoriality and cultural-historical considerations?; and: What is the position in this system of non-state 'right holders' who lost their cultural objects, such as communities or individuals?

*Whose cultural heritage? Crimean treasures at the crossroads of politics, law and ethics**

1 INTRODUCTION

Restitution claims concerning cultural objects are often a cause for vivid controversies, where concepts of property and state sovereignty are intertwined with intangible aspects such as a cultural-historical or religious identity. A case which exemplifies this is the so-called 'Crimean Gold' case, currently being litigated in Amsterdam.

At stake are 500-or-so archaeological artefacts from the Crimean Peninsula that had been sent to Amsterdam on a short-term loan by four Crimean museums for the exhibition 'Crimea: Gold and Secrets from the Black Sea' at the Allard Pierson Museum. The period of this exhibition in 2014 coincided with a series of political events, resulting in the Russian annexation of Crimea and its secession in March 2014 from the Ukrainian State of which the Peninsula had been part since 1954. This secession, however, is not recognised by most other states, including the Netherlands, adding a layer of complexity to the case. After the exhibition, the Allard Pierson was confronted with two competing claims to the objects: the Ukrainian State on the one hand and the Crimean museums on the other. Ukraine claims the objects as national patrimony and state property; the Crimean museums seek their return on the basis of guarantees contained in the loan agreement and the argument that Crimea is the 'true home' of the artefacts – having been discovered and preserved there over time. In December 2016, the Amsterdam District Court delivered a first substantive verdict in this case:[1] it found in favour of the Ukrainian State and ordered the return of the objects to Kiev on the basis of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.[2]

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1 *Rechtbank Amsterdam (Verdict of 14 December 2016) Amsterdam District Court*, C/13/577586/HA ZA 14-1179, ECLI:NL:RBAMS:2016:8264. *NB* see the post scriptum for the 2019 Amsterdam Appeals Court's interlocutory judgement.

2 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970) 823 UNTS 231 (1970 UNESCO Convention).

The Crimean Gold case presents a wealth of political, legal and ethical dilemmas, sufficient reason for an intermediary report. The present chapter aims to detach from the political context and to focus on the legal and ethical issues, with special attention for the position of right-holders other than nation states (like local communities, indigenous peoples or individuals) in the international legal framework for return requests.

To that end, it sets out with an overview of the factual background information and events leading up to the December ruling (section 2). The legal arguments of the parties – in as far these can be deduced from the ruling[3] – and a summary of the verdict, focusing on the Court's interpretation of the 1970 UNESCO Convention regarding the questions 'what is unlawful transfer?' and 'who can make a claim for their return?' will follow in section 3. Furthermore, section 4 will touch upon aspects not addressed in the verdict, such as the role of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its First Protocol;[4] the status of right holders beyond the Nation State; and alternative dispute resolution and its role in cultural heritage disputes.

2 BACKGROUND

2.1 The artefacts

'*Crimea: Gold and Secrets from the Black Sea*' at the Allard Pierson Museum in Amsterdam (hereafter also: AP Museum) was the second stage of an international travelling exhibition showing artefacts – jewellery, weapons, decorative objects – from five Ukrainian museums. Four of these were Crimean museums – the Tavrida Central Museum in Simferopol, the Kerch Historical and Cultural Preserve in Kerch, the Bakhchisaray History and Culture State Preserve of the Republic of Crimea in Bakhchisaray and the National Preserve of 'Tauric Chersonesos' in Sabastopol – and there was one museum in Kiev, the National Museum of History.[5] Before travelling to Amsterdam, the exhibition was displayed in the Landesmuseum in Bonn. The exhibition's alternate title, '*The Crimea: Greeks, Scythians and Goths at the Black Sea*', better

3 N.B.: in the Netherlands, the Parties' procedural documents are not public; the interpretation given here is therefore mainly based on the Court rulings.

4 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954) 249 UNTS 240 (1954 Hague Convention); First Protocol to the Hague Convention for the Protection of Cutlural Property in the Event of Armed Conflict (adopted 14 May 1954) 249 UNTS 358 (1954 Protocol) (ratified by the Netherlands, Ukraine and the Russian Federation).

5 The nineteen objects from the National Museum of History in Kiev were returned to Ukraine after the exhibition ended in August 2014.

characterises the objects. As described in the announcement by the AP Museum the exhibition would:

> reveal the rich history of the peninsula colonised 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 artefacts, in other words, are testimony to the various civilisations the Peninsula has known. One exhibit, a Chinese lacquer box dating from the Han dynasty, for example, attests to Crimea's position as part of the Silk Road.[6]

The present case is often referred to as the 'Scythian Gold case',[7] a cause for confusion as the name 'Scythian Gold' is also used for a well-known collection of antiquities excavated from the territory of the present-day Ukraine preserved in the Russian Hermitage. That *other* collection of Scythian Gold had been the subject of a dispute which arose after the collapse of the Soviet Union in the early 1990s.[8] The artefacts at stake in the dispute in the Netherlands are not the same as the controversial Scythian Gold treasures from the Hermitage. Since the objects from the National Museum of History in Kiev were returned to Ukraine after the exhibition ended in August 2014, the objects at stake in this present dispute are Crimean archaeological artefacts, that, until the loan, were part of four museum collections situated in the Autonomous Republic of Crimea in Ukraine.

2.2 Loan agreements and export licences

To arrange for the loan of the objects from Ukraine to Bonn (from July 2013) and to Amsterdam (from February 2014), agreements were finalised in the spring of 2013. The parties to the agreements were the representatives of the Landesmuseum and the AP Museum on one side, and their counterparts at the five Ukrainian museums – one in Kiev and four in Crimea – on the other. The loan agreements stipulated 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'.[9] 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:

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6 For the exhibits, see the Allard Pierson Museum Series. P. Retél and T. Vugts, *De Krim: Goud en geheimen van de Zwarte Zee* (2014) WBooks.

7 E.g. M. Nudelman, 'Who Owns the Scythian Gold? The Legal and Moral Implications of Ukraine and Crimea's Cultural Dispute' (2015) 38 *Fordham International Law Review* 1276, 1261.

8 A. Jakubowski, *State Succession in Cultural Property* (2015) Oxford University Press, 198-235.

9 Verdict (n. 1) 2.2, 2.8.

> 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.[10]

The Ukrainian executive branch of the Government approved the loans by signing export licences in June 2013 and an extension authorisation in January 2014.[11]

2.3 Geopolitical events

The exhibition at the AP Museum coincided with the Ukrainian-Russian political and military crisis with major consequences for the status of the Crimean objects. The Amsterdam court summarised the events 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 favour of accession to the Russian Federation. On 18 March 2014, the ARC and Sevastopol became part of the Russian Federation.[12]

It is beyond the scope of this research (and the expertise of the author) to delve into the history of the region. It is relevant, however, to note that Crimea has its own, turbulent, history. It was under Ottoman rule when it was annexed in 1783 by the Russian Empire, remaining under Russian influence till 1954, when it was transferred by an order of Nikita Khrushchev from the Russian Soviet Federative Socialist Republic to the Ukrainian Soviet Republic (both within the Soviet Union). In 1991, after the dissolution of the Soviet Union, it gained its autonomous status within the newly founded independent Ukrainian State.[13] From 1954 until the secession and Russian annexation in 2014, in other words, the Crimean peninsula was under Ukrainian rule.

The secession of Crimea – the ARC – from the Ukrainian State and the annexation by the Russian Federation in 2014, however, was not recognised by most other nation states, including the Netherlands. Ukraine took the position that Crimea was temporarily occupied rather than permanently

10 Ibid. 3.4; Loan Agreements (2013) art 7(1).
11 Ibid. 2.3, 2.4.
12 Ibid. 2.5.
13 For an overview of Crimea's history, see A. Taylor, 'To Understand Crimea, Take a Look Back at Its Complicated History' (27 February 2014) *The Washington Post* <https://www.washingtonpost.com/news/worldviews/wp/2014/02/27/to-understand-crimea-take-a-look-back-at-its-complicated-history/?utm_term=.d9b8bef3486c>.

annexed,[14] and the General Assembly of the United Nations underlined the territorial integrity of Ukraine by adopting Resolution 68/262 in March 2014.[15]

That the Russian Federation considers Crimea as its territory while the international community regards the annexation as unlawful occupation of Ukrainian territory has international legal consequences. It may suffice in this regard to allude to the difficulties of a situation where the Ukrainian State is considered to be the lawful representative of Crimea but lacks effective control over the territory. Besides, it may be obvious that any official act that could be understood as a *de facto* recognition of the illegal situation – such as the return of cultural objects other than to the Ukrainian State – might cause political problems.

2.4 Competing claims

During the exhibition, the AP Museum was confronted with competing demands for return of the objects that had come from Crimea: Ukraine on the one hand and the Crimean Museums on the other. From March 2014 onwards, the four Crimean museums insisted that the AP Museum return all objects to the lending institutions as stipulated in the loan agreements.[16] That same month, the Ministry of Culture of Ukraine requested an early return of the Crimean treasures to the State of Ukraine, stating that Ukraine was working on the return of all artefacts that belonged to the State Museum Fund as they were 'national treasures and an integral part of the cultural heritage of Ukraine protected by law'.[17]

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 it had no interest in the Crimean treasures and simply wanted to return the artefacts 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.[18] 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 in August 2014.[19]

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14 Law of Ukraine on Securing the Rights and Freedoms of Citizens and Legal Regime on the Temporarily Occupied Territory of Ukraine (15 April 2014) No 1207-VII. See also Nudelman (2015) 1276, 1283.

15 UNGA Res. 68/262 (27 March 2014) UN Doc A/RES/68/262, adopted by 100 states in favour, 11 agains and 58 abstentions; Resolutions by the Security Council stating the illegality of the events were vetoed by Russia.

16 Verdict (n. 1) 2.9.

17 Ibid. 2.6.

18 Ibid. 2.10, 3.7, 3.8.

19 Ibid. 2.11.

On 19 November 2014, the four Crimean museums commenced legal proceedings against the AP Museum before the District Court of Amsterdam.[20] Ukraine's request to intervene was granted by the Amsterdam District Court a few months later, on 8th April 2015.[21]

At that point, the Dutch State also asked to be admitted as a party to the civil proceedings in order 'to see that its international obligations would not be jeopardised' and to prevent the artefacts from being returned to the Crimean Museums 'unless it would be definitely and irrevocably established the Crimean Museums are the entitled party'.[22] This request was rejected by the Court in its April 2015 verdict on the grounds that the Dutch State lacked a specific interest in the outcome as it had shown no intentions to file an independent claim.

This last point is of interest, as a basis for legal action would seem to exist under the 1954 Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereafter: 1954 Protocol).[23] The Dutch State could (or even should), on this view, have taken the artefacts into custody for safekeeping pending their return to the appropriate party. This issue will be discussed in section 4 as that path was not taken.
The Russian Federation did not enter the debate independently.

2.5 Immunity from seizure?

One may ask, what was the role of immunity arrangements with the Dutch State to avoid litigation over works of art on short-term loan? In the 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 are issued to the borrowing museum to pass on to the lending institutions and 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.[24]

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20 Ibid. 2.12. Apparently, only two meetings were held in Amsterdam in Sept. and Oct. 2014: one between representatives of the AP and Crimean Museums, and another between the AP and government officials from Ukraine.

21 *Rechtbank Amsterdam* (8 April 2015) Amsterdam District Court, C/13/577586/HA ZA 14-1179, ECLI:NL:RBAMS:2015:2000.

22 Ibid. 4.6, 5.4. According to the Court, the interest of the Dutch State could be better served by the right to a hearing as provided for by art 44 Rv (Dutch Code of Civil Procedure).

23 1954 Protocol.

24 The Dutch system follows the 2004 UN Convention on Jurisdictional Immunities of States and their Property, under which State-owned cultural property enjoys immunity from meas-

In the present case, such letters indeed were issued to the Crimean institutions; however, although such 'letters of comfort' may provide some protection (against attachment by others than the 'foreign state'), they do not provide immunity from lawsuits, at least not in the Dutch situation.[25]

3 THE 2016 AMSTERDAM DISTRICT COURT RULING

The arguments of the three parties – the four Crimean Museums, the Ukrainian State, and the AP Museum – and the Court ruling will be discussed below.[26] In this discussion, the focus will be on the Court's interpretation of the 1970 UNESCO Convention concerning the questions as to what constitutes 'unlawful transfer', and which parties are entitled to make a return claim under the Dutch implementation laws of the UNESCO Conventions.

3.1 The arguments

The opposing parties based their claims for the return of the Crimean objects, summarised (and at points, simplified), on the following arguments. Ukraine claimed legal ownership of the loaned objects on the basis of Ukrainian law, which deems archaeological objects to be state property. In addition, it relied on the 1970 UNESCO Convention and the 1954 Protocol for its international return claim. The Crimean Museums based their claim for the return of the objects on the loan 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 'true home' of the archaeological findings as they were discovered and preserved there over time, while Ukraine argued on the basis of its sover-

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ures of constraint. See 'Temporary Import for Exhibitions' (*Cultural Heritage Inspectorate, Ministry of Education, Culture and Science*) <https://english.inspectie-oe.nl/cultural-goods/temporary-import-of-cultural-goods-for-exhibitions-in-heritage-institutions> accessed 21 April 2017. At some point, the Ukrainian State attached the objects (acc. to 16, pleading notes 5/10/2016 of Mr. P.L. Loeb on behalf of the AP Museum).

25 Cf a US case, *Malewicz v City of Amsterdam* (2007) United States District Court for the District of Columbia, 517 F. Supp. 2d 322, ruling that foreign states lending art to the United States were not *per se* immune from jurisdiction, even if the loaned objects were immune from seizure. In the US in 2016, however, the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act (FCEJICA), or Art Museum Amendment, was passed into law, 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.

26 See n. 3, above.

eign rights over the Crimean territory that the artefacts are part of its national patrimony, protected by international conventional law.

On 14th December 2016, the civil chamber of the Amsterdam District Court held in favour of Ukraine and against the Crimean Museums by relying on the interstate return system as provided for in the 1970 UNESCO Convention. The following issues were discussed in the verdict:

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

3.2 Contractual obligations in the loan agreement

One of the questions presented to the Court was whether or not the AP Museum was bound by its contractual obligations 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'.[27] A similar provision can be found in Dutch law.

The Dutch Court held that the Crimean annexation was indeed a 'material change in circumstances', justifying the termination of the AP Museum's contractual obligations.[28] The Court – referring as well to its main conclusion that the Ukrainian return request should be honoured (see below, 4.2) – set aside the loan agreement and found that the AP Museum was within its rights not to return the artefacts to the Crimean Museums.

3.3 Title to the artefacts

On the matter of title to the objects, as expected, opinions differ between Ukraine and the Crimean Museums. Ukraine, on the one hand, bases its claim on a Decree of 2nd February 2000 designating the collections of the four Crimean museums as Ukrainian State property.[29] More generally, Ukraine invokes Ukrainian laws vesting ownership of all archaeological finds in the

27 Verdict (n. 1) 4.24, 4.25.
28 Ibid. 4.27.
29 Decree on the Basis of Article 15 Paragraph 13 of the Law of Ukraine on Museum and Museum Affairs (29 June 1995). See Verdict (n. 1) 3.4.

state, one of those being the 2004 Law of Ukraine on Protection of Archaeological Heritage.[30] 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 of title is more complex and the Autonomous Republic of Crimea (ARC), not Ukraine, should be considered to be the owner of the majority of the loaned objects.[31] The ARC has had autonomous status since the foundation of Ukraine as an independent nation in the early 1990s. Moreover, according to the 1996 version of the Ukrainian Constitution, ARC is entitled to autonomously administer its possessions and to 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 to have title to all the objects other than those from the Sevastopol museum, which was founded by Ukraine. Further, they maintain that Ukraine's 'bare ownership right' over the objects is superseded by the superior rights of the Crimean Museums on the basis of their rights of 'operational management'. Under the previous version of the Ukrainian law, at least until May 2014, the Crimean Museums enjoyed certain *in rem* rights known as 'operational management rights' over the objects in their care. Following the annexation of Crimea, the Ukrainian Ministry of Culture transferred the operational management right over Crimean-based Ukrainian national patrimony to the National Historical Museum of Ukraine.[32] The Crimean Museums contest the legality of this transfer.[33]

Not without significance – and as a reminder that 'national patrimony' is a relative concept – the Russian Federation adopted a law on 4th February 2015, which states that museum collections in Crimea are to be included in the national museum registry of the Russian Federation.[34]

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30 Under the heading of 'Rights and Duties of Archaeological 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)) No 26 (2004) 361. UNESCO Database of National Cultural Heritage Laws (*UNESCO*) <http://www.unesco.org/culture/natlaws/media/pdf/ukraine/ua_law_protection_archaelogical_heritage_engtof.pdf> accessed 1 April 2017. Moreover, the Law of Ukraine on Protection of Cultural Heritage (Vidomosti of Verkhovna Rada (VVR)) No 39 (2000) art 17 confirms that all 'archaeological finds' are state property. See UNESCO Database of National Cultural Heritage Laws.

31 Verdict (n. 1) 3.2.

32 Per Order No 292 on Transfer of Museum Objects to the National Historical Museum of Ukraine (13 May 2014). Verdict (n. 1) 2.7.

33 Verdict (n. 1) 3.2.

34 Russian Federal Law 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…' (12 February 2015) No 9-FZ. Information provided by Irina Tarsis.

The Court in its December 2016 ruling avoided the issue of ownership. Instead, it limited itself to the question as to whom the AP Museum was obliged to return the objects to on the basis of the Dutch Heritage Act 2016 – the law implementing the 1970 UNESCO Convention in the Netherlands.[35] Questions as to ownership should be decided, according to the Verdict, once these objects have been returned to the state from which they came, as will be elaborated upon below.[36]

3.4 The 1970 UNESCO Convention

Ukraine as well as the Netherlands (and Russia) are States Parties to the 1970 UNESCO Convention and have 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 Implementation Act of 2009 that was replaced by the Dutch Heritage Act 2016.
The aim of the 1970 UNESCO Convention, to which 132 countries are party as of June 2017, was to attain a minimum level of uniform protection against the illicit trafficking of cultural objects and international co-operation and solidarity in doing so.[37] 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'.[38] The Convention's pillars are:

- Adopting protective measures, such as creating national inventories of cultural property (Article 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 (Articles 6-9). (As Ukraine issued temporary export licences with regard to the Crimean treasures.)
- The interstate return of illicitly transferred cultural property (Articles 3 and 7).

35 The Act Relating to the Combining and Amendment of Rules Regarding Cultural Heritage (9 December 2015) (Dutch Heritage Act) supersedes the earlier Implementation Act of 2009. It applies from 1 July 2016 on; it has not changed regarding the relevant provisions.

36 The court rules that on the basis of Article 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 (n. 1) 4.17.

37 I.A. Stamatoudi, *Cultural Property Law and Restitution?: A Commentary to International Conventions and European Union Law* (2011) Edward Elgar Publishing Limited.

38 1970 UNESCO Convention, art 2.

3.4.1 Unlawful transfer?

The provisions of the 1970 UNESCO Convention, the product of lengthy negotiations, are very generally, and even, at times, vaguely, phrased. As a consequence, various interpretations can co-exist, such as what exactly falls under the definition of 'illicit' import, export or transfer.[39] This is important, as Ukraine's request for return was based on the argument that the unlawfulness of the situation is created by the non-return of the objects once the export licences had expired, while the way the objects had been sent abroad on a short-term loan and had entered the Netherlands was perfectly legal.

Under Ukraine's implementing legislation for the UNESCO Convention, the expiration of an export licence results in an 'illicit' situation:

> Those cultural values, which were temporarily exported from Ukraine and were not returned in the period provided by the contract, are considered [to have been] unlawfully exported.[40]

The applicable provisions of the Dutch Heritage Act, however, do not provide for the unlawfulness of the situation in case of non-return after a loan abroad. Article 6.7 of the Dutch Heritage Act makes 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.[41]

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

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39 E.g. P.J. O'Keefe, *Protecting Cultural Objects: Before and After 1970* (2017) Institute of Art and Law. See also Stamatoudi (2011) 32-33.

40 Law of Ukraine on Exportation, Importation and Return of Cultural Values (Vidomosti Verkhovna Rada (BBP)) No 48 (1999) art 23: 'Those cultural values, which were temporarily exported from Ukraine and were not returned in the period provided by the contract, are considered unlawfully exported'.

41 Dutch Heritage Act, art 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.[42] In addition, the Court drew inspiration from the 2014 European Union Directive on unlawfully removed cultural objects,[43] and the 1995 UNIDROIT Convention,[44] both of which include in their definition of 'unlawfully removed' cultural objects, objects that were not returned at the end of a period of lawful temporary removal. The Court furthermore found it:

> 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 licences.[45]

Here the Court implicitly confirmed the view that the *lex originis* should be decisive for the question as to what constitutes 'unlawful transfer' of cultural objects. The country of origin's domestic law governs this matter, with the result that 'illicit export' means that an object which is considered by the country of origin to have been illicitly exported should then be considered to have been 'illicitly imported' if it enters other countries, thereby creating a sufficient basis for return claims under the UNESCO system. For the international protective framework to be successful, recognition of the laws of the country of origin seems a logical precondition. This principle indeed had already been recognised, in 1991 in a Resolution of the *Institut de Droit International*.[46]

For the Crimean case, the District Court found that the non-return of the artefacts after the lapse of the loan agreement – illicit export under Ukrainian

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42 See 1970 UNESCO Convention, art 2. Note that the 1970 UNESCO itself provides much clarity by stating in Article 7 in very general terms that States Parties undertake, at the request of the States 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 O'Keefe (2017) and L.P.C. Belder, *The Legal Protection of Cultural Heritage in International Law and Its Implementation in Dutch Law* (Doctoral Thesis, Universiteit Utrecht 2014).

43 European Parliament and Council Directive 2014/60 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State and Amending Regulation (EU) No 1024/2012 (Recast, 2014) OJ L 1159, 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.'

44 Convention on Stolen or Illegally Exported Cultural Objects (adopted 24 June 1995) 2421 UNTS 457 (UNIDROIT Convention) art 5.2(2): '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.'

45 Verdict (n. 1) 4.15.

46 Institut de Droit International, 'Resolution on The International Sale of Works of Art from the Angle of the Protection of the Cultural Heritage' (1991).

law – creates the 'illicit' situation the UNESCO Convention aims to reverse; and the situation of 'illicit import' within the meaning of the Dutch Heritage Act.

3.4.2 Return claim?

The next question – of crucial importance in this case – 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 states as well as non-State Parties. This possibility for non-state deprived owners 'with a valid title', as laid down in Article 6.7 of the Dutch Heritage Act, arises out of the 1995 UNIDROIT Convention – aimed at harmonisation of the principles laid down in the 1970 UNESCO Convention. Whilst the Netherlands signed but did not ratify the 1995 Convention, the Dutch legislator nevertheless chose to implement some of its principles into Dutch law.[47]

The Dutch Court, on this point, ruled that, in the event of concurring claims between a state that listed the objects as protected cultural patrimony and a third party, the question of ownership will be suspended and the return claim of the state will have priority.[48] The question of title and ownership should be left open and decided upon after their return in the requesting state, in this case Ukraine. For this, the Court invoked Article 1012 of the Dutch Code of Civil Procedure 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'.[49]

Prioritising claims of a sovereign state may well be in line with the UNESCO principles – based as they are on a system of protection in national patrimony laws. However, it raises the question what are the possibilities for deprived owners, not being national states, to claim their artefacts. What is the legal force of cultural rights of parties, other than sovereign states, like individuals or communities? This issue will be touched on below in section 4.

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47 See the Explanatory Memorandum to the Implementing Act 1970 UNESCO Convention (Parliamentary Documents, Kamerstuk 31255, No 3, 2007-2008).

48 Verdict (n. 1) 4.8, 4.16, 4.17. Conform Dutch scholarly opinion on the relevant provisions, see AIM van Mierlo and CJJC van Nispen, *Tekst & Commentaar, Burgerlijke Rechtsvordering* (2014) Wolters Kluwer.

49 Article 1012 Rv [Dutch Code of Civil Procedure] implements Article 13 of Directive 2014/60/EU (n. 43). However, it differs slightly from the EU provision which reads: 'Ownership of the cultural object after return shall be governed by the law of the requesting Member State.'

3.5 The verdict

In its decision of 14th December 2016, the District Court found in favour of Ukraine and held 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 Ukrainian State;
- pending an appeal, the artefacts shall remain in storage at the AP Museum;
- Ukraine shall pay storage and insurance costs to the AP Museum.[50]

As noted above, in January 2017, the Crimean Museums lodged an appeal.[51]

4 Discussion of alternative approaches

The outcome of the case confirms the view that the system of the 1970 UNESCO Convention for cross-border return claims is an interstate affair, with a focus on the protection of national interests. Might there have been other approaches?

4.1 The 1954 Hague Convention

Surprisingly, the 1954 Hague Convention is not mentioned in the verdict. Given the fact that this Convention and its Protocol are specifically aimed at situations of armed conflict and occupation, Netherlands and Ukraine are both parties and its principles are generally considered as binding customary international law, one may wonder why not.[52]

The central provision is that states 'undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of,

50 Verdict (n. 1) 4.20, 5.

51 According to the representative of Ukraine, G.J. van den Bergh, the case was scheduled for 'Grieven' (complaint by the Crimean Museums) in the summer of 2017.

52 On the customary international law status, see, for example, W.W. Kowalski, *Art Treasures and War* (1998) Institute of Art and Law; Stamatoudi (2011) 235; A. Chechi, *The Settlement of International Cultural Heritage Disputes* (2014) Oxford University Press, 258; Jakubowski (2015) 265. It is problematic in this context that the Russian Federation does not accept these principles, and adopted the Law on Removed Cultural Property (Federal Law on Cultural Valuables Displaced to the U.S.S.R. as a Result of the Second World War and Located on the Territory of the Russian Federation (1998) No 64-FZ). The Law declares to be the property of the Russian Federation all cultural valuables located in the territory of the Russian Federation that were brought into the USSR following the Second World War by way of exercise of the right of the USSR to compensatory restitution.

and any acts of vandalism directed against, cultural property', and 'shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.'[53] According to the 1954 Protocol, states should take into custody cultural property from occupied territories until the situation has stabilised, with the aim of ensuring its safe return to that territory, and cultural property 'shall never be retained as war reparations'.[54] The reasoning behind this is that cultural objects have a protected status and should not be used as hostages in a conflict. In the much-cited words of Justice Croke in 1813 (by which he released artefacts seized during the Anglo-American war):

> The same law of nations, which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favour and protection. They are considered not as the peculium of this or that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species.[55]

It could be argued that application of the 1954 Protocol would, in the short term, not produce more favourable results for the Crimean institutions. Like the 1970 UNESCO Convention, it creates obligations between sovereign states, leaving entities like the museums or the Crimean Autonomous Republic as outsiders. That said, the Dutch authorities would seem to be in a position to 'help out', by taking the objects in custody for safekeeping with a view to their eventual return upon cessation of hostilities to the territory they came from. Moreover, the Dutch Heritage Act, implementing the 1954 Protocol, prohibits the *possession* of cultural property from occupied territory – implicating that the question whether the object is unlawfully acquired or imported is irrelevant.[56] If 'there is a reasonable suspicion that the prohibition … has been

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53 1954 Hague Convention, Art 4.

54 1954 Protocol, art 1(2): 'Each High Contracting Party undertakes to take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory. This shall either be effected automatically upon the importation of the property or, failing this, at the request of the authorities of that territory', art 1(3): 'Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations.'

55 Judge Crook ordered the release of the *Marquis de Somerueles*, a vessel filled with artefacts seized in the war between the US and the UK. *The Marquis de Somerueles*: Vice-Admiralty Court of Halifax, Nova Scotia Stewart's Vice-Admiralty Reports 482 (1813), cited by J.H. Merryman, 'Note on The Marquis de Somerueles' (1996) 5 *International Journal of Cultural Property* 321.

56 In this way, no proof is necessary as to the unlawful *acquisition* by the current possessor. Any acquisition before 2007 (the year the 1954 Protocol was implemented in the Nether-

contravened, our Minister shall take into custody the cultural property concerned.'[57]

In fact, this is what happened (after some detours), in a case concerning the return of four Cypriot icons by the Netherlands to Cyprus in 2013.

4.1.1 2013 Dutch return of Cypriot icons

The icons, removed from the Greek Orthodox church of Christ Antiphonitis in Lefkosia in Northern Cyprus, were found in the possession of a Dutch private collector, who had bought them in 1975, shortly after the occupation of Northern Cyprus and their disappearance from the Church. The icons were attached by the Church upon discovery in 1995; however, at that point a civil action seeking their return before the Dutch courts was unsuccessful.[58]

The main reason for this was that the 1954 Hague Protocol which, although ratified by the Netherlands in 1958, had never been implemented in Dutch law. As a consequence, the ownership claim by the Church was time-barred under regular Dutch property law, as that law provides for a general limitation period for any right of action of twenty years.[59] And although concerns were raised about the collector's good-faith on acquiring the icons, the Appeal Court did not deal with those, stating that even if it was proven that the collector was in bad faith,[60] such a circumstance would not affect the outcome. The absolute twenty-year term, according to the Court, runs independently of the possible bad faith of the holder,[61] and since the icons had disappeared in March 1975 the claim was time-barred just months before their attachment

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lands) may well have been legitimate. A discussion of those rules can be found in n. 59, below.

57 Dutch Heritage Act, sections 6.10, 6.11. Section 6.11: 'Where there is a reasonable suspicion that the prohibition in Section 6.10 has been contravened, Our Minister shall take into custody the cultural property concerned [..] at his own volition at the time of the importation [...]; or at the request of the authorities of the relevant occupied territory or previously occupied territory.' In case of competing return claims based on the 1970 Convention and on the 1954 Protocol, the return claim based on the 1954 Protocol would seem to have priority, a view based on Article 24 of the 1954 Hague Convention. See Explanatory Memorandum to the Implementing Act 1970 UNESCO Convention.

58 *Autocephalous Greek Orthodox Church in Cyprus v Lans* (2002) Court of Appeal of the Hague, Case No. 99/693.

59 Dutch 'regular' law is far-reaching in its protection of new possessors of stolen goods, as a result of provisions on title transfer following a *bona fide* acquisition (Dutch Civil Code 3:86), and relatively short limitation periods for ownership claims: Article 3:306 DCC provides for a general limitation period of twenty years for all rights of action, also for a right based on ownership (revindication), moreover, after that period a possessor will gain ownership title irrespective of his or her good faith (DCC 3:105).

60 Something that would not easily be assumed, as appears from the earlier District Court's verdict in the case; NJK 1999, 37: Rb. Rotterdam (1999) No 44053/HA ZA 96-2403.

61 For this Dutch stance on losses predating the 2007 and 2009 Implementation Acts of the 1954 Protocol and 1970 Convention, see also *Land Sachsen* (1998) HR, Case No. 16546, C97/025 (Dutch Supreme Court).

in 1995. This controversial outcome – in the light of the fact the Netherlands signed the 1954 Protocol as early as 1958 – was one of the factors for the Dutch Government to speed up implementation.

Following that implementation in 2007 and an official request for their return from the Cypriot authorities in 2011, the Dutch authorities arranged for the acquisition of the icons from the collector (as discussed above, the legitimate owner under Dutch law) and their return to Cyprus in September 2013.[62] Two points are of interest within the present context. Their restitution to the Government of the recognised Republic of Cyprus was on the understanding that they would eventually return to the Church in Lefkosia: in the words of the Cypriot statement upon the presentation of the case at UNESCO headquarters 'their journey will only end when they finally occupy their original and rightful place in the iconostasis of the Church of Antiphonitis'.[63] Another point of interest is that the icons were returned through diplomatic channels after the initial failure of civil litigation. The first point – interests beyond those of a national state – will be touched upon in section 2, and the second point – as to what procedures are available – in section 3.

4.2 Interests beyond the national state: a 'genuine link'?

Returning to the Crimean Gold case: the 2016 Amsterdam District Court ruling highlights that the international legal framework does not address issues that are at the heart of this case, such as partition of a country or disconnect between the territorial or cultural-historical link of the object to (groups of) people(s). That framework, based on the UNESCO Conventions, provides for a system of interstate co-operation and is based on the premise that national states are key 'right holders' to cultural heritage. In the majority of cases, this will work efficiently but, on occasion, it may be to the detriment of other interests, including groups who do not believe themselves to be represented by their former national government.[64] A question that surfaces in this regard

62 According to the mutual presentation of the return case at the 10th meeting of the High Contracting Parties to the Hague Convention on 16 December 2013 in Paris, the case was the first return in the world under application of the First Protocol, see 'Mutual Presentation of Cyprus and the Netherlands on the Return of 4 Icons from the Netherlands to Cyprus under the Protocol of the Hague Convention of 1954', 10th meeting of the High Contracting Parties to the Hague Convention (16 December 2013) <http://www.unesco.org/culture/laws/1954/NL-Cyprus-4icons_en>.

63 Ibid.

64 Perhaps exactly because of this 'gap' in the legal framework, a parallel system of soft-law signals a trend that confirms the rights of communities or individuals – i.e. non-state actors – to *their* cultural heritage. Two well-defined categories would be: (i) rights of indigenous peoples to their lost cultural heritage – as included in the United Nations Declaration on the Rights of Indigenous Peoples; and (ii) rights of deprived private owners of Nazi-con-

is what elements could create a 'genuine link' to prioritise interests in cultural objects.

4.2.1 Territoriality and cultural-historical link

In that regard, it is worthwhile to reflect first of all on the meaning and scope of the notion of 'country of origin' in the UNESCO conventions. Article 4 of the 1970 Convention sets out five categories of objects that can qualify as protected national cultural objects,[65] all with a clear hint to territoriality as a necessary link between the object and national protection.[66] Archaeological objects like the Crimean treasures would logically fall under Article 4(b), as these are objects that form an integral part of the state's soil.[67] Arguably, this would mean that protection may be granted only to objects emanating from soil within the national borders over which the state has effective control.[68] That, however, is precisely the problem in the dispute under review; effective control over the Crimean territory is presently not with the Ukrainian State, and, moreover, historically it had not been so either.

In 1991 the Institute of International Law clarified the question of what should be understood as the 'country of origin' in return requests. For the purpose of protection of cultural heritage 'The country of origin of a work of art means the country with which the property is most closely linked from the cultural point of view'.[69] Return claims based on the national patrimony argument should, in other words, be seen in relation to a genuine link from a cultural-historical point of view. Obviously, a case like the Crimean Gold case, where national borders are contested and still unclear, pose a challenge to the UNESCO system; a system where protection is based on interstate co-

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fiscated art – based on the Washington Conference Principles of 1998, promoting 'fair and just' solutions to ownership claims.

65 1970 UNESCO Convention, art 4: 'property which belongs to the following categories forms part of the cultural heritage of each State: (a) cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within its territory of that State by foreign nationals or stateless persons resident within such territory; (b) cultural property found within the national territory.' Categories in sections (c)-(e) furthermore name objects acquired or exchanged with the consent of the country of origin.

66 Stamatoudi (2011) 38. See also M. Cornu and M.A. Renold, 'New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution' (2010) 17 *International Journal of Cultural Property* 1, 16-17, giving examples such as historical archives, objects of sacred or symbolic value, objects found in archaeological excavations, elements removed from monuments. See also Jakubowski (2015); Chechi (2014).

67 Stamatoudi (2011) 39.

68 Unless of course those objects were earlier acquired by the claiming state in accordance with the provisions of Article 4(c)-(d) of the 1970 Convention.

69 In its 'Resolution on The International Sale of Works of Art from the Angle of the Protection of the Cultural Heritage' (n. 46).

operation. The just outcome of such cases will obviously, ultimately, depend on political will, as can be illustrated by the following case example.

4.2.2 Case examples

– *Pechory Treasure*

A case with similarities to the Crimean Gold case is the return of the so-called Pechory Treasure to a Russian-Orthodox monastery in May 1973.[70] The story behind it is that of the return 'home' of the treasures of the Orthodox Pskovo-Pechersky Dormition Monastery in Pechory ('Petserin' in Estonian and 'Petschur' in German), in Russia, in an area that borders Estonia. It used to be under independent Estonian rule, however had been under Russian control since 1945. The Treasure – ecclesiastical objects and secular objects related to the history of the Monastery – was taken by Nazi officials in 1945 in anticipation of the advancing Russian army. It was discovered in the early 1970s, having been kept for decades in the storage area of a German museum, away from the public eye, by a German researcher.[71] At that point, a return claim was voiced by the Monastery (as well as by the Estonian World Council in exile). After lengthy discussions on the legal implications of the case with a focus on the Baltic question (the non-recognition of Soviet rule over Estonian and other Baltic territory by Western European nations), the Treasure was returned directly to the Monastery by the authorities of the German Federal Republic. This, after the formal consent by Soviet authorities, in effective control over the territory, constituted an acknowledgement that the Treasure would remain in the Monastery.[72]

In that sense, the return may be compared to the present dispute as in both instances the implicit recognition of an unrecognised state loomed around the corner as an unwanted side-effect of any act of restitution. In the German-Estonian-Soviet case of the Pechory Treasure a solution was found – and the politically sensitive issue of the 'Baltic question' was avoided – by the restitution of the objects directly to the Monastery. This, thanks perhaps to a moment of *détente* in international relations.

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70 I am much indebted to Ulrike Schmiegelt for bringing the case up in her paper 'A Hostage of the Cold War? The Return of the Monastery Treasure of Pechory' at the conference 'From Refugees to Restitution: The History of Nazi Looted Art in the UK in Transnational Perspective' (Cambridge, May 2017), and for her efforts and time to assist me in the archival research. I refer to her paper for general information on the case.

71 Report of the German Consul in Leningrad Following the Ceremonial Return (1973) Political Archive of the German Foreign Ministry, B 86, Bd 1596.

72 Ibid. According to a report by the Max Planck Institute for International Law in Heidelberg in this file, the Soviet Union was legally entitled to the Treasure, irrespective of the (non)-recognition of the annexation of Estonian territory by the Soviet Union. The official transfer, however, was in a deed signed by German and Church authorities. A claim by the Estonian Council in exile was denied; written consent had been given by Soviet authorities that the objects would remain in the Monastery.

– *Peace treaties*

State practice honouring the cultural-historical link principle can also be found in various bilateral or multilateral peace treaties.[73] The Treaty of Saint-Germain of 1919, for example, arranging for the division of the Austrian Empire, enabled the return of objects that were to be considered 'intellectual patrimony' of a given territory, to 'their districts of origin'.[74] Another famous example is the return of the leaves of the triptych of the *Mystic Lamb* by the Van Eyck brothers to Belgium after the First World War, taken by Germany in what appears to have been a perfectly legal transaction, as arranged for in the Treaty of Versailles.[75]

– *Intrastate returns*

Contemporary examples of intrastate returns are, for example, the UK/Scottish disagreement regarding the *Lewis Chess Men case* – A longstanding debate over where the figures, most of which are in the British Museum in London, belong[76] – and the *Ancient manuscripts and Globe case* between Saint Gall and Zurich in Switzerland.[77] In this last case, a creative solution was found honouring the cultural-historical link – not focusing on the ownership issue –, by means of a long-term loan and the production of a replica of the Globe for the other location.

– *Korean Buseok Temple Case (2017)*

A last example that is worth mentioning is a case presently under litigation in South Korea. It concerns contesting claims to a fourteenth-century bronze statue that was stolen from a Buddhist temple on the Japanese island of Tsushima in 2012, however originating from a Korean temple. As Japan and

73 Nudelman (2015) 1285-1290 discusses this point and names many examples. See also Jakubowski (2015); Kowalski (1998). P.S. Goodwin, 'Mapping the Limits of Repatriable Cultural Heritage: A Case Study of Stolen Flemish Art in French Museums' (2008) 157 *University of Pennsylvania Law Review* 673.

74 Treaty of Peace Between the Principal Allied and Associated Powers and Austria Together With Protocol and Declarations, Saint-Germain-en-Laye (adopted 10 September 1919, entered into force 8 November 1921) 226 CTS 8, art 196: 'objects of artistic, archaeological, scientific or historic character forming part of the [imperial] collections' could 'form part of the intellectual patrimony of the ceded districts', and 'may be returned to their districts of origin'. A.F. Vrdoljak, 'Enforcement of Restitution of Cultural Heritage through Peace Agreements' in F. Francioni and J. Gordley (eds) *Enforcing International Cultural Heritage Law* (2013) Oxford University Press, 35.

75 Treaty of Versailles (adopted 28 June 1919) 225 CTS 188, art 247.

76 About the long-term loan of six of the Lewis Chessman, see 'Lewis Chessmen' (*The British Museum*) <https://www.britishmuseum.org/about_us/news_and_press/statements/the_lewis_chessmen.aspx> accessed 8 August 2017.

77 A settlement regarding manuscripts looted during the religious wars in eighteenth-century Switzerland. A.L. Bandle, R. Contel and M.A. Renold, 'Case Note – Ancient Manuscripts and Globe – Saint-Gall and Zurich' (2012) Platform ArThémis, Art-Law Centre, University of Geneva.

South Korea both ratified and implemented the 1970 UNESCO Convention, a return claim by Japan regarding the other artefacts that were part of the same theft from Tsushima, *was* honoured in 2013. Pending the claim from Japan for the return of the specific bronze statue, however, the South-Korean Buseok Temple also filed a claim for its return. The statue apparently originated from the Buseok Temple from where it had disappeared centuries ago.[78] In its January 2017 ruling the South-Korean Daejon District Court decided that that statue should indeed be returned not to Japan but to the Buseok Temple 'considering the historical and religious value of the statue'. The Court found it sufficiently proven that the statue originated from the Temple – given a historic document inside the statue which mentioned its origin -, while it was common knowledge that the territory had been invaded by Japanese military in the fourteenth century.[79] Similarly to the Dutch Crimean case but from a different angle, this case highlights questions that are not answered with the 1970 UNESCO Convention.

Although at points different from the Crimean case, in all these examples the cultural interests of (public) entities other than the national state – such as monasteries, churches or communities – were at stake.

4.3 Alternative dispute resolution

A further question is how to resolve disputes by finding lasting solutions that can take account of the cultural interests that are at stake. Within the context of cultural heritage claims, adversarial litigation procedures are generally considered a last option, to be entered into only after good-faith negotiations and alternative dispute resolution (ADR) methods failed. This, precisely because certain interests are not covered by the present legal regime.

In that sense, the Operational Guidelines to the 1970 UNESCO Convention, adopted in May 2015, recognise that the Convention does not always provide answers, and suggest ADR to settle claims:

> 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,

78 Report by E.A. Heath, 'Korean Court Rules Statue Stolen from Japan Can Remain in the Country (January 26, 2017)' (2017) *American Society of International Law* <https://www.asil.org/blogs/korean-court-rules-statue-stolen-japan-can-remain-country-january-26-2017> accessed 10 August 2017.

79 *Daejeon District Court, 2017.1.26 Judgment 2016Ga* Hap102119 'Transfer of physical movables'. See Section II. My colleague Jinyoung Choi from Leiden University kindly translated the relevant parts for me.

> 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.[80]

In 2009, also the International Law Association promoted ADR methods for resolving cultural heritage disputes in the 'Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material'.[81] Similarly, in his draft for 'Guiding Principles Relating to the Succession of States in Respect of Tangible Cultural Heritage', Jakubowski proposes ADR methods to resolve claims on the basis of his analysis of state practice, legal doctrine and the tendencies detected.[82] In these draft Principles the use of equitable principles and alternative dispute resolution is promoted with regard to the settlement of disputes that result from a change of borders of a national state, for example as a result of dissolution of a state or war:[83]

> 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.

Obviously, ADR in all forms should not be seen as a *panacea* for complicated legal issues. Negotiation or mediation procedures are generally guided by party interests and not by principles of justice and the outcome of such procedures, as Shyllon points out, will depend on the bargaining chips brought to the table by parties that may not be equally powerful.[84] The role of lawyers, therefore, remains to find 'just' solutions based on the interpretation of existing legal

80 '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)' (2015) 2015) C70/15/3.MSP/11 (UNESCO Operational Guidelines) para 19.

81 As reproduced in J.A.R. Nafziger, 'The Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material' (2007) 8 *Chicago Journal of International Law* 147.

82 Jakubowski (2015) Annex, 321. The draft principles can be seen as an analysis of state practice and relevant legal doctrine and the 'promising tendencies' detected by Jakubowski in his extensive research of state practice.

83 In the first Principle the scope is 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) this is further refined by stating that it aims 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'.

84 F. Shyllon, 'The Rise of Negotiation (ADR) in Restitution, Return and Repatriation of Cultural Property: Moral Pressure and Power Pressure' (2017) 22 *Art Antiquity and Law* 130-142.

rules or developing new ones, as well as on the development of neutral and transparent alternative procedures if litigation would be considered inadequate.

5 Conclusion

In the 2016 verdict, the Dutch Court held, unsurprisingly perhaps, that the Allard Pierson Museum should return the artefacts to Ukraine and not to the Crimean Museums. The ruling confirms that the international legal framework – based on the UNESCO Conventions – is still firmly anchored in the idea that national states are the main right holders of cultural heritage. Consequently, it is up to national authorities to pass the objects on to other possible stakeholders. Usually that will work adequately. In cases where a national government is not in a position (or not willing) to represent the interest of such right holders, however, tensions in that framework will be noticeable, as in the present case.

Where, one may wonder, does this leave the rights and interests of non-state actors like local communities, minorities or individual victims of human rights violations, to 'their' cultural heritage? The principle of territoriality – over nationality – seems on itself an accepted notion in cultural heritage law and could benefit sub-state right holders. Such rights, however, are also increasingly acknowledged in soft law instruments – such as the UNDRIP recognising indigenous peoples' rights to cultural heritage, and the Washington Principles recognising rights of individual former owners to Nazi-confiscated art. This development may even signal the coming into existence of a right for former owners to 'their' cultural objects under international (human rights) law.[85] Although the content of that right may be far from clear as yet, an important point is the acknowledgement of the intangible interests of cultural heritage for certain (groups of) people, beyond being a commodity or state property.[86]

A non-formalistic approach – alternative procedures – to settle such disputes, as advocated in various soft law instruments to bridge this 'gap' in the international legal framework, was a path *not* taken yet in the Crimean Gold case. Neither was the path taken as set out in the 1954 Hague Protocol to take the objects in custody for safekeeping – with an eye at their return to Crimea after cessation of hostilities. Perhaps those paths are still open. A solution similar to that in the Pechory case might be an example of a solution that proved effective under similar conditions. In that case, upon their return a

85 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966) 993 UNTS 3, art 15 para 1(a).

86 See e.g. F. Shaheed, 'Report of the Independent Expert in the Field of Cultural Rights, Submitted Pursuant to Resolution 10/23 of the Human Rights Council' (22 March 2010) UN Doc A/HRC/14/36.

guarantee was given by the (non-recognised) Soviet authorities that controlled the area *de facto* at the time, that the Pechory treasure would remain *in situ* at the Monastery in Estonia, as the place with the closest cultural-historical ties. Admittedly, given the political context, this might be a challenge in the current time frame.

6 Addendum (April 2021): interlocutory judgment Amsterdam Courts of Appeals

On 16 July 2019, the Amsterdam Court of Appeals gave an interlocutory judgment in the appeals procedure.[87] In this ruling, the court rejected the opinion of the District Court that the 1970 UNESCO Convention covers the dispute. In the view of the Court of Appeals the failure to return the Crimean treasures cannot be qualified as unlawful behaviour the 1970 UNESCO Convention aims to address, and neither does the Dutch implementation law allow for such an extensive interpretation.[88] Instead, it qualified the case as a matter of title and private law.

According to Dutch international private law rules, Ukrainian law should be applied to clarify the matter which party is entitled to the objects, the Ukrainian State or the Crimean museums. In that context, the court asked the parties to provide further information to clarify the claim to ownership title by the Ukrainian State and entitlement to the objects by the Crimean museums in terms of their rights to 'operational management' under Ukrainian law.[89]

The court did not (yet) confirm the District Court's view that the loan contracts are void. Nevertheless, it ruled that, pending the outcome of the appeal the AP Museum is within its rights not to return the artefacts to the Crimean Museums. The appeal verdict is pending at the time of writing.[90]

87 *The Travida Central Museum, the Kerch Historical and Cultural Preserve, the Bakhchisaray History and Cultural State Preserve of the Republic of Crimea, the National Preserve of 'Tauric Chersonesos' v the State of Ukraine v University of Amsterdam* (Judgment of 16 July 2019) Amsterdam Court of Appeal, Case No. 200.212.377/01, ECLI:NL:GHAMS:2019:2427 (2019 Ruling).

88 Overruling the legal opinion of Patrick O'Keefe. See 2019 Ruling (n. 87) 4.13-4.32.

89 2019 Ruling (n. 87), ad 4.44.

90 January 2021.