State immunity and cultural objects on loan
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Chapter 11  Immunity from seizure at odds with international law?

“The interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations.”

As we saw in Chapter 1, various international agreements exist relating to the topic of immunity from seizure of cultural objects belonging to foreign States. In Chapter 1, I addressed several international agreements which aim at promoting the mobility of collections. However, some of these agreements have a double function: not only do they promote international cultural exchange and collection mobility, they also try to stop the trafficking of cultural objects, and aim at the safe return of cultural objects illegally removed. Or to use the words of Manlio Frigo:

“[...] on the one hand a number of international instruments such as conventions [...] are clearly aimed at granting the protection of cultural heritage by ensuring the restitution or the return of cultural objects to their ‘countries of origin’ and/or to their legitimate owner. On the other hand the same international instruments, particularly but not exclusively after the adoption of the UNESCO Convention on Cultural Diversity,[3] are aimed at promoting the mobility of artworks and of collections.”

In this chapter, I will approach some of the agreements discussed in Chapter 1 from the angle of restitutional obligations towards a country of origin and will explain what this means for the notion of immunity from seizure. Could it mean that immunity from seizure is at odds with other obligations under international law? This question specifically came up in several, primarily European, States where immunity from seizure legislation has been enacted. As we saw in the country-related chapters of the study, the discussions led to different outcomes.

Then there is another question: would the adoption of anti-seizure legislation or the issuing of

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guarantees contravene any fundamental human rights of potential claimants? Below, we shall see what the views of the European Court of Human Rights are on this issue.

11.1 International agreements addressing illicit import, export, transfer or expropriation of cultural objects

11.1.1 UNESCO

Let me start with an international instrument that I did not address in Chapter 1: the (First) Protocol to the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict. The protocol regards movable property and prohibits the export of cultural property from occupied territory and requires the return of such property to the territory of the State from which it was removed. The protocol also expressly forbids the taking of cultural property as war reparation. Article I(2), (3) reads:

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

When State X lends a cultural object for a temporary exhibition to State Y, it is possible that the State from the territory of which the cultural object was removed files a claim for restitution in the borrowing State Y and requests to return the object not to the lending State, but to itself. I will come back to that in Chapter 11.2 infra. Moreover, I will address this Protocol to the 1954 UNESCO Convention infra, in Chapter 12.5.1 as well, when I address further the issue of cultural objects taken during armed conflict.

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit

5 Of course, these instruments only apply if the State concerned is a party to them, unless when they can be considered as reflecting customary international law.
6 The Hague, 14 May 1954; 249 UNTS 358.
Import, Export and Transfer of Ownership of Cultural Property has been designed to address the increasing number of thefts of cultural objects at the end of the 1960s and the beginning of the 1970s, both from museums and from archaeological sites, and the fact that these objects were increasingly offered for sale or had been fraudulently imported. While the convention considers in the preamble, among other things, “that the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations”, it considers thereafter that “the illicit import, export and transfer of ownership of cultural property is an obstacle to that understanding between nations.”

So, with this convention, while promoting the mobility of collections, UNESCO gives a clear message that “exchange of cultural objects with a doubtful provenance, or which have been illegally acquired or replaced, cannot be tolerated.”

Article 7 contains obligations with regard to cultural objects stolen from a museum or a religious or secular public monument or similar institution in another State Party to the convention. At the request of the State Party of origin, appropriate steps should be taken by the State Party that received the said objects “to recover and return any such cultural objects imported after the entry into force of this Convention in both States concerned” The EU subgroup ‘Immunity from Seizure’ stated, correctly in my view, that it is foreseeable that this may include seizure of the said objects as well, in order to be able to return it to the requesting Party.

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9 Second preambular paragraph.
10 Seventh preambular paragraph.
12 Article 7: “The States Parties to this Convention undertake:
(a) to take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this Convention in both States;
(b) (i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution;
(ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party.”
State Party.\textsuperscript{13}

Article 13 states, \textit{inter alia}, that

“States Parties to this Convention also undertake, consistent with the laws of each State [...] to ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural objects to its rightful owner [and] to admit actions for recovery of lost or stolen items of cultural objects brought by or on behalf of the rightful owners[.]”\textsuperscript{14}

The wording ‘consistent with the laws of each State’ gives the States a certain leeway.\textsuperscript{15}

What should be taken into account, is that the provisions of the 1970 UNESCO Convention are not self-executing, but need implementation legislation. In Chapter 4 we saw, for instance, that the United States implemented the convention by means of its Convention on Cultural Property Implementation Act in the early 1980s, and in Chapter 9.5.3 we saw that Switzerland implemented the convention in the last decade in its Federal Act on the International Transfer of Cultural Property, to name two examples. By implementing the international obligations in the national legislation of the States, the return obligations under the 1970 UNESCO Convention become part of the domestic legal order. That may, however, never lead to a

\textsuperscript{13} Op. cit. n. 8.
\textsuperscript{14} Article 13: “The States Parties to this Convention also undertake, consistent with the laws of each State:
(a) to prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property;
(b) to ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner;
(c) to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners;
(d) to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported.”

\textsuperscript{15} Academic writing in Germany has argued that Article 7(a), second sentence, as well as Article 13(b) of the convention only creates obligations of notification and general cooperation in respect to illegally removed objects, but no claim for recovery; whereas Article 7(b) of the convention provides for a claim for the recovery of certain stolen objects but does not expressly extend to loaned objects, although it might well be interpreted in this sense. See: Matthias Weller, ‘The Safeguarding of Foreign Cultural Objects on Loan in Germany’, \textit{Art Antiquity and Law}, April 2009, Vol. XIV, Issue 1, pp. 63-77, at p. 74, as well as \textit{Aedon}, 2009, No. 2, to be found at http://www.aedon.mulino.it/archivio/2009/2/weller.htm. See also: Sabine Boos, \textit{Kulturgut als Gegenstand der grenzüberschreitenden Leihverkehre [Cultural property as object of international art loans]}, Berlin 2006, pp. 56, 275. Boos states that for the biggest part the obligations of States Parties under the UNESCO Convention are also applicable to cultural objects on loan. Although international art loans are not explicitly addressed in the convention, this can be understood from the wording and purpose of it. I have to say that I do not see why Article 7(b) should not apply to loaned objects. That “it might well be interpreted in this sense” is in my view a kind of an understatement.
situation where a State Party does not fully comply with the obligations under the convention, as that may result in an internationally wrongful act.\textsuperscript{16}

With a view to the 1970 UNESCO Convention, the UN General Assembly began an annual series of resolutions on “restitution of works of art to countries victims of expropriation”. Restitution of these works presented a means “for mankind to save the wealth and diversity of its cultures and to secure the best possible conditions for their further development.”\textsuperscript{17} These resolutions have now continued on a nearly biennial basis and are entitled “Return or restitution of cultural property to countries of origin”.\textsuperscript{18} Although not legally binding, they provide an important moral guideline.

\textbf{11.1.2 Unidroit\textsuperscript{19}}

As we already saw in Chapter 1, just as the 1970 UNESCO Convention,\textsuperscript{20} the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects emphasises “the fundamental importance of the protection of cultural heritage and of cultural exchanges for promoting understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilisation[.]”\textsuperscript{21} However, deep concern is being expressed about

“the illicit trade in cultural objects and the irreparable damage frequently caused by it, both to these objects themselves and to the cultural heritage of national, tribal, indigenous or other communities, and also to the heritage of all peoples, and in particular by the pillage of archaeological sites and the resulting loss of irreplaceable archaeological, historical and scientific information[.]”\textsuperscript{22}

\textsuperscript{16} More about internationally wrongful acts \textit{infra}, in Ch. 12.5.1. When the Netherlands implemented the 1970 UNESCO Convention in its national legislation in 2009, the Ministries of Culture, Justice and Foreign Affairs made sure that the national legislation would reflect all the obligations under the convention to the fullest. I have been partly involved in that process myself.

\textsuperscript{17} UN General Assembly Res. 3026A (XXVII) (18 December 1972).

\textsuperscript{18} The most recent one has been adopted on 7 December 2009, UN Doc. A/RES/64/L17/Rev.1.

\textsuperscript{19} Institut International pour l’Unification du Droit Privé / International Institute for the Unification of Private Law. Its purpose is to study needs and methods for modernising, harmonising and coordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives. See: http://www.unidroit.org.

\textsuperscript{20} Contrary to the 1970 UNESCO Convention, the 1995 Unidroit Convention offers uniform rules related to the private law aspects of the international protection of cultural property.

\textsuperscript{21} Second preambular paragraph.

\textsuperscript{22} Third preambular paragraph.
The convention intends, *inter alia*, to facilitate the restitution and return of cultural objects.\(^{23}\)

Article 3(1) therefore holds as the basic rule that the possessor of a cultural object which has been stolen shall return it.\(^{24}\) The convention has several provisions in order not to make this basic rule a dead letter. Article 5(1) states that “[a] Contracting State may request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of the requesting State.”\(^{25}\) This is followed (after Article 5(2) that I will address *infra*) by the statement in paragraph 3 that

> “[t]he court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests:
> a) the physical preservation of the object or of its context;
> b) the integrity of a complex object;
> c) the preservation of information of, for example, a scientific or historical character;
> d) the traditional or ritual use of the object by a tribal or indigenous community,
> or establishes that the object is of significant cultural importance for the requesting State.”

Article 8(1) states that “[a] claim under Chapter II [of the convention]\(^{26}\) and a request under Chapter III[\(^{27}\)] may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in the Contracting States.” Finally, Article 8(3) reads that refuge may be sought “to provisional, including protecting measures available under the law of the State where the object is located[.]”\(^{28}\)

According to the Explanatory Report to the convention, this would help to protect both the object itself (from physical harm) and the claimant’s rights (by preventing the object from disappearing due to its being sold or exported). Immunity from seizure provisions in the borrowing State could effectively limit the application of this paragraph.

Thus, the basic rule under the convention is that the possessor of a cultural object which has been stolen shall return it. But what if the possessor is a borrowing State that made a

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\(^{23}\) Fifth preambular paragraph.

\(^{24}\) It does not distinguish between public or private property or between good or bad faith purchasers.

\(^{25}\) The State may act on its own initiative or at the request of a private owner.

\(^{26}\) Which includes the aforementioned Article 3.

\(^{27}\) Which includes the aforementioned Article 5.

\(^{28}\) This is even the case when the claim for restitution or request for return of the object is brought before the
commitment to return the object to the lending State? How should an apparent contradiction between immunity from seizure and the Unidroit Convention be resolved? The Explanatory Report to the convention says with regard to Article 3(1), among other things:

“Although a proposal to include the words ‘in accordance with the provisions of this Convention’ – so as to prevent its being interpreted as incorporating procedures falling outside the scope of the Convention – was ultimately rejected, the diplomatic Conference made it clear that the obligation to return an object flowed exclusively from the mechanism established by the Convention.”

That brings me to Article 5(2) of the convention. Article 5(2) refers to the temporary exportation for purposes such as an exhibition and states:

“A cultural object which has been temporarily exported from the territory of the requesting State, for purposes such as exhibition, research or restoration, under a permit issued according to its law regulating its export for the purpose of protecting its cultural heritage and not returned in accordance with the terms of that permit shall be deemed to have been illegally exported.”

That gives the impression that a lending State should (at all times?) return the object to the borrowing State. The Explanatory Report states that the drafters of the convention were at all times mindful of the importance of exhibitions and were “at pains” not to create any obstacles. This Article 5(2) thus serves the return guarantee from borrowing to lending State as it tries to make sure that objects are returned after the finalisation of the temporary exhibition. I would say, that although the principle that stolen objects should be returned to the rightful owner has high priority under the convention, this should not lead to or result in other infringements of the convention.

11.1.3 Council of Europe

The 1957 European Convention on Extradition dates from a time when immunity from seizure of cultural property was not yet discussed, as we have seen in Chapter I. It is thus fair
to say that the situations I describe in my study had surely not been taken into account when the convention was drafted. The convention states in Article 20(1)\(^\text{32}\) that:

“[t]he requested Party shall, in so far as its law permits and at the request of the requesting Party, seize and hand over property
a. which may be required as evidence, or
b. which has been acquired as a result of the offence and which, at the time of the arrest, is found in the possession of the person claimed or is discovered subsequently.”

The Explanatory Report to the convention solely states that Article 20(1) provides that “the requested Party shall seize and deliver to the requesting Party property which may be required as evidence or which may have been acquired as a result of the offence. The requested Party is only required to satisfy a request of this kind so far as its law permits.” Specially the wording ‘in so far as its law permits’ is important. That would mean that if a national immunity law would not permit the seizure and handing over of e.g. loaned cultural objects, that national legislation prevails. The third paragraph of Article 20 states that

“[w]hen the said property is liable to seizure or confiscation in the territory of the requested Party, the latter may, in connection with pending criminal proceedings, temporarily retain it or hand it over on condition that it is returned.”

What would this mean if the property is temporarily in the requested State for an exhibition and not liable to seizure because of its enjoyment of immunity? In my view, this would then mean that this third paragraph would not apply. After all, because of the immunity, the property is not liable to seizure or confiscation in the requested (borrowing) State, so that one of the conditions of this paragraph is not fulfilled.

The 1985 European Convention on Offences relating to Cultural Property\(^\text{33}\) states in Article 6 that “[t]he Parties undertake to co-operate with a view to the restitution of cultural property found on their territory, which has been removed from the territory of another Party subsequent to an offence relating to cultural property committed in the territory of a Party […].” Article 8 of the 1985 Convention foresees in the possibility of seizure and restitution of the cultural object.\(^\text{34}\) However, the convention has not entered into force.

\(^{31}\) Paris, 13 December 1957; ETS No. 024.
\(^{32}\) Handing over of property.
\(^{33}\) Delphi, 23 June 1985; ETS No. 119.
\(^{34}\) Article 8(2): “Each Party shall execute in the manner provided for by its law any letters rogatory relating to proceedings addressed to it by the competent authorities of a Party that is competent in accordance with Article
On 5 November 1999, the Parliamentary Assembly of the Council of Europe unanimously passed Resolution 1205 on looted Jewish cultural property, calling for the restitution of looted Jewish cultural property in Europe. With the aim of restituting looted Jewish property, the resolution states in paragraph 15 that consideration should be given to, *inter alia*, “relaxing or reversing anti-seizure statutes which currently protect from court action works of art on loan[.]”

What we have seen in other chapters in this study, is that in practice the number of States enacting immunity from seizure legislation and issuing guarantees is slowly increasing. Would that not be at odds with the aforesaid wording in this resolution? I would say: probably partly. Generally speaking, immunity from seizure guarantees do not ban court action in general. They merely prevent conservatory measures in anticipation of a possible ruling, or execution of a judgment. But I have to admit: there is some contradiction in the fact that the number of specific immunity from seizure laws is slowly but steadily growing worldwide, and that this resolution calls upon the relaxation or reversing of anti-seizure statutes. We should also realise that this Parliamentary Assembly resolution has no legally binding force, although there is a moral force to be attributed to it. Moreover, the resolution is worded in a non-mandatory way. When taking, for instance, the above cited paragraph 15, it says nothing more than that “consideration should [also] be given”.

### 11.1.4 European Union

*Council Directive 93/7/EEC* on the return of cultural goods unlawfully removed from the territory of a Member State is a measure which was enacted to accompany the elimination of internal frontiers in the Community after 1 January 1993. Together with Council Regulation

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13 for the purpose of seizure and restitution of cultural property with has been removed to the territory of the requested Party subsequent to an offence relating to cultural property […]”

Article 8(3): “Each Party shall likewise execute any letters rogatory relating to the enforcement of judgments delivered by the competent authorities of the requesting Party in respect of an offence relating to cultural property for the purpose of seizure and restitution of cultural property found on the territory of the requested Party to the person designated by the judgment or that person’s successors in title […]”

35 Furthermore, the resolution concerns solely looted Jewish cultural property.

(EEC) No. 3911/92 on the export of cultural goods, the directive introduced a Community system “for cooperation between national authorities and a legal procedure for the return of cultural objects when they have been unlawfully removed from the territory of a Member State.” The aim of the directive is first and foremost to protect Member States’ cultural heritage. The European Commission called Directive 93/7/EEC “a measure to support the internal market with the aim of reconciling the operation of the internal market with a guarantee for the Member States that their cultural objects with the status of national treasures of artistic, historic or archaeological value, pursuant to Article 30 of the EC Treaty,[39] will be protected.”

The directive enables Member States of the European Union to secure the return to their territory of cultural goods that have been removed from their territory in breach of national or Community law. Article 2 states as the basic rule:

“Cultural objects which have been unlawfully removed from the territory of a Member State shall be returned in accordance with the procedure and in the circumstances provided for in the Directive.”

This return obligation, which arises only when a request for return is made by one Member State to another, is confined to objects unlawfully removed from the territory of a Member State on or after 1 January 1993. According to Article 1(2), unlawfully removed from the territory of a Member State means:

“- removed from the territory of a Member State in breach of its rules on the protection of national treasures or in breach of Regulation (EEC) No 3911/92, or
- not returned at the end of a period of lawful temporary removal or any breach of

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39 Articles 28 and 29 of the Treaty establishing the European Community prohibit restrictions on imports and exports and all measures having equivalent effect. However, Article 30 provides that Articles 28 and 29 of the treaty shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified “on grounds of […] the protection of national treasures possessing artistic, historic or archaeological value […].” Article 30 has been renumbered into Article 36 in the Treaty on the Functioning of the European Union.
41 Article 2: “Cultural objects which have been unlawfully removed from the territory of a Member State shall be returned in accordance with the procedure and in the circumstances provided for in this Directive.”
42 However, on the basis of Article 14(2) of the directive, Member States may broaden the scope to include objects which have been unlawfully removed from their territory before 1 January 1993.
another condition governing such temporary removal.”

It does not make a difference whether the cultural objects have been moved solely within the European Union or whether they were first exported to a non-EU country and then re-imported to another Member State.

Member States shall cooperate and promote consultation between each other’s competent national authorities. In particular, to “take any necessary measures, in cooperation with the Member State concerned, for the physical preservation of the cultural object”. Would this not leave open the possibility of seizure of the object? In my view, it could. Furthermore, on the basis of Article 5,

“[t]he requesting Member State may initiate, before the competent court in the requested Member State, proceedings against the possessor or, failing him, the holder, with the aim of securing the return of a cultural object which has been unlawfully removed from its territory.”

Article 8 then provides for an order of the competent court to return the cultural object in question.

Pursuant to Article 18, Member States had to bring the laws, regulations and administrative provisions necessary to comply with this directive into force within nine months of its adoption, except as far as Belgium, Germany and the Netherlands were concerned, which had to conform to the directive at the latest twelve months from the date of its adoption. The

43 This would mean, that if a cultural object would not be returned by the borrowing EU Member State to the lending EU Member State after the loan period as agreed, that may fall under the definition of ‘unlawfully removed’ in the directive.
45 Article 4(4).
46 Article 5 continues, stating: “Proceedings may be brought only where the document initiating them is accompanied by:
- a document describing the object covered by the request and stating that it is a cultural object,
- a declaration by the competent authorities of the requesting Member State that the cultural object has been unlawfully removed from its territory.”
47 Article 8: “Save as otherwise provided in Articles 7 and 13, the competent court shall order the return of the cultural object in question where it is found to be a cultural object within the meaning of Article 1(1) and to have been removed unlawfully from national territory.” Article 7 regards the statute of limitations. Article 13 states that the directive shall apply only to cultural objects unlawfully removed from the territory of a Member State on or after 1 January 1993. See also: Matthias Weller, ‘Die rechtsverbindliche Rückgabezusage’ [The legally binding commitment to return], in: Uwe Blaurock, Joachim Bornkamm and Christian Kirchberg (eds.), Festschrift für Achim Krämer zum 70. Geburtstag am 19. September 2009 [Commemorative vor Achim Krämer on the occasion of his 70th birthday], Berlin 2009, pp. 721-735.
48 One has to realise what the binding nature of a directive is. EU directives lay down certain end results that must be achieved in every Member State. National authorities have to adapt their laws to meet these goals, but
date of adoption was 15 March 1993.

The main relevance of the directive to international (European) art loans lies in the fact that an EU Member State that currently holds a cultural object on loan for a temporary exhibition, which comes from another Member State, may be subject to requests from a third Member State for the return of the object. It is arguable that the immunity laws of some European States may conflict with the directive in so far as these laws make the return to a claimant of unlawfully removed cultural objects more difficult or impossible. The subgroup ‘Immunity from Seizure’ of the European Union OMC Expert Working Group ‘Mobility of Collections’ stated that “it is necessary to clarify how this conflict may be overcome”. In Chapter 11.2 I will come back to that.

In January 2011, during the meeting of the working group ‘on return of cultural goods’, held in Brussels under auspices of the European Commission, Germany has proposed to examine the relationship between the guarantee of immunity from seizure and the obligation of returning a cultural object, or to say it in other words: “to clarify the impact of a statement given by a Member State guaranteeing ‘immunity from seizure’ on the obligations deriving from the Directive”. This proposal was seconded by Austria, but several other States were of the opinion that this issue should be discussed in the OMC Expert Working Group on ‘Mobility of Collections’. The proposal is currently being assessed by the European Commission, also in the light of other proposed amendments to Council Directive 93/7/EEC.

are free to decide how to do so. See: website of the European Union: http://ec.europa.eu/eu_law/introduction/what_directive_en.htm. [Last visited 23 March 2011.] So, the situation differs, for instance, from EU regulations. Regulations are the most direct form of EU law. As soon as they are passed, they have binding legal force throughout every Member State. National governments do not have to take action themselves to implement these. See: website of the European Union: http://ec.europa.eu/eu_law/introduction/what_regulation_en.htm. [Last visited 23 March 2011.] Thus, although a directive is binding on the national authorities, and is considered as forming part of EU law, the bindingness lies in the fact that they oblige the EU Member States to implement the obligations laid down in the directive in their national legislation, for instance the obligation that cultural objects which have been unlawfully removed from the territory of a Member State shall be returned.


50 The objectives of the working group were to:
  i) identify problems in the application of Directive 93/7/EEC;
  ii) propose effective and acceptable solutions for the Member States with a view to the possible revision of the directive.

51 Citation coming from the Minutes of the third meeting of the working group ‘on return of cultural goods’, held in Brussels on 26 January 2011. Doc. ACS/el entr.c.4(2011)139407, dated 4 February 2011.

52 For instance, with regard to the statute of limitations.
I will now come to the relationship between immunity from seizure legislation of EU Member States and *Council Regulation (EC) 44/2001 on jurisdiction and enforcement of judgments in civil and commercial matters*.53 This regulation is the main vehicle for the recognition and enforcement of judgments given in civil or commercial matters by courts in EU Member States and aims to establish a procedure that facilitates the free movement of judgments as much as possible.54 Judgments in civil and commercial matters delivered by such courts have the same force and effect as a judgment delivered by a court of the Member State in which recognition is sought, and - subject to the issue of a declaration of enforceability - they can be enforced as if they were originally given by that court.55

Article 33(1) states that “[a] judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.” There are, however, several reasons why the recognition of a judgment may be contested. One of these is if such recognition is “manifestly contrary to public policy in the Member State in which recognition is sought.”56 Pursuant to Article 38(1), “[a] judgment given in a Member State and

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53 Also called Brussels I Regulation, dated 22 December 2000, *Official Journal* L 12, 16 January 2001, p. 1. The regulation supersedes the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27 September 1968, which was applicable between the EU countries before the regulation entered into force. The convention continues to apply with respect to those territories of EU countries that fall within its territorial scope and that are excluded from the regulation pursuant to Article 299 of the Treaty establishing the European Community (EC). See: http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33054_en.htm.

54 The Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007 concluded between the European Community, Denmark, Iceland, Norway and Switzerland has similar provisions in a similar numbering. The 2007 Lugano Convention entered into force on 1 January 2010. It replaces the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 16 September 1988. With regard to Denmark, the following should be taken into account: Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, is not participating in the adoption of this regulation, and is therefore not bound by it nor subject to its application. That is why only the Lugano Convention is applicable to Denmark. See preambular para. 21 of the regulation.

55 See also: Norman Palmer, *Comments on the DCMS consultation paper on anti-seizure legislation for cultural objects on loan*, para. 35. See: www.culture.gov.uk/images/publications/Palmer_Prof_Norman.rtf. It should thereby be taken in mind that in the UK, registration of foreign judgments is necessary. In other Member States foreign judgments are not registered.

56 Article 34(1). “The concept of public policy is defined essentially by the national law of the State addressed. However, the Court of Justice has held that it has jurisdiction to review the limits within which a national court may invoke public policy to refuse recognition to a foreign judgment. It has ruled that recourse to the concept of public policy within the meaning of Article 34(1) can be envisaged only where recognition would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought, inasmuch as it infringes a fundamental principle; the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of that State.” See: Para. 133, Explanatory Report to the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, with reference to Court of Justice, Case C-7/98 Krombach [2000] *ECR* I-1935, paras. 23 and 37.

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enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.”

Article 31 states:

“Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.”

Unlike Article 47, that regards the enforcement of judgments and to which I shall come infra, Article 31 solely regards the question of jurisdiction. In this article, it is clear from the text that the law of the Member State where provisional measures are sought is determinative (and the availability of measures according to its legislation), and that the scope of the article is limited to those measures that could actually be enforced in the State in which they were sought. In my view that would mean that immunity from seizure legislation can prevent provisional, including protective, measures in this stage. If the law of the Member State does not foresee in available provisional, including protective, measures, for instance for reasons of State immunity, the option is nonexistent.

Coming now to Article 47 of the regulation, regarding the enforceability of a judgment. It states in its first paragraph:

“When a judgment must be recognised in accordance with this Regulation, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State requested, without a declaration of enforceability [...] being required.”

It thus allows provisional or protective measures to be taken once the foreign judgment is enforceable in the State of origin, always supposing it satisfies the tests for recognition in the State addressed, whether or not a declaration of enforceability has been issued. Article 47 leaves it to the national law of the State addressed to determine their classification, the type

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57 Pursuant to Article 43(1), the decision on the application for a declaration of enforceability may be appealed against by either party.
58 See also paras. 124-127, Explanatory Report to the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
59 And thus also of the Lugano Convention.
and value of the goods in respect of which the measures may be adopted, the conditions to be satisfied for such measures to be valid, and the detailed provisions for implementing them and ensuring that they are legitimate.

One the one hand, it should be borne in mind that the national law to which Article 47 refers must not in any circumstances lead to frustration of the principles laid down in that regard and must therefore be applied in a manner compatible with the principles in Article 47, which, as we saw, entitle the applicant to request provisional or protective measures from the moment that the judgment becomes enforceable in the State of origin.\(^{61}\) On the other hand, it is clear that the regulation does not say anything about the kind of objects which should or should not be eligible for measures of constraint. Article 47 even explicitly refers to the domestic legislation of the State concerned regarding this issue.

In *Capelloni et Aquilini v. Pelkmans*\(^ {62}\) the European Court of Justice stated with regard to (Article 39\(^ {63}\) of) the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters\(^ {64}\) that the convention leaves the matter of resolving any question not covered by specific provisions of the treaty to the procedural law of the court hearing the proceedings.\(^ {65}\) Nevertheless, and as stated *supra*, this must not in any circumstances lead to the frustration of the principles laid down in that regard by the convention.\(^ {66}\) As the convention, succeeded by the regulation, aims at facilitating and simplifying recognition and enforcement of judgments rendered in another Member State, the domestic legislation of Member States should not frustrate that aim. So, no procedural hurdles should be raised in that respect. But that does not say anything regarding the kind of objects that could or could not be involved.

What would this mean in case a cultural object is the subject of a judgment in Member State A and the recognition of that judgment is sought in Member State B? Based on the regulation, the courts of Member State B must in principle enforce the judgment and deal with that object accordingly. It would also mean that on the basis of Article 47, the cultural object can be

\(^{61}\) Ibid.


\(^{63}\) Which corresponds with Article 47 of the regulation.

\(^{64}\) The predecessor of this regulation.

\(^{65}\) See para. 20.

\(^{66}\) See para. 21.
subjected to ‘protective measures’, which in my view include seizure. However, as the regulation does not indicate which objects should or should not be subject to measures of constraint and leaves this to the domestic law of the State concerned, it would be fair to say, that the regulation leaves room to State legislation immunising cultural objects on loan. 67

Council Framework Decision 68 2003/577/JHA of 22 July 2003 69 on the execution in the European Union of orders freezing property or evidence 70 requires a court in a Member State to give effect to orders by courts in other Member States for the freezing 71 and confiscation of property in the context of criminal proceedings. 72 However, Article 7(1)(b) states:

“The competent judicial authorities of the executing State may refuse to recognise or execute the freezing order […] if there is an immunity or privilege under the law of the executing State which makes it impossible to execute the freezing order, the competent judicial authorities of the executing State may refuse to recognise or execute the freezing order [.]”

It may thus be fair to say that when the relevant order concerns a cultural object on loan to a museum of a Member State, and the object is protected from measures of constraint by domestic anti-seizure legislation, that legislation would prevail. 73

67 Also Matthias Weller is of the opinion that national immunity from seizure legislation does not violate the regulation, as it does not regulate the limits of the enforcement as such. See: Matthias Weller, ‘Third-Party Claims on the Occasion of Cross-Border Art Loans in Europe: Brussels I Regulation – Anti Seizure-Statutes – Human Rights’, Art Antiquity and Law, December 2009, Vol. XIV, Issue 4, pp. 303-316, at p. 313. Norman Palmer, however, seems to be indecisive. He brings up, that if the immunity precludes the enforcement, this would mean that the regulation would be frustrated; if the immunity would not preclude the enforcement, then the immunity is less complete than it may seem at first sight. See: op. cit. n. 55 (Palmer), para. 36.

68 Framework Decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect. See: Treaty on the European Union, Article 34(2)(b).


70 The purpose of the Framework Decision is to establish the rules under which a Member State shall recognise and execute in its territory a freezing order issued by a judicial authority of another Member State in the framework of criminal proceedings (according to Article 1).

71 A ‘freezing order’ means any measure taken by a competent judicial authority in the issuing State in order provisionally to prevent the destruction, transformation, moving, transfer or disposal of property that could be subject to confiscation or evidence (Article 2(c)).

72 Article 5(1): “The competent judicial authorities of the executing State shall recognise a freezing order […] without any further formality being required and shall forthwith take the necessary measures for its immediate execution in the same way as for a freezing order made by an authority of the executing State […]”.

73 Although the European Court of Justice had ordered in the Pupino case (Criminal proceedings against Maria Pupino, 16 June 2005, Case C-105/03, [2005] ECR I-5285) that a national court is required to take into consideration all the rules of national law and interpret them, so far as possible, in the light of the working and purpose of the Framework Decision (see para. 61; it regarded here Council Framework Decision 2001/220/JHA, on the standing of victims in criminal proceedings), this Framework Decision 003/577/JHA refers explicitly to the law of the executing State.
Finally a few words with regard to the Report on a legal framework for free movement within the internal market of goods whose ownership is likely to be contested. At the sitting of 4 July 2002, the President of the European Parliament announced that the Committee on Legal Affairs and the Internal Market had been authorised to draw up an own-initiative report on this subject. The main objective of that initiative of the European Parliament was to propose the development of transparent remedial structures, which should be consistent with applicable principles of European and international law. Willy C.E.H. De Clercq was appointed as rapporteur by the Committee. On 17 December 2003, the De Clercq Report on a legal framework for free movement within the internal market of goods whose ownership is likely to be contested was adopted by a 487-10 vote of the European Parliament. In the corresponding resolution, the European Parliament called on the Member States and applicant States

“to make all necessary efforts to adopt measures to ensure the creation of mechanisms which favour the return of the property referred to in the resolution and to be mindful that the return of art objects looted as part of crime against humanity to rightful claimants is a matter of general interest for the purposes of Article 1 of Protocol I to the European Convention of Human Rights”.

The resolution as such does not have a binding force, but with regard to European art loans it is again an indication that it is considered of utmost importance to return looted art to the rightful claimants.

11.1.5 Organization of American States

The Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations has been adopted as a reaction to the continuous looting and

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74 Explanatory Statement attached to the Motion for a European Parliament Resolution on a legal framework for free movement within the internal market of goods whose ownership is likely to be contested (2002/2114(INI)).
75 Finalised by the European Parliament's Committee on Legal Affairs and the Internal Market on 26 November 2003.
79 Convention of San Salvador, unanimously adopted by the General Assembly of the Organization of American States by resolution 210 (VI-O/76) on 16 June 1976. The text can be found at
plundering of the native cultural heritage suffered by the countries of the hemisphere, particularly the Latin American countries. The purpose of this convention is

“to identify, register, protect, and safeguard the property making up the cultural heritage of the American nations in order:
(a) to prevent illegal exportation or importation of cultural property; and
(b) to promote cooperation among the American states for mutual awareness and appreciation of their cultural property.”

According to Article 11,

“[w]hen the government of a State Party becomes aware of the unlawful exportation of an item of cultural property, it may address the government of the state to which the property has been removed, requesting that it take measures for its recovery and return [...]. The state petitioned shall employ all available lawful means in order to locate, recover, and return the cultural property claimed and that may have been removed after this convention has come into effect.”

Also judicial action for the recovery of the cultural property may be required. However, Article 16 of the convention makes an explicit exception with regard to cultural property on loan:

“Articles on loan to museums, exhibitions, or scientific institutions that are outside the State to whose cultural heritage they belong shall not be subject to seizure as a result of public or private lawsuits.”

This means, that an international art loan may freeze the possibility for restitution of the cultural objects concerned to the State of origin, and that the art loan cannot be used as an ‘opportunity’. Interestingly, this is more explicit and goes further than the 1970 UNESCO

http://www.oas.org/juridico/English/treaties/c-16.html. The convention entered into force at 31 August 1978 and has 12 States Parties, being Argentina, Bolivia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay and Peru. Chile only signed the convention. See:

80 Article 1. According to Article 2, the cultural property referred to in Article 1 is that included in the following categories:

a. Monuments, objects, fragments of ruined buildings, and archaeological materials belonging to American cultures existing prior to contact with European culture, as well as remains of human beings, fauna, and flora related to such cultures;
b. Monuments, buildings, objects of an artistic, utilitarian, and ethnological nature, whole or in fragments, from the colonial era and the Nineteenth Century;
c. Libraries and archives; incunabula and manuscripts; books and other publications, iconographies, maps and documents published before 1850;
d. All objects originating after 1850 that the States Parties have recorded as cultural property, provided that they have given notice of such registration to the other parties to the treaty;
e. All cultural property that any of the States Parties specifically declares to be included within the scope of this convention.”

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Convention, which does not contain such an exception.

11.1.6 The 1998 Washington Principles, the 2000 Vilnius Declaration and the 2009 Terezin Declaration

On 3 December 1998 the 44 governments participating in the Washington Conference on Holocaust Era Assets endorsed eleven principles for dealing with Nazi-looted art. These principles can be considered as a moral imperative for the return of looted property to its rightful owners. The first principle reads that “[a]rt that had been confiscated by the Nazis and not subsequently restituted should be identified.” Principle 8 states that “if the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing that this may vary according to the facts and circumstances surrounding a specific case.”

The Vilnius International Forum on Holocaust Era Looted Cultural Assets took place from 3 to 5 October 2000 in Lithuania, as a follow-up to the Washington Conference of December 1998, under the auspices of the Council of Europe. On 5 October 2000, the governments present agreed to a declaration.

“The Vilnius Forum asks all governments to undertake every reasonable effort to achieve the restitution of cultural assets looted during the Holocaust to the original owners or their heirs. To this end, it encourages all participating States to take all reasonable measures to implement the Washington Conference Principles on Nazi-Confiscated Art as well as Resolution 1205 of the Parliamentary Assembly of the Council of Europe.”

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81 See: http://www.lootedartcommission.com/Washington-principles. [Last visited 23 March 2011.] Participating States: Albania, Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Holy See (observer), Hungary, Israel, Italy, Latvia, Lithuania, Luxembourg, Macedonia (Federal Yugoslav Republic of), Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom, the United States, Uruguay.
82 Principle 8.
83 http://www.lootedartcommission.com/vilnius-forum. [Last visited 23 March 2011.] Signed by: Albania, Argentina, Austria, Belgium, Canada, Croatia, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Greece, Germany, Holy See, Hungary, Israel, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, FYROM, Romania, Russian Federation, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom, the United States.
84 Para. 1.
On 30 June 2009 the Terezin Declaration was signed by 46 States in Terezin, Czech Republic. The Signatory States expressed the urgent need to strengthen and sustain the efforts as agreed upon under the Washington Principles “in order to ensure just and fair solutions regarding cultural property [...] that was looted or displaced during or as a result of the Holocaust [...].” The part of the Terezin Declaration dealing with Nazi-Confiscated and Looted Art recalls these principles,

“which enumerated a set of voluntary commitments for governments that were based upon the moral principle that art and cultural property confiscated by the Nazis from Holocaust (Shoa) victims should be returned to them or their heirs, in a manner consistent with national laws and regulations as well as international obligations, in order to achieve just and fair solutions.”

The third paragraph of this part states, inter alia, that “[g]overnments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just and fair solutions [...].”

One should keep in mind that the aforementioned principles and declarations are not legally binding as such. Legally speaking, they therefore do not intervene with international obligations on State immunity or relevant national legislation. This is, for instance, expressed in the Terezin Declaration which states that State efforts should be consistent with “national laws and regulations as well as international obligations”. But although not legally binding, there is a considerable moral force to be attributed to it. Moreover, the principles and declarations are related to the wrongdoings during armed conflict. Infra, in Chapter 12.5.1, I will refer to some legally binding instruments, addressing these wrongdoings, and will discuss how these relate to a possible rule of customary international law, or the limitations to that rule.

11.2 Which obligation would prevail?

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85 http://www.holocausteraassets.eu/files/200000215-35d8ef1a36/TEREZINDECLARATION_FINAL.pdf. [Last visited 23 March 2011.] Signed by: Albania, Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, FYROM, Germany, Greece, Hungary, Ireland, Israel, Italy, Latvia, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom, the United States, Uruguay.

86 See para. 3 of the introductory part of the declaration.
In Chapter 11.1, I have examined several obligations which could be at odds with immunity from seizure for cultural objects on loan. It concerned first and foremost obligations to return stolen or otherwise illicitly appropriated cultural objects to the State of origin. Both the 1970 UNESCO Convention, the 1995 Unidroit Convention, as well as European Council Directive 93/7 EEC, contain obligations in that regard.

Some of the obligations as described in Chapter 11.1 are not legally, but only morally binding. Furthermore, as we saw, some instruments leave room for immunity provisions. Thus, it is in my opinion best to focus on two different, possibly conflicting, obligations, and to examine the relationship between them: the obligation to return an illicitly acquired or exported cultural object to the State of origin, and the obligation to provide immunity from seizure for a cultural object on loan. After all, when State X lends a cultural object for a temporary exhibition to State Y, it could be possible that the State from the territory of which the cultural object originally was removed files a claim for restitution in the borrowing State Y and requests to return the object not to the lending State, but to itself.

In that case there are two conflicting obligations to return the object.\textsuperscript{88} One towards the lending State X and one towards the State from which territory the object was taken. The obligation to return to the State of origin can be based on the (First) Protocol to the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict, the 1970 UNESCO Convention, the 1995 Unidroit Convention, or the 1993 EC Directive.\textsuperscript{89} Immunity from seizure provisions may be based on national legislation, on international obligations (for instance, a rule of customary international law or a bilateral or multilateral agreement) or on both. It would depend on the legal basis of the immunity from seizure provision which obligation will prevail.

If the immunity from seizure is based on an international legal obligation, and there is a conflict with a return obligation to the State of origin under international law (for instance, the 1970 UNESCO Convention), we have a situation in which there are two contradictory legal

\textsuperscript{87} Second introductory paragraph to this part.
\textsuperscript{89} The obligations are of course only applicable when the States involved are party to the convention, or EU Member States when it regards EU law.
obligations which are both based on international law. There are certain general rules of international law which may help to assess which return obligation prevails: first of all, there is the rule of *lex specialis derogat legi generali*, which means that a specific instrument normally prevails over a general instrument (unless a different intention of the Parties can be clearly established). This is a generally accepted technique of interpretation and conflict resolution in international law.\(^90\) Whenever two or more international legal norms conflict with one another, priority should be given to the norm that is more specific.\(^91\) Second, the rule *lex posterior derogat legi priori* is followed, best to translate as the later instrument supersedes earlier instruments.\(^92\)

This would mean, that if two (or more) States have concluded a bilateral, regional or international legal agreement, stating that cultural objects on loan will be immune from seizure, the ensuing more specific obligation would prevail over the more general obligation binding upon these States to return illicitly acquired or exported cultural objects to a State of origin, unless the bilateral, regional or international agreement, stating that cultural objects on loan would be immune from seizure, makes an exemption for these illicitly acquired or exported cultural objects.

What would be the situation if the 2004 UN Convention would enter into force? First of all, the 2004 UN Convention is of a more recent date than the instruments requiring the return of cultural objects to the State of origin. Second, the provision that State property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes (and consequently, that these objects are immune from measures of constraint) should be regarded as more specific than the general provision to return illicitly acquired cultural objects. Third, immunity obligations are still considered as very strong obligations, standing high in the hierarchy. As


\(^{91}\) The source of the norm (whether treaty or custom) is not decisive for the determination of the more specific standard.

\(^{92}\) See also: Peter Malanczuk, *Akehurst’s Modern Introduction to International Law, Seventh revised edition*, London, New York 1997, p. 56: “Thus, treaties and custom are of equal authority; the later in time prevails. This conforms to the general maxim of *lex posterior derogat priori* (a later law repeals an earlier law). However, in deciding possible conflicts between treaties and custom, two other principles must be observed, namely *lex posterior generalis non derogat priori speciali* (a later law, general in nature, does not repeal an earlier law which is more special in nature) and *lex specialis derogat legi generali* (a special law prevails over a general law).”
stated in Chapter 3, immunity from measures of constraint was called “the last bastion of State immunity”. All this leads me to conclude, that immunity for cultural objects on loan under the 2004 UN Convention would prevail over the return obligation to the country of origin, assuming that the States concerned are all party to both the 2004 UN Convention and the international legal instrument concerned obliging the return to the State of origin. This would be different, if the State of origin would not be a party to the 2004 UN Convention. In that situation, the only international instrument that binds the borrowing State and the State of origin would be the international legal instrument that provides for the return of the cultural object to the State of origin, and that would then be the only international instrument that applies in that situation. Next to that obligation, the borrowing State can have a different legal obligation towards the lending State, which means that the borrowing State may be faced with two conflicting return obligations. Whatever the borrowing State will do, the State that does not receive the cultural object may argue that the borrowing State commits an internationally wrongful act.\textsuperscript{93}

With regard to a rule of customary international law,\textsuperscript{94} stating that cultural objects belonging to foreign States and on temporary loan are immune from measures of constraint, the situation depends on the limitations of the rule of customary international law. It should be kept in mind that a rule of customary international law is not necessarily equal in content to a provision of treaty law. Behaviour of States (such as State practice or dissenting opinions) can make the rule subject to limitations. I shall come back to that in Chapter 12. If the rule of customary international law is unlimited, we are facing the same situation as above: a newer, more specific immunity from seizure provision prevails over an older, more general conflicting provision. If, however, the rule of customary international law would not extend immunity from seizure to, for example, illicitly acquired cultural objects, then, in practice, there would be no conflict of obligations, as the return obligation to the State of origin, and the rule of customary international law are in agreement with each other. With regard to a possible rule of customary international law to provide immunity from seizure, I will examine in Chapter 12 whether such a rule exists, and if so, to which limits that rule is subject.

What would be the situation with regard to the EC Directive on the return of cultural goods

\textsuperscript{93} More about that \textit{infra}, Ch. 12.5.1.  
\textsuperscript{94} Rules of customary law are binding upon all States, unless States have dissented from the beginning. See \textit{supra}, Ch. 2.
unlawfully removed from the territory of a Member State? After all, between Member States of the European Union, community law (such as directives and regulations) has to be taken into account as well, in addition to international law. It should be kept in mind, that the directive is only applicable between and on the territory of the EU Member States. This implies not only a geographical limitation, but regards also a rather homogeneous group of States. It is therefore less likely, that if a cultural object is normally located in lending State A and is temporarily on loan in borrowing State B, State C, from which the object was unlawfully removed, wants to file a request in borrowing State B, rather than in lending State A. One may therefore think that there are no good reasons why the temporary exhibition should be used or seen as an opportunity for filing a claim at specifically that moment.\footnote{Although we saw supra, Ch. 9.3.2 that Diag Human saw reasons to seize objects in Austria instead of in the Czech Republic.}

It is conceivable, however, that a cultural object is given on loan to an EU Member State by a non-EU Member State, and that, during the exhibition, another EU Member State finds out that the object had been unlawfully removed from its territory. After all, it is possible that the cultural object had first been illicitly exported to a non-member country and then re-imported to another Member State for the purpose of the loan.

If the immunity has been provided on the basis of a bilateral agreement between the borrowing EU Member State, and the lending non-EU Member State, then the borrowing State is faced with two conflicting return obligations. A return obligation to the lending State on the basis of the immunity agreement, and a return obligation to the EU Member State of origin on the basis of the directive. Whatever the borrowing State will do, the State that does not receive the cultural object may accuse the borrowing State of acting wrongfully. We have already seen a similar situation \textit{supra}, where I was discussing the relationship between conflicting international legal obligations.

If the immunity is based on a multilateral agreement to which both the lending State and the borrowing State, but not the State of origin is a party, we are facing a similar situation. However, in case the State of origin would also be a party to this agreement, which makes that all three States concerned are a party to the international immunity agreement, it is questionable whether the State of origin can reasonably compel the borrowing State to follow the directive and not the immunity agreement. Probably not, keeping in mind that the
multilateral immunity agreement is also applicable in the relationship between the borrowing State and the State of origin.

If the immunity is based on an unlimited rule of customary international law,\textsuperscript{96} and the State of origin cannot be considered a ‘dissenting State’,\textsuperscript{97} we are facing a similar situation as the situation I just described: the State of origin cannot reasonably compel the borrowing State to follow the directive and not the rule of customary international law. This would be different in case the State of origin has dissented from the rule of customary international law from the beginning. In that situation the rule is not binding on that dissenting State of origin, and the borrowing State may be faced with two conflicting return obligations. In case unlawfully removed cultural objects cannot be considered as eligible for immunity under the rule of customary international law (thus, when the rule of customary international law does not extend to unlawfully removed cultural objects from immunity), then there is no conflict with the directive.

With regard to the relationship between international law and community law, the European Court of Justice (ECJ) expressed its views as well. The ECJ has judged that the European Union must respect international law in the exercise of its powers.\textsuperscript{98} Customary international law needs to be complied with by the EU as well.\textsuperscript{99} Customary international law is binding


\textsuperscript{97} See supra. Ch. 2.6.


The European Court of Justice stated on 3 June 2008 in International Association of Independent Tanker Owners (Intertanko) and Others v. Secretary of State for Transport (Reference for a preliminary ruling from the High Court of Justice of England and Wales, Queen’s Bench Division (Administrative Court)), Case C-308/06, [2008] ECR I-4057, para 51: “Admittedly, as is clear from settled case-law, the powers of the Community must be exercised in observance of international law, including provisions of international agreements in so far as they codify customary rules of general international law (see, to this effect, Case C-286/90 Poulsen and Diva Navigation [1992] ECR I-6019, paragraphs 9 and 10; Case C-405/92 Mondiet [1993] ECR I-6133, paragraphs 13 to 15; and Case C-162/96 Racke [1998] ECR I-3655, paragraph 45).” To be found at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0308:EN:HTML. [Last visited 23 March 2011.]

\textsuperscript{99} Judgment of the European Court of Justice, 16 June 1998, A. Racke GmbH & Co. v. Hauptzollamt Mainz, Case C-162/96, para. 45: “It should be noted in that respect that, as is demonstrated by the Court's judgment in Case C-286/90 Poulsen and Diva Navigation [1992] ECR I-6019, paragraph 9, the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country.”
upon the institutions of the EU and forms part of the legal order of the EU, the ECJ stated.\footnote{Judgment of the European Court of Justice, 16 June 1998. - A. Racke GmbH & Co. v. Hauptzollamt Mainz, Case C-162/96, para. 46: “It follows that the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order.”} Purely on the basis of the ECJ-rulings, it would, however, go too far to state that the fact that customary international law is binding upon the EU and forms part of its legal order also implies that customary international law prevails over EU law when there is a conflict of legal obligations. Especially taking into account all the provisos the court made itself in its judgments, it is not likely that the ECJ wanted to go that far in its rulings.\footnote{See: Jan Wouters and Dries van Eeckhoutte, Giving Effect to Customary International Law Through European Community Law, Catholic University Leuven, Faculty of Law, Institute for International Law, Working Paper No. 25 - June 2002.} Therefore, one cannot say that through the case law of the ECJ the precise legal status and place of customary international law within the hierarchy of norms has become clear,\footnote{Ibid., p. 7.} at least not from a European law perspective.

Finally a few words about the situation that a return obligation stems from the national legislation of the borrowing State.\footnote{As I showed in this study, there can be numerous reasons to enact national legislation. The enactment of legislation can be influenced by demands of other States, and by the fact that the borrowing State wants to show that it is a safe haven for international art loans. Legal conviction that cultural objects on loan need to be protected may also be a motif for legislation, as well as the wish to emphasise and concretise an already existing, but as ‘vague’ considered rule of customary international law. Dualist States may have to enact legislation in order to implement the international legal provisions in their own domestic system. Another reason for legislation may be, that it helps to guide the judiciary in its assessments, so that it does not need to determine \textit{proprio motu} the possible existence of a rule of international law, as well as its limitations.} In the case of a clash of obligations whereby one obligation would be based on national legislation and the contradictory obligation would based on international or European community law, normally that international or community legal obligation would prevail, unless the international or community instrument gives leeway to national provisions.\footnote{With regard to community law the European Court of Justice has ruled in the cases \textit{Van Gend en Loos} (5 February 1963, Case No. 26/62, [1963] \textit{ECR} 1) and \textit{Flaminio Costa} v. \textit{ENEL} (15 July 1964, Case 6/64, [1964] \textit{ECR} 585 ) that community law prevails over national legislation.} If the international obligations are not self-executing and need to be implemented in national legislation, in order to become effective within the domestic legal order, it is in my view important that the implementation does not lead to an erosion of the international legal obligations. Otherwise, the State may be accused of committing an internationally wrongful act.\footnote{Article 27 of the 1969 Vienna Convention on the Law of Treaties states that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.} Thus, if the immunity provision is solely based on a national legal obligation, and the return obligation to a State of origin is based on international law or
community law, then in my view, the national immunity provision should be set aside.

However, we have seen that certain State Parties, such as Switzerland and Germany, have a somewhat layered approach: if a return guarantee as foreseen under the national immunity from seizure legislation has not yet been issued to the lending State (or institution), obligations under the 1970 UNESCO Convention can prevent the issuance of such a return guarantee. If the cultural object will nevertheless arrive in the borrowing country, then the borrowed object will not enjoy immunity under the national legislation, and the obligations arising out of, for instance, the 1970 UNESCO Convention are applicable. However, as soon as a return guarantee has been issued in favour of the lending State (for instance because before issuing the return guarantee it was not known that the objects concerned were stolen or otherwise illicitly appropriated), then that guarantee is considered as stronger than the return obligations as foreseen under the 1970 UNESCO Convention. The latter also applies to the American approach: the immunity from seizure based on the national legislation prevails. That may lead, in my view, to the non-fulfilment of the State’s treaty obligations.

Christoff Jenschke argued that if the borrowing State Y had issued a return guarantee to the lending State on the basis of its national immunity law, then the State from which territory the objects were taken has the possibility of filing a restitution claim based on an international legal obligation and before an international tribunal. That claim can be filed either against lending State X or borrowing State Y (provided that all States are party to the instrument). Jenschke called the possible claim against lending State X the primary claim, as that State is now seen as the owner of the object(s). Borrowing State Y is only a temporary possessor, thus that claim is called a secondary claim by Jenschke.106

Different academics formed an opinion with regard to the question which return obligation should prevail, the return to the State of origin under the EC Directive, or the return obligation to the lending State based on national immunity legislation. It has to be said that the views were far from uniform.107 It is no coincidence that the subgroup ‘Immunity from Seizure’ of

106 Op. cit. n. 88 (Jenschke). But how would this be if the lending State is not a party to the instrument requiring the return of the object to the State of origin? Then there is only one claim to make, viz against the borrowing State. Possibly, the State where the object originally came from can then make use of the fact that the object is temporarily on the territory of a State Party to the protocol, although the national legislation of the borrowing State may try to prevent that.
107 Matthias Weller is almost certain that a return guarantee, once issued, cannot be set aside during the loan on the ground that it violates community law. Community law should be interpreted in the light of EC primary law.
the European Union OMC Expert Working Group ‘Mobility of Collections’ stated with regard to a possible conflict between immunity from seizure guarantees and a return obligation under Council Directive 93/7/EEC, that “it is necessary to clarify how this conflict may be overcome”.

11.3 Immunity from seizure at odds with obligations under the European Convention on Human Rights?\footnote{108}

11.3.1 Introduction

Guarantees with regard to immunity from seizure gave and continue to give rise to numerous discussions in different fora and European States. Several questions were raised, such as: will

 thus the EC Treaty, replaced by the Treaty on the Functioning of the European Union. Article 288 states that “action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in non-commercial exchange”. That should suffice, in order to justify a teleological reduction of the scope of the directive in the case of temporary art loans from another Member State, thus Weller. See: Matthias Weller, ‘Immunity for artworks on loan? A review of international customary law and municipal anti-seizure statutes in the light of the Liechtenstein litigation’. Vanderbilt Journal of Transnational Law, October 2005, Vol. 38, Issue 4, pp. 997-1040, at pp. 1017-1018. See also: op. cit. n. 15 (Weller), pp. 72-73. Susanne Schoen is of the opinion that immunity from seizure under national legislation (in this case the German legislation) prevails. That does not only follow from the wording of the national legislative provision, but also from the object and purpose of the return provision to the lending State, which is to just exclude any intervention by a third party, in order to secure in full the return to the lender, thus Schoen. See: Susanne Schoen, ‘Die rechtsverbindliche Rückgabezusage – Das “Freie Geleit” für Kulturgut’ [A Legally Binding Commitment to Return – “Safe Conduct” for Cultural Property]. Im Labyrinth des Rechts? Wege zum Kulturgüterschutz [In the labyrinth of the law? Ways to the protection of cultural property], Magdeburg 2007, pp. 79-102, at p. 96. Eric Jayme is also of the opinion that the return commitment based on national law prevails: “The question can be raised, whether one should not interpret the Directive restrictively, in a way that during the period of the exhibit, States are not obliged to hand over objects, loaned from third States, to other EU Member States […]. It cannot be expected from the exhibiting State, that during the exhibition period its courts have to decide at the expense of the lender between conflicting claims for the return of two foreign States”. See: Erik Jayme, Das Freie Geleit für Kunstdenkmäler, Vienna 2001, pp. 16-17. Isabel Kühl, however, is of the view that a legally binding return commitment to the lender is at odds with Directive 93/7/EEC: “If there would be a restitution claim on the basis of the Directive, Section 20 [of the German immunity law] – including its commitment – would not be applicable on the basis of primacy of the Community law”. See: Isabel Kühl, Der internationale Leihverkehr der Museen [The international Loans of Museums], Cologne 2004, pp. 24, 25 and 42. Sabine Boos concluded that if there is a reasonable suspicion that the cultural object concerned is stolen, a return commitment is not to be given. However, if there is a return commitment, and this may infringe upon the directive, Boos is of the opinion that it depends on the legal basis of the return commitment which one prevails: the directive or the return commitment. If the loan is protected against measures of constraint according to principles of public international law on State immunity, the directive should be interpreted in that way. See: op. cit. n. 15 (Boos), pp. 273, 274: “[…] Etwas anderes gilt aber, wenn die Leihgabe nach den völkerrechtlichen Grundsätzen der Staatenimmunität vor gerichtlicher Inanspruchnahme im Belegenheitsstaat geschützt wird. In diesen Fall ist eine völkerrechtsconforme Auslegung der Richtlinie geboten […].” See in that regard also the remark made by Andrea Gattini, supra, n. 96.

\footnote{Many thanks go to Liselot Egmond, Deputy Agent of the Government of the Netherlands for the European Court of Human Rights.}
claimants be deprived of effective legal rights and remedies? Will immunity from seizure withstand testing against Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (or in short: the European Convention on Human Rights, ECHR), in particular, where the claimant will not otherwise have access to an effective legal remedy in the place where the lender or the object are usually located? Or could immunity from seizure result in an infringement on the right to the peaceful enjoyment of one’s possessions? In general: is there a potential conflict between anti-seizure legislation and certain guarantees embodied in the ECHR?

In the discussion, two rights are particularly relevant: the right to an effective access to court under Article 6 of the ECHR, and the right to the peaceful enjoyment of possessions under Article 1, Protocol 1, to the ECHR.

With regard to the right to an effective access to court, one should keep in mind - as I also explained supra in Chapter 3 - that immunity from jurisdiction or suit and immunity from seizure or measures of constraint are essentially different from each other: the fact that cultural objects are immune from seizure, does not necessarily mean that it is impossible to initiate an ownership claim with regard to these objects. In general it all depends on the laws of the forum State, as I showed supra in the different country-related chapters.

The ECHR states in Article 6(1), that “[…] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law […].” Protocol 1 to the convention is called ‘Enforcement of certain Rights and Freedoms not included in Section I of the Convention’. Article 1 of this protocol reads:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to

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110 Consultation Paper on anti-seizure legislation, United Kingdom Department of Culture, Media and Sport, 8 March 2006, para 1.17.
111 The full text of Article 6(1), reads: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”
the conditions provided for by law[113] and by the general principles of international law.”114

11.3.2 Article 6(1) ECHR

The European Court of Human Rights (ECtHR) has been asked in several cases to consider whether the notion of State immunity involves a violation of the right to access to court under Article 6(1) of the ECHR.

Since decades, the ECtHR is of the view that the right to court access is not an absolute right, but subject to limitations. In cases where the application of the principles of State immunity from jurisdiction restricts the exercise of the right to court access, the ECtHR must ascertain whether the circumstances of the case justify such restriction.115 But what should be considered as falling within this right of court access?

In 1975, in the case Golder v. United Kingdom116 the ECtHR reached the conclusion that Article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal.

“In this way the Article embodies the ‘right to a court’, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by [Article 6(1)] as regards both the organisation and composition of the court, and the conduct of the proceedings.”117

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113 This is not restricted by domestic law alone. The convention seeks to ensure that the domestic law itself complies with the essential requirements of ‘law’. See: Monica Carss-Frisk, ‘The right to property – A guide to the implementation of Article 1 of Protocol No. 1 of the European Convention on Human Rights’, Council of Europe, Human rights handbooks, No. 4, Strasbourg 2001, p. 9, para. 19.
114 It goes on, however, by making an exemption to the above cited rule: “The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest [...].”
116 Golder v. United Kingdom, judgment of 21 February 1975, No. 4451/70, 1 EHRR 524.
117 See para. 36. The ECtHR, however, considered that the right of access to the courts is not absolute. “As this is a right which the [ECHR] sets forth [...] without, in the narrower sense of the term, defining, there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication”, the ECtHR stated in para. 38. So, the ECtHR was of the opinion, that by its nature, the right of access to court calls for regulation by the State. The State has a margin of appreciation in making such regulations, provided that any limitations imposed serve a legitimate aim, are proportionate to that aim and do not restrict or reduce the access left to the individual in such a way, or to such an extent that the very essence of the right is impaired. See also: Consultation Paper on anti-seizure legislation, UK Department for Culture, Media and Sport, 8 March 2006, para. 1.18, that refers to the Golder-case. The ECtHR repeated this point of view in several cases. For instance, in Ashingdane v. United Kingdom, judgment of 28 May 1985, No. 8225/87; [1985] 7 EHRR 528, where the ECtHR restated that the immunity must have a legitimate aim, it must be proportionate and the very essence of
The right to access to court as guaranteed by Article 6(1) ECHR does not only provide for the right to institute civil proceedings before a court. In *Hornsby v. Greece*,\(^{118}\) the ECtHR was of the opinion that the execution of a judgment given by any court had to be regarded as an integral part of a ‘trial’ for the purposes of Article 6:

“The Court reiterates that, according to its established case-law, Article 6(1), secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way it embodies the ‘right to a court’, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6(1) should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention […]. Execution of a judgment given by any court must therefore be regarded as an integral part of the ‘trial’ for the purposes of Article 6 […].”\(^{119}\)

The question is whether that aspect of Article 6(1) conflicts with State immunity from enforcement measures such as execution, arrest or attachment.\(^{120}\) In that regard, there are several cases to refer to.

In *Kalogeropoulou and others v. Greece and Germany*,\(^{121}\) the ECtHR ruled once more that,

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\(^{118}\) *Hornsby v. Greece*, judgment of 19 March 1997, No. 18357/91, *RJD ECHR* 1997-II. This case concerned the delay by the administrative authorities in taking the necessary measures to comply with two judgments of the Supreme Administrative Court. The applicants (two British nationals) alleged that the administrative authorities’ refusal to comply with the Supreme Administrative Court's judgments of 9 and 10 May 1989 had infringed their right to an effective judicial protection of their civil rights (see para. 38). The court was of the opinion that in this case there has been a breach of Article 6(1) (see para. 45).

\(^{119}\) Para. 40.


\(^{121}\) No. 59021/00, 12 December 2002. The application was lodged by 257 Greek nationals who were the relatives of the victims of the massacre perpetrated by the German occupation forces in Distorno in 1944. After a Greek court decision became final, which granted the applicants’ claim for damages against Germany and ordered the payment of various amounts in compensation for the pecuniary and non-pecuniary loss sustained as a result of the massacre, applicants sought leave from the Greek Minister of Justice to bring enforcement proceedings against the German State, as according to Article 923 of the Greek Code of Civil Procedure that was a precondition for enforcing a decision against a foreign State. Despite not having the Minister of Justice’s consent, applicants instituted enforcement proceedings. Germany lodged an objection, which objection in the end was granted. The Greek court took thereby into account that the applicants’ right to have their judgment enforced was not completely frustrated as they could exercise that right in another country (Germany). (This information is based on the summary by the Registry.)
for the purposes of Article 6, the execution of a court order must be regarded as an integral part of the ‘trial’. While the refusal of the Greek State to allow the applicants to enforce an earlier judicial decision was a restriction on their right of access to court, it was according to the ECtHR justified because it pursued the legitimate aim of complying with international law to promote comity and good relations between States. Regarding the proportionality of the restriction, the ECtHR interpreted Article 6 in the light of other relevant norms of international law on State immunity and held “that measures taken by a High Contracting Party which reflected generally recognised rules of international law on State immunity could not [...] generally be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in [Article 6(1)].” Accordingly, the refusal of the Greek Minister of Justice to give the applicants leave to apply for expropriation of certain German property in Greece could not be regarded as an unjustified interference with their right of access to a tribunal, the ECtHR stated.122

In Manoilescu and Dobrescu v. Romania and Russia,123 the ECtHR followed the same line. Furthermore, it held that “[i]t should be noted that all the international legal instruments governing State immunity set forth the general principle that, subject to certain strictly delimited exceptions, foreign States enjoy immunity from execution in the territory of the forum State [...].124 In Treska v. Albania and Italy125 the ECtHR confirmed this approach.

122 The ECtHR declared the case inadmissible. See also: Kerstin Bartsch and Björn Elberling, ‘Jus Cogens vs. State Immunity, Round Two, The Decision of the European Court of Human Rights in the Kalogeropoulos et al. v. Greece and Germany Decision’, German Law Journal, 2003, Vol. 4, No. 5, pp. 477-491, esp. p. 483. Several applicants continued their legal battle and communicated their case to the Human Rights Committee (HRC), set up under the International Covenant on Civil and Political Rights (ICCPR). The authors of the communication (as it is called) stated that Greece violated Article 2(3) and 14 ICCPR, which, among other things, ensures the right to proceed with the enforcement of decisions relating to civil law. On 25 October 2010, the Human Rights Committee was of the view that the facts before it did not disclose a violation of the International Covenant on Civil and Political Rights. See: Communication No. 1507/2006, to be found at: http://www2.ohchr.org/tdru/ccpr/CCPR-C-100-D-1507-2006-Rev-1-E.pdf. [Last visited 23 March 2011.]
123 Manoilescu and Dobrescu v. Romania and Russia, judgment of 15 March 2005, No. 60861/00, RJD ECHR 2005-VI. In 1996 applicants brought proceedings in Romania, in order to obtain restitution of a building that belonged to their family but consequently was assigned to the Embassy of the Soviet Union (and later the Russian Federation) in Romania. The relevant administrative committee ordered that the property be restored to them, which decision became final. Applicants were, however, not able to enforce the decision. They tried to oblige the Romanian authorities to enforce the decision, but in the end that has been dismissed by the Bucharest Court of Appeals. In particular, the Court of Appeals noted that the building was now the property of the Russian Federation, and that consequently the appeal lodged by the applicants could not be brought against the Romanian authorities. Before the ECtHR, applicants complained that Article 5, Article 6 (1) and Article 1 of Protocol 1 had been violated. The ECtHR declared the complaints inadmissible (partly as being manifestly ill-founded).
124 Para. 73. The ECtHR referred to paras. 38 and 39 of its decision, in which it listed several international instruments where immunity from execution has been captured. For instance:
- the European Convention on State Immunity (Article 23);
- the UN Convention on Jurisdictional Immunities of States and their Property (Article 19 a.o.);
- Resolution of the Institute of International Law on immunity of foreign States in relation to questions of
Next to Article 6(1) of the ECHR, Article 1 of Protocol 1 to the ECHR may be relevant as well. Monica Carss-Frisk sums up that based on case law of the ECtHR, the following types of assets have been held to fall within the protection of Article 1: movable or immovable property, tangible or intangible interests, such as shares, patents, an arbitration award, the entitlement to a pension, a landlord’s entitlement to rent, the economic interests connected with the running of a business, the right to exercise a profession, a legitimate expectation that a certain state of affairs will apply, a legal claim, and the clientele of a cinema. An expectation to inherit property in the future will not be protected under Article 1, as that is not sufficiently concrete. “Article 1 of Protocol 1 does not expressly require the payment of compensation for a taking of, or other interference with, property. But in the case of a taking (or deprivation) of property, compensation is generally implicitly required.”

We shall see infra, that in assessing whether Article 1 of Protocol 1 has been infringed, the court applies the same criteria as to a possible infringement of Article 6(1) ECHR.

In *Sporrong and Lönroth v. Sweden* the ECtHR held that Article 1 of Protocol 1
comprises three distinct rules:

“[t]he first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possession and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.”  

In case of an interference, it needs to be assessed whether the interference can be justified. In order to be justified, the interference “must serve a legitimate objective in the public, or general interest.” Furthermore, it needs to be proportionate. The Court held in Sporrong and Lönnröth v. Sweden that it had to determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. A fair balance would not be struck where the individual property owner is made to bear ‘an individual and excessive burden’.

In Loizidou v. Turkey, the ECtHR emphasised that the ECHR must be interpreted in the light of the rules of interpretation set out in the 1969 Vienna Convention on the Law of Treaties and that Article 31(3)(c) of the Vienna Convention indicates that account is to be taken of “any relevant rules of international law applicable in the relations between the parties”. The ECtHR emphasised that “the principles underlying the [ECHR] cannot be interpreted and applied in a vacuum. Mindful of the [ECHR's] special character as a human rights treaty, it must also take into account any relevant rules of international law when

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131 Para. 61.
133 The Court refers to the judgment of 23 July 1968 in the Belgian Linguistic case, Series A No. 6, p. 32, par 5.
134 Para. 73. See also: op. cit. n. 113 (Carss-Frisk), p. 9, para. 17.
135 Judgment of 18 December 1996, Application No. 15318/89, RJD ECHR 1996-VI. Applicant was a Cypriot national who claimed to be the owner of several plots of land in northern Cyprus. The ownership could be attested by official registration certificates. She stated that she has been prevented by the Turkish forces from returning and ‘peacefully enjoying’ her property. The ECtHR held that the denial of access to the applicant’s property and consequent loss of control thereof is imputable to Turkey. It held that there has been a breach of Article 1 of Protocol 1 (but no breach of Article 8 of the ECHR, to which applicant also sought refuge).
136 1155 UNTS 331.
137 The ECtHR referred to its earlier judgment in Al-Adsani v. United Kingdom, No. 35763/97, RJD ECHR 2001-XI. There the ECtHR stated in para. 56: “[….] The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity. It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6(1). Just as the right of access to a court is an inherent part of the fair trial guarantee in that article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the
deciding on disputes concerning its jurisdiction pursuant to Article 49 of the [ECHR], according to the ECtHR.

In *Prince Hans-Adam II of Liechtenstein v. Germany* it turned out that the applicant’s surviving rights with regard to a cultural object may not always be sufficient to be regarded as property capable of being protected under Article 1 of Protocol 1. The ECtHR noted that,

> “according to the established case-law of [the organs of the ECHR], ‘possessions’ can be ‘existing possessions’ or assets, including claims, in respect of which the applicant can argue that he has at least a ‘legitimate expectation’ of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be considered as a ‘possession’ within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition […].”

The ECtHR continued by stating that

> “the applicant’s father and the applicant himself had not been able to exercise any owner’s rights in respect of the painting, which was kept by the Brno Historical Monuments Office in the Czech Republic. In these circumstances, the applicant as his father’s heir could not, for the purposes of Article 1 of Protocol No. 1, be deemed to have retained either a title to property or a claim to restitution against the Federal Republic of Germany amounting to a legitimate expectation in the sense of the court’s case-law.”

The ECtHR concluded therefore, that “the German court decisions and the subsequent return of the painting to the Czech Republic could not be considered as an interference with the doctrine of State immunity.”

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138 “In the event of dispute as to whether the Court has the jurisdiction, the matter shall be settled by the decision of the Court.”
139 Para. 43.
140 No. 42527/98, dated 12 July 2001, *RJD ECHR* 2001-VIII. The applicant, Prince Hans-Adam II of Liechtenstein alleged, in particular, that he had been deprived of an effective access to court in respect of his claim for the restitution of a painting by Pieter van Laer (*A Roman Lime Quarry*) confiscated by the former Czechoslovakia, on temporary loan in Germany (see also *supra*, Ch. 9.2.1). Furthermore, he complained that the German court decided to declare his action inadmissible, and that the consequential return of the painting to the Czech Republic violated his right to property. He relied on Article 6(1) of the ECHR and Article 1 of Protocol 1, [taken alone and in conjunction with Article 14 of the ECHR.]
141 The ECtHR also concluded that there had been no breach of the applicant’s right to a court, as guaranteed by Article 6(1) of the ECHR. The ECtHR considered (in para. 69 of its judgment) that the applicant’s interest in bringing litigation in the Federal Republic of Germany was not sufficient to outweigh the vital public interest in regaining sovereignty and unifying Germany. Accordingly, the German court decisions declaring the applicant’s ownership action inadmissible could not be regarded as disproportionate to the legitimate aim pursued and they did not, therefore, impair the very essence of the applicant’s ‘right of access to a court’ within the meaning of the Court’s case law.
142 Para. 83.
143 Para. 85.
applicant’s ‘possessions’ within the meaning of Article 1 of Protocol No. 1 [...]”

In *Kalogeropoulou v. Greece and Germany*, the ECtHR reiterated that Article 1 of Protocol 1 comprised three distinct rules as already summed up in *Sporrong and Lönnroth v. Sweden*. The ECtHR was of the opinion that it was undisputed that the applicants obtained an enforceable claim against the German State that amounted to a ‘possession’ within the meaning of Article 1 of Protocol 1. Nor was it disputed that the applicants, who were unable to obtain payment of the amounts owed to them, were victims of an interference with the exercise of their right to peaceful enjoyment of their possessions for the purposes of the first sentence of the first paragraph of Article 1, Protocol 1.

The ECtHR had to determine whether the interference pursued a legitimate aim, that is whether it was in the public interest within the meaning of the second rule laid down in Article 1 of Protocol 1. The ECtHR was of the opinion that, “because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is ‘in the public interest’”. So, the national authorities have to make the initial assessment, whereby they enjoy a certain margin of appreciation. The ECtHR respects the legislature’s judgment as to what is ‘in the public interest’ unless that judgment is manifestly without reasonable foundation. The ECtHR was “in no doubt that the Greek State’s refusal to expropriate certain German property situated in Greece was in the ‘public interest’, since it was intended to avoid disturbances in relations between Greece and Germany.”

The ECtHR went on by stating that “an interference with the right to the peaceful enjoyment of possessions must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.”

The court argued that in particular a reasonable relationship of proportionality between the

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144 Para. 86. The ECtHR also found unanimously that Article 6(1) had not been violated. The exclusion of German jurisdiction by the Settlement Convention was regarded by the ECtHR as a consequence of the particular status of Germany under public international law after World War II. Besides, the applicant had alternative measures as he could have challenged the expropriation before the Czech courts. See also: *op. cit.* n. 120 (Kloth), p. 155.

145 *Kalogeropoulou v. Greece and Germany*, No. 59021/00, *RJD ECHR* 2002-X; See also *supra*, n. 121.

146 The ECtHR referred *mutatis mutandis* to *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A No. 98, p. 32, para. 46.

means employed and the aim pursued by any measure depriving a person of his possessions is required.\textsuperscript{148} In determining whether this requirement was met, the ECtHR recognised that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.\textsuperscript{149} In the examination of the complaint, the ECtHR considered it relevant that the Greek Government “could not be required to override the principle of State immunity against its will and compromise its good international relations in order to allow the applicants to enforce a judicial decision delivered at the end of civil proceedings.” The court held that “by instituting enforcement proceedings, the applicants must have known that, without the prior consent of the Minister of Justice, their application was bound to fail. The situation could not therefore reasonably have founded any legitimate expectation on their part of being able to recover their debt.”\textsuperscript{150} Moreover, the ECtHR argued that the applicants had not lost the debt that Germany owed them, and that they might be able to recover it at a later, more appropriate stage, or in another country, such as Germany. Therefore, the ECtHR ordered that the Greek court’s refusal to authorise enforcement proceedings did not upset the balance that should be struck between the protection of the individual’s right to peaceful enjoyment of his or her possessions and the requirements of the general interest.\textsuperscript{151}

In \textit{Manoilescu and Dobrescu v. Romania and Russia}, a case I also mentioned supra with regard to Article 6(1), the ECtHR ascertained whether the Romanian authorities struck a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The ECtHR had already found “that the national authorities’ refusal of the applicants’ application for an order requiring the enforcement of the Administrative Board's decision in their favour did not constitute a disproportionate restriction on their right of access to a court under [Article 6(1) of the ECHR].”\textsuperscript{152} The ECtHR had emphasised with regard to Article 6(1) “that the Romanian Government could not be required to override the principle of State immunity against their will and to compromise good international relations in order to secure to the applicants the


\textsuperscript{149}With reference to \textit{Chassagnou and Others v. France}, No. 25088/94, 28331/95 and 28443/95, para. 75, \textit{ECHR} 1999-III.

\textsuperscript{150}With reference to \textit{Fredin v. Sweden} (No. 1), judgment of 18 February 1991, Series A No. 192, p. 18, para. 54.

\textsuperscript{151}The ECtHR thus rejected the complaint as manifestly ill-founded.

\textsuperscript{152}Para. 92. With reference to para. 81.
enforcement of a decision given in administrative proceedings instituted under [national legislation].”153 That consideration was also valid in the examination of the complaint regarding Article 1 of Protocol 1, the ECtHR argued. The ECtHR had no doubt, “that the omission by the relevant authorities of the Romanian State to take enforcement measures was ‘in the public interest’ in view of the need to avoid disrupting relations between Romania and the Russian Federation and hindering the proper functioning of that foreign State's diplomatic mission in Romania.”154 According to the ECtHR, “[i]n those circumstances, the fact that the Romanian authorities omitted to take steps to restore possession of the property in issue to the applicants - on ‘public interest’ grounds directly linked to observance of the principle of State immunity, universally enshrined in both conventional and customary international law - did not upset the requisite balance between the protection of the individual right to the peaceful enjoyment of possessions and the requirements of the general interest”.155

I already mentioned Treska v. Albania and Italy with regard to Article 6(1). However, the applicants also argued that by selling their property the Albanian authorities had de facto expropriated it without compensation and had thus breached Article 1 of Protocol 1. They further asserted that the inability to obtain the enforcement of the decisions in their favour had amounted to a violation of their property rights under the same article.156

Also in this case, the ECtHR ordered that the Albanian Government could not be required to override the rule of State immunity, which is designed to promote comity and good relations between sovereign States.157 Having regard to the circumstances of the case, the ECtHR was again in no doubt that the omission by the relevant Albanian authorities to take enforcement measures was ‘in the public interest’ in view of the need to avoid disrupting relations between Albania and Italy.

153 Ibid.
154 Para. 93.
155 Para. 97.
156 The applicants furthermore argued that by possessing sine titulo their property (plot of land and the additional building) and invoking immunity before the Albanian courts, the Italian authorities had infringed their right to the peaceful enjoyment of their possessions, as guaranteed by Article 1 of Protocol No. 1. The ECtHR, however, considered that the applicants had not shown that they were capable of coming “within the jurisdiction of Italy”.
157 Accordingly, the decisions in which the national courts refused to order the administrative authorities to take measures of constraint with regard to the property possessed by the Italian Embassy in Albania and also the non-enforcement of the court's decision of 24 April 1997 can be regarded as a justified restriction on the applicants' right of access to a court. It follows that this complaint must be rejected as being manifestly ill-founded.
11.4 Concluding

A number of international agreements exist, related to the topic of immunity from seizure of cultural objects of foreign States, especially propagating the promotion of international cultural exchanges and the mobility of collections. However, some of these agreements have a double function: not only do they promote international cultural exchange and collection mobility, they also try to stop the trafficking of cultural objects, and aim at the safe return of cultural objects illegally removed. Immunity from seizure for cultural objects on loan may conflict with return obligations to States from which territory the objects were taken, or ‘States of origin’.

Although States want to immunise cultural objects on loan, the same States also want to prevent and to combat illegal removal of cultural objects and strive for the return to the original owner. Immunity from seizure for such cultural objects may give the wrong signal. However, it has also been stated in several States, that

“both the art exhibits themselves and the publicity surrounding them are fundamental contributors toward the recovery of stolen artwork by increasing the chance that rightful owners will be alerted to the whereabouts of their displaced artwork. Fear of seizure may drive such works underground, making the resolution of such ownership claims much more difficult.”

From the several country-related chapters of this study, it appeared that in various, mostly European, States where immunity from seizure legislation has been enacted, discussions took place with regard to the question whether immunity from seizure would be at odds with international obligations, both under the ECHR and under other international agreements as cited supra, in Chapter 11.1. Different States have different opinions as to whether immunity from seizure can be set aside by international or community law with which it may be at odds. Based on an international law perspective, I have tried to give supra, in Chapter 11.2,

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158 See: Yin-Shuan Lue, Polly Clark and Marion R. Fremont-Smith, Countering a Legal Threat to Cultural Exchanges of Works of Art: The Malewicz Case and Proposed Remedies, The Hauser Center for Nonprofit Organizations, December 2007, Working Paper No. 42, pp. 22-23. A case involving a Monet exhibit illustrates this. In late 1998, a painting, Water Lilies 1904, listed with the Art Loss Registry was discovered in a Monet exhibit being held at the Museum of Fine Arts in Boston. The painting was on loan from the Caen Musée des Beaux-Arts in Normandy, France. Although seizure of the painting was not possible because of a governmental declaration on the basis of the Foreign Immunity from Seizure Act, the family of the original owner was relieved to learn of the painting’s whereabouts and planned to make a claim for the paintings’ return from the French Government when the exhibit returned to Normandy. See: Laura Popp, ‘Arresting Art Loan Seizures’, Columbia-VLA Journal of Law & Arts, 2001, Vol. 24, Issue 2, pp. 213-233, at p. 227.

159 As we saw, the French and Israeli immunity law is silent on this matter. In the United Kingdom we saw that
an overview of the different possibly conflicting return obligations and their interrelation and prevalence.\textsuperscript{160} \textit{Infra}, in Chapter 12.5.1, I will address the obligation to not consider a wrongful situation as legitimate, which is not a return obligation as such.

Andrea Gattini has expressed the opinion that “[t]he characterization of the immunity for state artworks on loan as part and parcel of the customary international law rules on state immunity should also be the decisive criterion when dealing with the possible conflict of anti-seizure statutes with some conventional norms and EC rules”.\textsuperscript{161} It would be important to know what the content and limits of these rules of customary international law would be: would they encompass all cultural State property on loan, or would they not apply to illicitly acquired or removed cultural State property? I will come back to that in Chapter 12.5.

Finally some words with regard to the European Convention on Human Rights. The ECtHR has established\textsuperscript{162} that the right of access to court, which also includes the right to have a
judgment enforced, is not absolute and may be subject to limitations if the restriction pursues a legitimate aim, is proportionate and does not have the effect of extinguishing the applicant’s right of access to court altogether.\textsuperscript{163}

The ECtHR considered that the grant of immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State’s sovereignty. According to the ECtHR, a State cannot be required to override the principle of State immunity against its will and compromise its good international relations in order to allow applicants to have a judicial decision enforced. Regarding the proportionality of the restriction, the ECtHR interpreted Article 6 in the light of other relevant norms of international law on State immunity and held that measures taken by a High Contracting Party which reflect generally recognised rules of international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6(1).

In case of interference with the right to the peaceful enjoyment of possessions as laid down in Article 1, Protocol 1, it needs to be assessed whether the interference can be justified. In order to be justified, the interference must serve a legitimate objective in the public interest. A fair balance needs to be struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim pursued by any measure depriving a person of his possessions. The individual property owner should not be made to bear ‘an individual and excessive burden’.

What does all this mean with regard to immunity from seizure for cultural objects belonging to foreign States, but temporarily on loan a foreign museum? In that case, we are considering a temporary limitation on the forms of relief available to a claimant in a certain jurisdiction. The limitation, which has its roots in the notion of State immunity, which has been considered by the ECtHR as pursuing a legitimate aim, would not prevent potential claimants from

\textsuperscript{163} An applicant must be able to have the relevant questions of the dispute concerned determined by an alternative tribunal. Otherwise, a remedy is lacking. That remedy must be of a judicial nature, and of course, a
bringing claims in the jurisdiction where the item is usually kept.

Apart from the case *Prince Hans-Adam II of Liechtenstein v. Germany*, the ECtHR has not had before it a case concerning cultural objects on loan. In that case, the loan was not determinative in the assessment and deliberations of the ECtHR, which focussed on other aspects, such as the decision of the German court to declare the applicant’s ownership claim inadmissible on the basis of post-World War II agreements between Germany and the Allied Forces. However, based on the jurisprudence of the ECtHR, I would argue that *prima facie*, immunity from seizure for cultural objects belonging to foreign States and on temporary loan is neither necessarily in conflict with Article 6(1) of the ECHR, nor with Article 1, Protocol 1 to the ECHR. It goes without saying that the particular facts of the individual applications are of relevance for the assessment of whether the application of the general rules of State immunity was proportionate.

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164 See also *supra*, Ch. 9.2.1 regarding the loan of the Pieter van Laer painting by Prince Hans-Adam II of Liechtenstein to Germany, as well as *supra* n. 140.

165 See also: *op. cit.* n. 120 (Kloth), p. 14.