State immunity and cultural objects on loan
van Woudenberg, N.

Citation for published version (APA):
van Woudenberg, N. (2011). State immunity and cultural objects on loan

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: http://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
Chapter 1  Introduction

“Cultural property is that specific form of property that enhances identity, understanding, and appreciation for the culture that produces that particular property.”

1.1  Preface

For centuries, cultural objects have been on the move, transported to foreign countries and safely returned to their countries of origin. So it is safe to say that borrowing and lending cultural objects is not a new phenomenon. What is relatively new, however, is the issue of immunity from seizure of cultural objects.

In the beginning of the 1960s, American-French connections, fuelled by the friendship between Jacqueline Kennedy and the French Minister of Culture, André Malraux, led to some very exciting developments. It had been agreed, after a lot of persuasion by Mrs. Kennedy, that Leonardo da Vinci’s masterpiece, the *Mona Lisa*, would be loaned to the United States. It was a political decision by the French Ministry of Culture, in order to improve the cultural relations with the United States. The curators of the Louvre Museum in Paris were not too keen on lending the painting, because of its fragile condition. On 19 December 1962, the painting arrived by ship in the United States. On 8 January 1963, it was unveiled at the Washington National Gallery, and on 7 February 1963, it went on show at the Metropolitan Museum in New York. This was an unprecedented event and one that had raised a number of issues: how to pack the *Mona Lisa* for travel, in order to minimise vibration which might

---

3 1452-1519.
4 The painting’s official name is *La Gioconda*. It was painted between 1503 and 1506 in Florence.
5 By way of a personal loan to President Kennedy.
6 Information from Jean-Paul Mercier-Baudrier and Orane Proisy, Bureau for the movement of works and inventory, Collections Department, Directorate of Museums of France, Ministry of Culture.
render fragile the layer of paint; how to handle and transport the packing case; how to make sure that maritime law concerning salvage rights relating to property retrieved outside territorial waters would not allow the painting to be removed from the possession of France; how to secure the painting. But there were no concerns about immunity from seizure. Nobody seemed to worry that an individual or a company might think of seizing the painting.

It would not be long, however, before such concerns did arise: only a few years later, the United States was pressed to enact immunity from seizure legislation. Since then, the issue of immunity from seizure for travelling cultural objects has become more and more a concern for States and museums. This is mainly due to an increasing number of legal disputes over the ownership of cultural objects, particularly as a result of claims made by heirs to those objects expropriated by Communist regimes in Eastern Europe as well as Holocaust-related claims.

1.2 What is immunity from seizure?

The term ‘immunity’ stems from the Latin term ‘immunitas’, which means freedom from taxes or freedom from services.

Let us first determine what immunity from seizure is and why one would want to seize cultural objects. In the report *Lending to Europe*, immunity from seizure was described as follows:

“Immunity from seizure involves the legal protection that one State grants to an object on loan in its territory from another State within the context of a temporary exhibition. The purpose is to secure the object against any legal claims by former owners or claimants who dispute the legitimacy of the current ownership. The claimant takes

---

8 The United States was the first country to introduce immunity from seizure legislation in 1965. The catalyst was an imminent exchange between a Soviet museum and the University of Richmond, in which the latter sought to import several cultural objects that had been expropriated by the Soviet Government from art collectors. The Soviet Union asked for a grant of immunity from seizure, as protection against former Soviet citizens claiming title to the cultural objects, a condition of the loan. See *infra*, Ch. 4.

9 *Immunitas* (from *in* and *munus*) means: 1. A freedom from taxes; 2. A freedom from services which other citizens had to discharge. With respect to the first kind of *immunitas* we find that the emperors frequently granted it to separate persons, or to certain classes of persons, or to whole States. When granted to individuals the *immunitas* ceased with their death. The second kind of *immunitas* was granted to all persons who had a valid excuse to be released from such services, and also to other persons as a special favour. See: William Smith, *A Dictionary of Greek and Roman Antiquities*, London 1875, p. 628.

10 *Lending to Europe: Recommendations on collection mobility for European Museums*, a report produced by an independent group of experts, set up by EU Council Resolution 13839/04, April 2005.
advantage of the fact that the object is temporarily in a different country with a different set of laws and requests its seizure. The protection offered by immunity from seizure is granted for a specific period, i.e. the period of exhibition, extended by the number of days necessary to prepare the exhibition.”

The question is whether this description is fully adequate. There can be disputes other than ownership disputes which result in attempts to seize a cultural object. For instance when an individual or a company is of the opinion that the owner of the cultural object on loan owes a debt (not necessarily related to the cultural object) to the claimant, and this claimant has concerns regarding the enforcement of a judgment or arbitration award in the State of residence of the owner. An example is the Noga case in Switzerland, where the Swiss company Noga asserted that it was a creditor of the Russian Federation,\textsuperscript{12} and the Diag Human case in Austria, where the Swiss company Diag Human argued that it was a creditor of the Czech Republic.\textsuperscript{13}

Furthermore, as we shall see, an immunity from seizure guarantee does not necessarily prevent legal proceedings in a foreign court. It should explicitly be kept in mind, that immunity from seizure involves a separate rule of international law, and is therefore different from immunity from jurisdiction.\textsuperscript{14}

“‘Immunity from jurisdiction refers to exemption from the judicial competence of the court or tribunal having power to adjudicate or settle disputes by adjudication. On the other hand, ‘immunity from [measures of constraint, or immunity from seizure]’, relates more specifically to the immunity of States in respect of their property from pre-judgment attachment and arrest, as well as from execution of a judgment rendered.’\textsuperscript{15}

The fact that a national court may have jurisdiction with regard to certain acts of a foreign State does not necessarily mean that measures of constraint can be taken. And the fact that cultural objects are immune from seizure does not necessarily imply that it would be impossible to initiate legal proceedings before the court of a borrowing State, in which the objects in question play a leading role. The presence of the objects (for the purpose of exhibition) in the jurisdiction of the borrowing State might provide a jurisdictional hook

\textsuperscript{11} Ibid., p. 15.
\textsuperscript{12} See infra, Ch. 9.5.1.
\textsuperscript{13} See infra, Ch. 9.3.2.
\textsuperscript{14} I shall elaborate on this in Ch. 3 on State immunity.
enabling the court in the borrowing State to exercise jurisdiction over the acts of a lending State.

I therefore prefer the following description of immunity from seizure for the purpose of this study:

“The legal guarantee that cultural objects on temporary loan from another State will be protected against any form of seizure during the loan period.”

When I refer to seizure, I have to emphasise that I use this term in a comprehensive way, as does the 2004 UN Convention on Jurisdictional Immunities of States and Their Property when referring to the overall term ‘measures of constraint’.

The notion of immunity from seizure for cultural objects on loan has also been discussed among the Member States of the European Union. One of the subgroups of the EU OMC Expert Working Group ‘Mobility of Collections’ was called ‘Immunity from Seizure’.

---

16 See on this issue infra, Ch. 4.4.5 regarding the Malewicz case, a legal dispute which occurred several years ago in the United States. In that case, the notion of the forum arresti was not an issue, as the assets had not been seized. Jurisdiction was based on US legislation (Foreign Sovereign Immunities Act). Forum arresti is a theory whereby the judge’s jurisdiction to order an attachment of assets located within a country is extended to jurisdiction over the merits of a dispute where the debtor does not have any residence within the country. See: Paul de Drée and Fanette André, Attachment of Assets, Lawrence W. Newman (ed.), 2009, Vol. 1; chapter regarding France, to be found at: http://www.salans.com/en-GB/Locations/~media/Assets/Salans/Publications/2009/2009%20of%20Assets%202.ashx. [Last visited 30 March 2011.] Within the European Union, seizure is considered to be an exorbitant, unnatural or excessive measure to create jurisdiction, which measure, in any case, is not recognised in the relationship between European States. In Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the notion of forum arresti is non-existent. For Norway, Switzerland and Iceland, the Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters of 16 September 1988 is applicable. The Dutch Code of Civil Procedure provides for a forum arresti (Article 10 in connection with Article 767), at least for situations in which the EU Council Regulation is not applicable or no international agreement regarding the enforcement of judgments exists between the Kingdom of the Netherlands and the State of residence of the defendant. The jurisdiction over the merits is in that situation solely based on the ground that assets are seized in the Netherlands. Immunity from seizure would preclude this competence. See also: Th.M de Boer, ‘Internationale kunstuitleen, een hachelijke onderneming?’ [International art loans, a perilous undertaking?], Nederlands Juristenblad [Dutch Lawyers Journal], 2006, No. 20, pp. 1097-1107.


18 More about this 2004 UN Convention infra, Ch. 3.

19 See infra, Ch. 6.

20 Open Method of Coordination.

21 See infra, Ch. 6.2.

From the beginning it was clear from the subgroup discussions that every process of attachment, execution, sequestration, forfeiture, requisition, foreclosure, replevin, detinue, etc., should be considered as included in this term.

1.3 Why would immunity from seizure be necessary?

In practice there appear to be two main situations in which someone may wish to seize a

---

23 ‘Attachment’ in legal terminology means a preliminary legal seizure of property to force compliance with a decision which may be obtained in a pending suit. See: http://definitions.uslegal.com/a/attachment/. [Last visited 30 March 2011.]

24 ‘Execution’ can be defined as ‘the seizure and sale of goods belonging to a debtor’, op. cit. n. 22.

25 ‘Sequestration’ can be defined as ‘the taking and keeping of property on the order of the court, especially seizing property from someone who is in contempt of court’, op. cit. n. 22. A ‘writ of sequestration’ is a prejudgment process which orders the seizure or attachment of property to be maintained in the custody of a designated official, under court order and supervision, until the court determines otherwise. See: http://definitions.uslegal.com/w/writ-of-sequestration/. [Last visited 30 March 2011.]

26 ‘Forfeiture’ can be defined as an ‘act of forfeiting a property or a right’. ‘To forfeit’ means ‘taking something away as a punishment’, op. cit. n. 22. It has also been stated that ‘forfeiture’ means that a person is divested of ownership in property. ‘Forfeiture’ occurs when a person gives up money, property, or privileges to compensate for losses resulting from a breach of a legal obligation. In criminal law, it may also refer to the government seizure of property connected to illegal activity. See: http://definitions.uslegal.com/f/forfeiture/. [Last visited 30 March 2011] According to Barbara T. Hoffman, in the United States, civil forfeitures are civil suits instituted by the US Government at the discretion of federal prosecutors pursuant to federal statutes. In every forfeiture case, the government is acting to seize property that is alleged to be the subject of criminal activity. Any person who has a legal interest in the property may file a claim to defend against forfeiture, and a claimant with a meritorious claim will prevail. See: Barbara T. Hoffman, ‘International Art Transactions and the Resolution of Art and Cultural Property Disputes’, in: Barbara T. Hoffman (ed.), Art and Cultural Heritage - Law, Policy, and Practice, Cambridge 2006, pp. 159-177, at p. 163.

27 ‘Requisition’ can be defined as ‘seizing property that belongs to someone else and holding it until profits pay the demand for which it was seized’. See: http://www.webdictionary.co.uk/definition.php?query=requisition. [Last visited 30 March 2011.]

28 ‘To foreclose’ means ‘to take possession of a property because the owner cannot repay money which he has borrowed (using the property as security)’, op. cit. n. 22.

29 An ‘action in replevin’ means in common law countries an action to claim the return of property. An action in replevin can also be defined as ‘an action for the repossession of personal property wrongfully taken or detained by the defendant, whereby the plaintiff gives security for and holds the property until the court decides who owns it’. Black’s Law Dictionary, 3rd pocket ed. 2006, p. 612. ‘Replevin’ means ‘an action brought to obtain possession of goods which have been seized, by paying off a judgment debt’, op. cit. n. 22. ‘Replevin’ has also been described as ‘an action or a writ issued to recover an item of personal property wrongfully taken’ and ‘an antiquated legal remedy in which a court requires a defendant to return specific goods to the plaintiff at the beginning of the action […].’ See: http://definitions.uslegal.com/r/replevin/. [Last visited 30 March 2011.]

29 Barbara T. Hoffman refers to ‘replevin’ as a legal action whereby the owner or person claiming the possession of personal goods may recover such personal goods where they have been wrongfully taken or unlawfully detained. See: op. cit. n. 26, (Hoffman) p. 169.

30 ‘Detinue’ means ‘tort of wrongfully holding goods which belong to somebody else’, op. cit. n. 22.

It has also been described as ‘similar to replevin, in that it seeks a recovery of a specific item of property. However, unlike replevin, which is based upon a wrongful taking of the property, detinue is based upon the wrongful holding or retainer of the property […].’ See: http://definitions.uslegal.com/d/detinue/. [Last visited 30 March 2011.]
cultural object that is temporarily on loan:
- First, if there is an ownership dispute over a cultural object on loan (allegedly stolen or otherwise wrongfully appropriated). A claimant may attempt to file a claim in the borrowing State and to try to seize the object if he believes that his chances are better, legally speaking, in the State where the cultural object is temporarily on loan, than they are in the State where the object is normally located.
- Second (as already noted), if a claimant (an individual or a company) asserts that the owner of the cultural object on loan owes a debt (not necessarily related to the object) to the claimant, and this claimant has doubts regarding the possibility of enforcing a judgment or arbitration award in the State of residence of the owner.

But there may be other situations. For instance, in the context of a criminal investigation, law enforcement officers may wish to seize certain cultural objects in order to preserve evidence. Or it may be the case that a third party, such as a carrier handling the cultural objects in connection with the exhibition, could have a lien on the object until he is paid for services provided.

Basically, the reason for providing cultural objects with immunity from seizure is to ensure that cultural objects on loan will not be subject to seizure while in the borrower’s jurisdiction and thereby to prevent cultural objects on loan from being used as ‘hostages’ in trade and/or ownership disputes. “The effect of immunity from seizure would be to suspend a claimant’s ability to be granted a particular form of relief for a strictly limited period of time, rather than removing it.” Immunity from seizure facilitates the lending of cultural objects for temporary exhibitions and overcomes the reluctance of lenders to send their cultural objects into a foreign jurisdiction where they might be subject to some form of judicial seizure.

31 Norman Palmer, ‘Comments on the DCMS consultation paper on anti-seizure legislation for cultural objects on loan’, 2006, in possession of the author. Palmer uses the phrase “[...] not be subject to judicial seizure or other hindrance from courts [...]”; however, it is in my view not completely correct to say that immunity from seizure can prevent any form of hindrance from the court. There is more than just ‘physical hindrance’. As a matter of fact, if the court has jurisdiction to examine a case and the cultural object may play a leading role in an ownership dispute, then that might be considered by the lender as a form of hindrance as well.
32 Consultation Paper on anti-seizure legislation, United Kingdom Department for Culture, Media and Sport, 8 March 2006, para. 1.16. ‘Relief’ has been defined as a ‘remedy sought by a claimant in a legal action’, Dictionary of Law, Third Edition, Middlesex 2000.
1.4 Approaches to granting immunity from seizure

There are basically two fundamental approaches to granting immunity from seizure: either protection is automatic when established criteria are met, or advance application is required, the application being assessed by a government body. These two approaches have been subdivided into five different types of immunity:

- automatic immunity: no action is required from the applicant and the object is protected by legislation during the term of the loan;

- immunity following application: the borrower or the lender, depending on the legislation in question, requests immunity and the immunity request is granted after an administrative procedure; such a grant is usually effective from the date of publication;

- immunity following application, publication and a period in which no objections are lodged;

- immunity from forfeiture: where domestic law prohibits possession of a type of object, for example, one that was illegally exported from a foreign State or one that is a protected cultural antiquity, but there is an exception for cultural objects on loan to an approved institution;

- sovereign immunity: in the event that the lender is a 'sovereign', there may be immunity with respect to its activities as well as loaned cultural objects.

As the issue of immunity from seizure for travelling cultural objects has only relatively recently become a real concern for States and museums, the relevant legislation in various States is comparatively new. As stated supra in Chapter 1.1, in 1965, the United States was the very first country to enact immunity from seizure legislation for cultural objects. Various Canadian provinces also have anti-seizure statutes. France was the first State in Europe, in 1994. Although the number of States with such legislation is slowly growing, there is as yet

---


35 Examples are: New York, Rhode Island, Texas, British Columbia, and Belgium. See infra, Ch. 4.3.2, Ch. 5.1.2 and Ch. 9.4.

36 Examples are: United States (Federal), Alberta, Manitoba, Ontario, Québec and Germany. See infra, Ch. 4.3.1, Ch. 5.1.2 and Ch. 9.2.2.

37 Examples are: France and Switzerland. See infra, Ch. 4.3.1, Ch. 5.5.2. 

38 For example: Australia. See infra, Ch. 10.2.2.

39 In my view, this too can be seen as a form of automatic immunity.

40 Including Switzerland, Germany, Austria, Belgium and the United Kingdom.
no uniform approach.\textsuperscript{41}

Other States have general legislation with regard to immunity from seizure of property belonging to foreign States, but do not deal specifically with cultural objects as such.\textsuperscript{42} And some States provide ‘immunity from seizure declarations’, in which they state that in accordance with international law and domestic law they will do everything within their power to ensure that the cultural objects loaned by a foreign State or institution will not be encumbered at any time while they are located in their territory.\textsuperscript{43} But whatever approach States have chosen, it goes without saying that the security, legal and otherwise, of international art loans has become a central issue for all of them.

But is providing immunity from seizure required by (customary) international law? Are States providing immunity from seizure because they feel there is a legal obligation to do so, or do they just want to act as pragmatically as possible? In this study I will explore this. I will thereby look at relevant State practice and motivation, jurisprudence of national and international courts, views and discussions in literature, and instruments of international law, all with a view to answering the following questions:

\textit{Does a rule of customary international law exist, to the effect that cultural objects belonging to foreign States are immune from seizure while on temporary loan to another State or foreign museum for an exhibition? If such a rule does not yet exist, is it emerging? Further, if such a rule does exist or is emerging, what is the scope of this rule, and what are its limitations?}

But first of all, certain terms need to be clarified. Earlier in this introductory chapter, I referred to a description of the notion of ‘immunity from seizure’. In Chapters 2 and 3 I shall address the topic of customary international law and State immunity respectively. Two terms need, moreover, still be identified: ‘cultural objects’ and ‘State’. Furthermore, I would like to take a moment to examine the possibility of cultural objects becoming so-called ‘good will ambassadors’ for a lending State and to consider which international instruments promote the mobility of collections, for which the immunity from seizure guarantees may serve as a tool.

\textsuperscript{41} As I will show in the next chapters, in which I discuss various existing immunity from seizure laws.
\textsuperscript{42} For example, the Netherlands. See \textit{infra}, Ch. 8.
\textsuperscript{43} Or words of similar meaning.
1.5 What are cultural objects?

The terms ‘cultural objects’, ‘cultural property’, ‘cultural heritage’, ‘cultural goods’, ‘cultural assets’ or ‘cultural valuables’, ‘works of art’, or ‘artworks’ are often used interchangeably. There is no single, universal definition for any of these terms. In common practice, they generally refer to the same things, but their exact definition and legal regime are to be sought in national legislation or international conventions. Therefore, such definitions and legal regimes may vary from State legislation to State legislation and from treaty to treaty. Generally, the word ‘property’ has a legal connotation (linked to ownership), whereas the word ‘heritage’ stresses conservation and transfer from generation to generation. In the literature, it has been stated that ‘property’ “does not incorporate concepts of duty to preserve and protect”, whereas ‘heritage’ can encompass “the evidence of human life that we are trying to preserve”, such as the “things and traditions which express the way of life and thought of a particular society”. No particular culture-oriented connotation characterises ‘good’, ‘object’, ‘asset’ or ‘valuable’. The question of the definition of cultural objects was also addressed during the drafting of the 1995 Unidroit Convention on Stolen or Illegally Exported Objects. The Secretariat of Unidroit reported: “Stress was laid on the difficulty, if not indeed the impossibility, of framing in abstracto an objective definition of cultural objects since the attribution of the epithet ‘cultural’ to an object is the consequence of a value judgment [...].”

The term ‘cultural property’ was first used in English in an international legal context in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed

---

44 Barbara T. Hoffman states that the entire question of the definition of such terms as ‘art’, ‘cultural heritage’, ‘cultural property’, ‘cultural objects’ etc. for legal and policy purposes is difficult, fluid and highly charged with political and social subtext. See: op. cit. n. 26, (Hoffman) p. 14.
48 International Institute for the Unification of Private Law.
49 Rome, 24 June 1995; 34 ILM 1322.
Conflict.\footnote{The Hague, 14 May 1954; 249 UNTS 240; see also: \textit{op. cit. supra} n. 45 (UNESCO); see also: Hazel Fox, \textit{The Law of State Immunity, Second Edition}, Oxford 2008, pp. 184, 647; see also: Tanya Evelyn George, ‘Using customary international law to identify “fetishistic” claims to cultural property’, \textit{New York University Law Review}, 2005, Vol. 80, No. 4, pp. 1207-1236 at p. 1213. And at p. 1216 George refers to the 1954 Hague Convention as the first modern effort to protect cultural property.} One definition of cultural property which is used the most often in the international field, is the definition in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.\footnote{Paris, 14 November 1970; 823 UNTS 231.} The UNESCO Draft Declaration of Principles relating to cultural objects displaced in connection with the Second World War, of which the UNESCO General Conference took note in October 2009,\footnote{Resolution 35 C/COM CLT/DR.3 REV, dated 19 October 2009.} refers to this definition of cultural property. Also, sometimes national legislation refers to the definition in the 1970 UNESCO Convention (for instance the Swiss immunity from seizure legislation)\footnote{Swiss Federal Act on the International Transfer of Cultural Property (Cultural Property Transfer Act) of 20 June 2003, Article 2(1): “Cultural property is defined as significant property from a religious or universal standpoint for archaeology, pre-history, history, literature, arts or sciences belonging to the categories under Article 1 of the UNESCO Convention of 1970.” The second paragraph states that “cultural heritage is considered the entirety of cultural property belonging to one of the categories under Article 4 of the UNESCO Convention 1970”.}, whereas legislations of other States have their own definitions of cultural goods or property, for instance Belgium\footnote{Article 1412 ter(2), of the Belgian Judicial Code: “Pour l’application de cet article, sont considérés comme des biens culturels les objets qui présentent un intérêt artistique, scientifique, culturel ou historique.”} the Russian Federation,\footnote{The definition of cultural property in Article 7 of the Law on Export and Import of Cultural Property, dated 15 April 1993, contains the following categories: “- Historical valuables associated with, but not limited to, historical events in the life of the nation, society and state development, history of science and techniques, life and activities of outstanding personalities (state, politics and public figures, thinkers, scholars, literature or arts figures); - Items and their fragments obtained from archeological excavations; - Arts valuables including fully handwork paintings and drawings, original works of sculpture, original artistic compositions and designs, cult items with artistic finish (icons etc.), engravings, prints, lithographies, works of decorative and applied arts, and works of traditional folk arts; - Elements or fragments of architectural, historical or arts monuments, and works of monument art; - Old age folios and publications presenting certain interest (either historical, artistic, scientific or literary); - Rare manuscripts and document relics; - Archives (including photography, phonography, cinematography and video); - Unique or rare musical instruments; - Postage stamps or other philatelic materials; - Old age coins, orders, medals, stamps and other numismatic items; - Rare flora/fauna collections and specimens, items presenting interest for such science branches as mineralogy, anatomy and paleontology; - Other movable items, including copies representing historical, artistic, scientific or other cultural value, historical and cultural monuments preserved by the state.”} or Israel.\footnote{Loan of Cultural Objects (Restriction of Jurisdiction) Law of 1 May 2007, Article 2: “cultural property means a property with artistic value, historic value or other cultural value that is of importance to the public in Israel.”}

Article 1 of the 1970 UNESCO Convention states that the term ‘cultural property’ means “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 and which belongs to [eleven specified] categories."\(^{58}\) The 1970 UNESCO Convention does not give a definition of cultural heritage, but lists in Article 4 five categories of property forming part of the cultural heritage of each State.\(^{59}\) The 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage\(^{60}\) defines the term ‘cultural heritage’ for the purpose of that convention.\(^{61}\) Likewise, the Council of Europe primarily uses the notion of ‘heritage’ in its international instruments.

The 1995 Unidroit Convention states in Article 2 that for the purposes of that convention, ‘cultural objects’ are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories

\(^{58}\) "(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance;
(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
(f) objects of ethnological interest;
(g) property of artistic interest, such as:
(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
(ii) original works of statuary art and sculpture in any material;
(iii) original engravings, prints and lithographs;
(iv) original artistic assemblages and montages in any material;
(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
(i) postage, revenue and similar stamps, singly or in collections;
(j) archives, including sound, photographic and cinematographic archives;
(k) articles of furniture more than one hundred years old and old musical instruments."

\(^{59}\) Article 4: "The States Parties to this Convention recognize that for the purpose of the Convention 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 the territory of that State by foreign nationals or stateless persons resident within such territory;
(b) cultural property found within the national territory;
(c) cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property;
(d) cultural property which has been the subject of a freely agreed exchange;
(e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property."

\(^{60}\) Paris, 16 November 1972; 1037 UNTS 157.

\(^{61}\) "For the purpose of this Convention, the following shall be considered as ‘cultural heritage’: - monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
- groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;"
listed in the [annex to the convention].” The listing in that annex is similar to the listing in Article 1 of the 1970 UNESCO Convention.

The 1976 UNESCO Recommendation Concerning the International Exchange of Cultural Property has its own, broad definition of ‘cultural property’ and the European Union has its own definition in its rules and regulations as well. Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State states that for the purposes of the directive, a ‘cultural object’ means an object which is classified among the ‘national treasures possessing artistic, historic or archaeological value’ under national legislation. Additionally, the object must either belong to one of the categories listed in the annex to the directive or form an integral part of public collections listed in the inventories.

---

- sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.”

62 “Cultural property’ shall be taken to mean items which are the expression and testimony of human creation and of the evolution of nature which, in the opinion of the competent bodies in individual States, are, or may be, of historical, artistic, scientific or technical value and interest, including items in the following categories:
(a) zoological, botanical and geological specimens;
(b) archaeological objects;
(c) objects and documentation of ethnological interest;
(d) works of fine art and of the applied arts;
(e) literary, musical, photographic and cinematographic works;
(f) archives and documents[.]

63 Categories referred to in the second indent of Article 1(1) to which objects classified as ‘national treasures’ within the meaning of Article 36 of the Treaty must belong in order to qualify for return under the directive:

A. 1. Archaeological objects more than 100 years old which are the products of:
- land or underwater excavations and finds,
- archaeological sites,
- archaeological collections.
2. Elements forming an integral part of artistic, historical or religious monuments which have been dismembered, more than 100 years old.
3. Pictures and paintings, other than those included in Category 3A or 4, executed entirely by hand on any material and in any medium (which are more than fifty years old and do not belong to their originators).
3A. Water-colours, gouaches and pastels executed entirely by hand on any material (which are more than fifty years old and do not belong to their originators).
4. Mosaics in any material executed entirely by hand, other than those falling in Categories 1 or 2, and drawings in any medium executed entirely by hand on any material (which are more than fifty years old and do not belong to their originators).
5. Original engravings, prints, serigraphs and lithographs with their respective plates and original posters (which are more than fifty years old and do not belong to their originators).
6. Original sculptures or statuary and copies produced by the same process as the original (which are more than fifty years old and do not belong to their originators) other than those in category 1.
7. Photographs, films and negatives thereof (which are more than fifty years old and do not belong to their originators).
8. Incunabula and manuscripts, including maps and musical scores, singly or in collections (which are more than fifty years old and do not belong to their originators).
9. Books more than 100 years old, singly or in collections.
10. Printed maps more than 200 years old.
11. Archives and any elements thereof, of any kind, on any medium, comprising elements more than 50 years old.
12. (a) Collections and specimens from zoological, botanical, mineralogical or anatomical collections;
of museums, archives or libraries' conservation collection or in the inventories of ecclesiastical institutions. Also Council Regulation (EEC) No. 116/2009 of 18 December 2008 on the export of cultural goods has its own 15 categories of cultural objects.

The Washington Conference Principles on Nazi-Confiscated Art uses the term ‘art’ consistently, without explaining what kind of objects and items are qualified as ‘art’. The Vilnius Forum Declaration, which can be seen as a follow-up to the Washington Principles, uses the term ‘cultural assets’, whereas the Terezin Declaration of the Holocaust Era Assets Conference refers to both ‘art’ and ‘cultural property’ as seemingly two different categories. But none of these documents uses a definition.

It is thus fair to say that there is not one single definition of ‘cultural objects’, ‘cultural goods’, ‘cultural property’, or ‘cultural assets’. One has to look into the relevant international instrument or the national legislation concerned to determine what falls within the notion. In this study, I use the term ‘cultural objects’, unless I refer to a specific paragraph or statement where one of the other phrases has been used in that original paragraph or statement. When I use the term ‘cultural objects’ in this study, I use it in a comprehensive manner, which can include each of the categories in the overlapping lists of either the 1970 UNESCO Convention, the 1976 UNESCO Recommendation, Council Directive 93/7/EEC or Council Regulation No 116/2009.

(b) Collections of historical, palaeontological, ethnographic or numismatic interest.

(Collections means collections as defined by the Court of Justice in its Judgment in Case 252/84, as follows: ‘Collectors’ pieces within the meaning of Heading No. 99.05 of the Common Customs Tariff are articles which possess the requisite characteristics for inclusion in a collection, that is to say, articles which are relatively rare, are not normally used for their original purpose, are the subject of special transactions outside the normal trade in similar utility articles and are of high value.)

13. Means of transport more than 75 years old.
14. Any other antique item not included in categories A 1 to A 13, more than 50 years old.

The cultural objects in categories A 1 to A 14 are covered by the directive only if their value corresponds to, or exceeds, the financial thresholds under part B of the listing [not included in this footnote].

Interestingly, Article 1 states that the term ‘cultural goods’ shall refer to the items listed in Annex I. In Annex I, however, the term ‘cultural object’ is used, instead of ‘cultural good’.


And refers to it as such.

Terezin, 30 June 2009, to be found at: http://www.lootedartcommission.com/NPNMG484641. [Last visited 30 March 2011.]

Held from 26 until 30 June 2009 in Prague and Terezin, Czech Republic.
1.6 Cultural objects as good will ambassadors?

In the literature, links have been made between cultural objects and diplomatic relations. Laura Popp, for instance, referred to such a diplomatic link. She stated that transnational loans can symbolise and foster diplomatic relations.\(^{71}\) Andrea Gattini argued that international loans are increasingly understood by the States as an important tool of ‘diplomacy of good-will’.\(^{72}\) And Rodney Zerbe stated: “Art is a ‘good ambassador’ [...] helpful in breaking down parochialism and in fostering international understanding.”\(^{73}\)

The idea of considering cultural objects as ‘good will ambassadors’, however, has originally been used by Erik Jayme. Jayme stated, for instance, that international exhibitions quite often are the first contacts between former ‘enemy’ States. According to Jayme, cultural objects have a mission; they break the ice of misunderstandings and can be the first steps in new bilateral ties. Culture and diplomacy are interlinked.\(^{74}\) He also noted that loaned cultural objects can be regarded as ‘peace envoys’.\(^{75}\) Jayme furthermore stated that in continental Europe, the terms *sauf conduit* or *freies Geleit*, to be found in immunity from seizure legislation of different States and illustrating the return guarantee, are used to underline the idea that cultural objects are seen as ambassadors of good will and therefore enjoy international protection during their voyage across the boundaries of the States.\(^{76}\)

---

Cultural objects of foreign States are in that way of thinking considered as diplomatic envoys, and could consequently fall in that view under the 1961 Vienna Convention on Diplomatic Relations.\textsuperscript{77} The convention itself does not refer to cultural objects,\textsuperscript{78} and although it has been stated that cultural objects of foreign States which are loaned for an international exhibition should be seen as some kind of diplomatic agent, this should not be taken too literally.

Although literature seems to make this rather literal link between cultural objects of foreign States and diplomatic envoys,\textsuperscript{79} States themselves are more hesitant to see it that way. In December 2008, I asked 19 States\textsuperscript{80} whether cultural objects of foreign States could be seen as diplomatic envoy and whether consequently they would fall under the diplomatic immunity of the Vienna Convention on Diplomatic Relations. It turned out that, according to these States, this is a bridge too far. States do agree that cultural objects can promote the mutual understanding between countries. And several States saw a possibility for diplomatic immunity when the objects were located within an embassy or diplomatic residence. However, the States did not see a direct link between cultural objects and protection under the Vienna Convention. I will therefore not elaborate on a possible link between cultural objects of States and the Vienna Convention on Diplomatic Relations.

1.7 What is a State?

This study is focused on cultural objects belonging to foreign States. I already paid attention to the term ‘cultural object’, so now it is time to pay attention to the other relevant term: the notion of ‘State’.

In literature, it has been stated that there are four conditions which must be fulfilled for the

\begin{footnotesize}
\textsuperscript{77} Vienna, 18 April 1961; 500 UNTS 95. Article 29 of the convention states: “The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.”

\textsuperscript{78} However, Article 3(1)(e) of the convention refers to cultural relations: “The functions of a diplomatic mission consist, inter alia in: […] promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.”

\textsuperscript{79} Although Erik Jayme stated that he did not intend to propagate that cultural objects should be protected under Article 29 of the Vienna Convention on Diplomatic Relations. It should merely be seen as a metaphorical characterisation. Interview with the author, 17 January 2011.

\textsuperscript{80} Austria, Australia, Belgium, Canada, China, Czech Republic, Germany, France, Indonesia, Ireland, Israel, Italy, Japan, Poland, Romania, Spain, Switzerland, the United Kingdom, the United States. This has been done through the Royal Netherlands Embassies in those States.
\end{footnotesize}
existence of a State. There must be a people, a territory in which the people is settled, a
government, which should be a sovereign one.81 Also the Montevideo Convention of 1933 on
the Rights and Duties of States provides in Article 1 that a State as a person of international
law should possess a permanent population, a defined territory, a government and the capacity
to enter into relations with other States.82 Only States of North, Middle and South America are
Parties to this convention, but the European Union followed this definition in the Montevideo
Convention in its Badinter Committee.83

So now the conditions for the existence of a State in general are described. But how has a
State been defined in instruments related to jurisdictional immunity of States and their
property?

The 2004 UN Convention on Jurisdictional Immunities of States and Their Property84 states in
Article 2(1)(b) that for the purposes of that convention:

“State means:
(i) the State and its various organs of government;
(ii) constituent units of a federal State or political subdivisions of the State, which
are entitled to perform acts in the exercise of sovereign authority, and are acting
in that capacity;
(iii) agencies or instrumentalities of the State or other entities, to the extent that they
are entitled to perform and are actually performing acts in the exercise of
sovereign authority of the State;
(iv) representatives of the State acting in that capacity[.]”

So, the 2004 UN Convention does not differentiate between the State and State entities to the
extent that they are entitled to perform acts in the exercise of sovereign authority of the State.
Thus, it is not the structure or nature of the entity that matters, but the act it performs.85

The European Convention on State Immunity86 has a different approach. It does not give a

1996, Vol. 1, pp. 120-123.
82 Montevideo, Uruguay, 26 December 1933. To be found at:
83 The Arbitration Commission of the Conference on Yugoslavia (commonly known as Badinter Arbitration
Committee) was a commission set up by the Council of Ministers of the European Economic Community on 27
August 1991 to provide the Conference on Yugoslavia with legal advice.
85 Judith Spiegel, Vreemde Staten voor de Nederlandse rechter [Foreign States in Dutch courts], Amsterdam,
2001, p. 18.
86 Basel, 16 May 1972; ETS 074; 1495 UNTS 181.
definition of a State, but explains what is excluded from that notion:

“For the purposes of the present Convention, the expression ‘Contracting State’ shall not include any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued, even if that entity has been entrusted with public functions.”

The Explanatory Report on the European Convention on State Immunity mentions political subdivisions or national banks and railway administrations as examples of such State entities, which thus are not included in the notion of a State. In my view, it would be possible for State museums to fall under that exclusion as well. Also, constituent States of a Federal State are excluded from the scope of this convention.

The definition of a foreign State under the Foreign Sovereign Immunities Act of the United States of America is rather broad:

“(a) a ‘foreign state’[ … ] includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
(b) an ‘agency or instrumentality of a foreign State’ means any entity -
(1) which is a separate legal person, corporate or otherwise, and
(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
(3) which is neither a citizen of a State of the United States as defined in Section 1332(c) and (e) of this title, nor created under the laws of any third country.”

Where the US immunity legislation uses a rather broad definition of a State, the approach that the United Kingdom follows in its State Immunity Act is much more limited. The Act states that

“references to a State include references to -

87 Article 27(1). As a consequence, proceedings may be instituted against any entity referred to in paragraph 1 before the courts of another Contracting State in the same manner as against a private person; however, the courts may not entertain proceedings in respect of acts performed by the entity in the exercise of sovereign authority (Article 27(2)).
89 Article 28(1): “[…] the constituent States of a Federal State do not enjoy immunity”.
91 The term ‘political subdivisions’ includes all governmental units beneath the central government, including local governments, according to the Act’s legislative history. More about this law in Ch.4.1.2.
93 Article 14(1).
(a) the sovereign or other head of that State in his public capacity;
(b) the government of that State; and
(c) any department of that government,
but not to any entity […] which is distinct from the executive organs of the government
of the State and capable of suing or being sued.”\textsuperscript{94}

Although strictly speaking it does not regard State practice, finally in this subchapter some
words regarding the definition of a State used by the International Law Association (ILA).\textsuperscript{95}
The ILA concluded at the 1994 Buenos Aires Conference\textsuperscript{96} a ‘Final Report on Developments
in the Field of State Immunity and Proposal for a Revised Draft Convention on State
Immunity’. In its proposal, Article 1B states:

“The term ‘foreign State’ includes:
1. The government of the State;
2. Any other State organs;
3. Agencies and instrumentalities of the State not possessing legal personality distinct
from the State.
An agency or instrumentality of a foreign State which possesses legal personality
distinct from the State shall be treated as a foreign State only for acts or omissions
performed in the exercise of sovereign authority, i.e. \textit{jure imperii.”}

What we can actually conclude from these examples, is not only that there is not one single
definition for a State, but also that it can depend on the acts performed by an agency or
instrumentality of a State whether or not it falls under the definition of a State (or whether or
not it enjoys the same immunity as the State). In practice, this can mean that it is up to
national courts to consider, whether in an actual situation an organ or entity can be identified
as falling under the definition of a State.\textsuperscript{97}

\textbf{1.8 International agreements related to international cultural cooperation and
immunity from seizure}\textsuperscript{98}

\textsuperscript{94} According to Article 14(2), such an entity is immune from the jurisdiction of the courts of the United Kingdom
if, and only if the proceedings relate to anything done by it in the exercise of sovereign authority and the
circumstances are such that a State would have been so immune.
\textsuperscript{95} The International Law Association was founded in Brussels in 1873. Its objectives, under its Constitution, are
“the study, clarification and development of international law, both public and private, and the furtherance of
international understanding and respect for international law”. The ILA has consultative status, as an
international non-governmental organisation, with a number of the United Nations specialised agencies.
\textsuperscript{97} This has also been stated by Judith Spiegel, \textit{op. cit.} n. 85 (Spiegel), pp. 19 and 285.
\textsuperscript{98} Separately, in Ch. 3, I shall address the 2004 UN Convention on Jurisdictional Immunities of States and Their
Property.
There are a number of international agreements which are related to, or of influence on, the topic of immunity from seizure of cultural objects belonging to foreign States. These include especially agreements aiming to promote the mobility of collections, agreements with anti-seizure provisions, or agreements aiming to guarantee the safe return of a cultural object to the State of origin. Many States have committed themselves through international legal instruments to supporting the exchange of cultural objects. It has been stated by Andrea Gattini, and I can subscribe to his view, that nowadays there is a well-established and universally shared interest to protect and enhance the international cooperation of museums and other cultural institutions.

*Charter of the United Nations*

The Charter of the United Nations attaches importance to international cultural cooperation as helpful for the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations. The Charter can be considered as *the* fundamental international agreement, as Article 103 of the Charter states that in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail. This gives extra weight to, for instance, the promotion of international cultural cooperation as foreseen in the Charter.

*UNESCO*

The 1950 UNESCO Agreement for the Importation of Educational, Scientific, or Cultural

---

99 I will not go into the Convention Related to International Exhibitions (Paris, 22 November 1928). Although this convention is the only global international agreement which deals with international exhibitions, it does not address questions with regard to seizure or mobility of collections. Furthermore, Article 1 excludes cultural exhibitions from the scope of the convention: “The provisions of the said Convention do not apply to the following: […] 3. Exhibitions of the fine arts; 4. Exhibitions organised by one country in another country on the invitation of the latter.”


102 Article 55: “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. […];

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. […].”
Objects states in its preamble that “the free exchange of ideas and knowledge and, in general, the widest possible dissemination of the diverse forms of self-expression used by civilizations are vitally important both for intellectual progress and international understanding, and consequently for the maintenance of world peace[.]” It goes on by considering that “this interchange is accomplished primarily by means of books, publications and educational, scientific and cultural materials[.]” According to Article III(1),

“the Contracting States undertake to give every possible facility to the importation of […] cultural materials, which are imported exclusively for showing at a public exhibition approved by the competent authorities of the importing country and for subsequent re-exportation.”

Article III(2) may even be read as a provision empowering the host-State to guarantee the return of cultural material on loan to exhibitions, as it states: “Nothing in this article shall prevent the authorities of an importing country from taking such steps as may be necessary to ensure that the materials in question shall be re-exported at the close of their exhibition.” 104

In its preamble, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 105 expresses the notion that “the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations.” 106 With this convention, while promoting the mobility of collections, UNESCO intends to give a clear message that exchange of cultural objects with a doubtful provenance, or which have been illegally acquired or replaced, cannot be tolerated. 107

In 2005, UNESCO Member States adopted the Convention on the Protection and Promotion

103 Florence, 22 November 1950. To be found at: http://portal.unesco.org/en/ev.php-URL_ID=12074&URL_DO=DO_TOPIC&URL_SECTION=201.html. [Last visited 30 March 2011.] This Agreement is more customs related and therefore formally falls outside of the scope of my dissertation. However, I cannot refrain from mentioning it here, as it has an obvious link with the mobility of collections and anti-seizure.


106 Preamble, second paragraph. However, it considers thereafter rightly in the seventh preambular paragraph that “the illicit import, export and transfer of ownership of cultural property is an obstacle to that understanding between nations”.

107 I shall come back to this convention in Ch. 11, where I shall look into some international instruments which at the same time may be at odds with the notion of immunity from seizure.
of the Diversity of Cultural Expressions. The objectives of the convention are, *inter alia*, “to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace;”¹⁰⁹ “to foster interculturality in order to develop cultural interaction in the spirit of building bridges among peoples;”¹¹⁰ and “to strengthen international cooperation and solidarity in a spirit of partnership with a view, in particular, to enhancing the capacities of developing countries in order to protect and promote the diversity of cultural expressions.”¹¹¹ The preamble expresses that “cultural diversity is strengthened by the free flow of ideas, and that it is nurtured by constant exchanges and interaction between cultures”¹¹² and reflects the conviction that “cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value[.]”¹¹³ In my view, that conviction may also provide guidance with regard to cultural objects on loan: the cultural, non-commercial, aspects may never be lost sight of. Article 7 of the convention states that Parties “shall endeavour to create in their territory an environment which encourages individuals and social groups [...] to have access to diverse cultural expressions from within their territory as well as from other countries of the world.”¹¹⁴ Article 12 states that “Parties shall endeavour to strengthen their bilateral, regional and international cooperation for the creation of conditions conducive to the promotion of the diversity of cultural expressions [...].” These articles can in my view also be seen as supporting the international mobility and exchange of cultural objects.

Next to legally binding agreements, also some important politically and morally binding obligations have been developed under the auspices of UNESCO, relevant for the topic of the mobility of collections. The 1966 Declaration of Principles of International Cultural Cooperation¹¹⁵ can serve as an example thereof.¹¹⁶

¹⁰⁹ Article 1(c).
¹¹⁰ Article 1(d).
¹¹¹ Article 1(i).
¹¹² 11th preambular paragraph.
¹¹³ 18th preambular paragraph.
¹¹⁴ Article 7(1)(b).
¹¹⁶ The aims of international cultural cooperation are listed [in Article 4] as follows:
1. To spread knowledge, to stimulate talent and to enrich cultures.
2. To develop peaceful relations and friendship among the peoples and bring about a better understanding of each other's way of life.
The UNESCO Recommendation Concerning the International Exchange of Cultural Property was adopted in 1976.\textsuperscript{117} The recommendation considers that

“the extension and promotion of cultural exchanges directed towards a fuller mutual knowledge of achievements in various fields of culture, will contribute to the enrichment of the cultures involved, with due appreciation of the distinctive character of each and of the value of the cultures of other nations making up the cultural heritage of all mankind”\textsuperscript{118}

and that “the circulation of cultural property [...] is a powerful means of promoting mutual understanding and appreciation among nations[.]”\textsuperscript{119} Article II.2 of the recommendation directs that,

“bearing in mind that all cultural property forms part of the common cultural heritage of mankind and that every State has a responsibility in this respect, not only towards its own nationals but also towards the international community as a whole,”

UNESCO Member States should adopt, within the sphere of their competence, different measures “to develop the circulation of cultural property among cultural institutions in different States in co-operation with regional and local authorities as may be required.” States should also

“give special attention to the problem of covering the risks\textsuperscript{120} to which cultural property is exposed throughout the duration of loans, including the period spent in transport, and should, in particular, study the possibility of introducing government guarantee and compensation systems for the loan of objects of great value, such as those which already exist in certain countries.”\textsuperscript{121}

3. To contribute to the application of the principles set out in the United Nations Declarations that are recalled in the Preamble to this Declaration.
4. To enable everyone to have access to knowledge, to enjoy the arts and literature of all peoples, to share in advances made in science in all parts of the world and in the resulting benefits, and to contribute to the enrichment of cultural life.
5. To raise the level of the spiritual and material life of man in all parts of the world.”\textsuperscript{116}

\textsuperscript{116} Article 5 emphasises that cultural cooperation is a right and a duty for all peoples and all nations, which should share with one another their knowledge and skills. Article 8 states that cultural cooperation shall be carried on for the mutual benefit of all the nations practicing it. Exchanges to which it gives rise shall be arranged in a spirit of broad reciprocity. Article 9 goes on by stating that cultural cooperation shall contribute to the establishment of stable, long-term relations between peoples, which should be subjected as little as possible to the strains which may arise in international life.


\textsuperscript{118} Second preambular paragraph.

\textsuperscript{119} Third preambular paragraph.

\textsuperscript{120} One has to think about risks such as theft, loss, damage, etc., and not so much the risks of ownership claims.

\textsuperscript{121} Paragraph II(9) of the recommendation.
‘Government guarantee’ here does not so much refer to a guarantee with regard to immunity from seizure, but rather regards an indemnity guarantee. However, the text illustrates that art loans are being considered as a cardinal form of modern cultural exchange.\textsuperscript{122} John Henry Merryman argued that the recommendation, while supporting the international exchange of cultural property, opposes international trade. Merryman bases his view on the fourth preambular paragraph, which reads:

> “Considering that the international circulation of cultural property is still largely dependent on the activities of self-seeking parties and so tends to lead to speculation which causes the price of such property to rise, making it inaccessible to poorer countries and institutions while at the same time encouraging the spread of illicit trading.”

The recommendation rejects the market and relies exclusively on inter-institutional (government to government and museum to museum) exchanges as the medium through which to promote enrichment of cultures and mutual understanding and appreciation among nations, according to Merryman.\textsuperscript{123} And Merryman has a point here, as during the discussions resulting in the recommendation the air was pregnant with aversion against the market. The Report of the Special Committee of Governmental Experts\textsuperscript{124} stated:

> “The Draft Recommendation […] was designed to extend both the concept and the practice of international exchanges of cultural property, which would be certain to have good effects on international co-operation and understanding while, at the same time, removing the free circulation of such objects from the harmful pressures of the international market and encouraging cultural institutions to display, for the benefit of all, the artistic and cultural wealth which was often unused.”\textsuperscript{125}

In 1978 a separate UNESCO Recommendation for the Protection of Movable Property was adopted.\textsuperscript{126} The preamble\textsuperscript{127} notes

> “the great interest in cultural property now finding expression throughout the world in

\begin{itemize}
\item \textsuperscript{122} This has been stated as well by Norman Palmer in ‘Adrift on a sea of troubles: cross-border art loans and the specter of ulterior title’, \textit{Vanderbilt Journal of Transnational Law}, October 2005, Vol. 38, Issue 4, pp. 947-996.
\item \textsuperscript{124} Doc. 19 C/25, Annex II (dated 6 August 1976). The Committee was tasked to examine, finalise and approve the draft recommendation.
\item \textsuperscript{125} Para. 5 of the Report.
\item \textsuperscript{127} Preambular paragraphs 1 and 2.
\end{itemize}
and considers “that this is a very positive development which should be encouraged, in particular by applying the measures advocated in the [aforementioned 1976 Recommendation]”. But just as the 1976 Recommendation, in addressing possible risks during transport and temporary exhibitions, the focus is more on the indemnity guarantee than the guarantee with regard to immunity from seizure.

**Unidroit**

Just as the 1970 UNESCO Convention, the Parties to the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects\(^{128}\) are “convinced of the fundamental importance of the protection of cultural heritage and of cultural exchanges for promoting understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilisation[.].”\(^{129}\) The convention intends, *inter alia*, to facilitate the restitution and return of cultural objects.\(^{130}\)

**Council of Europe**

The 1954 European Cultural Convention of the Council of Europe\(^{131}\) was designed to foster among the nationals of all members of the Council of Europe, and of such other European States as may accede thereto, the study of the languages, history and civilisation of the others and of the civilisation which is common to them all. Article 1 states that “[e]ach Contracting Party shall take appropriate measures to safeguard and encourage the development of its national contribution to the common cultural heritage of Europe.” Article 4 obliges the Parties, “insofar as may be possible, [to] facilitate the movement and exchange of persons as well as of objects of cultural value [...].” Article 5 obliges Parties to “regard the objects of European cultural value placed under [their] control as integral parts of the common cultural heritage of Europe [and to] take appropriate measures to safeguard them as well as to ensure reasonable access thereto.”

---

\(^{128}\) Op. cit. n. 49.

\(^{129}\) Second preambular paragraph.

\(^{130}\) Fifth preambular paragraph. In Chapter 11 I shall come back to this convention, to see how this restitution and return provision relates to the immunity from seizure legislation that certain States have enacted. After all, an immunity from seizure guarantee may secure the return of the cultural object, but may on the other hand also prevent the return to requesting State under Unidroit.

\(^{131}\) Paris, 19 December 1954; ETS No. 018; 218 UNTS 139.
The European Convention of 1969 on the Protection of Archaeological Heritage of the Council of Europe\textsuperscript{132} stated in Article 5 that

\begin{quote}
“With a view to the scientific, cultural and educational aims of this Convention, each Contracting Party undertakes to:
\begin{itemize}
\item[a.] facilitate the circulation of archaeological objects for scientific, cultural and educational purposes;
\item[b.] encourage exchanges of information on:
  \begin{itemize}
  \item[i.] archaeological objects,
  \item[ii.] authorised and illicit excavations
\end{itemize}
between scientific institutions, museums and the competent national departments.”
\end{itemize}
\end{quote}

The European Convention of 1992 on the Protection of Archaeological Heritage of the Council of Europe\textsuperscript{133} replaced the 1969 Convention. It states in Article 8, basically as successor article of Article 5 of the 1969 Convention:

\begin{quote}
“Each Party undertakes:
\begin{itemize}
\item[i.] to facilitate the national and international exchange of elements of the archaeological heritage for professional scientific purposes while taking appropriate steps to ensure that such circulation in no way prejudices the cultural and scientific value of those elements;
\item[ii.] to promote the pooling of information on archaeological research and excavations in progress and to contribute to the organisation of international research programmes.”
\end{itemize}
\end{quote}

Article 9 regards the promotion of public awareness. It states, among other things, that each Party undertakes to “encourage the display to the public of suitable selections of archaeological objects.”

\textit{European Union}

The European Union is very active with regard to the mobility of collections, as we shall see in Chapter 6, which concerns the actions within the European Union.

The Treaty establishing the European Community and its successor, the Treaty on the Functioning of the European Union, has a separate title on culture.\textsuperscript{134} Article 167 of the Treaty on the Functioning of the European Union\textsuperscript{135} states in the first two (of the five) paragraphs:

\textsuperscript{132} London, 6 May 1969; ETS No. 066; 788 UNTS 227.
\textsuperscript{133} Valetta, 16 January 1992; ETS No. 143; 1966 UNTS 305.
\textsuperscript{134} Title XII and Title XIII respectively.
\textsuperscript{135} Formerly Article 151 of the Treaty Establishing the European Community.
“1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.
2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:
   - improvement of the knowledge and dissemination of the culture and history of the European peoples,
   - conservation and safeguarding of cultural heritage of European significance,
   - non-commercial cultural exchanges,
   - artistic and literary creation, including in the audiovisual sector.”

The third paragraph exceeds the geographical borders of the Union, stating that “[t]he Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.”

Thus, it can be concluded that in different fora international agreements and recommendations exist which promote the exchange and accessibility of cultural objects. The promotion and enhancement of collection mobility is one of the ways to implement the aims and provisions of these instruments. Immunity from seizure plays a role in this as well. After all, as we saw, immunity from seizure guarantees may be a means to overcome the reluctance of lenders to send their cultural objects temporarily to another State, thereby contributing to a better collection mobility.

1.9 Method and structure of this study

As the 2004 UN Convention on Jurisdictional Immunities of States and Their Property has not yet entered into force, currently no legally binding treaty exists with provisions relating to State immunity and cultural objects on loan. It is thus fair to state, that currently there is no international rule of treaty law, immunising cultural objects on loan and belonging to foreign States from seizure.

As it occurred to me that it was not clear whether States actually knew what the current state

---

136 Eleven States are currently party to it. Thirty ratifications or accessions are needed in order for the convention to enter into force.
137 With the exception of the Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations, which convention has a rule on immunity from seizure for cultural objects on loan, as we shall see infra, in Ch. 11.1.5.
of affairs was with regard to the topic of State immunity and cultural objects on loan, I decided to investigate whether, in the absence of an existing rule of treaty law, another rule of international law would already be applicable: a rule of customary international law. After all, that rule would be binding upon States, without necessarily becoming a party to a convention. That led to my central research questions, as already formulated *supra* in Chapter 1.4:

*Does a rule of customary international law exist, to the effect that cultural objects belonging to foreign States are immune from seizure while on temporary loan to another State or foreign museum for an exhibition? If such a rule does not yet exist, is it emerging? Further, if such a rule does exist or is emerging, what is the scope of this rule, and what are its limitations?*

When researching whether such a rule of customary international law already exists or is emerging, the practice of States was the main focus of my investigations. I thereby also tried to find out whether that State practice was based on *opinio juris*, on pragmatism, or maybe on a combination of both.

I consulted a wide range of sources for this study. Not only did I examine the relevant treaty law and literature, I also assessed the available relevant case law. Furthermore, I looked into national legislation on State immunity and immunity for cultural objects, enacted by various States, and tried to discover what brought States to enact specific legislation immunising cultural objects on loan from seizure.\(^{138}\) Also, I looked into the way in which States raised their voices in the deliberations of the International Law Commission while discussing the topic of immunity of States and their property. Regarding those Member States of the European Union which took part in the subgroup ‘Immunity from Seizure’\(^{139}\) of the EU OMC Expert Working Group ‘Mobility of Collections’,\(^{140}\) I followed their oral observations during the meetings of the subgroup.

I utilised two questionnaires. One concerned the enquiry of the aforementioned subgroup ‘Immunity from Seizure’. The aim of that enquiry was to get insight into the immunity from

---

\(^{138}\) Hazel Fox stated that of the three main forms of State practice, acts of the executive, legislation and decisions of national courts, the last two have provided the main source of the law. According to Fox, there is little alternative but to accept that law-making on State immunity in municipal systems provides sound evidence of international custom relating to State immunity. See: Hazel Fox, *The Law of State Immunity*, Oxford 2002, pp. 74, 100.

\(^{139}\) Austria, Belgium, Finland, France, Germany, Greece, Hungary, the Netherlands, Poland, Romania, Portugal, Spain, and the United Kingdom.
seizure regulations and policy of the EU Member States. All the 27 Member States answered this questionnaire in the spring of 2009.

However, before that enquiry had been sent out, I had sent an enquiry with a similar purpose\textsuperscript{141} to Austria, Australia, Belgium, Canada, China, the Czech Republic, France, Germany, Ireland, Israel, Italy, Japan, Poland, Romania, the Russian Federation, Spain, Switzerland, the United Kingdom, and the United States.\textsuperscript{142} These States were chosen because it was known to me that they had specific immunity from seizure legislation for cultural objects on loan, or because they had been vocal in this matter to a certain extent. Later, questions to Brazil, Colombia, Egypt, Guatemala, the Islamic Republic of Iran, Morocco, Mexico, Nigeria, Senegal, South Africa, Venezuela and Zambia followed in order to try to follow a somewhat more balanced geographical approach.\textsuperscript{143}

I visited Belgium, Germany, Austria, Switzerland, Italy, France, the United Kingdom, Hungary, Israel, the Russian Federation and the United States of America in order to investigate and discuss the issue in depth ‘on the spot’ and to receive more information regarding the specific situation in that State and the reasons for certain State practice. During those visits I spoke with the people most involved in the actual lending and borrowing of cultural objects and governmental officials who have competence in the matter of immunity for cultural objects on loan.\textsuperscript{144}

Finally, I discussed the relevant issues with highly valued academics and lawyers to analyse the findings. All that led to the conclusions, which are to be found in Chapter 12.

The present study will consist of the following chapters after this introductory Chapter 1.

As the search for a rule of customary international law goes as a connecting thread through my study, a chapter on the formation of customary international law can not be missed. Custom as a source of international law, State practice and \textit{opinio juris}, and relevant judgments of, \textit{inter alia}, the International Court of Justice will therefore be addressed in

\textsuperscript{140} More about this \textit{infra}, in Ch. 6.
\textsuperscript{141} And to compare the situation in that specific State with the approach followed in the Netherlands.
\textsuperscript{142} Thus, there was a certain overlap of States.
\textsuperscript{143} The enquiry and the separate questions had been forwarded with the kind assistance of the Royal Netherlands Embassies in those States.
Chapter 2.

Chapter 3 is called ‘State immunity and cultural objects’. In that chapter, first the development of immunity from jurisdiction is described: from absolute to restrictive immunity. This is followed by a general evaluation of the developments regarding the doctrine of immunity from measures of constraint. Thereafter the chapter addresses the 2004 UN Convention on Jurisdictional Immunities of States and Their Property. After a general introduction, and having addressed the terms ‘commercial transaction’ and ‘State enterprise’, I continue with addressing the way the 2004 UN Convention deals with immunity from measures of constraint. I specifically pay attention to the special place cultural objects on loan have in that part of the convention. After the 2004 UN Convention, I shall briefly discuss the European Convention on State Immunity, the Inter-American draft Convention on Jurisdictional Immunity of States, the Final Report of the Asian-African Legal Consultative Committee on Immunity of States, the Draft Convention on State Immunity of the International Law Association and the Resolutions on State immunity of the Institute of International Law.

Chapter 4 regards the situation in the United States of America. As stated supra, the United States was the very first State ever introducing immunity from seizure legislation for cultural objects. Moreover, in 1976 the United States enacted its State immunity legislation. The United States is also the State where most case law can be found. All this made it logical to take the United States as the first State for my assessment. One may notice, that not all the case law in Chapter 4 relates to immunity from seizure, but to immunity from jurisdiction as well. Although I am aware of the fact, that this formally exceeds my central research questions, the reason why I decided to address this case law is twofold. First of all, it will help to understand the US legislation on State immunity and its limitations. Secondly, as I already stated in my foreword, several States and State institutions have been (or are being) confronted with the situation where their cultural objects (although not on loan abroad) are the involuntary subject matter of legal disputes before foreign (generally US) courts. I thus thought that it was appropriate to pay some attention to these related cases as well.

I continue in Chapter 5 with the other parts of the American continents and address the

144 Furthermore, I had contact with State officials from Finland and Canada through email.
situation with regard to immunity for cultural objects on loan in Canada and in Central and South America.

In Chapter 6 I turn to the European Union; not to assess the situation in different EU Member States, but to see how the European Union as an institution deals with the doctrine of immunity from seizure for cultural objects on loan. As we shall see, the discussion in regard to immunity from seizure forms part of the broader notion of mobility of collections.

Thereafter, I will address in Chapter 7 the situation in the United Kingdom. In 1978, the United Kingdom enacted its State Immunity Act, and as from 31 December 2007, it has its own immunity from seizure legislation for cultural objects on loan. The fact that the United Kingdom has both State immunity legislation and specific immunity from seizure legislation concerning cultural objects, and the fact that within the United Kingdom intense discussions occurred with regard to this specific legislation, led me to believe that it deserved a stand-alone chapter.

That chapter is followed by Chapter 8, where I will address the situation in the Netherlands. As we shall see, the Netherlands has no specific immunity legislation for cultural objects, but is still able to provide legal protection on the basis of its more general legislation. In the course of this study, I discovered that it was not common knowledge that the Netherlands follows this specific path: no specific legislation, but general immunity legislation which includes in the view of the Dutch Government immunity of cultural objects belonging to foreign States and on loan from abroad. I considered it therefore necessary to address the situation in the Netherlands in a separate chapter.

Chapter 9 regards the situation in various other European States. I will start with those States which enacted specific immunity legislation for cultural objects: France, Germany, Austria, Belgium, Switzerland, Liechtenstein, Finland and the Czech Republic. Then I turn to those European States which are in the process of enacting legislation, followed by a short look at other European States which expressed an opinion on the possible development of specific immunity from seizure legislation in regard to cultural objects on loan. A brief description of the situation in the Russian Federation could not be omitted in this chapter, as that State is very involved in especially the lending of cultural objects.
Chapter 10 is the last country related chapter, where I will examine the situation in Asia, Australia and on the African continent.

In many States discussions have taken place on whether immunity from seizure legislation would not be at odds with obligations under international law, such as return obligations under different conventions, or human rights obligations as the right to access to court and the right to peaceful enjoyment of one’s possessions. I shall briefly address this question in Chapter 11. The European Court of Human Rights has several times examined whether State immunity could infringe upon these obligations and rights. The most relevant judgments are referred to.

All this will bring me to the concluding chapter, Chapter 12, where finally the question will be answered whether or not a rule of customary international law exists or is emerging, to the effect that cultural objects belonging to foreign States are immune from seizure while on temporary loan to another State or foreign museum for an exhibition; and if such a rule does exist or is emerging, what the limitations to this rule are.