

## UKRAINE

### LEGAL BASIS

- 1. Is your State a party to international legal instruments guaranteeing the immunity of State owned cultural property on loan (including bilateral agreements) such as the *United Nations Convention on Jurisdictional Immunity of States and Their Property* (2004)?**

Ukraine is not a party either to the 2004 United Nations Convention on Jurisdictional Immunity of States and Their Property or to the 1972 European Convention on State Immunity of the Council of Europe. Ukraine is not a party to the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. Ukraine has not yet signed the Declaration on Jurisdictional Immunities of State Owned Cultural Property but this is presently under consideration.

However, Ukraine is a party to a number of multilateral agreements concerned with protection, illicit movement of State owned cultural property and its return to State owner. Among these agreements are the following: the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage; the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its First Protocol; the 2001 CIS Agreement on Export and Import of Cultural Property; the 2007 Agreement on Cooperation of the Participating States of the Commonwealth of Independent States in Fight Against Plunders of Cultural Values and Ensuring Their Return. Ukraine is also considering the possibility of ratifying the Second Protocol (1999) to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

As regards Ukraine’s relevant bilateral treaties, the majority of them focus on restitutorial issues. They have only generic provisions on cultural cooperation, not specifying the cultural property immunity issues (see e.g. Article 13(1), 13(4) of the [Ukraine-Poland Agreement](#) on Peaceful Neighbourliness, Friendly Relations and Cooperation; Articles 7, 8, [Ukraine-Netherlands Agreement](#) on Cultural Cooperation).

Given the lack of specific provisions on the possible immunity of *foreign* cultural objects, an attempt might be made to interpret Ukraine’s approach to the management of *its own* cultural property<sup>1</sup> and her respective position in the [Scythian Gold](#) case (for more details see para 2 below) *mutatis mutandis* to cultural property of other States.

- 2. Does your State recognize the customary international law nature of Part IV of the *United Nations Convention on Jurisdictional Immunity of States and Their Property* (2004)? More specifically, does your State consider that, pursuant to a rule of customary international law, cultural property owned by a foreign State while on temporary loan is not considered as property specifically in use or intended for use by the State for other than government non-commercial purposes?**

The existing relevant domestic practice in Ukraine can hardly be seen as sufficient to constitute recognition of such a rule of customary international law. One of the reasons for that is that the Ukrainian museums do not host frequently exhibitions from abroad. The

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<sup>1</sup> Articles 15, 22, Law of Ukraine “On Museums and Museum Affairs” No. 249/95-VR of 1995, <http://zakon5.rada.gov.ua/laws/show/249/95-%D0%B2%D1%80/print>.

ongoing armed conflicts<sup>2</sup> and the so-called *Scythian Gold* dispute have further reduced any practice of bringing foreign cultural objects to Ukraine.

However, the *Scythian Gold* case indicates that although neither Ukraine nor the Netherlands have ratified the 2004 Jurisdictional Immunity Convention yet (and the Convention has yet to enter into force even between those states which have given their consent to be bound by it), Ukraine counted on its application by other states with respect to its cultural property.<sup>3</sup>

In its submissions in this case, the Ministry of Justice of Ukraine, representing the State of Ukraine, explicitly recognized that the United Nations Convention on Jurisdictional Immunity of States and Their Property (2004) had codified the rules of the (customary) international law, but the Ministry did not specify whether Part IV of the Convention is a reflection of customary international law.<sup>4</sup>

Further, in its submissions in the case, the Ministry of Justice of Ukraine highly relied on the provisions of the [1970 UNESCO Convention](#) on the Means Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Interpreting the Convention cumulatively with its domestic and Dutch legislation, Ukraine argued that only it as the State could decide on the fate of its state cultural property. Ukraine's express agreement to participate in the proceedings and its line of argument could be used as an indication of its understanding that a state and its cultural objects enjoy immunity in another State that may be withdrawn by the owner State's explicit will.<sup>5</sup>

Even though the provided examples are quite straightforward, they alone can hardly suffice to establish Ukraine's *opinio juris*. At this stage Ukraine considers it premature to express a definitive position as to the customary international law nature of Part IV of the United Nations Convention on Jurisdictional Immunity of States and Their Property (2004).

### **3. Has your State adopted a national legislation on immunity concerning:**

- a) Specifically cultural objects of foreign States; or**
- b) more generally, property of foreign States intended for official/public use; or**
- c) more generally, cultural objects either owned by foreign States or by private individuals?**

a) No such legislation has been adopted.

b) General rules on jurisdictional immunity of States and their property are set out in Article 79 of the Law of Ukraine "On Private International Law". Paragraph 1 thereof stipulates that starting court proceedings against a foreign state or ordering its appearance before the court as a defendant or a third person, arrest of property belonging to a foreign state, using any restrictive measures against such property can only be possible if the state in question consents to such actions – unless otherwise provided by a treaty to which Ukraine is a party

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<sup>2</sup> ICC, The Office of the Prosecutor, Report on Preliminary Examination Activities (2017), paras 88, 94, [https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf).

<sup>3</sup> In its official clarifications to the *Scythian Gold* case, the Ministry of Culture of Ukraine stresses that the Dutch MFA has provided the guaranties for the return of respective artefacts to Ukraine if a treaty on their temporary use indicated that such artefacts are state property of Ukraine. In such cases, the Netherlands shall act pursuant to the 2004 Jurisdictional Immunities Convention – see here: [http://mincult.kmu.gov.ua/mincult\\_old/uk/publish/article/389589;jsessionid=57569BB6D0ABE95B3C9432D510F2941C.app1](http://mincult.kmu.gov.ua/mincult_old/uk/publish/article/389589;jsessionid=57569BB6D0ABE95B3C9432D510F2941C.app1).

<sup>4</sup> "According to the rules of the (customary) international law, as it has been codified in the Convention of the United Nations on the immunity of jurisdiction of states and their property, of 2004 (the UN Convention below) immunity of jurisdiction and execution shall accrue to the State of Ukraine" (Court of Amsterdam, Private Law Division, *Scythian Gold* case. Judgment of 14 December 2016, para 4.33). For more information about Ukrainian position, please see the Appendix to the Reply of Ukraine.

<sup>5</sup> Court of Amsterdam, Private Law Division, *Scythian Gold* case. Judgment of 14 December 2016, paras 3.3-3.6, 4.2, 4.8. For more information about Ukrainian position, please see the Appendix to the Reply of Ukraine.

or by another law. Paragraph 4 mentions that such immunity can be waived by Ukraine's government if the respective foreign state fails to respect the immunity of Ukraine's property.<sup>6</sup> c) No specific provisions on cultural property immunities exist in Ukraine. It should be noted that the persons enjoying diplomatic immunities are subject to the general provisions on importing cultural property to Ukraine.<sup>7</sup>

**4. Does your State consider that there are limitations to the rule of immunity of State owned cultural property on loan, in particular in the event of an armed conflict or when there are return obligations deriving from international or European law?**

Ukraine supports the position that there are limitations to the rule of immunity of State owned cultural property on loan, in particular in the event of an armed conflict or when there are return obligations deriving from general international or European law.

1) These limitations are imposed, inter alia, by the provisions of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention along with its two Protocols (1954, 1999), the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the 1995 UNIDROIT Convention on Stolen and Illegally Exported Objects, other relevant international instruments as well as by customary international humanitarian law.<sup>8</sup>

For example, the First Protocol to the 1954 Hague Convention states that each Member State has an obligation to prevent the exportation of cultural property from a territory under its occupation during an armed conflict, and to confiscate and return cultural property imported into its territory either directly or indirectly from an occupied territory (Art. I). Its Second Protocol obliges a Party in occupation of the whole or part of the territory of another Party to prohibit and prevent in relation to the occupied territory any illicit export, other removal or transfer of ownership of cultural property (Art. 9). The 1970 UNESCO Convention also covers

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<sup>6</sup> Article 79. Judicial Immunity

1. The filing of a suit against a foreign State, involvement of a foreign State to participate in a case as a respondent or third person, imposition of arrest on property belonging to a foreign State and situated on the territory of Ukraine, application of other means of securing a suit relative to such property and levy of execution against such property may be permitted only with the consent of the competent agencies of the respective State unless provided otherwise by an international treaty of Ukraine or by a law of Ukraine.

2. Diplomatic representatives of foreign States accredited to Ukraine and other persons specified in respective laws of Ukraine and international treaties of Ukraine shall be subject to the jurisdiction of courts of Ukraine only within the limits determined by the principles and norms of international law or international treaties of Ukraine [as amended 21 January 2010].

3. International organizations shall be subject to the jurisdiction of courts of Ukraine within the limits determined by international treaties of Ukraine or laws of Ukraine [as amended 21 January 2010].

4. In those instances when in violation of norms of international law the same judicial immunity is not provided to Ukraine, its property, or representatives in a foreign State which in accordance with paragraphs one and two of the present Article is provided to foreign States, their property, and representatives in Ukraine, the Cabinet of Ministers of Ukraine may take respective measures against this State or its property authorized by international law only if measures of a diplomatic character are not sufficient to regulate the consequences of the said violation of norms of international law. (Translation by William E. Butler, John Edward Fowler Distinguished Professor of Law, Pennsylvania State University (USA). The translation is an updated version of the translation first published in William E. Butler, *Civil Code of Ukraine and Law of Ukraine on Private International Law* (Wildy, Symmonds & Hill Publishing 2011) 353–374.) See: [https://www.elgaronline.com/view/nlm-book/9781782547228/b-9781782547235-CT\\_74.xml](https://www.elgaronline.com/view/nlm-book/9781782547228/b-9781782547235-CT_74.xml)

<sup>7</sup> "Procedure of exportation of cultural values, determined by this Law, applies to the persons, which have diplomatic privilege. Personal luggage of mentioned persons may be the subject to customs examination according to customs legislation of Ukraine and international treaties of Ukraine." Article 18, Law of Ukraine "On Import, Export and Return of Cultural Property" No. 1068-XIV of 1999, <http://zakon0.rada.gov.ua/laws/show/1068-14>, text is also available in English at [http://www.unesco.org/culture/natlaws/media/pdf/ukraine/ua\\_law\\_exportation\\_importation\\_engtof.pdf](http://www.unesco.org/culture/natlaws/media/pdf/ukraine/ua_law_exportation_importation_engtof.pdf);

<sup>8</sup> "The occupying power must prevent the illicit export of cultural property from occupied territory and must return illicitly exported property to the competent authorities of the occupied territory". Rule 41, Customary International Humanitarian Law, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule41](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule41).

the protection of property in case of war or occupation. Article 11 of the Convention stipulates “*The export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit.*” According to the Article 13 the Convention the State parties undertake to prevent transfers of ownership of cultural property likely to promote the illicit import or export of that property.

Ukraine shares the opinion that provisions of the above-mentioned legal instruments regarding the return of cultural property belonging to a State which has been illegally removed from part of its territory under military occupation, apply independently of and should in no way be prejudiced nor affected by claims of immunity derived from customary international law. In the case of Ukraine, this is especially relevant with regard to cultural objects that have been illegally removed from the territory of the Autonomous Republic of Crimea, the City of Sevastopol and certain districts of Donetsk and Luhansk regions, unlawfully occupied by the Russian Federation. The ongoing Russian military occupation of this integral part of the sovereign territory of Ukraine since 2014 prevents the competent State authorities of Ukraine from effectively dealing with the looting, plundering, illicit trafficking and illicit export of cultural objects that are considered to be, according to national legislation, State property. Therefore, it is extremely important to ensure that the practice of due diligence is always exercised before a cultural object is granted immunity.

2) The rule of immunity of State owned cultural property on loan is also limited by the obligation of non-recognition – the obligation not to recognize as lawful a situation created by a serious breach by a State of an obligation arising under a peremptory norm of general international law. Ukraine proceeds from the view that this obligation, being an expression of the maxim *ex injuria jus non oritur* (the well-established principle, according to which a violation of international law cannot produce legally valid outcomes), has a basis in customary international law. At the same time, it believes that there is a charter basis of the obligation of non-recognition as well.<sup>9</sup>

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<sup>9</sup> First of all, such an obligation is a logical corollary to Article 2(4) of the UN Charter on the prohibition of the use of force. Moreover, it is incorporated in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations (UNGA Resolution A/RES/25/2625, 24 October 1970), which states: “*No territorial acquisition resulting from the threat or use of force shall be recognized as legal*”. This view is confirmed by the definition of aggression annexed to the UNGA Resolution A/RES/29/3314, 14 December 1974. Article 5, para 3 of this instrument states “*No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful*”.

The Ministry of Foreign Affairs of Ukraine works on the premise that resolutions like the “*Friendly Relations Declaration*” or the “*Definition of aggression*” embody principles and rules of international law and are considered especially significant. These resolutions fit into the sources of international law contained in Article 38 of the Statute of the International Court of Justice.

Another confirmation of the principle of non-recognition may be found in the documents of the International Law Commission. For instance, Article 11 of the 1949 “*Draft Declaration on Rights and Duties of States*” adopted by the ILC declared that “*Every State has the duty to refrain from recognizing any territorial acquisition by another State acting in violation of article 9*”. Article 9 of the same Declaration contains the general prohibition of resort to war as a national policy and “*to refrain from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order*”.

In this regard, it is also worth mentioning Article 41 of Draft articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), adopted by the ILC at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/56/10). Under article 41, paragraph 2, “*no State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation*”. The article 40 of ARSIWA specifies that international responsibility is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law and gives the criteria to determine which breach of such an obligation is serious – “*if it involves a gross or systematic failure by the responsible State to fulfil the obligation*”.

Further confirmation by the United Nations of the principle of non-recognition in repeated reiterations of it when discussing specific situations, practice of individual States regarding non-recognition as well as legal views expressed by the International Court of Justice in its advisory opinions, especially in its Advisory Opinion on the legal consequences for States of the

In February-March 2014 the Russian Federation has illegally occupied the Autonomous Republic of Crimea and the City of Sevastopol and purported to annex this part of Ukraine. It is patently clear that the actions by the Russian Federation in the Autonomous Republic of Crimea and the city of Sevastopol constitute acts of military aggression against Ukraine and flagrantly violate the peremptory norms of general international law (the *jus cogens* norms), and more specifically the duty to refrain in international relations from the threat or use of force against the territorial integrity or political independence of any State. International community strongly condemned this grave breach of international law and adopted a non-recognition policy for Crimea and Sevastopol.

In order to honour the obligation of non-recognition under general international law on 27 March 2014 the General Assembly of the United Nations adopted a resolution entitled "Territorial integrity of Ukraine". By this resolution Assembly affirmed its commitment to Ukraine's sovereignty, political independence, unity and territorial integrity within its internationally recognised borders, underscoring the invalidity of the so-called "referendum" held in Crimea on 16 March 2014 by the Russian occupying authorities. What is even more important, however, that in paragraph 6 of this document the Assembly called upon States, international organizations and specialized agencies not to recognize any change of status of Crimea and the city of Sevastopol and to refrain from actions or dealings that might be interpreted as such.<sup>10</sup>

In the light of the above, Ukraine considers that the obligation of non-recognition as applied to cultural objects consists, inter alia, in the following:

- not to recognize the validity of any act (document, decision) issued by the Russian Federation as Occupying Power or by the de facto local authorities, or any action undertaken by them in temporarily occupied Ukrainian territory seeking to modify jurisdiction in relation to Ukraine's cultural, industrial and technical heritage sites or to

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continued presence of South Africa in Namibia, 1971, allow the assertion that the obligation of non-recognition is established as part of general international law.

<sup>10</sup> The call for the non-recognition was reaffirmed in the subsequent General Assembly's resolutions on Russia's purported annexation of Crimea: namely the Resolution 71/205. Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine), adopted by the UN General Assembly on 19 December 2016 and more recently in the Resolution 72/190. Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine), adopted by the UN General Assembly on 19 December 2017.

The commitment not to recognise the annexation of Crimea and the city of Sevastopol was made and reaffirmed on multiple occasions by the European Union (European Council Conclusions 20/21 March 2014; 19/20 March 2015); the Council of Europe (Committee of Ministers decisions adopted at its 1196th (2-3 April 2014), 1207th (17 September 2014), 1225th (15 April 2015), 1254th (27 April 2016), 1285th (3 May 2017) meetings), the PACE Resolutions 1988 (2014) «Recent developments in Ukraine: threats to the functioning of democratic institutions», 1990 (2014) «Reconsideration on substantive grounds of the previously ratified credentials of the Russian delegation», 2034 (2015) «Challenge, on substantive grounds, of the still unratified credentials of the delegation of the Russian Federation», 2132 (2016) «Political consequences of the Russian aggression in Ukraine», Declaration of the CoE Congress of Local and Regional Authorities «Situation in Ukraine» of 27/03/2014, Declaration of the CoE Congress of Local and Regional Authorities «Separatist tensions in Ukraine and neighbouring countries» of 16/10/2014; the OSCE Parliamentary Assembly (Resolution on Clear, Gross and Uncorrected Violations of Helsinki Principles by the Russian Federation (Baku Declaration, 28 June to 2 July 2014), Resolution on the Continuation of Clear, Gross and Uncorrected Violations of OSCE Commitments and International Norms by the Russian Federation (Helsinki Declaration, 5 to 9 July 2015), Resolution on violations of human rights and fundamental freedoms in the Autonomous Republic of Crimea and the city of Sevastopol (Tbilisi Declaration, 1 to 5 July 2016), Resolution on restoration of the sovereignty and territorial integrity of Ukraine (Minsk Declaration, 5 to 9 July 2017), other international actors (States, international organizations, non-governmental organizations etc.).

nationalize and expropriate Ukrainian cultural property.<sup>11</sup> Such acts are null and void, and can give rise to no legal consequences<sup>12</sup>;

- consider any transfer of Ukrainian cultural property to Russia from the territory of occupied Crimea without clear and unequivocal consent of Ukraine (in particular, in the form of export permit) as illicit. Any Ukrainian cultural objects transferred in this way are to be regarded as unlawfully brought outside the territory of Ukraine<sup>13</sup>;
- not to cooperate with Russian museums that might attempt to showcase abroad Ukrainian cultural objects illegally transferred from the territory of occupied Crimea to Russia. Such cultural objects should not be granted immunity from seizure due the fact that the Russian Federation acquired them in grave breach of international law<sup>14</sup>.

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<sup>11</sup> Follow up by UNESCO of the Situation in the Autonomous Republic of Crimea, U.N. Doc. 194 EX/32 (Apr. 3, 2014), available at <http://unesdoc.unesco.org/images/0022/002272/227294e.pdf>; Follow up by UNESCO of the Situation in the Autonomous Republic of Crimea, U.N. Doc. 196 EX/5. Part II (March 20, 2015), available at <http://unesdoc.unesco.org/images/0023/002321/232104e.pdf>; Follow up by UNESCO of the Situation in the Autonomous Republic of Crimea, U.N. Doc. 199 EX/5. Part I (March 4, 2016), available at <http://unesdoc.unesco.org/images/0024/002439/243925e.pdf>; Follow up by UNESCO of the Situation in the Autonomous Republic of Crimea, U.N. Doc. 200 EX/5. Part I (H) (Aug 29, 2016), available at <http://unesdoc.unesco.org/images/0024/002457/245703e.pdf>; Follow up by UNESCO of the Situation in the Autonomous Republic of Crimea, U.N. Doc. 201 EX/5. Part I (G) (March 22, 2017), available at <http://unesdoc.unesco.org/images/0024/002477/247706e.pdf> (noting that the “any action undertaken by the Russian Federation in the temporarily occupied Ukrainian territory seeking to modify jurisdiction in relation to Ukraine’s cultural, industrial and technical heritage sites constitutes a direct violation of Ukraine’s sovereign rights and of universally recognized standards and principles of international humanitarian law, including the provisions of the Convention for the Protection of the World Cultural and Natural Heritage (1972), the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), its Protocols, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995).”); Tyshchenko Y. *Annexed Property in Crimea* / By Y. Tyshchenko, Y. Kazdobina, M. Diachuk. – Kyiv, Agentstvo Ukraina LLC, 2016. – pp. 52-57, available at [http://www.ucipr.org.ua/index.php?option=com\\_content&view=article&id=568&catid=42&Itemid=172&lang=en](http://www.ucipr.org.ua/index.php?option=com_content&view=article&id=568&catid=42&Itemid=172&lang=en);

<sup>12</sup> Paragraph 3, Article 9, Law of Ukraine “On Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine” No. 1207-VII of April 15, 2014 (with changes), <http://zakon3.rada.gov.ua/laws/show/1207-18/print1512561744600756>; Follow up by UNESCO of the Situation in the Autonomous Republic of Crimea, U.N. Doc. 195 EX/5. Part II Add. (Sept. 19, 2014), available at <http://unesdoc.unesco.org/images/0022/002293/229322e.pdf>; Follow up by UNESCO of the Situation in the Autonomous Republic of Crimea, U.N. Doc. 197 EX/5. Part II. (Aug. 11, 2015), available at <http://unesdoc.unesco.org/images/0023/002340/234080e.pdf>;

<sup>13</sup> Follow up by UNESCO of the Situation in the Autonomous Republic of Crimea, U.N. Doc. 202 EX/5. Part I (L) (Aug 8, 2017), available at <http://unesdoc.unesco.org/images/0025/002527/252788e.pdf> (noting that the “in March 2016, 38 paintings were moved from the Aivazovsky National Art Gallery in Feodosia for the exhibition to the Tretyakov State Gallery which was held in Moscow in July 2016. Only some paintings have been returned to the Ivan Aivazovsky National Art Gallery after the exhibition at the State Tretyakov Gallery, the rest of paintings have been moved to St. Petersburg for the exhibition “The 200th anniversary of Ivan Aivazovsky” in the National Russian Museum (opened 22 December 2016). The Russian delegation misled the States Parties to the 1970 UNESCO Convention at the 4th session of the Subsidiary Committee of the mentioned Convention at the end of September 2016 as it stated that these paintings would be returned to Feodosia. Since that time there has been no information whether the paintings were returned to Crimea. Such actions of the Russian Federation constitute a blatant violation of the provisions of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. On 29 June 2017 the exhibition “Pantikapee and Phanagoria” was opened in the Pushkin State Museum of Fine Arts in Moscow. It includes 450 artifacts representing the history of the Bosphorus Kingdom from the 7th century BC to the 1st century AD. In particular, a separate group of exhibits represents archaeological finds from the funds of Eastern Crimean historical museum-reserve in the city of Kerch. All these objects were moved to the exhibition in violation of a number of international conventions and the legislation of Ukraine”); Follow up by UNESCO of the Situation in the Autonomous Republic of Crimea, U.N. Doc. 204 EX/5. Part I (D) (March 9, 2018), available at <http://unesdoc.unesco.org/images/0026/002615/261576e.pdf>;

<sup>14</sup> For example, pictures from the Aivazovsky National Art Gallery in Feodosia, artifacts representing the history of the Bosphorus Kingdom from the funds of Eastern Crimean historical museum-reserve in the city of Kerch or any other cultural object illicitly exported by the Russian Federation as Occupying Power from the areas not under the effective control of Ukraine may be lent to a third State for purposes of temporary exhibition. Due to the fact that these objects were acquired in grave breach of international law, they should not be granted immunity from seizure and Ukraine should be able to repatriate them.

**5. Does your State consider that the rule of immunity of cultural property extends to other categories of property other than those owned by a State, i.e. property in possession or control of a State (such as property belonging to a State museum)?**

Yes, but only as applied to Ukraine's museums. This is explained by the particularities of Ukraine's traditional legislation, which provides for such a concept as the Museum Fund of Ukraine. According to article 15 of the Law of Ukraine "On Museums and Museum Affairs" of June 29, 1995 (hereinafter – the Museum Act)<sup>15</sup> the Museum Fund of Ukraine forms the national heritage of Ukraine and it is an inalienable part thereof.

The Museum Fund of Ukraine is a "collection of separate museum objects, collections, museum collections permanently stored on the territory of Ukraine, regardless of their origin and patterns of ownership, as well as museum items and museum collections, located outside Ukraine and owned by Ukraine or in accordance with international treaties, are subject to return to Ukraine"<sup>16</sup>. The Museum Fund of Ukraine consists of a state and non-state part. The state part of the Fund includes state-owned artefacts, stored in state or communal museums (museums belonging to the sphere of local government). It is important to note that under paragraph 5 of article 15 of the Museum Act the management of the cultural objects is commissioned to museums in the form of "operational management", as referred to in article 137 of the "Economic Code of Ukraine". On February 2, 2000 the Cabinet of Ministers of Ukraine adopted Decree No. 209, which approved list of museums managing cultural objects of state part of the Fund<sup>17</sup>. These museums are not owners of artefacts belonging to the state part of the Museum Fund, they are only responsible for the "operative management" and can dispose of such cultural objects only to the extent provided for by their statutory documents and national legislation. The permanent control over management of cultural objects belonging to the state part of the Museum Fund is carried out by the central executive authority, which implements state policy in the fields of culture and arts.

Considering the above, it can be affirmed that the rule of immunity of cultural property extends to the cultural objects belonging to the state part of the Museum Fund of Ukraine, the operational management of which State and/or communal museums are entrusted with.

In Ukrainian legislation there is no special provisions regarding immunity of cultural property in possession or control of foreign State. This seems to imply that in such cases general rules on jurisdictional immunity of States and their property, set out in Article 79 of the Law of Ukraine "On Private International Law", are applicable.

## **NATIONAL PRACTICE AND PROCEDURE**

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<sup>15</sup> Article 15, Law of Ukraine "On Museums and Museum Affairs" No.249/95-VR of June 29, 1995, <http://zakon5.rada.gov.ua/laws/show/249/95-%D0%B2%D1%80/print>. The property rights of Ukraine are further enshrined in the Law of Ukraine «On Protection of Cultural Heritage», which states that "All monuments of archaeology, also those, which are situated under the water, including movable objects, connected with them, are the state property. Such movable objects are to be included to the state part of Museum fund of Ukraine, are to be registered and to be preserved in accordance with procedure, established by the legislation" (Art. 17). Available at [http://www.unesco.org/culture/natlaws/media/pdf/ukraine/ua\\_law\\_protection\\_cultural\\_heritage\\_engtof.pdf](http://www.unesco.org/culture/natlaws/media/pdf/ukraine/ua_law_protection_cultural_heritage_engtof.pdf). Ukraine has also a law that specifically protects archaeological heritage – Law of Ukraine "On Protection of Archaeological Heritage". This law defines archeological heritage as "the system of archeological monuments and shared territories, being under State protection, and also moveable cultural values (archeological items), that comes from the objects of the archeological heritage." Article 18 of the law states that any objects found as a result of archeological research, movable and immovable objects, are property of the State of Ukraine. Available at [http://www.unesco.org/culture/natlaws/media/pdf/ukraine/ua\\_law\\_protection\\_archaeological\\_heritage\\_engtof.pdf](http://www.unesco.org/culture/natlaws/media/pdf/ukraine/ua_law_protection_archaeological_heritage_engtof.pdf).

<sup>16</sup> Article 1, Law of Ukraine "On Museums and Museum Affairs" No.249/95-VR of June 29, 1995, <http://zakon5.rada.gov.ua/laws/show/249/95-%D0%B2%D1%80/print>.

<sup>17</sup> Paragraph 1, Decree of the Cabinet of Ministers of Ukraine "On the approval of the list of museums entrusted with storing State owned museum collections and museum objects, classified as state part of the Museum Fund of Ukraine" No. 209 of February 2, 2000 <http://zakon2.rada.gov.ua/laws/show/209-2000-n/print1511788195870251>.

**6. Is there national case-law in the field of immunity of State owned cultural property on loan? If so, please provide information on these decisions (date of the judgment, authority that issued the judgment, name of the parties, main points of law, French or English translation of the judgment or summary of the judgment in English or in French).**

None, with the exception of the above-mentioned case of Ukrainian *Scythian Gold* adjudicated by the Court of Amsterdam (Private Law Division). It should be kept in mind that the case focused more on jurisdictional immunities and the legality of cultural property import / export permits. However, some aspects of Ukraine's perspective on cultural property immunities could be deduced from the proceedings.

Judgment rendered by the Court of Amsterdam on 14 December 2016 (in Dutch): <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3ARBAMS%3A2016%3A8264>. Briefly about the case (in English): <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Amsterdam/Nieuws/Paginas/Crimean-Treasures-to-go-to-the-Ukrainian-State.aspx>. From an academic perspective (in English): Evelien Campfens, *Whose Cultural Heritage? Crimean Treasures at the Crossroads of Politics, Law and Ethics*, Grotius Working Paper. (publ in AAL, Vol. XXII, 3, Oct. 2017), pp. 5-11, available at [http://www.iuscommune.eu/html/activities/2017/2017-11-23/workshop\\_3\\_Campfens.pdf](http://www.iuscommune.eu/html/activities/2017/2017-11-23/workshop_3_Campfens.pdf)

**7. Does your State resort to “letters of comfort” or other practice guaranteeing the recognition of the immunity from seizure of State owned cultural property on loan?**

There has been no such practice in place so far.

**8. Is the immunity granted automatically to State owned cultural property on loan or is it subject to approval by a State authority?**

No special mechanism has been established so far and Ukraine does not have evidence of sufficient State practice in this field. However, it is reasonable to assume that any relevant immunities under national legislation, in particular Article 79 of the Law of Ukraine “On Private International Law”, and bilateral agreements or multilateral instruments in force, consented by the Verkhovna Rada of Ukraine as binding, will apply automatically. Any additional immunity, not covered by national legislation or existing arrangements, shall be the subject of separate agreements, in each case, between Ukraine and concerned State or Organization.



## APPENDIX TO THE REPLY OF UKRAINE

### SCYTHIAN GOLD CASE

#### Extract from the Judgment rendered by the Court of Amsterdam on 14 December 2016

“... The State of Ukraine

3.3. The State of Ukraine claims in short that the court, by judgment, where possible provisionally enforceable:

- shall order the APM to return the Crimea Treasures to the State of Ukraine and to have them transported to the permanent custodian of the Crimea Treasures indicated by the State of Ukraine, namely the National Historical Museum of Ukraine in Kiev; shall order the APM to pay the costs relating to this return;
- shall order the Crimea Museums to tolerate the return of the Crimea Treasures to the State of Ukraine,

costs to be determined by the court.

3.4. The State of Ukraine supports its claims in short as follows. The Crimea Treasures are the property of Ukraine, are part of the cultural heritage of Ukraine and are unlawfully held by the APM. Among other things the State of Ukraine hereto refers to article 7.1 of the loan for exhibition agreements:

“In any case, the Parties realize that the exhibits of the exhibition are the acquirement of Ukraine and world civilization and shall take all possible measures to avoid their loss and damage”.

and in the heading of the annexes with the loan for exhibition agreements in which the Crimea Treasures are indicated (among other things):

“LIST OF EXHIBITS MUSEUM FUND OF UKRAINE (WORKS OF ART) which are taken out on the temporal exhibiting from territory of Ukraine”.

Pursuant to article 15 of the “Law of Ukraine on Museums and Museum Affairs” of June 29, 1995 (the Museum law below) the Museum fund of Ukraine forms the national heritage of Ukraine and it is an inalienable part thereof. Under article 15 paragraph 3 of the Museum Act a list has been constituted of museums managing objects that are part of the state property division of the Museum fund (the other division of the Museum Fund is not state property) by decree of February 2, 2000 of the cabinet of ministers of Ukraine. The Crimea Museums are on the list of the decree of February 2, 2000. Consequently, the objects which these museums have in their custody (including the Crimea Treasures) are part of the state property division of the Museum fund. The property rights of Ukraine are further enshrined in the “Law of Ukraine On Protection of Archaeological Heritage”. In article 18 of this law it is established that cultural heritage and archaeological objects situated in Ukraine, are property of the State of Ukraine. From article 13 of the Constitution of Ukraine as well it follows that what emerges from Ukrainian ground shall belong to the State of Ukraine. Under article 15 paragraph 5 of the Museum act the management of the objects of the Crimea Museums has been commissioned to them in the form of ‘operational management’, as referred to in article 137 of the “Economic Code of Ukraine”. By decree of the Minister of Culture of Ukraine of May 13, 2014 (Order No. 292) the power to manage the Crimea Museums regarding the Crimea Treasures has temporarily been ended and commissioned to the National Museum of History of Ukraine. The Ministry of Culture of Ukraine has legal power to do so.

3.5. The Crimea Treasures are further objects of cultural value within the meaning of the Agreement in the matter of the means to prohibit and prevent the unlawful import, export or

transfer of ownership of objects of cultural value that came into being in Paris on November 14, 1970 (the UNESCO-convention 1970 below). Pursuant to article 6.3 of the Cultural Heritage Act (previously article 4 of the UNESCO-convention Implementation Act 1970 in the matter of unlawful import, export or transfer of ownership of objects of cultural value; the Implementation Act below) and article 1011a paragraph 2 of the Dutch Code of Civil Procedure (Rv below) these objects of cultural value can be reclaimed by the contracting country from which the goods originate (in this case Ukraine).

3.6. The State of Ukraine shall only submit itself to the jurisdiction of the Dutch court in so far as its claim to return of the Crimea Treasures is involved. For the rest it invokes immunity. ...

... Where shall the Crimea Treasures go to?

4.2. The State of Ukraine based its claims on two principles, in summary coming down to (i) that the Crimea Treasures must be handed over to the State of Ukraine in view of its right of ownership (revendication) and (ii) that the Crimea Treasures are cultural objects and thus must be returned to their country of origin, namely Ukraine, pursuant to the UNESCO-convention 1970 and the Cultural Heritage Act. At the hearing the State of Ukraine clarified that the claim is based on two equally important principles. The court shall pass judgment on the latter principle first in this international dispute. ...

... 4.8. The Court judges as follows. Handing over can be claimed of cultural objects brought into the Netherlands contrary to the prohibition of article 6.3 of the Cultural Heritage Act, by the contracting state from which the objects originate or by the party entitled to the said objects<sup>7</sup>, under private law, namely subject to articles 1011a up to and including 1011d CCP. It is not in dispute that the Crimea Treasures are cultural objects or cultural heritage ('cultural property') within the meaning of the UNESCO-convention 1970 and the Cultural Heritage Act. According to article 1 of the UNESCO-convention 1970 the 'cultural property' of a contracting state shall include that which that state has indicated as such: "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science (...)". In the Dutch translation (Published in the Treaty Series 1983, 66) this is described as follows: "property that for religious or secular reasons has been designated by each State as important for archaeology, prehistory, history, literature, the arts or science (...)". Even though The Crimea Museums, take the position that the Crimea Treasures belong to the cultural heritage of the Crimea (or the ARC), neither the Crimea, nor the ARC is a (sovereign) state. It is a fact that the ARC, in any case at the moment of the export of the Crimea Treasures, was part of the (sovereign) State of Ukraine. The UNESCO-convention 1970 aims at protecting the cultural heritage of sovereign states.<sup>8</sup>

This means that for the application of the UNESCO-convention 1970 (so for the Cultural Heritage Act which follows this definition in article 6.1, under c as well) the Crimea Treasures belong to the cultural heritage of Ukraine.

<sup>7</sup> House of Representatives, 2007-2008, 31 255, no. 3, p. 12

<sup>8</sup> See for example: The legal protection of cultural heritage in international law and its implementation in Dutch Law, Dr. Drs Lucretia PC Belder, 2014 (thesis):.. "(...) The UNESCO 1970 Convention, the measure has become a system classification of cultural property originating from the nation state as a central actor in the protection of cultural heritage. This claim can result in national states cultural standing after being unlawfully across borders into other countries." (P 309-310;. 108); see also Mary Nudelman, Who Owns the Scythian Gold? The Legal and Moral Implications of Ukraine and Crimea's Cultural Dispute, Fordham International Law Journal Volume 38, Issue 4, p.1278-1279 ..."

... 4.33. However, the State of Ukraine contests that it is obliged to compensate any costs and thereto invokes immunity of jurisdiction. According to the rules of the (customary) international law, as it has been codified in the Convention of the United Nations on the immunity of jurisdiction of states and their property, of 2004 (the UN Convention below) immunity of jurisdiction and execution shall accrue to the State of Ukraine. With its intervention in these proceedings it only invokes a right or interest regarding its property which is subject of these

proceedings and did it not renounce the immunity it is entitled to (see article 8 paragraph 2 under b of the UN Convention 2004). The State of Ukraine subjects itself in this dispute emphatically only to the jurisdiction of the Dutch court referring to its claim to hand over the Crimea Treasures. The State of Ukraine does not accept any exercise of jurisdiction of this court regarding a possible order to pay the costs to the APM pursuant to management of the affairs of another and a possible costs order. This invocation of immunity accrues to the State of Ukraine because in this case it performs acts connected to the exercise of a task under the public law and because this is not commercially acting, still states of the State of Ukraine.

4.34. The invocation of immunity by the State of Ukraine is rejected. According to the rules currently applicable in the Netherlands as unwritten international public law, foreign states enjoy immunity of jurisdiction, this is however not absolute. The UN Convention 2004 includes a codification of the customary international law relating to the immunity of jurisdiction and the immunity of execution, and the boundaries imposed to these. The latter is supported in the preamble of this convention (not ratified by the Netherlands and not yet brought into effect) stating among other things:

“Considering that the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law”,

“Believing that an international convention on the jurisdictional immunities of States and their property would enhance the rule of law and legal certainty, particularly in dealings of States with natural or juridical persons, and would contribute to the codification and development of international law and the harmonization of practice in this area”

and

“Taking into account developments in State practice with regard to the jurisdictional immunities of States and their property”.

Other than the State of Ukraine argues however, it does not follow from the above that all stipulations of the UN Convention 2004 can be considered customary international law (Supreme Court September 30, 2016, ECLI:NL:HR:2016:2236). This means that each stipulation of the UN Convention 2004 must be examined to see if customary international law has been codified with it. In article 8 paragraph 1 under a it is stipulated that a state cannot invoke immunity of jurisdiction in an action in court of another state if it has instituted the action itself. The State of Ukraine does not dispute that this stipulation must be considered customary international law and neither that voluntary intervention in the proceedings can be considered equal with this. However, it argues with invocation of the exception in article 8 paragraph 2 under b of the UN Convention 2004 that it does not lose its immunity because it only intervened in the proceedings for the purpose of revendication its property. In the judgment of the court it can be left untreated whether this stipulation is to be considered customary international law because the State of Ukraine in this case cannot in any way invoke the exception of article 8 paragraph 2 under b. As has been considered in the main action the State of Ukraine instituted a claim in these proceedings pursuant to an international convention, the UNESCO-Convention 1970, article 6.7 Cultural Heritage Act and article 1011a CCP. This claim cannot be seen as instituted “exclusively on behalf of an invocation of a right or an interest in the property that is the subject-matter of the action”. As we know this claim was instituted for the purpose of revendication its cultural heritage, the Crimea Treasures. The question whether the State of Ukraine has to count as owner of the Crimea Treasures under the public law as well is (in the end) no subject of dispute in these proceedings. By instituting a claim pursuant to article 1011a CCP, it has to have article 1011c CCP applied against itself relating to this claim; in this article it is expressly stipulated that the costs referred to there shall be charged to the state instituting the claim.