

MINUTES OF THE SPRING MEETING

held on Thursday 17 April 2014 at the Hague Institute for Global Justice

LOOTING of CULTURAL PROPERTY during FOREIGN OCCUPATION

The annual Spring Meeting of the Royal Netherlands Society of International Law was attended by about 40 members and non-members. The Chairman opened the meeting at [7:00] P.M. He then introduced the three speakers and invited them to give their respective presentations, to be followed immediately by a discussion.

The Presentations

The first speaker was **Mr. Taco Dibbits**, Director of Collections of the Rijksmuseum, who gave an overview of the research on Nazi-confiscated art in The Netherlands. It all started in 1998 with the Washington Conference Principles on Art, addressing the sale, purchase and possession of Nazi-confiscated art. With this, nations pledged to an organised international effort backed by strong moral commitment to recover stolen art.

Research into the provenance of art (2009) is focussed on these Washington principles, which apply only to Nazi-confiscated art, and not to art from colonies or other countries. Against the background of these principles the museum participated in the investigation into the provenance of works of art in Dutch museums Museum Acquisitions from 1933 onwards. Between 2009 and 2013 more than 162 museums throughout The Netherlands scoured their collections for works acquired in the periods 1933-1940 and after 1948 that might have been wrenched from the hands of their rightful owners through confiscation or forced sale. The website www.musealeverwervingen.nl contains information about 139 objects that might have confiscated or sold under pressure during the Nazi regime.

Now, in 2014, all claims for restitution are time-barred. There is no legal ground for restitution anymore. The State of the Netherlands, however, believes that there are moral grounds for restitution.

The Restitutions Committee issues opinions at the request of the Minister of Education, Culture and Science on claims from owners and their heirs. The Committee has received claims since early 2002 and gives advice as an alternative way for settling disputes. The Committee acts independently from the Ministry. It checks claims concerning certain works of art from the national art collection. This collection comprises 300,000 works of art. Most stolen works were sold during the Nazi-regime. After 1945 they were traced and sent back by the allies.

In total, the Restitutions Committee has dealt with 129 claims. 51% were awarded, 36% rejected, 13% were partly rejected and partly awarded. Next to all of this, the Committee also offers a procedure for binding expert opinion in all types of cases. This is a voluntary procedure, but parties agree beforehand that the result will be binding.

For the future: in the Rijksmuseum, nearly all the works of art are property of the State of The Netherlands. The research done in the collection is for a large part in the museum's own interest. We wonder: What do we actually have in the museum and where does it come from? Five researchers try to retrace the provenance of the works of art. If we are suspicious, we refer

a work of art to the museum's committee, and we can approach the Ministry. This research never ends: Each year new sources are disclosed and each year we continue our research.

An important question is: Will there ever be closure and what does closure mean?

From a legal perspective the way to restitution is now closed, but what about moral closure? This question is still important for today, for museums as well as for society. We have limited ourselves to Nazi-looted art while we also have other works of art in our collections. These other cases will also become of importance.

The second speaker was **Prof.dr. Liesbeth Lijnzaad**, Legal Adviser of The Netherlands Ministry of Foreign Affairs and professor Practice of International Law at Maastricht University, speaking in her personal capacity. She addressed the (first) Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Protocol deals with the situation of occupation, and it is important to keep in mind the basics of the law of occupation. Occupation is legally conceptualized as a temporary situation: the occupier is not allowed to become the sovereign. The occupier is meant to act as an administrator and trustee of the occupied territories, which means he has a duty of care and protection of the people living under occupation. This includes the duty to prevent and prohibit destruction and damage of works of art. Furthermore, there is the obligation to prosecute when looting occurs.

Major parts of the law of occupation can be found in the Regulations concerning the Laws and Customs of War on Land, annexed to the IVth Hague Convention of 1907 (Articles 42-56). This Convention is old but is still relevant today. Besides that, the Geneva Conventions, especially Convention IV, Additional Protocols I and II, customary law and case law are relevant to the protection of cultural property in armed conflict, but the specialised instrument is the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1949.

The Hague Convention specifically states that the occupier must prohibit and prevent theft, pillage, misappropriation and vandalism. Its (First) Protocol contains four substantive paragraphs followed by the final clauses. The explanation for this unusual structure is that when the Convention was drafted the substantive rules now contained in the Protocol were intended to be part of it. It was decided only in the final stages of negotiations to take out the part on the protection of cultural property during occupation. There is a great difference in ratification of the Convention and the Protocol: The Protocol is not extremely well ratified (105 against 128 ratifications of the Convention). The reason for the lower number of ratifications must be found in the content. All in all, it is a rather unusual document. It is intended for times of war and occupation, while it has elements of private law.

The Protocol contains a general prohibition on the transfer of cultural goods from the occupied State to any other State. Three States are potentially involved in this scenario: the occupying State, the occupied State and the third State where the goods appear on the market. This third State will have the unusual role of acting as a trustee on behalf of the occupied State. It has the obligation to seize the goods. The third State, which is not participating in the conflict, has a role in this protective scenario, which leads to questions of private law. If a private party acquires an object, the protection of the *bona fide* owner is at stake. Thus there may be a need for national legislation, or direct applicability for the (first) Protocol to be implemented.

The Protocol is fairly basic. It contains four substantive obligations: first of all the occupying Power must prevent export of cultural property from the occupied State. It may not be very easy to prevent troops from illegally exporting cultural objects from occupied territory. Secondly, a third State has the obligation to take goods into custody when found on its territory and return them to the occupied State at the end of hostilities. The former occupying Power must pay indemnity to holders in good faith of these goods. The beneficiary of the Protocol is always the occupied State. What is not regulated in the Protocol is that the third State may need to indemnify the good faith holder when seizing the artefacts, and it may also incur costs for keeping the goods in custody. These must be stored under good conditions and may need restoration. The third State involuntarily gets drawn into the conflict. It has to take action, which might lead to political problems. The occupied State will have a claim to have the goods returned.

How does this work? Must all three States be a party to the Protocol? My conclusion is that if the occupying Power is not a party to the Protocol but the others are, there will be an obligation of custody, but it might be hard for the third State to claim compensation because there is no legal basis. If the occupied State is not a party, the third State still has an obligation to take cultural property from occupied territory into custody. The occupied State will benefit from this in spite of not being a party to the Protocol. In this situation there is a legal basis for compensation because the occupying State is a party to the Protocol. If the third State is not a party to the Protocol, custody is possible but unlikely. Return of cultural property will not be covered by the Protocol and it probably will be very difficult to claim compensation for the expenses as a consequence of the seizure of cultural property.

Having demonstrated what kind of problems the Protocol leads to, prof. Lijnzaad mentioned, once again, that the Convention is better ratified than the Protocol. The Netherlands ratified it in 1959, but at the time no attention was given to the need to provide implementing legislation, as can be seen in the parliamentary papers.

The third speaker is **Mr. Rob Polak**, former partner at De Brauw Blackstone Westbroek and currently Chairman of the Association of Art, Culture and Law, whose subject is the Act on the Return of Cultural Property Originating from Occupied Territory. In 2007, The Netherlands implemented the Protocol mentioned by prof. Lijnzaad in the *Wet tot teruggave cultuurgoederen afkomstig uit bezet gebied*. While the Protocol was ratified in 1959, there was no mention of the need to implement this back then. There was no awareness of the impact of the Protocol.

Mr. Polak defended the Greek Orthodox Church of Cyprus, in a case concerning icons stolen around 1975 from the part of Cyprus occupied by Turkey. These icons were found in 1995 at the home of a couple in Rotterdam. In the end, the Church lost, but there was victory much later. The position of the Church in the litigation was that the Protocol was sufficiently clear to operate directly and thus to be invoked before the Dutch courts. Both the District Court (*rechtbank*) and the Court of Appeals (*hof*) ruled, however, that the Protocol is only aimed at contracting states, and because The Netherlands has not implemented it, the courts cannot apply it to the detriment of civilians, such as the Rotterdam couple. After these decisions the Dutch government came to the conclusion that The Netherlands should implement the Protocol, which resulted in the *Wet tot teruggave cultuurgoederen afkomstig uit bezet gebied* of 8 March 2007.

What happens if the Dutch government finds out that cultural objects are held in The Netherlands? The Minister of Education, Culture and Science may confiscate such property on his own initiative or at the request of the (former) occupied State when it enters The Netherlands, or later when he expects such a request. This decision is a *beschikking* that can be tested by administrative courts. If this is done, the only test is whether the Minister had reasonable grounds to believe that the prohibition to import or to hold looted property was violated. After the Minister has made such a decision, he must ask the civil court to order the return. This is done in a regular civil procedure. The opposing party in this procedure is the possessor or the holder of the object.

If the civil court grants the application, the possessor loses his property and the object will be given back. Dutch good faith protection rules are set aside here. Parties with a pledge or right of retention have to give up this right. The actual effect of the law is expropriation. This can take place only if the owner is compensated, which is provided for in this Act. Even if the possessor is the holder, not the owner, he may be entitled to reasonable, if not full, compensation. This depends on the circumstances, because a high standard of good faith applies. The possessor must do all reasonably available provenance research before buying the object in order to be regarded as a good faith possessor.

The system of compensation according to this law deviates from the Protocol. The compensation will be paid by the Dutch State, while according to the Protocol it must be paid by the occupying State. The Netherlands thought this might be difficult and the owner should not have to go after the occupying State.

The Act has some interesting temporal aspects. It applies to cultural property imported after 1959, the date of ratification, even though the law was enacted in 2007. Another remarkable part of the law is that the claim by the Minister of Education, Culture and Science does not expire. There is no statute of limitations. This is very unusual in The Netherlands. If the Minister has confiscated an object, however, he should file a claim within a reasonable period of time.

This Dutch Act also applies to the Rotterdam icons case. The import happened between 1975 and 1977. The occupation was after 1959. That means the Minister of Education, Culture and Science could indeed confiscate these icons. That is interesting because the Court had decided already that the couple were the owners and could keep the icons. Apparently, a compromise was reached. Most likely, the Rotterdam couple (or their heirs) were entitled to full compensation because the court had already established they were the owner. The icons were returned to Cyprus in September 2013.

The Discussion

The discussion is chaired by Prof.mr.dr. Willem van Genugten. After a short recap of the presentations, he gives the floor to the audience.

Q. (addressed to R.P.): You represented the Greek Church. Did you ever consider inviting the Republic of Cyprus to The Netherlands?

R.P: They were not involved in the litigation, but the Greek Minister of Foreign Affairs made a request and wrote a letter to the then Minister of Foreign Affairs of The Netherlands, Mr. Hans van Mierlo, asking to apply the Protocol and to confiscate the icons. The Dutch government

felt they could not interfere. We actually said that we were willing to withdraw the litigation, but we never got a response from the Dutch government. Lobbying also took place and the government was asked questions in Parliament, but did not interfere.

Q.: Was the topic for this Spring meeting chosen before the conflict in the Crimea? [The question relates to the exposition in the Allard Pierson museum in Amsterdam on “Crimea: Gold and Secrets of the Black Sea” and the return of the objects at the moment the exposition ends].

WvG: We made a decision in September of last year. We can only be happy that the news incidentally coincides with the topics of our discussion.

Q.: Can any speaker explain if there is a definition of art? Lots of other things like coins, furniture and cars can be looted as well.

T.D.: I am not a lawyer, but in the museum we talk about art and artefacts. Most claims and questions are about objects with the value of art, often historical objects. Usually we do not get questions about other objects: artefacts are more difficult to trace back because they have less unique features, the way they were described in the past, but for us everything has cultural value and we do not distinguish.

R.P.: The law is not restricted to art but to cultural objects. In practice this does not create a problem. I think cars will not be regarded as cultural objects, but the concept is still so broad that problems barely arise.

L.L.: In the Hague Convention a definition is given in Article 1. For the drafters it was important to distinguish between cultural objects in general, and those that you wish to protect under the Convention. The Convention deals with objects of great importance to the cultural heritage of people. There has been some discussion about definitions of ‘cultural property’ because some UNESCO Conventions contain different language.

Q. (addressed to L.L.): About the hypothetical situations you discussed: What if the third State is the only party to the Protocol?

L.L.: I suspect that a third State will have to think very hard and consider whether there are provisions binding as customary obligations in the Protocol, even though I would hesitate to call it customary law. The third State would then be acting to the benefit of mankind in taking all protective measures, most likely at its own expense in that situation. There are situations in which they are unlikely to be compensated. They can take some action, but I think it depends on the domestic debate on the protection of cultural property.

To add something to what Mr. Polak said: It is true that the Dutch statute talks about providing compensation and the government must offer this, whereas the Protocol says the occupied power should do this. I think the State had in mind that if they did the first step, it could afterwards claim that back from the occupying power. The Netherlands does it in two separate steps instead of one.

T.D.: How is it decided if a territory is occupied or not? Do the parties have to agree that the territory is occupied or not?

L.L.: The occupying Power may try to deny that territory is occupied, but the law is relatively clear. Article 42 Hague Regulations states: "Territory is considered occupied when it is actually placed under the authority of the hostile army." I would say there are few situations where it is disputed whether an occupation exists because only the occupying State denies it, while all other States do not. The law refers to occupation as a factual situation. It is clearer than it may seem.

R.P.: Indeed, the occupying State often denies occupation. In the Cyprus case we also had this situation and Turkey did not acknowledge this. But there is enough international evidence that it is an occupation, so, generally, this will not generate problems. If east-Ukraine were looted, it would be a borderline case.

Q. (addressed to L.L.): You mentioned the Hague Convention of 1907. Before this there was the Convention of 1899. The first speaker said there is no legal obligation to return the Nazi-looted art, but during WWII these Conventions were both enforced. Is there a possibility for restitution based on the Hague Convention of 1907?

L.L.: Maybe I was not clear. The Hague Conventions of 1899 and 1907 are relevant for the law on occupation. They provide norms on the law of occupation, including on the need to protect cultural property. The (first) Protocol I discussed, however, belongs to the Convention of 1954. This Protocol is "new" law established in the 1950s. There is no possibility to claim on the basis of the Hague Conventions, other than that the occupying power acted contrary to its obligations under the Hague Conventions. The whole idea of seizing goods exported illegally is new, and dates from the 1950s.

Q.: I mean that if the Japanese looting was in violation of the 1907 Convention, can this be a legal basis for a claim?

L.L.: In general, this depends on how the conflict has been concluded. If the matter of looting of cultural objects was covered in peace agreements at the end of the conflict, it has already been dealt with.

Q.: I would like to comment on Mr. Polak's remarks on the implementing Dutch law with retroactive effect. I wonder, are you aware of instances in which this law has been applied on colonised territories?

R.P.: I am not aware of any situations in which this act has been applied, but I know of cases where EU countries returned objects that had been taken during the colonial period. For this act to apply the territory would have to have been occupied after 1959.

Q.: I know of museums that dealt with cases in which on ethical grounds they returned some artefacts and ethnological objects to countries that formerly were colonised. For example, the Obelisk of Axum that was returned to Ethiopia.

T.D.: Occupation is seen as a temporary thing, while colonisation was not temporary. We have some objects from Africa in our museum, where restitutions on moral grounds have been made for human remains. I certainly think that the research that focussed on WWII-looting will again shift to non-western countries and other situations as well.

Q.: The main point is whether there is law that applies to the colonial times. Is there?

R.P.: I would like to say something about this distinction. The statute of limitations under Dutch law does not extinguish legal obligations. After a claim has become time-barred the obligation still exists, but the possibility to start a legal action is extinguished. This could be seen as a theoretical distinction, but it is not the distinction legal vs. moral, but legal and enforceable vs. legal but not enforceable.

L.L.: There is a distinction between belligerent occupation and non-belligerent occupation. Colonisation is not seen as occupation in international law, although in plain language we may consider it to be an occupation. I mentioned the laws of occupation as an element of the laws of war. Return of artefacts from the colonial period is not specifically regulated in conventions, so restitution activities are most likely based on informal international instruments or domestic law.

Q.: When is it established that an object is taken? The situation in a former occupied State can still be unsafe to return the artefact, which would make it better for the third State to keep it. Is there an exception for such a situation?

L.L.: The obligation reads that the third State must return an object at the close of hostilities, while that may not be the moment when museums are up and running. I expect that when the authorities know what they are doing, they can come to an understanding about when it will be returned. The message in the Protocol is also that return takes place in agreement with the competent authorities of the State. Both States together can determine when to send it back. The Protocol creates a relationship between the formerly occupied State and the third State, and they can agree on these situations themselves.

Q.: What is an artefact? Does it have to be a symbol of the State or can it also be a symbol of a minority group?

L.L.: Let it be clear that the third State is always under an obligation to give objects back. How exactly this is carried out can be addressed in negotiations.

T.D.: If you have to return an object to an aggressive iconoclast, that can make a difficult case. I would find it hard to return an object when there is a strong possibility of it being destroyed. What I try to stress is that such objects are world heritage, not merely Dutch or otherwise national heritage.

Q.: There has been a special relationship between Switzerland and Afghanistan. Russians captured works of art in Afghanistan. In Switzerland there was a museum of Afghan art, run by a watchmaker. In this case the Swiss did not intervene. But Afghanistan was not occupied but in a civil war. What are the legal consequences of art taken from a country in a civil war? Should the Swiss authorities have intervened? This art came from shops in Afghanistan, which had taken them from the museum in Kabul.

L.L.: This is complex because the Protocol is about obligations of States, not obligations for individuals. There also may be interesting and knowledgeable NGO's that do good things in this respect, but in the end the legal framework for the protection of cultural property in armed conflict is always about the obligations of the State.

T.D.: There are many other ways to secure and safeguard cultural heritage. In this case the individual interests were different from safeguarding property. You have to turn to larger

bodies to safeguard objects. Switzerland knows well if something is imported and whether it is legal or not, because they keep track of it.

R.P.: I cannot comment on this specific case. I assume these objects were illegally exported, which would be relevant. In that case UNESCO could do something about it.

WvG: What about the gaps in existing law? It might be interesting to hear what the shortcomings are and the issues that should be taken care of.

R.P.: I think what is frustrating for claims in Dutch law is the manner in which Dutch courts and the law protect holders in good faith. The standards have become higher, but in 20th century case law the courts were quick to accept good faith. Courts did not easily come to the conclusion that owners should have done more research. This may have changed, though it is not yet reflected in case law. In parliamentary history it is said that acquirers should take all reasonable measures to find out what the background of an object is. I wonder if that is already the case.

T.D.: For museums and individuals more guidelines on due diligence would be very useful. We need to prepare our law for colonial art works. I also think we tend to want to solve everything with law, but with art some things are not that easily described in law. Law does not always provide a solution. The question is: What is closure, how do we deal with the past? How far should we go back?

L.L.: I like it when people say that not everything can be solved with law. What I think is an issue of concern is that other States have not implemented the Convention. When it turned out The Netherlands had difficulties implementing the (first) Protocol, we asked UNESCO for examples of implementation from other States, but there were only about three examples. This means some 100 States have not implemented the Protocol yet. It would help if the UNESCO reflected on model legislation to turn the Protocol into national realities. Problems such as the matter of the Cypriot icons can arise in any country, and with so many parties to the Protocol it is important to get on with implementation.

Q.: The 2007 Act implements the Protocol, it implements obligations from The Netherlands as a third State. Does it differentiate in its implementation whether any suspected looted object was from other parties to the Protocol?

R.P.: The wording of the Act does not, but in the parliamentary history it is stated that if the occupied territory is a party to the Protocol, it certainly applies. If the occupying State is a party it might apply. According to Article 1.2 of the Protocol it does not say it must be 'another party'.

Q.: Are Cyprus and Turkey party to the Protocol? The Dutch government can give restitution, but can The Netherlands claim from the occupying State, Turkey, for any compensation paid by The Netherlands?

R.P.: Certainly. Both Cyprus and Turkey are parties to the Protocol. I wonder if prof. Lijnzaad has already written a letter to Turkey.....

L.L.: It is very interesting to note that Article 1.2 refers to 'any' occupied territory. It seems to reach out beyond the Protocol itself. Whether the third State which incurred costs can and

will claim compensation, is also a political question for the third State. In international law there should not be much difficulty. We have compensated the holders in good faith. This is especially so because the occupying Power failed to prevent the exportation. There is not much of an issue of whether the third State can go to the occupying Power, but the third State is drawn into the conflict. Because they take charge of these cultural goods they are not only faced with expenses but consequently also with the question of how to get the money back. In anticipation of those discussions this can play a role in how active a third State wishes to be on acting upon such objects. There are choices to be made there.

Q.: I have a question about the Dutch implementation law, on the request or anticipated request by a State. What if it is not a State, if for example the Palestinian authority request this, would that fit within the description of this law?

R.P.: I think the language of the law refers to a State. The question is whether Palestinian territory *de facto* has the standing of a State. I do not think this Act will answer this question because it refers to statehood, to a foreign government.

L.L.: May I point out that the law does indeed refer to States.

Q.: If the drafters would have wanted to limit it in any way, they could have mentioned that by stating 'another contracting party' instead of calling it merely 'territory'. This would be consistent by the language of paragraph 1.2. It even strengthens the 'any' of 1.2. Prof. Lijnzaad, what do you think of that?

L.L.: I am not convinced yet.

Q.: If we return to the Crimea and the exposition at the Allard Pierson museum, prof. Lijnzaad, could you apply the existing law to that situation?

L.L.: In general, I would say it is not a question of whether The Netherlands wish to return the objects because the museum has custody of them. The loan agreement for the artefacts is a private law engagement. The main question is who is the party on the other side. We are trying to figure out how to deal with the matter in this concrete case, but we should be aware of the fact that the legal status of Crimea is not very clear at this moment.

At this point the discussion was closed and the chairman invited everyone present to conclude the meeting informally with a glass of wine.