State immunity and cultural objects on loan
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Chapter 3  State immunity and cultural objects

“If one perceives States or State entities as the owner of property situated abroad, such as a travelling artwork, it is logical to resort to the general principles of sovereign immunity.”

3.1 Immunity from jurisdiction; from absolute to restrictive immunity

The International Law Commission has pointed out that the doctrine of State immunity “is the result of an interplay of two fundamental principles of international law: the principle of territoriality and the principle of State personality, both being aspects of State sovereignty.”

It has been argued that the topic of State immunity is of importance to States broadly from two opposing points of view:

“States as territorial sovereigns for the exercise of their sovereign authority over the entirety of their territorial units, and States as foreign sovereigns being pleaded or pursued in litigation or suits by individual or corporate plaintiffs before the judicial or administrative authorities of another State exercising territorial jurisdiction over cases involving foreign States.”

Until the second half of the nineteenth century, it was believed that sovereign immunity from the jurisdiction of foreign courts was an absolute one, and therefore left no room for exception. The principle known as par in parem non habet imperium derives from the

1 I would like to thank Hazel Fox, Barrister at Grays Inn and Bencher of Lincoln’s Inn in London, United Kingdom, Gerhard Hafner and August Reinisch, both University of Vienna, Austria and Matthias Weller, University of Heidelberg, Germany for their thoughts and time and for the useful discussions I could have with them on this issue.


3 Jurisdiction means the exercise of authority and power. The Institute of International Law defined ‘jurisdiction’ in its ‘Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes’ (Napoli Session 2009) as: “the criminal, civil and administrative jurisdiction of national courts of one State as it relates to the immunity of another State or its agents conferred by treaties or customary international law”. To be found at: http://www.idi-iil.org/idiE/resolutionsE/2009_naples_01_en.pdf. [Last visited 3 March 2011.]


sovereign equality of States and it was thought to be a consequence of this equality that one State could not exercise jurisdiction over another State.7 “Inherent in the recognition of the foreign State’s independence is an acknowledgement that it alone is responsible for the determination of its policy and conduct of its public administration, and that courts should refrain from hampering the foreign State in the achievement of these purposes”, as Hazel Fox stated in 2002.8 She argued as well that the municipal court’s inability to enforce its judgments against a foreign State remains as well an important reason for the retention of immunity, as demonstrated by the fact that a separate immunity from execution is afforded to States and largely remains an absolute bar on enforcement of judgments against State property.9 In 2008, she followed a somewhat more nuanced approach, as we shall see in the next subchapter, making a distinction between State property in use for a sovereign or a commercial purpose.

The Special Rapporteur of the International Law Commission10 argued in his eighth report that it is significant to note that, “even at the very beginning, the rule of State immunity was never expressed in completely absolute terms. The doctrine of ‘absolute immunity’ has never found general acceptance.” From the start, the rule of State immunity was applied “subject to limitations, qualifications and exceptions”, the Special Rapporteur stated.11

I would hesitate to say that the doctrine of ‘absolute immunity’ has never found general acceptance. Before the end of the nineteenth century, there were just very few States and courts which followed a more restricted approach. As early as 1879, for instance, a Belgian court denied immunity in proceedings arising out of a contract for the sale of guano, observing that there can no longer be any question of sovereignty when a foreign government “takes actions and enters into contracts which, always and everywhere, have been considered

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9 Ibid., p. 56.
10 In 1947, the International Law Commission was established by the General Assembly to promote the progressive development of international law and its codification.
to be commercial contracts, subject to the jurisdiction of commercial courts”.

Hazel Fox brings into memory that Hersch Lauterpacht launched a strong attack on the absolute rule in 1952: “He challenged its justification by reference to the independence and equality of States; such a rule should prohibit all proceedings against a foreign State, yet many States [...] exercised jurisdiction against foreign States in respect of acts of a private law or jure gestionis character.” And indeed, as governments became increasingly engaged in commercial activities, the view emerged that immunity of States engaged in such activities should not be supported by international law. After all, it deprived private parties that dealt with a State of their effective remedies and it gave States an unfair advantage in competition with private commercial enterprises.

The doctrine of absolute immunity has thus gradually given way to a doctrine of restrictive immunity, under which a State is immune from the exercise of judicial jurisdiction by another State in respect of claims arising out of governmental activities (acts jure imperii); it is not immune, however, from the exercise of such jurisdiction in respect of claims arising out of activities of a kind carried on by private persons (acts jure gestionis). Hazel Fox stated in 2002 that “[t]here has been a steady trend, with the current main exception of the People’s Republic of China, towards all States accepting a restrictive doctrine.” Meanwhile, China signed the 2004 Convention on Jurisdictional Immunities of States and their Property, where a more restrictive approach is followed.

Several ‘common law’ States, for instance the United States of America and the United Kingdom, codified the restrictive theory in their national legislation.

But how to determine whether an activity should be considered as an act jure imperii or as an act jure gestionis? Should just the nature of the activity be considered, or also the purpose of the activity be taken into account? The purpose criterion has been largely rejected in judicial practice and criticised by international lawyers because all acts performed by a State could be

13 Op. cit. n. 8 (Fox), p. 36.
14 Ibid., n. 8 (Fox), p. 2.
15 More about the convention infra, Ch. 3.3.
16 I shall come back to that in the country related chapters.
assumed to have some public purpose. The question whether and when an activity should be considered as *jure imperii* or *jure gestionis* must, in the view of the countries which adhere to the doctrine of restrictive immunity, first and foremost be answered by assessing the nature of the activity, as opposed to its purpose. According to the nature test, the foreign State is not entitled to immunity if the act is of such a nature that a private person could perform it. But the nature test gives also rise to difficulties. The nature test would not, for example, protect a developing State that sought to boost its economy (a sovereign act) through normal commercial contracts with foreign investors.

The purpose criterion has not been completely put aside, as it is merely impossible to see the nature of an activity completely separated from its purpose. Moreover, during the negotiations of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property, several developing countries wanted to stick to the purpose criterion, and as a result of that, the applicable provision with regard to ‘commercial acts’ in the 2004 UN Convention is somewhat ambiguous, as we shall see.

### 3.2 Immunity from measures of constraint

Immunity from jurisdiction is essentially different from immunity from measures of constraint. The ILC pointed out that ‘“[i]mmunity 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]’ 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 the judgment rendered.”

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17 See also Dutch jurisprudence: *Russian Federation v. Pied-Rich B.V.*, Supreme Court 28 May 1993, *NJ* 1994, 329, where the Dutch Supreme Court clearly spoke out in favour of the nature criterion (see para. 3.2). The ruling of the Supreme Court was preceded by a conclusion of Attorney General L. Strikwerda. He pointed in para. 11 of his conclusion at the lack of distinctiveness of the purpose criterion, as the behaviour of States is almost always, either directly or indirectly, aimed at defending the public interest.
18 However, as we will see infra, according to the 2004 UN Convention the purpose should also be taken into account if the parties have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determine the non-commercial character of a contract or transaction.
The principle of immunity from measures of constraint was deemed to flow “from the same principle as immunity from jurisdiction, namely par in parem imperium non habet, and [was] thus founded on the principles of the independence and sovereign equality of States.”22 The restrictive doctrine in respect of immunity from jurisdiction also led to a more critical approach towards immunity from measures of constraint.23

As I just stated, immunity from measures of constraint involves, however, a separate rule of international law, and should therefore not be confused with immunity from jurisdiction. The fact that a national court can have jurisdiction with regard to acts jure gestionis of a foreign State does not necessarily imply that measures of constraint can be taken.24 States are still relatively reluctant to accept the restrictive concept of immunity also for measures of constraint. The reason for this is their more drastic effect on State sovereignty than the mere adjudication.25 Fox stated that the “[e]nforcement against State property constitutes a greater interference with a State’s freedom to manage its own affairs and to pursue its public purposes than does the pronouncement of a judgment or order by a national court of another State.”26 “Immunity in respect of property owned, possessed, or used by States […] is all the more meaningful for States in view of the growing practice of private litigants, including multinational corporations, to seek relief through attachment of property owned, possessed or used by developing countries […]”, thus the ILC.27

Although the notion of immunity from measures of constraint is still much more firmly established than the notion of immunity from jurisdiction, there seems to be a trend also in

24 The Netherlands stated in its Explanatory Memorandum to the amendment of the Court Bailiffs Act, dated 5 April 1993 (Kamerstukken [Parliamentary Papers] 23081, No. 3): “Both in treaties and in customary international law, immunity from execution is more readily accepted than immunity from jurisdiction. Although the matter is not absolutely clear, and opinions differ, it can be said that, in accordance with both customary and codified international law, it should be assumed that the property of a foreign State enjoys immunity from execution.”
25 See Ian Brownlie, Principles of Public International Law, Sixth Edition, Oxford 2003, p. 338; see also: Eva Wiesinger, State Immunity From Enforcement Measures, Univ. of Vienna, July 2006, p. 23. To be found at: http://forschungsnachrichten.univie.ac.at/fileadmin/user_upload/int_beziehungen/internetpubl/wiesinger.pdf. [Last visited 6 March 2011.] The United States argued in its ‘Second Statement of Interest of the United States’ (dated 3 March 2006) in the case Jenny Rubin, et al. v. The Islamic Republic of Iran, et al. (see infra, Ch. 4.2.2): “judicial incursion on a foreign sovereign’s property is often likely to be far more problematic from a foreign relations point of view than simply requiring the sovereign to appear to defend a lawsuit on the merits.”
respect of the immunity from measures of constraint whereby absolute immunity is changing towards a more restrictive approach. Hazel Fox stated in 2008 that “immunity from enforcement continues to be largely absolute save in respect of property which is in use by a foreign State or intended for use for commercial purposes.” Indeed it can be stated that in many States, there is an upward trend in favour of allowing measures of constraint in respect of property in use or intended for use in commercial transactions or for commercial purposes.

As we saw, the purpose criterion has been largely rejected in judicial practice as a means to determine whether an act should be considered as *jure gestionis* or *jure imperii*. It is merely the nature of the act which determines whether a State is entitled to immunity from jurisdiction. Does the same criterion apply to immunity from measures of constraint? Should the nature or purpose be taken into account? And should it be the nature or purpose of the act, or of the property?

Matthias Weller argued:

“Under the modern restrictive and no longer absolute approach towards sovereign immunity, a State enjoys immunity only with respect to acts de iure imperii, not with respect to acts de iure gestionis. As far as jurisdictional immunity is concerned, the characterization depends on the nature of the act in question rather than the purpose the State claiming immunity pursues. [...] Sovereign immunity, however, also includes immunity from enforcement measures, and on this level it is the purpose rather than the nature of the act in question that determines the characterization of the act or the use of property as de iure imperii vel gestionis. As a rule of customary international law, the forum State must not levy any kind of enforcement measures including interim protective measures, seizures, attachments, and the like against the foreign State with respect to property situated in the forum State and serving purposes de iure imperii of the foreign State invoking immunity.”

A bit further, he stated:

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28 Meant are here measures of constraint, as she stated: “Immunity from execution also concerns immunity from the imposition without its consent of forcible measures against the property of a foreign State by the judicial or administrative authorities of another State. Such measures may be directed against the property of the State or its agencies by way of orders such as arrest, attachment, Mareva order, *saisie-conservatoire*, or *saisie-arrêt.*” *Op. cit.* n. 23 (Fox), pp. 624-625. Also, she speaks about ‘immunity from execution’ where she refers to both Articles 18 and 19 of the UN Convention. *Op. cit.* n. 23 (Fox), p. 386. Judith Spiegel stated: “[…] moreover, execution also includes the conservatory measures which can be taken before having received an enforceable award.” [Bovendien wordt onder executie ook verstaan de bewarende maatregelen die een procespartij kan nemen alvorens een vonnis in de bodemprocedure verkregen te hebben.] See: Judith Spiegel, *Vreemde staten voor de Nederlandse rechter [Foreign States in Dutch courts]*, Amsterdam 2001, p. 103.


“The assumption of immunity for artworks on loan from foreign States [...] is based on the condition that the purpose of the loan is one de iure imperii”[31] and “[...] one may consider that loaned artwork is in the forum State for the purpose of cultural exchange between States – a purpose de iure imperii, protected from seizure by customary international law”. 32

In the end, he comes to the conclusion that immunity for cultural objects “is grounded in the generally acknowledged principle in international law that sovereign immunity exists in enforcement measures where property is used by a State for purposes de iure imperii.”33

The above cited lines give the impression that there may be some kind of shift from the nature test to the purpose test in assessing the relevant act. After all, Weller states that as far as jurisdictional immunity is concerned, the characterisation depends on the nature of the act in question rather than the purpose the State claiming immunity pursues, but as far as immunity from measures of constraint is concerned, it is the purpose rather than the nature of the act in question that determines the characterisation of the act or the use of property.34

Hazel Fox seems to endorse this opinion as well. She stated

“[...] it is the purpose and not the nature of the transaction which determines whether the State property is or is not immune. That purpose which allows State property to satisfy a claim is described as its use or intended use for other than government non-commercial purposes.”35

So, both Weller and Fox assert that in determining immunity from jurisdiction the nature test is determinative, whereas in the determination of immunity from measures of constraint it is the purpose test which is applicable. But according to them, it is the purpose of the act that

31 Ibid., p. 1009.
32 Ibid., p. 1012.
33 Ibid., pp. 1023-1024.
34 Weller confirms this view in an interview with the author on 17 January 2011. In case a loan serves the cultural exchange and mutual understanding between States, or intends to promote the cultural heritage of a State, then the loan can be considered as having a public purpose, and consequently the cultural objects would be immune from measures of constraint. However, in case the loan is led by financial and commercial aspects (with the aim of making profit), then the purpose of the loan is one jure gestionis, and consequently, the cultural objects involved would not be entitled to immunity from measures of constraint, according to Weller. Weller is under the impression that States are nowadays increasingly lending cultural objects with commercial aims. When Weller refers in his articles to a possible rule of customary international law for cultural objects on loan and belonging to foreign States, he only refers to those loans which serve a public purpose, as explained by him in the interview.
35 Fox continues by referring to Article 21 of the 2004 UN Convention, to which I shall come infra, stating that this article identified five types of State property which by the purpose of the use – diplomatic, military, monetary, cultural, and for display on exhibition – are declared as such a government non-commercial purpose. Op. cit. n. 23 (Fox), p. 616.
counts, not the purpose of the property.\textsuperscript{36} I do not completely follow that line. I agree that the purpose test is applicable. However, in my view, in determining whether immunity from measures of constraint is justified, it is the purpose of the property that should be in the focus of the attention, not first and foremost that of the act concerned. This view is supported by Judith Spiegel:

“In the case of immunity from jurisdiction, it is the foreign State or an entity of that State that performs acts \textit{iure imperii} that is entitled to a right to immunity. Immunity from execution, however, is not directly related to the nature of the transaction at stake. For immunity from execution it is more the qualification, or better: the purpose of certain goods that counts. In case the purpose is the public service of a foreign State, immunity from execution could apply with regard to these goods, rather than with regard to the foreign State or entity acting \textit{iure imperii}. […] It is therefore not to say, that the fact that an act \textit{iure gestionis} is at stake makes that also all objects of the foreign State should be labelled as intended for commercial purposes.”\textsuperscript{37}

And: “The nature or characterization of the objects determines the possibility of measures of constraint, not the nature of the undertaking or the acts involved in that undertaking.”\textsuperscript{38} So, Judith Spiegel points out that not the foreign State enjoys immunity from measures of constraint, but the objects intended for the public service of that State.\textsuperscript{39}

August Reinisch expressed the same opinion, and has stated that “contrary to the requirements of immunity from jurisdiction, the distinctive criterion [for immunity from measures of constraint] is not the nature of the act in issue but rather the purpose of the property to be subjected to enforcement measures.”\textsuperscript{40} He went on by saying that the view, “confirming a basic distinction between property serving sovereign, on the one hand, and non-sovereign purposes, on the other hand, is reflected in many […] court decisions in European countries.”\textsuperscript{41}

\textsuperscript{36} But they do not stand alone. The Berlin Court of Appeals followed the same approach, as we shall see infra, Ch. 9.2.3. Also the United States seems to follow an approach where the act plays a decisive factor in the question whether State property is immune from measures of constraint, as we shall see infra, Ch. 4.2.1.

\textsuperscript{37} \textit{Op. cit.} n. 28 (Spiegel), pp. 105-106.

\textsuperscript{38} \textit{Ibid.}, p. 212.

\textsuperscript{39} \textit{Ibid.}, p. 273.

\textsuperscript{40} August Reinisch, ‘European Court Practice Concerning State Immunity from Enforcement Measures’, \textit{European Yearbook of International Law}, 2006, Vol. 17, No. 4, pp. 803-836, at p. 804. At p. 807, he states: “While in the field of jurisdictional immunity the nature of an act as \textit{iure imperii} or \textit{iure gestionis} is decisive, concerning immunity from execution it is prevailingly the purpose of the property against which enforcement measures are sought that determines whether or not immunity will be granted.”

Similarly, Andreas Fischer-Lescano stated that with regard to immunity from measures of constraint the purpose of the objects are decisive.  

The Austrian authorities stated, when ratifying the 2004 UN Convention on Jurisdictional Immunities of States and Their Property in 2005 that the essentially decisive criterion for distinguishing between the subject of enforcement and other assets results primarily from the purpose that serves the property. Switzerland followed that line as well and stated during the national ratification process of the 2004 UN Convention that measures of constraint can under circumstances be excluded because of the purpose of the State property. Germany stated when ratifying the European Convention on State Immunity: “The decisive criterion is rather whether the object of the execution serves sovereign purposes of the foreign state at the time at which the execution is bound to commence.” Already in 1977 the Federal Constitutional Court of the Federal Republic of Germany stated:

“There is a general rule of international law that execution by the State having jurisdiction on the basis of a judicial writ of execution against a foreign State, issued in relation to non-sovereign action [...] of that State upon that State’s things located or occupied within the national territory of the State having jurisdiction, is inadmissible without the assent by the foreign State, insofar as those things serve sovereign purposes of the foreign State at the time of commencement of the enforcement measure.”


45 See infra, Ch. 3.4.


Also the International Law Commission (ILC) raised the question whether distinctions such as between acts *jure imperii* and acts *jure gestionis* persist in the practice of States beyond the immunity from jurisdiction stage. The ILC focused as well on the property concerned instead of on the transaction and stated that

“[w]hile the case-law of States has not unsettled the general rule of State immunity from attachment and execution, it may furnish ample grounds for supporting the distinction between certain types of property that are not normally subject to attachment or execution, such as property devoted to public service (*publicis usibus destinata*), and other types of property in use or intended for use in commercial transactions or for commercial purpose, which are clearly intended for possible seizure if the need arises[.]”

In the process of drafting Part IV of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property the ILC Special Rapporteur stated in 1985 that

“[t]he question of jurisdictional immunities relates, in this property connection, to the nature of the use of State property or the purpose to which property is devoted rather than to the particular acts or activities of States which may provide a criterion to substantiate a claim of State immunity.”

As a logical consequence Part IV on immunity from measures of constraint has an article listing property of a State which shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes. Consequently, this property cannot be seized, unless the State to which the property belongs has explicitly consented to the taking of measures of constraint or has allocated or earmarked the property for the satisfaction of the claim which is the object of the related proceeding.

### 3.3 2004 UN Convention on Jurisdictional Immunities of States and Their Property

#### 3.3.1 General introduction

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On 2 December 2004, the UN General Assembly adopted without a vote\(^{51}\) Resolution A/Res/59/38\(^{52}\) regarding the UN Convention on Jurisdictional Immunities of States and Their Property.\(^{53}\) It came a long way, as the General Assembly invited the ILC to start working on the issue of jurisdictional immunities of States and their property as early as 1977.\(^{54}\) Actually, the issue came up for the first time already in 1949, as at its first session, the ILC selected the subject of jurisdictional immunities of States and their property as one of the topics for codification without, however, including it in the list of topics to which it gave priority.\(^{55}\) It lasted until 1977 before the topic was recommended for selection in the near future for active consideration by the ILC, bearing in mind its day-to-day practical importance as well as its suitability for codification and progressive development.\(^{56}\) At its thirtieth session, in 1978, the ILC set up a Working Group and appointed Sompong Sucharitkul as Special Rapporteur for the topic.\(^{57}\) In 1987, the ILC appointed Motoo Ogiso as his successor.

In 1980, the ILC began the first reading of the draft articles, which reading was concluded in 1986.\(^{58}\) From 1989 to 1991 the second reading of the draft articles was held. This resulted in 1991 in the adoption by the ILC of a text of twenty-two draft articles, with commentaries.\(^{59}\) The draft articles were submitted to the UN General Assembly (UNGA), accompanied with a recommendation that the UNGA convene an international conference of plenipotentiaries to examine the draft articles and to conclude a convention on the subject.\(^{60}\) The Sixth (Legal) Committee of the General Assembly established an open-ended working group to consider the

\(^{51}\) Therefore, by consensus.

\(^{52}\) The text of the 2004 UN Convention is attached to this UNGA resolution.


\(^{54}\) GA Res. 32/151 of 19 December 1977.


draft articles. This working group met for two sessions. At the invitation of the General Assembly, the ILC took up the subject again in 1999. It focussed on five main issues which were identified on the basis of deliberations in the Sixth (Legal) Committee. These issues were: (1) the concept of a State for purposes of immunity; (2) the criteria for determining the commercial character of a contract or transaction; (3) the concept of a State enterprise or other State entity in relation to commercial transactions; (4) contracts of employment; and (5) measures of constraint against State property. In 2000, the UNGA decided to establish an Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, with a view to elaborating a generally acceptable instrument based on the draft articles. The Ad Hoc Committee convened in different sessions until March 2004. It adopted its report containing the text of a draft United Nations Convention on Jurisdictional Immunities of States and Their Property and recommended its adoption by the General Assembly.

It was generally understood during the negotiations that the convention does not cover criminal proceedings. This restriction was already made in the 1991 commentary and the General Assembly explicitly agreed with that interpretation in its resolution adopting the convention.

The convention consists of 33 articles. The text reflects a compromise between the advocates of the absolute theory of State immunity, and the supporters of the restrictive theory. The preamble expressly refers to State immunity as a principle of customary international law.

This led to a remark made by Andrea Gattini: “The generic language of the title of Part IV was aptly adopted in order to make sure that immunity [from measures of constraint] applies to any kind of claims. However, it does not seem that the immunity guaranteed by the Convention extends to criminal proceedings, having regard to operative paragraph 2 of Resolution A/Res/59/38 [...]” See: Andrea Gattini, ‘The International Customary Law Nature of Immunity from Measures of Constraint for State Cultural Property on Loan’, in: Isabelle Buffard, James Crawford, Alain Pellet, Stephan Wittich (eds.), International Law between Universalism and Fragmentation – Festschrift in Honour of Gerhard Hafner, Leiden, Boston 2008, pp. 421-439, at p. 434.
Para. 2 of Resolution UN Doc. A/Res/59/38 states that the General Assembly “agrees with the general understanding reached in the Ad Hoc Committee that the United Nations Convention on Jurisdictional Immunities of States and Their Property does not cover criminal proceedings.” See also: op cit. n. 53 (Hafner/Köhler), p. 46.
“Considering that the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law.” However, in the third preambular paragraph, the believe is expressed that “an international convention on the jurisdictional immunities of States and their property would enhance the rule of law and legal certainty […] and would contribute to the codification and development of international law and the harmonization of practice in this area.”
and states that developments in State practice had been taken into account. Article 5 expresses the basic principle of State immunity and declares that “[a] State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the Convention.” Subsequently, Part III of the convention (Articles 10-17) enumerates the proceedings in which State immunity cannot be invoked.

The text of the convention makes clear, that the convention should be considered as of a subsidiary nature. Article 26, which was only formulated at the third meeting of the Ad Hoc Committee in March 2004, gives priority to any other international agreement in this field:

“Nothing in the present Convention shall affect the rights and obligations of States Parties under existing international agreements which relate to matters dealt with in the present Convention as between the parties to those agreements.”

The convention was open for signature by all States until 17 January 2007. 28 States signed the convention. According to Article 18 of the Vienna Convention on the Law of Treaties, “a State is obliged to refrain from acts which would defeat the object and purpose of the treaty when it has signed the treaty […]”. The 2004 UN Convention will enter into force when thirty instruments of ratification, acceptance, approval or accession have been deposited with the Secretary-General of the United Nations. Eleven States did that so far: Austria, Iran, Japan, Kazakhstan, Lebanon, Norway, Portugal, Romania, Saudi-Arabia, Sweden and Switzerland.

In 2008, Hazel Fox stated that,

“even if entry into force is delayed, the adoption of the Convention by the UN General Assembly and its Sixth Committee and the support already indicated by it, particularly

Hazel Fox stated that the 2004 UN Convention can be seen as a harmonisation and articulation of the international law on State immunity, and that the preamble to the convention stressed that the rules of customary international law continue to govern matters not regulated by the provisions of the convention. Op. cit. n. 23 (Fox), pp. 373, 393 and 397.

“Taking into account developments in State practice with regard to the jurisdictional immunities of States and their property”. In its commentary to the 1991 draft articles, the ILC stated that Article 5 does not prejudge the question of the extent to which the articles, including Article 5, should be regarded as codifying rules of existing international law.

Article 10: commercial transactions; Article 11: contracts of employment; Article 12: personal injuries and damage to property; Article 13: ownership, possession and use of property; Article 14: intellectual and industrial property; Article 15: participation in companies or other collective bodies; Article 16: ships owned or operated by a State; Article 17: effect of an arbitration agreement.

23 May 1969; 1155 UNTS 311.

Article 30.

As of 1 July 2011.
by China, India and Russia, would seem to establish an international standard - a source of customary law and an agreed framework for international law making - at any rate so far as private law and commercial transactions are concerned, for the treatment of immunity by individual national legal systems and their courts.”

In any event, “the treaty form of the rules relating to State immunity is likely to aid the process of crystallization of some if not all of its provisions into rules of customary law”, thus Fox. August Reinisch has expressed the opinion that the rules contained in the 2004 UN Convention are regarded as widely reflecting customary international law. He stated that “it is to be expected that the rules contained in [the] Convention, which are also regarded as widely reflecting customary international law, will provide important guidelines for the enforcement of investment awards against assets owned by respondent States.” According to Andrew Dickinson, the content of the convention is to be derived primarily from the custom and practice of States.

The Swiss authorities were very explicit in their communication with regard to the Swiss ratification of the 2004 UN Convention and stated that the Federal Court had determined that the convention had codified the general principles of international law in the field of State immunity, and that the convention should be seen as a codification of customary international law. Also the Russian Federation is of the opinion that the 2004 UN Convention is a reflection of customary international law.

In *Llanos Oil Exploration v. the Republic of Colombia, the State of the Netherlands and Ecopetrol S.A.*, the Netherlands declared before the District Court as well as before the Supreme Court that the 2004 UN Convention is an important and recent source for

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75 *Op. cit*. n. 23 (Fox), p. 4. And at p. 100 she argues that even without the required ratifications the convention represents a coherent statement of the current international law based on State practice in a text prepared by the International Law Commission and subsequently completed in discussions in the Sixth Legal Committee of the General Assembly and its working party.


77 *Op. cit*. n. 41 (Reinisch) p. 683. See for the relationship between treaty law and customary international law the International Court of Justice, which recognised in its judgment in the *Continental Shelf* case that “multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them”. *Continental Shelf case, Libyan Arab Jamahiriya v. Malta*, ICJ Reports 1985, pp. 13, 29-30.


80 Information obtained from the Legal Adviser of the Ministry of Foreign Affairs of the Russian Federation (through the Legal Department of the Russian Embassy in The Hague, the Netherlands) on 28 February 2011 and 2 March 2011, and from the Deputy Legal Adviser on 20 and 30 June 2011.
international legal practice, as well as in providing an answer to the question if and to which extent foreign States enjoy immunity of execution in the Netherlands. The 2004 UN Convention could in a sense be seen as a reflection of generally accepted rules under public international law, according to the Netherlands before the Dutch Supreme Court.

3.3.2 Commercial transactions and international art loans

In Chapter 1, I already referred to the definition of a ‘State’ under this convention. I will now address another important term under the convention. Commercial transactions constitute one of the most important exceptions to immunity under this international instrument. According to Article 2(1)(c) of the 2004 UN Convention, a ‘commercial transaction’ means:

“(i) any commercial contract or transaction for the sale of goods or supply of services; (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction; (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.”

Article 2(2) states that in determining whether a contract or transaction is a ‘commercial transaction’ under the convention,

“reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.”

The consequence of the above is that the application of either the nature criterion or the purpose criterion can lead to very different results. Application of the purpose criterion will in general result in a (much) more extensive immunity of a foreign State than the application of the nature criterion, and could therefore undermine the basic assumption of restrictive State immunity.

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81 Llanos Oil Exploration v. the Republic of Colombia, the State of the Netherlands and Ecopetrol S.A., trial brief of the Dutch State at the hearing of the Court of Appeals, The Hague, 9 April 2009, and written defence of the Dutch State at the Supreme Court, 20 November 2009, para. 3.3.1. On file with the author.
82 Ibid., para. 3.3.2.
83 And I shall elaborate more on that infra.
84 The approach, which provides for the consideration not only of the nature, but in some instances also of the purpose of the contract or transaction, is designed to provide an adequate safeguard and protection for developing countries, especially in their endeavours to promote national economic development, as the ILC stated in its commentary to the 1991 draft articles (Article 2(2)).
Thus, as it has been established that the characterisation of a commercial transaction depends on the nature of the act in question rather than its purpose, although under circumstances the purpose could also be taken into account, how should an international loan of cultural objects belonging to a foreign State be considered? In literature, some attention has been paid to this question. Laura Popp is of the opinion that “[a]rt loans undoubtedly do have the earmarks of commercial acts. First, they consist of lending property in exchange for compensation. Additionally, art exhibitions frequently involve the sale of tickets and memorabilia by the lender itself.”\textsuperscript{85} Norman Palmer also emphasised this financial linkage by stating that “art loans are frequently rewarded by direct monetary payment, which may consist of a flat-rate sum or a percentage of the admission fees.”\textsuperscript{86} One should not forget, however, that in general the compensation will merely go towards reimbursing the lending institute for its costs.\textsuperscript{87} Matthias Weller stated: “If a state lends an artwork to a museum abroad, the loan or the constructive possession must be considered the legal relationship in question. Loans and possessory relations, however, are legal relationships equally open to individuals and thus have to be qualified as an act de iure gestionis.”\textsuperscript{88} He went on by saying a bit further: “The assumption of immunity for artworks on loan from foreign states, however, is based on the condition that the purpose of the loan is one de iure imperii.”\textsuperscript{89} Isabel Kühl joined Weller in expressing the view that indeed cultural exchange between States constitutes a purpose \textit{jure imperii}, as many States have committed themselves to supporting cultural exchanges through international legal instruments.\textsuperscript{90} Finally, Sabine Boos explained that in Germany the nature of the transaction is decisive. But then she made a distinction between claims addressed to the

\textsuperscript{85} Laura Popp, ‘Arresting Art Loan Seizures’, \textit{Columbia-VLA Journal of Law & Arts}, 2001, Vol. 24, Issue 2, pp. 213-233, at p. 231. It is, however, my impression, that it would generally rather be the borrower than the lender who would be involved in the sale. The US State Department says at its website with regard to immunity from seizure applications that catalogue and print sales and admission and similar fees – all of which merely cover costs – are permissible. See: http://www.state.gov/s/l/3196.htm. [Last visited 6 March 2011]

\textsuperscript{86} Norman Palmer, \textit{Art Loans}, London, The Hague, Boston 1997, p. 40. See also my conversation with Matthias Weller, as reflected \textit{supra}, in n. 34 of this Chapter.

\textsuperscript{87} In \textit{re Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art}, 677 N.Y.S.2d 872 (Sup. Ct. 1998), where the court found that the Leopold Foundation is a not-for-profit-entity whose compensation for the loan - US $ 60,000 and a portion of profits from catalogue sales - simply defrayed the costs incurred.

\textsuperscript{88} \textit{Op. cit.} n. 2 (Weller), p. 1007. When a person does not have actual possession, but has the power to control an asset, he/she has constructive possession.

\textsuperscript{89} \textit{Ibid.}, p. 1009.

\textsuperscript{90} Isabel Kühl, \textit{Der internationale Leihverkehr der Museen [The international Loans of Museums]}, Cologne 2004, p. 27: “Eine Leihgabe kann daher nur dann immun gegen die Ausübung der Gerichtsgewalt sein, wenn der leihgebende Staat bei der Gebrauchsüberlassung für die Ausstellung hoheitlich handelt.” [“A loan may therefore only be immune from the exercise of judicial power, if the lending State is acting sovereign in the loan for the exhibition.”]
lending State and those to the borrowing State: if the legal action for claiming the property is addressed against the borrowing State, then, according to Boos, the loan agreement needs to be taken into account. By using the nature test, you are likely to come to the conclusion that an act *jure gestionis* is at stake. However, if the complaint is addressed to the lending State, then Boos argued that it depends on the peculiarities of the facts: if the complaint focuses on an act of nationalisation of the lending State, then this act will most likely be considered as an act *jure imperii* and State immunity will apply; the purchase of stolen property, however, would be seen as an act *jure gestionis*, as this can be done by States and individuals likewise.

How should an international art loan between States be considered under the 2004 UN Convention? As an act *jure imperii*, or an act *jure gestionis*? I would say, that according to its nature, the act should be regarded as a commercial activity, as not only States can perform international art loans, but also private individuals or foundations can lend and borrow cultural objects on an international scale. However, as States indeed have committed themselves to supporting the exchange of cultural objects through international legal instruments, it seems quite plausible that lending and borrowing States act with a public, non-commercial, aim, for instance mutual understanding for each other’s (cultural) history or re-establishment of bilateral diplomatic relations. It could thus indeed very well be stated that the nature of the art loan would be an act *jure gestionis*, whereas the purpose of the art loan could be one *jure imperii*. Consequently, a lending State may be immune from jurisdiction, if the art loan indeed has a governmental non-commercial purpose and the parties involved in the act have agreed to take the purpose into account, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the act. However, most jurisdictions take solely or primarily the nature of the act into account, as we also will see in the country related chapters.

In the light of this study, focusing on immunity from *seizure*, a question could be how relevant it is to assess whether an art loan is an act *jure imperii* or *jure gestionis*. If State-owned cultural objects should indeed by definition be considered as goods intended for public use, thus putting the emphasis on the property instead of the act, then the question whether an

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91 The question is whether immunity plays a role then, as the claims will be addressed before the court of the borrowing State.

92 Sabine Boos, *Kulturgut als Gegenstand der grenzüberschreitenden Leihverkehrs [Cultural property as object of international art loans]*, Berlin 2006, p. 204.
art loan is a commercial transaction could be left aside.\textsuperscript{93} Having said that, in the next chapter regarding the United States, I will already show that in determining whether property is immune from seizure under US State immunity legislation, it is of importance whether the property has been used for a commercial activity in the United States. In that sense, it may be important to pay some attention to the question whether an art loan should fall within that notion of commercial activity.

3.3.3 State enterprises

The third paragraph of Article 10 needs some reflection as well. David Stewart pointed out that “[a] number of states were concerned during the negotiations to clarify that the immunity of a state would not automatically be waived when one of its enterprises engages in a commercial transaction. Others wanted to make it abundantly clear that legally distinct State-owned commercial enterprises do not enjoy derivative immunity simply by virtue of their State ownership or interests.”\textsuperscript{94} Paragraph 3 of Article 10\textsuperscript{95} therefore states:

“Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of:
(a) suing or being sued; and
(b) acquiring, owning or possessing and disposing of property, including property which that State has authorized it to operate or manage,
is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected.”

In Chapter 1, I already referred to the definition of a ‘State’ under this convention\textsuperscript{96}, \textit{i.e.} ‘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;

\textsuperscript{93} At least from the perspective of immunity from seizure. From the perspective of immunity from jurisdiction, it will of course still be of relevance whether the act should be considered as \textit{jure imperii} or \textit{jure gestionis}.
\textsuperscript{95} Article 10(3) was not in the text from the outset. It was incorporated as certain voices had been raised to distinguish such enterprises from the parent State, so as to avoid the misuse of judicial procedures against the State.
\textsuperscript{96} Article 2(1)(b).
(iii) agencies or instrumentalities of the State or other entities\textsuperscript{97}, 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[.]

It follows from this article that an agency, instrumentality or another entity of a State falls under the definition of a State \textit{to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State}. The commentary on the 1991 version of the draft articles states that even private entities can be considered as included in the definition of a State, “but only to the extent that they are entitled to perform acts in the exercise of \textit{prérogative de la puissance publique}. Beyond or outside the sphere of acts performed by them in the exercise of the sovereign authority of the State, they do not enjoy any jurisdictional immunity.”\textsuperscript{98} The wording ‘acts performed [...] in the exercise of the sovereign authority of the State’ requires to determine whether the acts concerned are acts \textit{jure imperii} or acts \textit{jure gestionis}. Only acts \textit{jure imperii} “are to be equated with things done ‘in the exercise of sovereign authority’”.\textsuperscript{99} Thus, what is decisive are the characteristics of the act this agency/instrumentality/entity performs.

The concept of ‘agencies or instrumentalities of the State or other entities’ could theoretically include State enterprises or other entities established by the State performing commercial transactions. For the purpose of the articles under the convention, however, “such State enterprises or other entities are presumed not to be entitled to perform governmental functions, and accordingly, as a rule are not entitled to invoke immunity from jurisdiction of the courts of another States”,\textsuperscript{100} as we saw just above in Article 10(3). In the specific context of commercial transactions, it occurs that a legal distinction is made between a State and certain entities within that State. That would reflect actual practice, whereby commercial transactions are normally conducted by State enterprises or other entities established by a State, which have an independent legal personality. In that sense, those State entities engage in commercial transactions not on behalf of the State as such, but on their own behalf as a separate State entity. As a result, that entity may be sued before the courts of another State.

\textsuperscript{97} The reference to ‘other entities’ is intended to cover non-governmental entities when in exceptional cases endowed with governmental authority. See: \emph{op. cit.} n. 27 (ILC 1991), p. 17, para. 15.
\textsuperscript{98} \emph{Ibid.}, p. 17, para. 14.
\textsuperscript{99} \emph{Op. cit.} n. 78 (Dickinson).
That does not affect the immunity of the parent State, since it is not a party to the commercial transaction.\textsuperscript{101}

Thus, what is decisive is whether an entity of a State performs an act \textit{jure imperii}, in which case Article 2(1)(b)(iii) is applicable, or whether it performs an act \textit{jure gestionis}, in which case Article 10(3) applies.

When it concerns a State museum, the case is not all that easy: in principle, State museums will have a legal personality, independent from the State, and would be capable of suing or being sued. The decisive question is then, whether the State museum is performing an act \textit{jure imperii}, or \textit{jure gestionis}. We saw above, on the one hand, that art loans do have the earmarks of a commercial transaction; an art loan is an act which can be performed by an individual private person. On the other hand, we have seen that there may be reasons to attach a public purpose to the art loan, and some academics indeed put emphasis on the purpose of the act. However, we also saw that for the determination whether an act is to be considered as \textit{jure imperii} or \textit{jure gestionis}, in most jurisdictions solely or primarily the nature of the act has to be taken into account. And that would then mean that an art loan is considered to be an act \textit{jure gestionis}.

3.3.4 Immunity from measures of constraint

Part IV of the 2004 UN Convention deals with State immunity from measures of constraint in connection with proceedings before a court. It “provides in general, but subject to certain limitations, for the immunity of a State from all such measures of constraint in respect of the use of its property or property in its possession or control.”\textsuperscript{102} Immunity from measures of constraint has been described as “the last bastion of State immunity”.\textsuperscript{103}

As we already saw above, the Special Rapporteur stated in 1985 that

“[t]he question of jurisdictional immunities relates, in this property connection, to the nature of the use of State property or the purpose to which property is devoted rather

\textsuperscript{101} Ibid., p. 35, para. 9.
than to the particular acts or activities of States which may provide a criterion to substantiate a claim of State immunity.\textsuperscript{104}

As to the scope of the draft articles in this Part,

“the intention was that they should cover attachment, arrest and execution where ordered by a court of law or tribunal, but not decrees of an executive or legislative nature under which property was nationalised or requisitioned.”\textsuperscript{105}

The final wording of the 2004 UN Convention makes a distinction between pre-judgment measures of constraint and post-judgment measures of constraint. This has not always been the case; the first reading of the draft articles in 1986 and the second reading of the draft articles of 1991 had only one article with regard to measures of constraint. Article 18 of the second reading reflected the principle that no measures of constraint against the property of a State could be taken, which was followed by exceptions to that principle; measures of constraint could be taken with the express consent of the State, or against property that was allocated or earmarked for the satisfaction of the claim. Moreover, measures of constraint could be taken to the extent that the property was specifically in use for other than government non-commercial purposes that was in the territory of the forum State and had a connection with the claim which was the object of the proceeding or with the agency or instrumentality against which the proceeding was directed.\textsuperscript{106}

However, several States favoured a distinction between pre-judgment, or interim, measures and measures of execution.\textsuperscript{107} The Working Group concluded that a distinction between pre-judgment and post-judgment measures of constraint may help to sort out the difficulties in this issue.\textsuperscript{108} In the end, this resulted in 1999 in a proposal of the Chairman of the Working Group of the Sixth Committee, Carlos Calero Rodrigues, to make a distinction between pre-

\textsuperscript{106} Op. cit. n. 27 (ILC 1991), p. 56. Article 18 was followed by Article 19, which listed the specific categories of property that should be interpreted as being in use for government non-commercial purposes, and with which I will deal \textit{infra}.\textsuperscript{107} GA Doc. A/C/6/47/L.10 of 3 November 1992.
judgment measures and post-judgment measures in two separate articles.\footnote{Ibid., p. 171, para. 126: “The Working Group concluded that a distinction between pre-judgment and post-judgment measures of constraint may help to sort out the difficulties inherent in the issue. […]”} This was introduced in the draft convention in 2002.\footnote{Report of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property (4-15 February 2002), General Assembly Official Records, fifty-seventh session, Suppl. No. 22 (UN Doc. A/57/22), p. 10.}

Article 18 of the convention, regarding State immunity from pre-judgment measures of constraint\footnote{The ILC stated that the expression ‘measures of constraint’ has been chosen as a generic term, not a technical one in use in any particular internal law. Since measures of constraint vary considerably in the practice of States, it would be difficult, if not impossible, to find a term which covers each and every possible method or measure of constraint in all legal systems. See: op. cit., n. 27 (ILC 1991), p. 55, para. 2.} reads:

“No pre-judgment measures of constraint, such as attachment or arrest\footnote{The measures of constraint indicated are illustrative and non-exhaustive.} against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:
(a) the State has expressly consented to the taking of such measures as indicated:
(i) by international agreement;
(ii) by an arbitration agreement or in a written contract; or
(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or
(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding.”

Pre-judgment measures of constraint can be taken in anticipation of a judgment, so also when it is not at all clear whether a foreign State may rely on immunity from jurisdiction. Furthermore, in some legal systems the pre-judgment measures of constraint can create a competent forum, the \textit{forum arresti}.\footnote{See supra, Ch. 1, n. 16.} Jin Sun calls it that

“[p]re-judgment attachment, whether to establish jurisdiction or to secure assets for post judgment execution, has the results of execution of assets of a foreign State before a decision on the merits, has great potential to infringe the traditional immunities of a sovereign state” \textit{[sic]}.\footnote{Jin Sun, ‘Immunity from execution of judgments under the FSIA - Moderate balance to the new UN Convention’, \textit{US-China Law Review}, May 2007, Vol. 4, No. 5, pp. 13-24, at p. 14.}

That may be a reason why the applicable article in the 2004 UN Convention is so protective.

The Special Rapporteur stated in this regard:

\begin{footnotesize}

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  \item \footnote{Ibid., p. 171, para. 126: “The Working Group concluded that a distinction between pre-judgment and post-judgment measures of constraint may help to sort out the difficulties inherent in the issue. […]”}
  \item \footnote{Report of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property (4-15 February 2002), General Assembly Official Records, fifty-seventh session, Suppl. No. 22 (UN Doc. A/57/22), p. 10.}
  \item \footnote{The ILC stated that the expression ‘measures of constraint’ has been chosen as a generic term, not a technical one in use in any particular internal law. Since measures of constraint vary considerably in the practice of States, it would be difficult, if not impossible, to find a term which covers each and every possible method or measure of constraint in all legal systems. See: op. cit., n. 27 (ILC 1991), p. 55, para. 2.}
  \item \footnote{The measures of constraint indicated are illustrative and non-exhaustive.}
  \item \footnote{See supra, Ch. 1, n. 16.}
\end{itemize}
\end{footnotesize}
“This type of immunity in respect of State property is connected with a proceeding or litigation in progress. An order may be issued by a court to secure performance or satisfaction of a prospective judgment through the assets attached. This immunity from attachment appears to be more absolute in the sense that pre-judgment or pre-trial attachment is not normally permitted against State property or property in the possession or control of a State.”

The Special Rapporteur concluded: “In normal circumstances, the general rule does not appear to support such attachment against State property without its consent.” Unlike Article 19, which I will discuss infra, Article 18 does not consider it relevant whether the property is or is not ‘specifically in use or intended for use for other than government non-commercial purposes’; immunity from pre-measures of constraint is applicable in either situation.

It is not clear, to what extent this provision in the 2004 UN Convention should be considered as a codification of a rule of customary international law. It has been stated in literature that the established practice in most European courts uses the same test with regard to the permissibility of pre-judgment measures of constraint, as with regard to post-judgment measures of constraint, thus whether the property is specifically in use or is intended for use for commercial or for governmental non-commercial purposes. A holding of the Italian Supreme Court of Cassation stated for example: “According to an international customary law principle, the assets of a foreign State are exempt from provisional and executive measures, provided that the assets are used in the exercise of sovereign functions or to attain public goals.”

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116 Ibid., p. 29, para. 37.
118 To which I shall come later in this subchapter.
120 Libya v. Condor Srl., Corte di Cassazione [Supreme Court of Cassation], 23 August 1990, Rivista di Diritto Internazionale, 1991, p. 679. See: Gerhard Hafner, Marcelo G. Kohen and Susan C. Breau, State Practice Regarding State Immunities, Leiden, Boston, 2006, p. 434. See also: ibid. (Reinisch), p. 834, n. 207. At the same page, Reinisch also referred to two German court decisions concerning pre-judgment attachments, where also the purpose of the property was the leading criterion. The cases were: Central Bank of Nigeria Case, Landgericht Frankfurt, 2 December 1975 [1976] Neue Juristische Wochenschrift 1044, 65 ILR 131, at 137; and NIOC Revenues Case, Bundesverfassungsgericht, 12 April 1983, BVerfGE 64, 1, 65 ILR 215, at 242.
With regard to Article 18, already on 11 November 1994, Germany made an intervention in the UNGA Sixth (Legal) Committee, stating: “With regard to prejudgment measures we hold it necessary that they be subject to the same legal regime as postjudgment measures [...]”.

So far, only Norway (which became the first State Party in March 2006) made a reservation, which reservation also refers to the same distinction. It stated:

“[…] in cases where it has been established that property of a State is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, it is the understanding of Norway that Article 18 does not prevent pre-judgment measures of constraint from being taken against property that has a connection with the entity against which the proceeding was directed.”

Thus, it seems that also for Norway it is decisive whether the property is used (or intended for use) for commercial purposes or for government non-commercial purposes.

Article 19 of the convention regards post-judgment measures of constraint. The ILC Special Rapporteur stated in 1985:

“Execution is subsequent to, and dependent upon, a positive judgment requiring satisfaction and sometimes also upon failure on the part of the debtor to comply with the award within a reasonable time limit. Execution is not automatic but is a process that serves to expedite and secure payment or satisfaction of a judgment debt. Immunity from execution is, in this way, linked to the existence of a judgment whereby a foreign State is an adjudged debtor.”

Article 19 states with regard to immunity from post-judgment measures of constraint the same as Article 18 with regard to immunity from pre-judgment measures of constraint, but gives an extra exemption:

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121 Quotation can be found at: http://www.coe.int/t/dlapil/cahdi/state_immunities/documents/Cahdi%20(2005)%20bil%20PartI%20Germany.pdf, under D/5. See also: op. cit. n. 46 (Hafner c.s.), p. 363.

122 In 2006, the Dutch Advisory Committee on Issues of Public International Law advised the Dutch Government to make a similar reservation if and when the Kingdom of the Netherlands would become a party to the convention. See: Commissie van Advies inzake Volkenrechtelijke Vraagstukken [Dutch Advisory Committee on Issues of Public International Law], Advies inzake de United Nations Convention on Jurisdictional Immunities of States and Their Property, Advice No. 17, 19 May 2006, p. 28. It is common practice that the Dutch Government provides the Dutch Parliament with a response to the advices of the Advisory Committee. However, on 15 August 2006, the Minister of Foreign Affairs informed the Parliament that it was not yet possible for the government to react.

“No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

[...]

(c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.”

Before a Dutch court, the Netherlands has stated that ‘it has been established’ should be seen as that it should have been proven that the objects concerned have a non-governmental, commercial purpose. So, the immunity from execution is the rule, unless the exception (commercial use of State property) has been established.

One should be aware that the property should be specifically in use or intended for use by the State for other than government non-commercial purposes. This means that objects which are indivisible and serve both public and non-public uses would be immune from measures of constraint.

With regard to the same subparagraph (c), the annex of the 2004 UN Convention reflects the following understanding: “The words ‘property that has a connection with the entity’ in subparagraph (c) are to be understood as broader than ownership or possession.” This actually shows, that subparagraph (c) should be interpreted in a somewhat extensive way and that the understanding in the annex has a wider impact on the exception of immunity from

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124 The 2004 UN Convention includes an annex with understandings with respect to certain provisions of the convention. With regard to Article 19(c), it says that ‘entity’ in this subparagraph means the State as an independent legal personality, a constituent unit of a federal State, a subdivision of a State, an agency or instrumentality of a State or other entity, which enjoys independent legal personality. I would conclude from this sentence that such an entity could be a State museum as well.

125 A Munich court (Germany) already relied on the exception of Article 19(c) concerning the distinction between property serving governmental purposes and property serving commercial purposes. See: op. cit. n. 41 (Reimisch), p. 683 and n. 83.


128 The annex is for purposes of interpretation only. It is called “Understandings with respect to certain provisions of the Convention”. The annex must be read together with the convention and forms part of the context of the treaty in the sense of Article 31 of the 1969 Vienna Convention on the Law of Treaties. Op. cit. n. 23 (Fox), p. 383.
post-judgment measures of constraint. It is not clear, however, how wide this exemption to immunity from measures of constraint exactly is, as a further explanation has not been given. Hazel Fox argued that as the understanding to Article 19 states that the words ‘property that has a connection with the entity’ in subparagraph (c) of Article 19 should be understood as broader than ownership or possession, “[t]his would seem to suggest that the word ‘property’ used on its own [elsewhere in the convention] is restricted to the State having a title, either a proprietary or possessory one.” Gerhard Hafner, however, is of the clear view that the understanding in the annex concerning Article 19(c) cannot be considered as applicable to the whole convention text; the understanding only serves its goal for this paragraph, and should thus be seen as such and can therefore not give an interpretation with regard to ‘property’ in other articles of the convention.

While the 2004 UN Convention proceeds from the principle that no measures of constraint may be taken against property of a State, it also provides for certain exceptions to that principle. Most exceptions to the principle that no measures of constraint may be taken against property of a State apply to both pre-judgment and post-judgment measures of constraint, as subparagraphs (a) and (b) of Article 18 and 19 are identical. However, I indicated above that there is one situation that applies to post-judgment measures only and where State property is not immune from post-judgment measures of constraint, namely where it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.

Article 21 of the convention, however, limits the foregoing exception by stating that certain categories of property are excluded from the exception of Article 19(c), and as a consequence are after all immune from post-judgment measures of constraint:

129 I shall come back to that infra, when I try to examine which State property falls under the immunity of the convention.
130 Op. cit. n. 23 (Fox), p. 626.
131 Gerhard Hafner is Professor of International Law at the Department of International, European and Comparative Law, University of Vienna. Professor Hafner was a long-standing member of the International Law Commission. After the end of his term in the ILC he was appointed Chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property that elaborated the final text of the convention which was adopted by the General Assembly on 2 December 2004.
132 Interview with Professor Hafner by the author, Vienna, 18 October 2010.
“1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under Article 19, subparagraph (c):
(a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences;
(b) property of a military character or used or intended for use in the performance of military functions;
(c) property of the central bank or other monetary authority of the State;
(d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;
(e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.
2. Paragraph 1 is without prejudice to Article 18 and Article 19, subparagraphs (a) and (b).”

The first draft of the article was based on a list approved by the International Law Association in its draft Montreal Convention of 1982. That list, in turn, was based upon Section 1611 of the US Foreign Sovereign Immunity Act (FSIA) of 1976. The FSIA provided that the property of international organisations, the property of a foreign central bank or monetary authority, and property used or intended to use in connection with a military activity were all immune from measures of constraint. In addition, the category of property forming part of the cultural heritage of a State was included in the 1985 draft of the 2004 UN Convention.

The article was designed to provide some protection for certain specific categories of property by excluding them from any presumption of consent to measures of constraint. Paragraph 1 sought “to prevent any interpretation to the effect that property classified as belonging to any one of the categories specified is in fact property specifically in use or intended for use by a State for commercial non-governmental purposes [...].” So, “[e]ach of these specific categories of property by its very nature must be taken to be in use or intended for use for governmental purposes removed from any commercial considerations.” The Special Rapporteur explained that the provision was designed “to protect the higher interests of weaker developing nations from the pressure generating from industrialised or developed

133 More about this infra, Ch. 3.7.
134 To which I will come back in Ch. 4.2.
137 Ibid., p. 59, para. 2.
countries and multinational corporations to give prior consent to possible attachment and execution against certain types of property that are entitled to protection under public international law in the form of inviolability [...]”\textsuperscript{138}

In this regard, it is interesting to read the commentary to Article 21(2):\textsuperscript{139}

“Nowithstanding the provision of paragraph 1, the State may waive immunity in respect of any property belonging to one of the specific categories listed, or any part of such a category by either allocating or earmarking the property within the meaning of article [18(b) and 19(b)], or by specifically consenting to the taking of measures of constraint in respect of that category of property, or that part thereof, under article [18 (a) and 19(a)]. A general waiver or a waiver in respect of all property in the territory of the State of the forum, without mention of any of the specific categories, would not be sufficient to allow measures of constraint against property in the categories listed in paragraph 1.”

Especially the last sentence of the citation is of interest: that paragraph 1 of Article 21 is without prejudice to Article 18(a) and (b) and Article 19(a) and (b) gives the impression that also for the categories of Article 21(1) a general consent to the taking of measures of constraint, or earmarking for the satisfaction of a claim, would be sufficient. However, the abovementioned citation shows that this is not the case; a general consent or earmarking is considered not to include any of the specific categories listed in Article 21(1). In line with the afore mentioned aim “to protect the higher interests of weaker developing nations” the specific category or categories of property should be mentioned, in order to be susceptible for measures of constraint.\textsuperscript{140}

The Special Rapporteur also emphasised that “[…] the taking, even as a judicial sanction, of property constituting the cultural heritage of a nation […] cannot be condoned by mere

\textsuperscript{138} Op. cit. n. 21 (ILC 1985), p. 25, para. 14. At that time, the relevant article was Article 24. Ultimately it became Article 21.

\textsuperscript{139} At the time of the commentary, in 1991, it was still Article 19(2).

\textsuperscript{140} Hazel Fox also stated that Article 21(2) means that execution may take place where the State has either given express consent to the execution against such property in pre-judgment and/or post-judgment proceedings, or specifically allocated such property for the allocation of a claim. Op. cit. n. 23 (Fox), p. 651. See also Cour d’Appel, Paris, 1ère Ch., Section A, 10 August 2000 (No. 287) in Ambassade de la Fédération de Russie en France v. Compagnie Noga: “However, a court hearing an appeal from an execution measure, where it is alleged that the State against which the measure was taken waived the immunities which are recognized by customary international law principles and by international conventions, must examine the scope of the alleged waiver, in so far as it is disputed […].”

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judicial confirmation by a municipal tribunal”141 and that “the permanence of such unattachability or untouchability by legal process is based on State practice”.142

Hazel Fox stated that the Special Rapporteur proposed this article identifying ‘untouchable’ State property in 1985 as a counterbalance to the wide exceptions permitting attachment for ‘commercial non-governmental’ property and to accommodate the views of those opposed to execution of State property.143 I would not like to withhold one other conclusion of Hazel Fox with regard to this article:

“Although the ownership of the State served as a justification, the emphasis on the public use and purpose which State property served led to the property rather than the owner being the basis for immunity”.144

This goes back to what I said supra, in Chapter 3.2, that with regard to immunity from measures of constraint, the focus is first and foremost on the property of the State and not on the State as such or the act performed by it.

At the time of the ILC meeting in 1985, Doudou Thiam from Senegal stated:

“There were certain types of property which, by their nature or because of the use to which they were put, seemed to have to be regarded as unattachable. In internal law that was true of property relating to the integrity and dignity of the individual, and the parallel at the international level was the property relating to the integrity, dignity and sovereignty of the State […].”145

In 1985, at the time of the meetings of the thirty-seventieth session, current subparagraph (e) did not yet form part of the article. The only culture-related term was ‘property forming part of the national archives of a State or of its distinct national cultural heritage’, as the text could be read in its original version of 1985.146 The insertion of a provision on the protection of national cultural heritage has been supported to a very large extent by the members of the ILC.147 Ian Sinclair from the United Kingdom observed that “there was ample authority for

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142 Ibid., p. 42, para. 106.
143 Op. cit. n. 23 (Fox), p. 611. As first drafted, all these categories of property were declared to be immune regardless of consent or waiver.
144 Ibid., p. 636.
146 At that time Article 24(1)(e).
147 Laurel B. Francis from Jamaica, for instance, was vocal to this extent during the 1921st Meeting of the ILC; See: op. cit. n. 22 (ILC 1985), p. 262. So did Edilbert Razafindralambo from Madagascar, who during the same meeting stated that this paragraph was “entirely necessary”. See: ibid., p. 264. Only José Manuel Lacleta Muñoz
the proposition that the immunity of foreign State property from attachment, arrest and execution was not absolute, but dependent upon the uses to which the property was being put or had been put.”148 Abdul G. Koroma from Sierra Leone was of the opinion that “[t]he Special Rapporteur had [...] rightly provided that certain State properties were permanently immune from attachment and execution.” However, the list of property contained in - at that time - Article 24 should not be considered as exhaustive, according to Koroma.149

The intervention of Paul Reuter from France during the 1919th Meeting of the ILC probably hinted already towards a separate category for property forming part of an exhibition of objects of scientific, cultural or historical interest. He stated:

“Property forming part of ‘the national archives of a State or its distinct national cultural heritage’ should be designated by other terms. The property in question would be registered in the State of origin but perhaps temporarily taken to another State on the occasion of, say, an exhibition.”150

So, as from the thirty-eighth session in 1986, ‘property forming part of the cultural heritage of the State or part of its archives which is in the territory of another State and not placed or intended for sale’ has been supplemented with a subparagraph (e) reading “property forming part of an exhibition of objects of scientific or historical interest which is in the territory of another State and not placed or intended to be placed on sale”.151 It is, however, important to keep in mind that “State-owned exhibits for industrial or commercial purposes” were not covered by this subparagraph, according to the ILC.152

from Spain stated that there was no need to take account of property forming part of a State’s ‘national cultural heritage’ in the draft articles under consideration. See: ibid., p. 279. And Stephen C. McCaffrey from the United States was of the view that Article 24 (ultimately redrafted into Article 21) should be deleted as it – in the 1985 drafting - would create a rule which would preclude a State from giving its consent to execution in respect of certain types of property. See: ibid., p. 274.

148 Ibid., p. 268.
149 Ibid., p. 276.
150 Ibid., p. 253. See also: op. cit. n. 64 (Gattini), p. 431. Gattini states: “It is interesting to note that only one member, Paul Reuter, had observed that the paragraph, as formulated, did not respond to the real practical problems that would arise when the cultural property of a State would temporarily be taken to another State for an exhibition.”

151 The wording ‘which is in the territory of another State’ had been deleted again in a later stage, as it was considered by the ILC as a matter of course that for the sake of State immunity the property should be in the territory of another State. With regard to these subparagraphs (d) and (e), Andrea Gattini called it striking that the commentary neither gave any explanation of its insertion nor provided any footnote referring to State practice confirming its nature of customary law. See: ibid. (Gattini).

Without much discussion, the ILC agreed in 1986 to adopt provisionally the revised version of the article, with the new reference to property forming part of an exhibition.\textsuperscript{153} However, in 1991 one single, but important, word had been inserted: the word ‘cultural’.\textsuperscript{154} Subparagraph (e) from that time mentioned “property forming part of an exhibition of objects of scientific, cultural or historical interest”. But again no explanation in the ILC Report\textsuperscript{155} or commentary.

So, cultural valuables play a certain special role in the convention when it comes to immunity from measures of constraint, and I consider it as an illustration of the growing sentiment and acceptance in international law that the cultural property of a State should not be subject to measures of constraint.\textsuperscript{156}

When Austria was in the process of ratifying the 2004 UN Convention in 2005, it stated that it is in the self-interest of a State especially to protect cultural heritage against measures of constraint. Based on a similar motive, according to subparagraph (e), also property is protected that is the subject of scientific, cultural or historical exhibitions, Austria argued.\textsuperscript{157}

In the United States, the National Iranian-American Council called Article 21 of the UN Convention the reflection of the international consensus on the treatment of cultural property in domestic litigation.\textsuperscript{158}

Thus, property forming part of an exhibition of objects of scientific, cultural or historical interest belonging to the State is protected from enforcement measures, unless it regards objects designated for industrial or commercial purposes.\textsuperscript{159} Moreover, the property must not be placed or intended to be placed on sale, otherwise, - to quote the words of the Austrian


\textsuperscript{154}Yearbook of the International Law Commission, 1991, Vol. I, Summary records of the meetings of the forty-third session, UN Doc. A/CN.4/SER.A/1991, p. 91, para. 23: “[…] the Drafting Committee had deemed it useful to add the word ‘cultural’ after the word ‘scientific’.”

\textsuperscript{155}Op. cit. n. 27 (ILC 1991), p. 59. See also: op. cit. n. 64 (Gattini), p. 431.


\textsuperscript{158}Rubin v. The Islamic Republic of Iran, ‘Brief Amicus Curiae of the National Iranian-American Council in support of the defendants-judgment debtors’ renewed motion to declare the property exempt’, Case No. 03-CV-9370, US District Court for the Northern District of Illinois Eastern Division, filed 2 March 2009.

academic Eva Wiesinger - “it is not worth protection from enforcement measures, since even the State itself does not have interest to keep the property”. ①60

But what does ‘property of a State’ ①61 or ‘belonging to the State’ ①62 mean? Does the article only refer to ‘State-owned’ objects, or should it be considered as having a broader meaning?

It is a somewhat open question which property falls under the categories of immunised property. To get a better understanding of which property should be immune from measures of constraint, one has to assess the deliberations of the ILC. Examining these deliberations gives the clear impression, that it has been the intention from the beginning, not only to protect property owned by a State, but also property in its possession or control. However, it is also clear from these deliberations that especially the term ‘control’ gave rise to several requests for clarification.

The Special Rapporteur, Sompong Sucharitkul, clarified that he took the definition of State property of Article 8 of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts ①63 as a point of departure for the debate in the ILC on the jurisdictional immunities of States and their property. ①64 That definition reads: “‘State property of the predecessor State’ means property, rights and interests which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.” The Special Rapporteur was, however, of the opinion that this definition was inappropriate, “for what was at issue was property in a much wider sense.” ①65 For that reason, the then Article 2 on the use of terms had in subparagraph 1(e) a broader definition on ‘State property’, meaning “property, rights and interests which are owned, operated or otherwise used by a State according to its internal law”. In particular, the wording ‘operated or otherwise used’ had been inserted in the text. The main purpose of defining ‘State property’ in this paragraph was “to determine which State property would or would not enjoy immunity”. ①66 Abdul G. Koroma (Sierra Leone) stated that although certain categories of

①61 The wording in the article.
①62 The wording in the 1991 commentary to then Article 19(1)(e).
①65 Ibid., p. 280, para. 31.
①66 Op. cit. n. 153, (ILC 1986), p. 34, para. 8. With regard to this article, there was a diversion of opinion in the ILC. Especially the words ‘otherwise’ and ‘according to its internal law’ were contested. Another question was, whether the wording should It was proposed that the ILC should re-examine the definition once more, and in
rights and interests in property mentioned in the definition did not exist under some legal systems, it did cover all the different categories of States rights in property. However, with regard to this article, there was a diversion of opinion in the ILC. Especially the words ‘otherwise’ and ‘according to its internal law’ were contested. Moreover, it was proposed that the definition as proposed by the Special Rapporteur should be more in alignment with the one under the 1983 Vienna Convention, although it was understood that both definitions served different purposes. It was also proposed that the article would be deleted, since the various aspects of State property had been elaborated in other articles of the draft, inter alia the draft articles regarding immunity from measures of constraint. The Special Rapporteur was not unwilling to delete draft Article 2(1)(e). Not much later, the paragraph indeed was deleted and eventually only definitions of ‘court’, ‘State’ and ‘commercial contract’ remained in the text of the convention.

Already in 1981, when the deliberations were still in an early stage, Special Rapporteur stated: “Possibly the criterion to be adopted whether, in a given case, immunity from jurisdiction or, as the case might be, from attachment or execution, should be granted was whether the property in question was in the possession and control of the State.”

At certain times, possibly in order to get a better understanding, a comparison was made with the situation of State vessels:

“There were also proceedings affecting State property or property in the possession or control of a foreign State. State practice seemed to suggest that a State would be impleaded if a vessel in its possession or control was attached without due consideration being given to the kind of activity in which the vessel was engaged, with a view to determining the extent of its immunities and how amenable it was to the jurisdiction of the court.”

The third report of the Special Rapporteur reads:

refer in the relevant articles on immunity from measures of constraint simply to ‘State property’. It was also proposed that the article would be deleted.

Ibid., p 34, para. 2.

Ibid., p 34, para. 2.

See the intervention by S.P. Jagota of India, op. cit. n. 153 (ILC 1986), p. 32, para. 37. See also the intervention by Carlos Calero Rodrigues of Brazil, op. cit. n. 153 (ILC 1986), p. 31, para. 25.


See Article 2 of the 2004 UN Convention.


Ibid., p. 58, para. 16.
“[...] it is necessary to note that actions involving seizure or attachment of public properties or properties belonging to a foreign State or in its possession or control have been considered, in the practice of the States, to be proceedings which implead the foreign sovereign or seek to compel the foreign State to submit to the local jurisdiction. Such proceedings include not only actions in rem or in admiralty against State-owned or State-operated vessels for defence purposes and other peaceful uses, but also measures of prejudgement attachment or seizure [...] as well as execution or measures in satisfaction of judgment [...]. The criterion for the foundation of State immunity is not limited to the claim of title or ownership by the foreign Government, but clearly encompasses cases of properties in actual possession or control of a foreign State.”

In 1983, the Special Rapporteur stated in his fifth report that “there may be different types of property that can enter and leave the territory of another State. It is no longer enough that the foreign State merely asserts its title; it may be required to give evidence to prove title or to establish its ownership or possession or its right to use.”

In 1985, Part IV of the draft convention had a specific article concerning the scope of that part. The then draft Article 21 read: “The present part applies to the immunity of a State in respect of State property, or property in its possession or control or in which it has an interest, from attachment, arrest and execution by order of a court of another State.” Draft Article 22 started with: “[...] State property, or property in the possession or control of a State, or property in which a State has an interest, is protected by the rule of State immunity from attachment, arrest and execution by order of a court of another State, as an interim or precautionary pre-judgment measure, or as a process to secure satisfaction of a final judgment of such a court, [...]”

Several ILC members expressed some doubts with regard to the terminology used by the Special Rapporteur in the draft Articles 21 and 22. Doudou Thiam (Senegal), for instance, argued:

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“under article 22, paragraph 1, the rule of State immunity applied to ‘State property or property in the possession or control of a State’. The concepts of ownership and possession posed no difficulties, but the same could not be said of the concept of control. To give it a significance other than those of holding or keeping [...] would be to open the way to uncertainty.”

Paul Reuter (France) also questioned the term ‘control’:

“[...] article 21 related to state property or property in the State’s possession or control or in which the State had an interest. Instead of that long enumeration, which might cause difficulties, it might perhaps be preferable to use a phrase such as ‘any property to which the State can claim legal title’. The question arose, however, whether in addition to legal title, the State could not also claim a \textit{de facto} power, which possibly explained the Special Rapporteur’s use of the term ‘control’.”

Also Alexander Yankov (Bulgaria) asked for a clarification of the meaning of the term ‘control’, whereby Nikolai Ushakov (Soviet Union) stated that “[t]he concept of State property [...] had to be defined more clearly, since the formulae used in draft articles 21 and 22, namely ‘property in its possession or control’ and ‘property in the possession or control of a State’ were confusing.”

In a reaction to these comments, the Special Rapporteur explained that

“‘possession’ applied to cases in which the property was in the possession of the State itself or through one of its agents. Similarly, property such as a ship or aircraft could be under the control of a State through the captain or crew of the ship or aircraft in question. But article 21 was not intended to cover the assets of companies in such a way as to entitle them to immunity from arrest, attachment or execution.”

The Special Rapporteur concluded in his seventh report in 1985: “[...] States are immune not only in respect of property belonging to them, but also invariably in respect of property in their possession or control or in which they have an interest, from attachment, arrest and execution by order of a court of another State.” He explained: “Immunity from attachment

\[\text{\textsuperscript{177}}\textit{Ibid.}, p. 251, para. 5.\]
\[\text{\textsuperscript{178}}\textit{Ibid.}, p. 253, para. 16.\]
\[\text{\textsuperscript{179}}\textit{Ibid.}, p. 254, para. 18.\]
\[\text{\textsuperscript{180}}\textit{Ibid.}, p. 257, para. 10.\]
\[\text{\textsuperscript{181}}\textit{Ibid.}, pp. 254-255, para. 34.\]
\[\text{\textsuperscript{183}}The Special Rapporteur stated in 1985, that the term ‘interest’ had nothing to do with the concept of a ‘controlling interest’ in a company; that matter was governed by company law, thus the Special Rapporteur. See: \textit{op. cit.} n. 22, p. 280, para. 32.\]
is sustainable even if the property is not owned by the State but is used by it or is under its control for public services[.]

At the time of the eighth report of the Special Rapporteur, in 1986, the article on State immunity from measures of constraint at that time, Article 21, stated: “A State enjoys immunity, in connection with a proceeding before a court of another State, from measures of constraint […] on the use of its property or property in its possession or control […].” The Special Rapporteur namely noted that “[t]he notion of “State property” has to be expanded to cover not only the relation to the State through ownership, but also the connection through operation and use […].” Also at that time, in 1986, it was said that the property protected by immunity from measures of constraint was to be understood, not solely as State property or as property belonging to a State, but as comprehending property owned by the State or property in its possession or control.

The clause ‘or property in which it has a legally protected interest’ still formed part of the aforementioned Article 21, but had meanwhile been placed within square brackets, and was therefore still under explicit discussion. The summary records of the ILC Meetings of the thirty-eighth session reveal that this was due to a difference of opinion in the Drafting Committee “on whether it was proper to provide protection in the case of a State having a legally protected interest in property, but not owning, possessing or controlling that property.” The interest of the State may be so marginal as to be unaffected by any measure of constraint.” Or the interest of a State may by nature “remain intact, irrespective of the measure of constraint placed upon the use of the property.” According to the Dutch ILC representative Riphagen, the notions of possession and control were justified, and immunity from measures of constraint could be acceptable in the case of an object in the possession or control of a State, “since measures of constraint on the use of the object were likely to affect

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185 The Special Rapporteur gives certain examples, none of those relate to cultural objects on loan: military aircraft, transboundary trains and other means of public transport. See: ibid., p. 29, para. 36.
186 Article 22 on the consent to measures of constraint stated: “A State cannot invoke immunity, in connection with a proceeding before a court of another State, form measures of constraint on the use of its property or property in its possession or control […].”
191 The term ‘its property’ was not under discussion.
the activities of that State.” That did not, according to Riphagen, apply to legally protected interests in an object.\textsuperscript{192}

After the UN General Assembly urged States to make comments and observations on the draft articles, in 1988 several States made critical remarks concerning the notions of ‘property in its control’ or ‘property in which it has a legally protected interest’. Belgium, for instance, stated that these terms were too vague\textsuperscript{193} and France considered the term ‘control’ and, \textit{a fortiori}, ‘interest’ as “extremely imprecise”.\textsuperscript{194} Also the German Democratic Republic was of the view that these terms were “not sufficiently clearly defined”, “unsuitable” and therefore “tend to complicate the application of the future convention”.\textsuperscript{195} Czechoslovakia stated that the wording ‘property in which it has a legally protected interest’ should be deleted.\textsuperscript{196} Also the Nordic countries\textsuperscript{197} argued for the deletion, stating that ‘property in which it has a legally protected interest’ “might permit a widening of the present scope of State immunity from execution, which has little to say for it, since the preceding words ‘on the use of its property or property in its possession or control’ must be regarded as covering all State interest in property that is neither marginal nor, by its very nature, unaffected by the various measures of constraint.”\textsuperscript{198} The United Kingdom considered the reference to ‘interest’ “vague in itself and uncertain in its effect”.\textsuperscript{199} Only Chile\textsuperscript{200}, Thailand\textsuperscript{201} and Venezuela\textsuperscript{202} were of the opinion that ‘property in which it has a legally protected interest’ should be retained.

The Special Rapporteur proposed to delete the text in square brackets (thus the wording ‘or property in which it has a legally protected interest’), as a majority of commenting States was of the opinion that this phrase was too vague in itself and uncertain in its effect.\textsuperscript{203} The words

\textsuperscript{194} \textit{Ibid.}, p. 65, para. 9.
\textsuperscript{195} \textit{Ibid.}, p. 68, para. 16.
\textsuperscript{196} \textit{Ibid.}, p. 64, para. 13.
\textsuperscript{197} Denmark, Finland, Iceland, Norway and Sweden.
\textsuperscript{199} \textit{Ibid.}, p. 89, para. 33.
\textsuperscript{200} \textit{Ibid.}, p. 63, para. 16.
\textsuperscript{201} \textit{Ibid.}, p. 82, para. 19.
\textsuperscript{202} \textit{Ibid.}, p. 90, para. 8.
‘its property or property in its possession or control’ were kept in the draft of the article on immunity from measures of constraint.

In the commentaries to the draft articles as adopted in second reading in the year 1991, we find: “[...] State immunity may be invoked even though the proceeding is not brought directly against a foreign State but is merely aimed at depriving that State of its property or of the use of property in its possession or control.” That having said, I cannot refrain from pointing at something remarkable in the commentaries: in the article regarding State immunity from measures of constraint, at that time Article 18, only the term ‘property of a State’ is used. The commentary states:

“The property protected by immunity under this article is State property, including, in particular, property defined in Article 19 [on specific categories of property; final Article 21]. The original text of the chapeau of former Article 21 and of paragraph 1 of former Article 22 as provisionally adopted on first reading [in 1986] contained the phrase [, or property in which it has a legally protected interest.], over which there were differences of view among members of the Commission. In their written submissions, a number of Governments criticized the phrase as being vague and permitting broadening of the scope of immunity from execution. The bracketed phrase was therefore deleted and replaced by the words ‘property of a State’.”

However, also the words ‘its property or property in its possession or control’ disappeared, without any explanation given. So it seems that the term ‘property of a State’ in fact replaced the wording ‘its property or property in its possession or control [, or property in which it has a legally protected interest.]’

When focusing on the wording of Article 21(1)(e), the question comes up which property would be included in the wording “property [of a State] forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on

205 Ibid., pp. 56-57, para. 5.
206 Hazel Fox pointed out that “the lesser links of control or interest removed the immunity from being in the ownership of the State as an immune person to the asset or fund itself; it may even go that far, that an interest in cultural objects might permit a State to claim immunity over an object which is privately owned.” Particularly when related to cultural heritage of the State or cultural objects on loan, ‘interest’ “would permit a private party to claim immunity where objects in private ownership were under the internal law of the foreign State registered as of special cultural or artistic value”, according to Hazel Fox. See: Op. cit. n. 23 (Fox), p. 611 and n. 31. I cannot follow this last argumentation; the notion of ‘interest’ was between brackets in an earlier stage of the negotiations and was quite heavily contested. Deletion of this notion was merely inevitable. I would therefore conclude that it is not sufficient that a State has solely a ‘legally protected interest’ in a certain property in order for that property to enjoy immunity from measures of constraint; there should be a connection through ownership, possession or control, whereby I am aware that specifically the latter terms are relatively vague and exact limitations have not been set in practice.
It is important not to be put on the wrong foot by what is now Article 21(1)(d). In 1986, the ILC stated with regard to that subparagraph:

“The purpose of subparagraph 1(d) is to protect only property characterized as forming part of the cultural heritage or archives of the State which is owned by the State. Such property benefits from protection under the present articles when it is in the territory of another State and is not placed or intended to be placed on sale. Subparagraph 1(e) extends such protection to property forming part of an exhibition of objects of scientific or historic interest belonging to the State and in the territory of another State.”

If subparagraph 1(e) would be a mere extension of subparagraph 1(d), would that mean that also 1(e) only refers to ‘State-owned’, not even ‘possessed’? Gerhard Hafner, who has been intensely involved in the conclusion of the 2004 UN Convention as Chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, is of the firm opinion that Article 21(1)(d) and (1)(e) should be considered separately; the one does not connect with the other. From the 1991 commentary, it is clear that Article 21(1)(d) refers solely to property owned by a State. According to Hafner, paragraph 1(e) should, however, be seen more broadly, in the ‘regular’ meaning of ‘State property’ under the convention. This means that all cultural property on loan owned by a foreign State, but also all property towards which a foreign State can serve as a custodian or has a right of disposal may fall under the notion of Article 21(1)(e), Hafner argued. And why would it indeed not be possible to think of the situation that a State possesses someone else’s artwork and uses it for the purpose of international cultural exchange? Matthias Weller seems to follow this approach, and so does Sabine Boos, by stating that regardless whether the ownership is clear, already the possession by a foreign State of a cultural object makes it immune from measures of constraint.

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207 Gerhard Hafner stated in the interview with the author on 18 October 2010, that ‘such protection’ does not refer to ‘protection of State owned property’, but to ‘protection against measures of constraint’.


209 Gerhard Hafner used the German word ‘Verfügungsgewalt’.

210 Interview with Gerhard Hafner by the author. Vienna, 18 October 2010.

211 See Matthias Weller: “[If] a state possesses someone else’s artwork and uses it for the purpose de iure imperii of cultural exchange and as a ‘peace envoy’, such conduct should constitute an act de iure imperii enjoying immunity, irrespective of whether the lending State is in fact the owner.” Op. cit. n. 2 (Weller), p. 1014.

212 Op. cit. n. 92 (Boos), p. 209: “The seizure of loaned cultural property is not permitted if the loan process in essence has a non-commercial background. This also applies if the ownership of the loaned object is unclear, since according to the principles of State immunity already the indirect possession by a State prevents the seizure.” In the original German language: “Die Beschlagnahme entliehener Kulturgüter ist unzulässig, wenn der Leihvorgang im Wesentlichen ohne kommerziellen Hintergrund erfolgt. Dies gilt auch, wenn die Eigentumsverhältnisse an dem Leihobjekt ungeklärt sind, da bereits der mittelbare Besitz eines Staates die Beschlagnahme nach den Grundsätzen der Staatenimmunität verhindert.”
It may be fair to say that not only loaned cultural objects owned by foreign States are protected under Article 21(1)(e) of the convention against immunity from measures of constraint, but also loaned objects which have a connection with the lending State through possession and control. Through that latter connection, cultural objects housed in (State) museums may be entitled to immunity (depending on the relationship between the State and the objects). After all, with reference to Chapter 3.3.3 supra, it would be rather questionable whether a State museum as such would be entitled to immunity.213

That makes the protection under the 2004 UN Convention a rather broad one, although the exact scope has not yet been determined in practice.214 It may be necessary in concrete situations to assess the actual relationship between the foreign State and the cultural property on loan in order to determine the possible immunity.

3.4 European Convention on State Immunity

By Resolution (63)29 of 13 December 1963, the Committee of Ministers of the Council of Europe included the subject of State immunity in the Council of Europe Intergovernmental Work Programme.215 A Committee of Experts, set up by recommendation of the Third Conference of European Ministers of Justice in 1964, drafted during 14 meetings a text, resulting in the conclusion on 16 May 1972 of the European Convention on State Immunity with its Additional Protocol. On 11 June 1976, it entered into force. Currently it has eight European States Parties.216 The convention is based on the outline supra, in Chapter 3.1, regarding the extensive competence of a foreign court to declare cases with or against foreign

213 To refer to the words of Andrew Dickinson: “In practice, given the presumption which appears to underlie the 2004 UN Convention that State enterprises and other entities are not entitled to exercise government functions, it may be difficult for entities (other than central banks or other monetary authorities, and perhaps State-owned museums and galleries [emphasis by the author]) to rely on immunity from enforcement.” Op. cit. n. 78 (Dickinson).
214 In that regard, I also want to refer to the remarks of the Special Rapporteur in 1985: “The question of ownership and title had to be settled under the lex situs, as in the case of immovable property acquired abroad, or under the law of the place where the property was registered, as in the case of a car imported for use by a diplomat residing in a foreign State, or under the rules of private international law.” See: op. cit. n. 22, p. 280, para. 31. In my view, this means that not one clear single definition can be given of the notions of ‘State property’, ‘possession’, or ‘control’, and that in practice the content of those terms can vary.
216 Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom. Portugal signed the convention, but did not ratify it.
States regarding acts *jure gestionis* of those States admissible. The aim of the convention is to secure to individuals (legal) protection in their private law claims against States.\(^{217}\) It has no specific provisions on cultural objects.

On the basis of Article 15 of the convention, “[a] Contracting State shall be entitled to immunity from the jurisdiction of the courts of another Contracting State if the proceedings do not fall within the enumeration of Articles 1 to 14 […]” The convention has a somewhat different approach when it comes to ‘commercial transactions’. A ‘commercial transaction’ as such is not mentioned as one of the exceptions. Article 4(1) states that “a Contracting State cannot claim immunity from jurisdiction of the courts of another Contracting State if the proceedings relate to an obligation of the State, which, by virtue of a *contract*,\(^ {218}\) falls to be discharged in the territory of the State of the forum.”\(^ {219}\) Article 7(1) goes on by saying that

“[a] Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has on the territory of the State of the forum an office, agency or other establishment[\(^ {220}\)] through which it engages, in the same manner as a private person, in an industrial, commercial, or financial activity, and the proceedings relate to that activity of the office, agency or establishment.”\(^ {221}\)

The Explanatory Report\(^ {222}\) on Article 7 states that that article covers the principal activities of a State *jure gestionis*. The report makes a link between the requirement under the convention to give effect to judgments rendered against a Contracting State and the way of drafting of the article:

“Had the Convention dealt simply with questions of jurisdictional immunity, it might have been possible to frame the article in more general terms so as to extend, [*sic*] it to cover all cases where a State engages in industrial, commercial or financial activities having a territorial connection with the State of the forum. As the Convention requires States to give effect to judgments rendered against them, it was necessary to insert a connecting link to found the jurisdiction of the courts of a State of the forum, namely the presence on the territory of this State of an office, agency or other establishment of the foreign State. This limitation is counter-balanced by the broad terms of Article 4: most industrial, commercial or financial activities carried on by a State on the territory

\(^{217}\) Op. cit. n. 8 (Fox), p. 95.

\(^{218}\) Emphasis by the author. The contract need not be in writing if an oral contract is valid under the applicable law. See: *op. cit.* n. 215 (Exp. Rep.), para. 28.

\(^{219}\) The second paragraph gives certain exceptions to this rule.

\(^{220}\) Emphasis by the author.

\(^{221}\) The paragraph shall not apply if all the parties to the dispute are States, or if the parties have otherwise agreed in writing.

\(^{222}\) Para. II of the Explanatory Report states that the text does not constitute an instrument providing an authoritative interpretation of the text of the convention, although it might be of such a nature as to facilitate the application of the provisions therein contained.
of another State where it has no office, agency or establishment would probably give rise to contractual obligations which are dealt with by Article 4.”

Certain States were of the opinion that Article 15 was “too rigid either because some acts iure gestionis fall outside the cases covered by [Articles 1 to 13], or because the connecting links prescribed in these articles do not correspond, with the rules of jurisdictional competence applied in those States.” Article 24 gives therefore States the opportunity to derogate from Article 15. It states that

“any State may, when signing this Convention or depositing its instrument of ratification, acceptance or accession, or at any later date, [...] declare that, in cases not falling within Articles 1 to 13, its courts shall be entitled to entertain proceedings against another Contracting State to the extent that its courts are entitled to entertain proceedings against States not party to the present Convention. Such a declaration shall be without prejudice to the immunity from jurisdiction which foreign States enjoy in respect of acts performed in the exercise of sovereign authority (acta jure imperii).”

Let me go now from immunity from jurisdiction to immunity from measures of constraint. The system of the convention “represents a compromise in that it combines an obligation on States to give effect to judgments [...] with a rule permitting no execution.” As an explanation for that system, the Explanatory Report states:

“In some States the rule which prohibits measures of constraint against property of a foreign State is regarded as a rule of international law; in other States, measures of constraint against property of foreign States is considered permissible under strictly defined conditions. [...] it is one of the objectives of the Convention to protect the rights of individuals.”

It has been stated in literature that the convention therefore does not, and does not purport to, codify existing customary law on this subject.
Article 23 reads that “[n]o measures of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Contracting State except where and to the extent that the State has expressly consented thereto in writing in any particular case.” So, this seems to reflect an absolute immunity from both pre-judgment as post-judgment measures of constraint. However, from the Explanatory Report, it appears that ‘preventive measures’ in Article 23 cover only such measures as may be taken with a view to eventual execution. That would mean that pre-judgment measures of constraint which are not taken with a view to eventual execution are not ruled out. The Explanatory Report, or the literature, does not dwell upon this point. In Chapter 4 of this study, regarding the situation in the United States, I will address the case Deutsch v. Metropolitan Museum of Art. Joram Deutsch wanted to seize a painting in order, inter alia, to have the possibility to examine the painting with the aim of preserving evidence whether or not the painting was a copy of the original. He stated that he was not given permission to analyse the painting before the end of the exhibition and therefore made an emergency application, in order to prevent the painting from leaving the United States after termination of the exhibition. Would such an action be possible under Article 23 of the European Convention? It is a measure to prevent the immediate return of the painting after termination of the exhibition; it is not a preventive measure with a view to eventual execution. Thus, maybe Article 23 is not as absolute as it seems at first instance.

Article 23 should be seen in relation to the notion of mutual confidence within a close community of States. That confidence is illustrated by an undertaking by each Contracting State to honour a judgment given against it. That undertaking is reflected in Article 20(1) of the convention, which states that a Contracting State shall give effect to a judgment given against it by a court of another Contracting State:

“(a) if, in accordance with the provisions of Articles 1 to 13, the State could not claim immunity from jurisdiction; and
(b) if the judgment cannot or can no longer be set aside if obtained by default, or if it is not or is no longer subject to appeal or any other form of ordinary review or to annulment.”

The undertaking by a Contracting State under Article 20(1) is limited by paragraph 2, which exonerates a Contracting State from giving effect to a judgment given against it, inter alia,

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231 See also: op. cit. n. 28 (Spiegel), p. 137.
232 Ch. 4.4.4.
“where it would be manifestly contrary to public policy in that State to do so […]”; “where proceedings between the same parties, based on the same facts and having the same purpose” are pending before another court; or “where the result of the judgment is inconsistent with the result of another judgment given between the same parties[…]” Paragraph 3 of Article 20 gives another exemption whereby a Contracting State is not obliged to give effect to a judgment in a proceeding related to a right in movable or immovable property arising by way of succession, gift or *bona vacantia*. It can therefore be concluded that the undertaking to give effect to a judgment contains certain exceptions. On the other hand, in order to ensure that the undertaking is effectively discharged, judicial safeguards are provided in Article 21. According to paragraph 10(3) of the Explanatory Report, these judicial safeguards have been inserted “because Article 23 prohibits execution being levied in one Contracting State against property in another Contracting State.”

Above, I already referred to the declaration which States may make under Article 24. That declaration also has consequences for the general rule which prohibits execution against the property of a foreign State. Article 26 introduces, “for the purposes of the optional regime provided for in Article 24”, an exception to the rule as contained in Article 23:

“execution may be levied in the State of the forum against any property of a foreign State used exclusively in connection with an industrial or commercial activity,” provided that the proceedings relate exclusively to such an activity of the State, and both States have made the declaration provided for in Article 24.”

In that situation, “conservatory measures may also be taken against such property with a view to ensuring eventual execution of the judgment.”

Finally some words about what is meant by a ‘Contracting State’ under the convention. As we saw in the Introductory Chapter of this study, the European Convention does not give a definition of a State, but explains what is excluded from that notion. The convention states in Article 27 that “[f]or 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

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233 Op. cit. n. 215 (Exp. Rep.), para. 10.3. Interesting enough, the Explanatory Report only speaks about “execution being levied in one Contracting State against the property of another Contracting State”, and not about the “preventive measures” which are after all also addressed in Article 23.

234 In which the State is engaged in the same manner as a private person.


236 Ibid., para. 106. Interestingly, the Report speaks here about “conservatory measures” and not about “preventive measures”, as in Article 23.
is capable of suing or being sued, even if that entity has been entrusted with public functions.”

The Explanatory Report states:

“In practice, proceedings are frequently brought by an individual, not, strictly speaking, against a State itself, but against a legal entity established under the authority of the State and exercising public functions. As an important consequence of paragraph 1 provisions of the Convention which lay down special rules for proceedings to which one of the parties is a State (Articles 16-19), those dealing with the obligation to comply with a judgment or a settlement (Articles 20-22), and those prohibiting execution in the territory of the State of the forum (Article 23), do not apply to such entities.”

Thus, as an important consequence, provisions of the convention which lay down special rules for proceedings to which one of the parties is a State, but also those prohibiting execution or preventive measures in the territory of the State of the forum, do not apply to such entities; according to Article 27(2), proceedings may be instituted against such entity before the courts of another Contracting State in the same manner as against a private person. However, Article 27(2) continues, stating that the courts may not entertain proceedings in respect of acts performed by the entity in the exercise of sovereign authority.

The Explanatory Report states that the applicable paragraph 2 of Article 27 “is worded in such a way that where an entity is authorised to exercise public functions in the State of the forum an action may be brought against it provided the proceedings do not relate to acts performed by the entity in the exercise of sovereign authority (acta iure imperii).” The Explanatory Report cites political subdivisions or national banks and railway administrations as examples of these entities. In my view, it would be possible that State museums fall under that notion of entity as well. Thus in summary: the basic principle is that such a State entity does not enjoy immunity from jurisdiction in cases where it is not involved in sovereign activities and also lacks immunity from pre- and post-judgment measures of constraint.

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237 Article 27(1). Also, constituent States of a Federal State are not contained in the scope of the convention; Article 28(1) reads: “[…] the constituent States of a Federal State do not enjoy immunity”.
239 Ibid., para. 107.
240 See Article 27(2).
241 Para. 109.
242 I have to admit that this sounds somewhat contradictory: the notion of a Contracting State does not include any separate legal entity of a Contracting State even if that entity has been entrusted with public functions, and consequently proceedings may be instituted against such entity before the courts of another Contracting State in the same manner as against a private person, unless that entity performs public functions.
244 Para. 109 of the Explanatory Report states: “The overall effect of Article 27 is to deny to entities, when they are not exercising public functions, any right to treatment different from that accorded to a private person.”
245 That would thus also mean that Article 23 is not applicable in that situation.
unless it performs acts *jure imperii*. This then goes back to the discussion as described *supra*, whether international art loans should be considered as acts *jure gestionis* or *jure imperii*.

### 3.5 Inter-American Draft Convention on Jurisdictional Immunity of States


Article 1 provides as basic principle that “[a] State is immune from the jurisdiction of another State”, but notwithstanding that article, Article 4 states that “a State may be brought before the adjudicatory authorities of another State under the circumstances foreseen in this Convention.” According to Article 3,

“[a] State is granted immunity from jurisdiction for acts performed by virtue of governmental powers. Immunity from jurisdiction applies equally to activities regarding property owned and to assets which the State uses by virtue of its governmental powers.”

There are certain exceptions to the immunity from jurisdiction. Article 5 refers to the commercial exception and states that “States shall not invoke immunity against claims relative to trade or commercial activities undertaken in the State of the forum. Trade or

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246 Ch. 3.3.2.
248 The oldest predecessor of the Inter-American Juridical Committee was the International Commission of Jurists, created in 1906. Its first meeting was held in 1912. In 1927, the Congress of Jurists approved 12 Draft Conventions in the field of public international law. In 1948, the Ninth International Conference of American States adopted the Charter of the Organization of American States, and created thereby the Inter-American Council of Jurists, composed of one representative from each OAS Member State. Its permanent Committee was to be the Inter-American Juridical Committee, composed of nine jurists from the member States. In 1967, the Protocol of amendment to the Charter of the Organization of American States was approved, which Protocol eliminated the Inter-American Council of Jurists, whose functions were transferred to the Inter-American Juridical Committee. The Inter-American Juridical Committee is headquartered in Rio de Janeiro. The Juridical Committee is composed of eleven jurists who are nationals of member States of the Organization and represent all the States. Chapter XIV of the OAS Charter details its composition, powers, and functions. It serves as an advisory body to the Organization on juridical matters, promotes the progressive development and codification of international law, and studies juridical problems related to the integration of the developing countries of the hemisphere and, insofar as may appear desirable, the possibility of attaining uniformity in their legislation. See: *Annual Report of the Inter-American Juridical Committee to the [OAS] General Assembly 2000*, 25 August 2000, CJI/doc.45/00, pp. 11-12, to be found at: http://www.oas.org/cji/eng/INFOANUAL.CJI.2000.ING.pdf. [Last visited 4 March 2011.]
249 The instrument did not enter into force.
commercial activities of a State are construed to mean the performance of a particular transaction or commercial or trading act pursuant to its ordinary trade operations.”

For the purpose of the convention, the definition of State includes: 250

“a) the government and its departments, its decentralized agencies and self-governing or self-sustaining entities;
b) its agencies, whether or not endowed with a separate legal personality, and any other entity, of legal national interest, whatever its technical and legal form;
c) national, regional or local political or administrative institutions.”

With regard to execution of a judgment, Article 14 states that “[f]inal judgment given in accordance with this Convention shall be executed in the foreign State Party to the proceeding, subject to the provisions of treaties in effect between the States involved or, in default thereof, to its national legislation.” The draft convention has a very straightforward article on immunity from pre-judgment measures of constraint. The foreign State shall, according to Article 15, “always be immune to foreclosure or other preventive measures, unless it formally waives immunity.” 251 This therefore means that, as is the case in the 2004 UN Convention, immunity from pre-judgment measures of constraint is more absolute than immunity from post-judgment measures of constraint.

The text of the Draft Convention has no provisions in regard to cultural objects.

3.6 Asian-African Legal Consultative Committee 252

The Asian-African Legal Consultative Committee 253 examined the topic of State immunity, in the years 1957-1960. 254 The Final Report of its Committee on Immunity of States in respect

250 It is stated that this list is not all-inclusive.
251 With the exception of certain real, or immovable, property.
252 The Asian-African Legal Consultative Committee is an international governmental organisation, established in 1956 as an advisory board to Member States on international legal matters. Since 2001 it is called Asian-African Legal Consultative Organization. It has currently 47 Member States. See: www.aalco.int [Last visited 4 March 2011.]
254 The following States were members of this Committee: Burma, Ceylon, India, Indonesia, Iraq, Japan, Pakistan, Sudan, Syria, and the United Arab Republic.

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of Commercial and Other Transactions of a Private Character was finalised in Colombo in February 1960. The question which was put before the Committee was

“whether a Foreign State or a State Trading Organization should be regarded as immune from jurisdiction of the Courts in respect of commercial and other transactions which do not strictly fall within the ambit of ‘Governmental Activities’ as traditionally understood.”

It was observed by the Committee that many States did not confine their activities to the traditional functions of a State. Reference was made to the fact that States also entered into trading contracts with merchants in foreign States in the exercise of their State functions. Such contracts were usually entered into on behalf of the State, a government department or a State trading organisation. The Committee pointed out that it was being “increasingly realised that the doctrine of sovereign immunity of foreign states was not meant to include these new and extended functions […]. In these circumstances it was thought to be opportune for the Asian-African Nations to consider if they should also place restrictions on the immunity granted to foreign States in respect of such activities.”

All delegations, except Indonesia, were of the view that “a distinction should be made between different types of state activity and [that] immunity to foreign States should not be granted in respect of their activities which may be called commercial or of private nature.” All the delegations agreed, however, “that a state trading organisation which is part of the government and is not a separate juristic entity should be treated on the same footing as the government proper.” All the delegations also agreed that where a state trading organisation is considered to be a separate legal entity under the national laws of a State, immunity should not be available to it. So it basically depends upon whether the State trading organisation was or was not a separate legal entity. In the first case, it would receive the same treatment as a State, in the latter, it would not.

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255 Para. 1 of the Final Report.
256 Para. 2 of the Final Report.
257 Para. 4 of the Final Report.
258 In the terms of the Committee: “where the state trading organization has an entity of its own under the Municipal Laws of the state”.
259 Para. 5 of the Final Report.
All delegations also agreed “that a decree obtained against a foreign State could not be executed against its public property.” The property of a State trading organisation which constitutes a separate legal entity may, however, be eligible for such execution.260

Thus, with regard to property of a State, post-judgment measures of constraint could only be taken against property that is not considered as ‘public’. No post-judgment measures of constraint are possible against public State property. The same goes for property of a State trading organisation which is not separate from the State. Property of a separate State trading organisation is, however, not in any case immune from post-judgment measures of constraint. The Committee did not refer to conservatory measures or pre-judgment measures of constraint in its report.

Based on the foregoing, the Committee decided to recommend as follows:

“(i) The State Trading Organizations which have a separate juristic entity under the Municipal Laws of the country where they are incorporated should not be entitled to the immunity of the state in respect of any of its activities in a foreign state. Such organisations and their representative could be sued in the Municipal Courts of a foreign state in respect of their transactions or activities in their State.
(ii) A State which enters into transactions of a commercial or private character, ought not to raise the plea of sovereign immunity if sued in the courts of a foreign state in respect of such transactions. If the plea of immunity is raised it should not be admissible to deprive the jurisdiction of the Domestic Courts.”262

3.7 Draft Convention on State Immunity by the International Law Association

The International Law Association (ILA)263 established its Committee on State Immunity in 1979. At its sixtieth Conference in Montreal from 29 August to 4 September 1982, the Council of the ILA adopted the Montreal Draft Convention on State immunity.264 In 1988 the Council decided to reactivate the Committee for the purpose of studying the more recent developments in the field of State immunity. “At the Cairo Conference in 1992, the

260 Para. 8 of the Final Report.
261 I would call it: “which constitute a separate legal entity under the national laws of the State […]”.
262 Para. 9 of the Final Report. No remarks are made with regard to measures of constraint.
263 For a short introduction about the ILA, see: Ch. 1, n. 95. I recall here, that the ILA is an international non-governmental organisation and has a consultative status with a number of the United Nations specialised agencies.
Committee was given the task to give a final evaluation of the 1982 Montreal Draft Convention in the light of new state practice and the work of other international learned bodies, especially the ILC, the Institut de Droit International and scholars of international law. Finally, in 1994 at its sixty-sixth Conference in Buenos Aires from 14 to 20 August, the ILA Council adopted the revised draft articles for a Convention on State immunity. In literature, it has been stated that the ILA Draft Convention “comes closer to a codification of trends perceived in the actual practice of State immunity decisions”.

Article II of the draft convention is the centrepiece of the text and stipulates that “[i]n principle a foreign State shall be immune from the adjudicatory jurisdiction of a forum State for acts performed by it in the exercise of its sovereign authority, i.e. jure imperii. It shall, however, not be immune in the circumstances provided in Article III.” That article states in Section B that a foreign State shall not be immune from the jurisdiction of the forum State where the cause of action arises out of a commercial activity carried on by the foreign State, or an obligation of the foreign State arising out of a contract unless the parties have otherwise agreed in writing. According to Article I(C), the term ‘commercial activity’ refers “either to a regular course of commercial conduct or a particular commercial transaction or act. It shall include any activity or transaction into which a foreign State enters or in which it engages otherwise than in the exercise of sovereign authority [...].” Article I(C), ends by saying that “[i]n applying this definition, the commercial character of a particular act shall be determined by reference to the nature of the act, rather than by reference to its purpose.”

Article III(G) states that a foreign State shall not be immune from the adjudicatory jurisdiction of the forum State “[w]here the cause of action relates to rights in property taken in violation of international law and that property or property exchanged for that property is [either] in the forum State in connection with a commercial activity carried on in the forum State by a foreign State or owned or operated by an agency or instrumentality of the foreign State.

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268 The 1982 text used the words ‘in general’ instead of ‘in principle’. The Rapporteur, Georg Ress from Germany, was of the opinion that there was not a real difference between these wordings, because in the context of Article II both equally denote that not all acts *jure imperii* are entitled to immunity. See: *op. cit.* n. 265 (ILA), p. 494.
269 Whether or not a commercial transaction but excluding a contract of employment.
270 In particular:
- any arrangement for the supply of goods and services;
- any financial transaction involving lending or borrowing or guaranteeing financial obligations.
State and that agency or instrumentality is engaged in a commercial activity in the forum State.” A similar article can be found in the United States Foreign Sovereign Immunity Act, Section 1605(a)(3), on which this ILA article has been based. The drafters of the ILA text were of the opinion that an article like this was necessary, as ownership claims of expropriated objects are often subject to international disputes.

As we saw in Chapter 1.7, the term ‘foreign State’ in the draft convention 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. jure imperii.”

Article VII concerns the immunity from attachment and execution, and establishes the principle of immunity of State property from measures of constraint. It reads: “A foreign State’s property in the forum State shall be immune from attachment, arrest and execution, except as provided in Article VIII.” Article VIII states in Section A that

“[a] foreign State’s property in the forum State shall not be immune from any measure for the enforcement of a judgment or an arbitration award if:
1) The foreign State has waived its immunity […];
2) The property is in use for the purpose of commercial activity or was in use for the commercial activity upon which the claim is based; or
3) Execution is against property which has been taken in violation of international law, or which has been exchanged for property taken in violation of international law and is pursuant to a judgment or arbitral award establishing rights in such property.”

Section B of Article VIII deals with mixed financial accounts and limits immunity to that proportion of an account duly identified as used for non-commercial activities. Section C gives a list of the types of property in respect of which attachment or execution shall not be permitted:

“Attachment or execution shall not be permitted, if:

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271 More about that infra, Ch. 4.1.2.
272 Op. cit. n. 28 (Spiegel), p. 97. Spiegel concludes that here explicitly the distinction between acts jure imperii and acts jure gestionis has disappeared, and that a plea for immunity has bounced off, for the reason that a rule of international law has been infringed upon.
273 Article I(B).
1. The property against which execution is sought to be had is used for diplomatic or consular purposes; or
2. The property is of a military character or is used or intended for use for military purposes; or
3. The property is that of a State national bank held by it for central banking purposes; or
4. The property is that of a State monetary authority held by it for monetary purposes […]"

Thus, this draft convention follows more or less the same approach as the 2004 UN Convention: first it lists which property of State is not immune from post-judgment measures of constraint and in which situations, and then it sums up against what kind of specific categories of property cannot be made subject to measures of constraint. However, unlike the 2004 UN Convention, property forming part of the cultural heritage of the State or part of its archives, or property forming part of an exhibition of objects of scientific, cultural or historical interest is not included in this listing. As we saw supra in Chapter 3.3.4, at the time of the revised ILA Draft in 1994, the two ‘cultural categories’ were already included in the ILC Draft.

Section D of Article VIII, finally, provides for the possibility of pre-judgment measures of constraint in exceptional circumstances. It says that

“[i]n exceptional circumstances²⁷⁴, a tribunal of the forum State may order interim measures against the property of a foreign State, available under Article VIII A to C [of this convention] for attachment, arrest or execution, including prejudgment attachment of assets and injunctive relief, if a party presents a prima facie case that such assets within the territorial limits of the forum State may be removed, dissipated or otherwise dealt with by the foreign State before the tribunal renders judgment and there is a reasonable probability that such action will frustrate execution of any such judgment”²⁷⁵

As this citation refers to the possibilities of Article VIII A to C, it means that also with regard to interim measures, State property which is in use for a public, non-commercial purpose is not eligible for measures of constraint.²⁷⁶ However, as cultural property is not separately listed in Article VIII under C, cultural objects are only immune, if they can be considered as

²⁷⁴ The opening phrase ‘in exceptional circumstances’ is described by the ‘if’ clause later in the sentence and no further exceptional circumstances are required. See: op. cit. n. 265 (ILA), p. 498.
²⁷⁵ Hazel Fox is of the opinion that the ILA text primarily expresses the Western developed States’ wishes, and goes further than State practice supports. Op. cit. n. 8 (Fox), p. 93.
²⁷⁶ Unless it regards property taken in violation of international law; see Article VIII(A)(3).
sovereign, public, non-commercial property of the State and are not taken in violation of international law.

3.8 Institute of International Law

In 1891, the Institute of International Law adopted its first Resolution on State immunity. Already in that resolution, “[i]mmunity was expressly reserved for acts of sovereignty and public debt. It was provided that there should be no attachment of movables or immovables directly in use of the service of the State but execution was allowed, subject to adequate notice, in respect of property expressly given as security for payment of a debt.”

During its session in Aix-en-Provence in 1954, the Institute adopted a Resolution on immunity of foreign States in relation to jurisdiction and enforcement. Article 1 states that immunity should be enjoyed for claims relating to acts of sovereign power performed by a foreign State or by a separate legal person acting on behalf of that State. Article 5 of this resolution says that no measures of constraint or preventive attachment may be carried out in respect of property belonging to a foreign State if the property is used for the performance of activities of its government not connected with any form of economic exploitation.

The resolution has been followed by the one adopted by the Institute during its session in Basel in 1991, entitled ‘Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement’.

277 The non-governmental Institute of International Law was founded on 8 September 1873 at the Gent Town Hall in Belgium. Eleven international lawyers of renown had decided to join together to create an institution independent of any governmental influence which would be able both to contribute to the development of international law and act so that it might be implemented. One of the founders was the Dutchman Tobias M.C. Asser. In 1904 the Institute of International Law was awarded the Nobel Peace Prize. In 1911, T.M.C. Asser received the Nobel Peace Prize himself. See http://www idi-iil.org. [Last visited 7 April 2011.]

278 Or in French: l’Institut de Droit International.

279 ‘International Regulation of the jurisdiction of courts relating to process against sovereign States and foreign heads of State’, Hamburg, 11 September 1891.

280 Op. cit. n. 8 (Fox), p. 89.


That resolution gives in Article 2 criteria which are in the absence of agreement to the contrary indicative of the competence of the relevant organs of the forum State to determine the substance of a claim. It says under a) that “[t]he organs of the forum State are competent in respect of proceedings relating to a commercial transaction to which a foreign State (or its agent) is a party.” This is followed by subparagraph b), stating that “the organs of the forum State are competent in respect of proceedings concerning legal disputes arising from relationships of a private law character to which a foreign State (or its agent) is a party […]”. This is broadened in subparagraph c), which subparagraph regards contracts of employment and contracts for professional services, and subparagraph d), stating:

“The organs of the forum State are competent in respect of proceedings concerning legal disputes arising from relationships which are not classified in the forum State as having a “private law character” but which nevertheless are based upon elements of good faith and reliance (legal security) within the context of the local law.”

The criteria are also applicable “to activities of agencies and political subdivisions of foreign States” regardless of “their formal designation or constitutional status in the State concerned.” “The fact that an agency or political subdivision of a foreign State possesses a separate legal personality […] under the law of the foreign State does not in itself preclude immunity in respect of its activities.”

Article 4 of the resolution concerns measures of constraint. The first paragraph gives as basic rule that “[t]he property of a foreign State is not subject to any process or order of the courts or other organs of the forum State for the satisfaction or enforcement of a judgment or order, or for the purpose of prejudgment measures in preparation for execution” (hereafter referred to as measures of constraint).” However, the Article provides in paragraph 3 for an exception to that rule: property allocated or earmarked by the State for the satisfaction of the claim in question is not immune from measures of constraint. And where that property “has

285 These include but are not confined to: commercial contracts; contracts for the supply of services; loans and financing arrangements; guarantees or indemnities in respect of financial obligations; ownership, possession and use of property; the protection of industrial and intellectual property; the legal incidents attaching to incorporated bodies, unincorporated bodies and associations, and partnerships; actions in rem against ships and cargoes; and bills of exchange.

284 See Article 3 of the resolution.

285 Just like Article 23 of the European Convention on State Immunity speaks about preventive measures with a view to eventual execution, Article 4(1) of the IIL Resolution speaks about pre-judgment measures in preparation for execution. Again, this would mean that other pre-judgment measures of constraint are not covered, and that the property of a foreign State could be subject to those pre-judgment measures.

286 Also Article 5 gives an exception to the immunity rule, namely in case of explicit consent to measures of constraint or a waiver of immunity.
been exhausted or is shown to be clearly inadequate to satisfy the claim”, also “other property of the State within the territory of the forum State which is in use or intended for use for commercial purposes” would not be immune from measures of constraint.

However, certain categories of property of a State in particular are immune from measures of constraint, according to Article 4(2). When it comes to culture-related property, the only category is “property identified as part of the cultural heritage of the State, or of its archives, and not placed or intended to be placed on sale”. There is no separate category for property forming part of an exhibition of objects of scientific, cultural or historical interest.\(^{287}\) Theoretically, this could be problematic: it would follow from the resolution that in case that the property which the State has allocated or earmarked for satisfaction of a claim is exhausted or clearly inadequate to satisfy the claim, and if the property exhibited during an international art loan would be considered as in use or intended for use for commercial purposes, those loaned cultural objects would not be protected against measures of constraint, unless the objects are identified as part of the cultural heritage of that State.

Article 4 applies also to property of or in the possession of State agencies and political subdivisions of a State.

### 3.9 Concluding

Until the end of the nineteenth century, it was believed that sovereign immunity from the jurisdiction of foreign courts was absolute. The doctrine of absolute immunity has, however, gradually given way to a doctrine of restrictive immunity; as governments became increasingly engaged in commercial activities, the view emerged that immunity of States engaged in such activities should not be supported by international law. After all, it deprived private parties that dealt with a State of their effective remedies and it gave States an unfair advantage in competition with private commercial enterprises.

\(^{287}\) The other categories of property of a State immune from measures of constraint are:

- a) property used or set aside for use by the State’s diplomatic or consular missions, its special missions or its missions to international organizations;
- b) property in use or set aside for use by the armed forces of the State for military purposes;
- c) property of the central bank or monetary authority of the State in use or set aside for use for the purposes of the central bank or monetary authority[.]")
Immunity from jurisdiction is essentially different from immunity from measures of constraint; both in kind as well as in the stage at which it occurs. Immunity from jurisdiction refers to exemption from the judicial competence of the court or tribunal having power to adjudicate or settle disputes by adjudication. Immunity from measures of constraint relates more specifically to the immunities of States in respect of their property from pre-judgment attachment and arrest, as well as from execution of a judgment rendered.

With the adoption of a restrictive doctrine of immunity from jurisdiction came also a more critical approach to immunity from measures of constraint. However, States are still reluctant to accept the restrictive concept of immunity for measures of constraint. The reason for this is their more drastic effect on State sovereignty than the mere adjudication. Enforcement against State property constitutes a greater interference with a State’s freedom to manage its own affairs and to pursue its public purposes than does the pronouncement of a judgment or order by a national court of another State.

Although the notion of immunity from measures of constraint is still broader and more absolute than the notion of immunity from jurisdiction, there is also in respect of the immunity from measures of constraint a trend whereby absolute immunity is changing to a more restrictive approach. The case law of many States may be said to have begun a trend in favour of allowing measures of constraint in respect of property in use or intended for use in commercial transactions or for commercial purposes. But it may be safe to say that under customary international law, State property in use or intended for use for government non-commercial purposes is immune from measures of constraint.

On 2 December 2004, the UN General Assembly adopted without a vote the UN Convention on Jurisdictional Immunities of States and Their Property. The preamble expressly refers to State immunity as a principle of customary international law and states that developments in State practice had been taken into account. Article 5 expresses the basic principle of State immunity and declares that a State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the convention. Subsequently, the convention enumerates the proceedings in which State immunity cannot be invoked. The convention does not cover criminal proceedings.
Commercial transactions constitute one of the most important exceptions to immunity under the convention. When it comes to the notion of immunity from jurisdiction, it has been established that the characterisation of a transaction depends on the nature of the act in question rather than its purpose, although under circumstances the purpose could also be taken into account. An international art loan between States has the features of a commercial transaction, as it can be performed by private individuals as well. The purpose of the loan could be very well a governmental, non-commercial one. However, that purpose can only be taken into account if the parties involved so decide, or if in the practice of the forum State the purpose is of relevance for the determination.

The definition of a State under the convention is rather broad. It includes agencies or instrumentalities of a State, or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of the sovereign authority of the State. If not, then they would rather be seen as State enterprises. For the determination of a State museum, this brings us back to the question whether an art loan should be considered as an act *jure imperii*. In my view that would only be the case if the loan concerned indeed has a governmental, non-commercial purpose, and there is room (either through the consent between the parties or through the practice of the forum State) to take that purpose into account. If that is not the case, then a State museum should rather be considered a State enterprise than an instrumentality of the State. However, if a State museum does not enjoy immunity from jurisdiction, that does not by definition mean that its cultural objects lacks immunity from measures of constraint as well. After all, immunity from measures of constraint is not directly related to the nature of the transaction at stake; it is more the purpose attached to the objects that counts, although some academics consider the purpose of the transaction concerned as the decisive criterion.

Part IV of the 2004 UN Convention deals with State immunity from measures of constraint in connection with proceedings before a court. It provides in general, but subject to certain limitations, for the immunity of a State from all such measures of constraint in respect of its property or property in its possession or control. The 2004 UN Convention makes a distinction between pre-judgment measures of constraint and post-judgment measures of constraint.
Article 18 of the 2004 UN Convention, regarding State immunity from pre-judgment measures of constraint, states that no pre-judgment measures of constraint against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that the State has expressly consented to the taking of such measures or the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding.

With regard to post-judgment measures of constraint Article 19 has the same content as Article 18 with regard to pre-judgment measures of constraint, but gives an extra exception: no post-judgment measures of constraint against property of a State may be taken unless it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.

It has been stated in literature that the established practice in most European courts uses the same test with regard to the permissibility of pre-judgment measures of constraint, as with regard to post-judgment measures of constraint, thus depending on whether the property is in use or intended for use for other than government non-commercial purposes.

Part IV of the 2004 UN Convention also has an article where property of a State is listed which shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes. Consequently, this property is immune from seizure, unless the State to which the property belongs has explicitly consented to the taking of such measures or has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding. The relevant article, Article 21, is designed to provide protection for certain specific categories of property by excluding them from any presumption or implication of consent to measures of constraint. According to the ILC, paragraph 1 seeks to prevent any interpretation to the effect that property classified as belonging to any one of the categories specified is in fact property specifically in use or intended for use by a State for commercial non-governmental purposes. Thus, each of these specific categories of property by its very nature must be taken to be in use or intended for use for governmental purposes removed from any commercial considerations. The fifth category reads “property forming part of an exhibition of objects of scientific, cultural or historical
interest and not placed or intended to be placed on sale.” State-owned exhibits for industrial or commercial purposes are not covered by this subparagraph. Without much discussion, dispute or counterpoise the International Law Commission agreed to adopt this article with the reference to property forming part of an exhibition. I have to admit that cultural objects on loan cannot considered to be one of those ‘classical’ categories of protected objects, such as military property, diplomatic property or property of the central bank of a State. But the fact that cultural objects can be important for the identity of a State, the fact that cultural objects may help to understand the culture, history and development of a State, as well as the fact that cultural objects can be used as a means in the promotion of international cultural exchanges (codified in several international agreements) and the strengthening of bilateral or multilateral diplomatic relations, makes it fair to consider these cultural objects on loan as an additional category of protected State property.

It may be fair to say that not only exhibited cultural objects owned by foreign States are under the 2004 UN Convention protected against immunity from measures of constraint, but also objects forming part of an exhibition which have a connection with the lending State through possession and control. That makes the protection under the convention a rather broad one, although the exact scope has not yet been determined in practice.

Thus, in case a State museum has to be considered as a State enterprise instead of an instrumentality of a State, the cultural objects located in that museum can under circumstances still be immune from measures of constraint when loaned abroad. After all, a (State) museum can house a lot of different cultural objects; some of those objects may be owned by a State, a State may be able to exercise control over other objects, and some objects may not have a link with the State at all. In case a State owns, possesses or controls these objects, and the objects form part of an exhibition of scientific, cultural or historical interest and are not placed or intended to be placed on sale, then the objects would fall under the protection of Article 21(1)(e) of the 2004 UN Convention and consequently enjoy immunity under that convention.

entitled ‘Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement’, none of them have provisions included specifically related towards immunity from measures of constraint for cultural objects on loan belonging to foreign States.

However, certain aspects need to be taken into account. First of all, all these instruments, reports, doctrines and resolutions have been developed in a time when cultural property on loan was not as much an ‘issue’ as it is nowadays. All of these have been developed before actual State practice had emerged, and most of the aforementioned documents originate from the time before (in 1986) the notion of ‘property forming part of an exhibition of objects of scientific, cultural or historical interest’ had been inserted in the draft UN Convention.

Moreover, as the European Convention contains a fairly absolute immunity from measures of constraint - although I concluded that the protection may be less absolute than so far assumed - cultural objects on loan would benefit from that fairly absolute approach as well. The Inter-American Draft Convention has a very straightforward article on immunity from prejudgment measures of constraint: the foreign State shall always be immune to foreclosure or other preventive measures, unless it formally waives immunity. The Asian-African Legal Consultative Committee recognised that a decree obtained against a foreign State could not be executed against its public property, whereas the ILA Draft Convention on State Immunity established the principle of immunity of State property from measures of constraint. It reads that a foreign State’s property in the forum State shall be immune from attachment, arrest and execution, except as provided elsewhere in the text. One of the main exceptions is when the property is in use for the purpose of a commercial activity or was in use of a commercial activity upon which the claim is based. The ILA Draft Convention also has a list of the types of property in respect of which attachment or execution shall not be permitted. Unlike the 2004 UN Convention, property forming part of the cultural heritage of the State or part of its archives, or property forming part of an exhibition of objects of scientific, cultural or historical interest is not included in this listing. Finally, the resolution of the Institute of International Law gives as basic rule that the property of a foreign State is not subject to measures of constraint, although the rule has certain exceptions. Certain categories of property of a State in particular are immune from measures of constraint. When it comes to culture related property, the only category is property identified as part of the cultural heritage of the State, or of its archives, and not placed or intended to be placed on sale. There is no
separate category for State property on loan to another State and forming part of an exhibition of objects of scientific, cultural or historical interest.

Thus, although with the exception of the 2004 UN Convention none of these documents mention cultural objects on loan, they generally all provide for immunity from measures of constraint for State property with a public purpose. I will now assess how States in practice deal with the protection against seizure of cultural objects on temporary loan and belonging to foreign States.