State immunity and cultural objects on loan
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Chapter 12  Cultural objects on loan and belonging to foreign States – immune from seizure under customary international law?

12.1  General

Can it be said that under customary international law cultural objects belonging to foreign States are immune from seizure while on temporary loan to another State or foreign museum? Is this protection against seizure given by means of a specific rule of customary international law? If such a rule does not yet exist, is it emerging? Further, if such a rule does exist or is emerging, what is the scope of this rule, and what are its limitations?\(^1\)

Let us first go back to the general principles of State immunity and their limitations. In Chapter 3, I argued that, with regard to immunity from jurisdiction, in the twentieth and twenty-first century the doctrine of absolute immunity has gradually given way to a doctrine of restrictive immunity; as governments became increasingly engaged in commercial activities, the view emerged that immunity of States engaged in such activities should not be supported by international law. Nowadays it can be safely stated that this corresponds to the general view. The 2004 UN Convention on Jurisdictional Immunities of States and Their Property reflects this view, and so does the national State immunity legislation of those States which enacted such legislation, such as the United States, Canada, Argentina, the United Kingdom, Israel, Pakistan, Singapore, Japan, Australia, and South Africa. States which did not enact specific State immunity legislation act likewise. Even States which once were the strongest supporters of the doctrine of absolute State immunity, such as China and the Russian Federation, signed the 2004 UN Convention.

The adoption of a restrictive doctrine of immunity from jurisdiction also brought a more critical approach to immunity from measures of constraint. However, States are still fairly reluctant to accept the restrictive concept of immunity also for measures of constraint. Although the notion of immunity from measures of constraint is still much more firmly established than the notion of immunity from jurisdiction, with regard to the immunity from

\(^1\) It is often rather difficult to ascertain the exact content of a rule of customary international law. See: Abdul Ghafur Hamid, ‘Sources of International Law: a Re-evaluation’, *International Islamic University Malaysia Law Journal*, 2003, Vol. 11, No. 2, pp. 203-240, at p. 206.
measures of constraint, there is a trend whereby absolute immunity is changing to a more restrictive immunity as well. The case law of many States has begun a trend in favour of allowing measures of constraint in respect of property in use or intended for use in commercial transactions or for commercial purposes.

With regard to the notion of immunity from jurisdiction, it has been established that the characterisation of a transaction depends on the nature of the act in question rather than its purpose, although under circumstances the purpose could also be taken into account. Immunity from measures of constraint, however, is not directly related to the nature of the transaction at stake, but rather to the purpose of the objects.

It may be safe to state that under customary international law, State property in use or intended for use for government non-commercial purposes is immune from measures of constraint. August Reinisch stated with regard to the situation in the Member States of the Council of Europe: “[t]he analysis of European court practice with regard to enforcement immunity confirms that absolute immunity is no longer the rule. Instead, a more restrictive approach which permits enforcement measures against property clearly serving non-governmental purposes, against earmarked property and in cases of waiver is pursued by many national courts.”

Thus, when under customary international law State property in use or intended for use for government non-commercial purposes is immune from measures of constraint, the question comes up whether cultural objects belonging to foreign States and on loan abroad for a temporary exhibition can be considered as property with a sovereign, public purpose, or to say it differently, as property specifically in use or intended for use by the State for government non-commercial purposes. As a consequence, those objects would enjoy immunity from measures of constraint.

This is at least the line followed by the 2004 UN Convention. Article 21 of the 2004 UN Convention lists five categories of State property which according to the convention shall not be considered as property specifically in use or intended for use by the State for other than

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government non-commercial purposes. The fifth category regards property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale. State-owned exhibits for industrial or commercial purposes are not covered by this article. I recall here, that according to the ILC the article was designed to provide some protection for certain specific categories of property by excluding them from any presumption of consent to measures of constraint. Article 21(1) sought to prevent any interpretation to the effect that property classified as belonging to any one of the categories specified was in fact property specifically in use or intended for use by State for commercial non-governmental purposes.

With regard to Article 21, the question that can be asked is twofold. First of all: can the interpretation as reflected in Article 21 be considered as a common, undisputed interpretation, followed in practice by the community of States? And second: can Article 21 of the 2004 UN Convention, especially Article 21(1)(e) be considered as reflecting a rule of customary international law?

As a matter of fact, this double layer could also be found in the question posed by the subgroup ‘Immunity from Seizure’ of the EU OMC Expert Working Group ‘Mobility of Collections’ to the Member States of the European Union, as referred to supra, in Chapter 6: “Does your country, on the basis of (customary) international law, treat cultural property belonging to foreign States as goods intended for public use, and as meaning that those goods are considered to be non-commercial?” When analysing the question, it can be regarded to include two elements: first, whether States treat cultural property belonging to foreign States as goods intended for public, non-commercial, use, and, second, whether States do so based upon an underlying rule of customary international law.

Before addressing in this chapter the practice of individual States, it should be borne in mind that the gist of Article 21 has neither been disputed in the ILC, nor in the Sixth (Legal) Committee of the UN General Assembly. Not only does that mean that the international community of States agreed with the interpretation contained in it (or at least was not against it), but it can also serve as an indication of the possible existence of a rule of customary international law. As we have seen, the convention (the preamble of which expressly refers to State immunity as a principle of customary international law) has been adopted by consensus.

429
In that regard, it is interesting to refer to the ruling of the European Court on Human Rights in the case *Cudak v. Lithuania*.\(^3\) There, the court called it a well-established principle of international law that, even if a State has not ratified a treaty, it may be bound by one of its provisions in so far as that provision reflects customary international law, either ‘codifying’ it, or forming a new customary rule. It thereby paid attention to the fact that there were no particular objections by States to the wording of the ILC draft article concerned\(^4\) (at least not by the respondent State, in this case Lithuania). Although Lithuania has not ratified the 2004 UN Convention, it shared the consensus. The court therefore held that the article concerned applied to Lithuania under customary international law. To continue on that path, it may be safely concluded that an important hint towards the existence of a rule of customary international law is formed by the fact that certain provisions have been accepted and adopted without discussion, dispute or opposition.

### 12.2 State practice and the ratio behind it

#### 12.2.1 Method of working

I have attempted to collect my information with regard to State practice and the ratio behind that practice in various ways. First of all, I examined the existing relevant legislation, as well as relevant case law. Also, I investigated in which way States raised their voices in the deliberations of the International Law Commission while elaborating upon the topic of the immunity of States and their property. Regarding those Member States of the European Union which took part in the subgroup ‘Immunity from Seizure’\(^5\) of the EU OMC Working Expert Group ‘Mobility of Collections’, I followed their oral observations during the meetings of the subgroup.

I made use of two questionnaires. One was the enquiry of the subgroup ‘Immunity from Seizure’ operating under auspices of the European Commission. All 27 Member States provided an answer in the spring of 2009. The enquiry consisted of ten questions. The eighth, and for this study most relevant, question was the question I already referred to a few times:

\(^3\) No. 15869/02, 23 March 2010.
\(^4\) Regarding employment contracts.
\(^5\) Austria, Belgium, Finland, France, Germany, Greece, Hungary, the Netherlands, Poland, Romania, Portugal, Spain, and the United Kingdom.
“Does your country, on the basis of (customary) international law, treat cultural property belonging to foreign States as goods intended for public use, and as meaning that those goods are considered to be non-commercial?”

However, before that enquiry had been sent, I had already sent a similar questionnaire to Austria, Australia, Belgium, Canada, China, the Czech Republic, France, Germany, Ireland, Israel, Italy, Japan, Poland, Romania, the Russian Federation, Spain, Switzerland, the United Kingdom, and the United States. As stated in Chapter 1, these States were chosen because it was known to me that they had specific immunity from seizure legislation for cultural objects on loan, or because they had been vocal in this matter to a certain extent. Later, with the assistance of the Royal Netherlands Embassy in the respective States, questions to Brazil, Colombia, Egypt, Guatemala, the Islamic Republic of Iran, Morocco, Mexico, Nigeria, Senegal, South Africa, Venezuela and Zambia followed, in order to try to follow a somewhat more balanced geographical approach.

In addition, I paid a visit to several States, in order to receive more information regarding the country-specific situation and the reasons for certain State practice. These States were the United States, the United Kingdom, France, Germany, Austria, Switzerland, Italy, Hungary, the Russian Federation and Israel. Furthermore, I had contact with State officials from Belgium, Finland and Canada. In this context it is necessary to say that, although on the one hand several States or their representatives were explicit in their opinions (mostly to the affirmative with regard to a rule of customary international law), on the other hand several States (or State representatives) had not assessed the question with regard to the existence of a rule of customary international law so far, and as a consequence did not have an explicit opinion in regard to the question whether immunity from seizure of cultural State property on loan is covered by a rule of customary international law. As I have shown in the country-related chapters of this study, based on State practice and their underlying legal believe that this property should be immunised, some of these States actively contribute in practice to the formation of a rule of customary international law.

Finally, I assessed literature which addressed State practice in this field.

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6 The enquiry has been sent through the Royal Netherlands Embassy in the respective States.
7 Especially Josh Knerly and Anna O’Connell were helpful in that sense. And together with Anna O’Connell, I analysed her findings.
12.2.2 State practice

In Chapter 2 on the notion of customary international law, I already concluded on the basis of jurisprudence of the International Court of Justice that with regard to the development of a rule of customary international law special attention needs to be paid to those States which are active in the field of lending and borrowing artworks for cross-border exhibitions. This means that not all States need to have taken part in the formation of such a rule.

It can be seen, that in recent years, there is a growing State practice pointing towards the protection against measures of constraint of cultural objects on loan belonging to foreign States.

As I showed supra, in Chapter 6, in answering the enquiry of the EU ‘Immunity from Seizure’ subgroup, approximately half of the EU Member States have stated that they, on the basis of (customary) international law, treat cultural property belonging to foreign States as goods intended for public use and consider this cultural property as non-commercial goods by definition. These States were Belgium, Cyprus, Denmark, Estonia, Finland, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain and the United Kingdom.

This led to the following text in the final report of the subgroup ‘Immunity from Seizure’:

“Several States are of the opinion that the above mentioned provision [Article 21(1)(e) of the 2004 UN Convention] can be considered a rule of customary international law, or that this rule is emerging. That would imply that the content of the provisions of the Convention are applicable, without the necessity of becoming a Party to the Convention. Based on the questionnaire, the following States were explicit in stating that a rule of

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8 Although Poland answered the relevant question in the enquiry of the EU subgroup ‘Immunity from Seizure’ with “yes”, it made outside of the framework of the enquiry orally clear that Polish cultural property taken out of Poland as war trophies during World War II can never be considered as foreign cultural property and consequently immune from seizure.

9 Report of the subgroup ‘Immunity from Seizure’ of the Expert Working Group ‘Mobility of Collections’, para. 2.1.3, p. 12. See: http://ec.europa.eu/culture/our-policy-development/doc/mobility_collections_report/reports/immunity_seizure.pdf. However, certain States, for instance Germany, expressed in their answers doubts as to whether sufficient State practice had been developed so far, whereas Sweden was of the opinion that a rule of customary international law had not (yet) been developed. Several States did not express an opinion. It can therefore be concluded that the answers were not uniform. The answers are also on file with the author.
customary international law exists: Belgium, Cyprus, Denmark, Estonia, Finland, Malta, the Netherlands, Portugal, Romania, Slovenia, Spain and the United Kingdom.”

As stated supra, it can be considered that the abovementioned States gave two messages: first, that they consider cultural property belonging to foreign States as goods intended for public, non-commercial, use. And second, that they do so on the basis of the belief that an underlying rule of customary international law exists.

The United Kingdom is of the view that cultural property belonging to foreign States is already immune from seizure on the basis of customary international law “if the goods are sent for an exhibition for the enjoyment of the public”. In 2007, it enacted specific immunity from seizure legislation in order to cover cultural objects on loan belonging to a State, a separate entity (such as a museum) or private lenders (institutions or individuals).

On the basis of customary international law, Belgium considers cultural objects belonging to foreign States as immune from seizure when these objects are in Belgium. This has not only been stated individually by Belgian representatives and by the Kingdom of Belgium in response to the EU subgroup ‘Immunity from Seizure’-enquiry concerning immunity from seizure for cultural objects on temporary loan, but can also be inferred from the explanatory report to the specific immunity from seizure legislation for cultural State property on loan. Belgium signed the 2004 UN Convention on Jurisdictional Immunities of States and Their Property on 22 April 2005.

In 2011, Finland enacted immunity from seizure legislation for cultural objects on loan. The legislation does not only aim to protect cultural property belonging to foreign States from seizure, but also cultural property belonging to private individuals while on temporary loan in Finland. It could even protect cultural objects of Finnish natural or legal persons, as long as the objects to be exhibited are normally permanently located outside of Finland. Finland is in the process of ratifying the 2004 UN Convention. Although the convention has not yet entered into force, as a Signatory State, Finland has stated that it subscribes to the object and purpose

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10 Ibid.
11 See supra, Ch. 7.2.
12 See supra, Ch. 9.4.
13 See supra, Ch. 9.7.
of the convention, and is of the opinion that it reflects current customary international law in the field of jurisdictional immunities of States and their property.

The Netherlands has repeatedly expressed the opinion that based on customary international law cultural objects belonging to foreign States and on temporary loan in the Netherlands are to be considered as property intended for public service, as long as the objects do not clearly have a commercial goal (e.g. are offered for sale). As such, these objects are immune from seizure.\textsuperscript{14} It provides by means of its more general legislation cultural objects belonging to foreign States and temporarily on loan in the Netherlands with considerable and satisfactory protection against measures of constraint.

\textit{Supra,\textsuperscript{15}} I already referred to the case \textit{Llanos Oil Exploration v. the Republic of Colombia, the State of the Netherlands and Ecopetrol S.A}. The Netherlands declared before the Dutch court that even though the 2004 UN Convention had not yet entered into force, the provisions included therein concerning immunity from measures of constraint do offer an important guideline in answering the question whether such immunity should be enjoyed. The Netherlands referred in \textit{Llanos} to the rather absolute rule of customary international law (being that State property is immune from measures of constraint, unless the objects are not used for public, but for commercial purposes), which can also be concluded from the few written sources of public international law, such as the 2004 UN Convention, according to the declaration of the Netherlands. In its declaration, the Netherlands referred to the conclusion of Supreme Court General Attorney Strikwerda in the case \textit{Azeta v. Japan Collahuasi Resources B.V. and the State of the Netherlands}. Strikwerda concluded there:

\begin{quote}
“An important indication with regard to the current views concerning the emerging relativity of immunity from measures of constraint give the provisions in Chapter IV (Articles 18-21) of the in 2004 by the United Nations concluded Convention on Jurisdictional Immunities of States and Their Property. […] The text can […] be considered as a reflection of the development of the second half of the twentieth century generating the restrictive approach to State immunity and to form the legal basis for a universally acceptable legal solution of the question of State immunity based on this development.”
\end{quote}

\textsuperscript{14} See \textit{supra}, Ch. 8.3.
\textsuperscript{15} See Ch. 3.3.1 and Ch. 8.1.4.
Austria, which enacted specific immunity from seizure legislation for foreign cultural objects on loan, answered the enquiry of the EU subgroup ‘Immunity from Seizure’ by stating that it did not wish to rely on a possible rule of customary international law. It considered a rule of customary international law prohibiting the seizure of cultural objects belonging to foreign States as insufficiently developed, as a representative of the Austrian Ministry of Culture, involved in the matter, explained orally. However, attention needs to be paid to the statements made by the Austrian Government during the national ratification process of the 2004 UN Convention. In October 2005 it stated that “the convention reflects the codification of existing customary international law with regard to State immunity in the field of civil law”.

According to the Austrian authorities, the use of the provisions as enshrined in the convention as international customary law could have been an alternative for ratification. However, for reasons of legal security, ratification of the convention was considered as the preferred option. I shall come back to this legal security and insecurity infra. Moreover, Austria stated during its process of ratification that it is in the self-interest of a State especially to protect cultural heritage against measures of constraint. Based on a similar motive, pursuant to Article 21(1)(e), also property that is the subject of scientific, cultural or historical exhibitions is protected, Austria argued. Meanwhile, the Austrian Ministry of Foreign Affairs, competent in questions concerning immunity and international law, argued in the Diag Human case that customary international law has been codified in Articles 18 to 21 of the 2004 UN Convention and that with regard to cultural State property on loan and not intended for sale Article 21(1)(e) of the 2004 UN Convention can be considered as the reflection of a rule of customary international law.

Germany is of the view that cultural objects belonging to foreign States contribute to a better understanding of that State, and may be considered as tools in the promotion of tolerance towards foreign States. Germany enacted legislation immunising foreign cultural objects with the aim of securing the return of those objects to the lending State. The German Executive Branch is under the impression that currently there may not yet be sufficient State practice to rely on the international customary nature of a rule that states that cultural objects belonging to foreign States and on temporary loan are immune from seizure. However, the German

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16 The legislation applies only to foreign cultural objects loaned to one of Austria’s nine federal museums, or to a public exhibition whereby one of the federal museums is one of the organisers.
17 See supra, Ch. 9.3.1, n. 99.
18 See supra, Ch. 3.3.4.
19 See supra, Ch. 9.3.2.
20 See supra, Ch. 9.2.2.
Judicial Branch seems to have another opinion. The Berlin Court of Appeals ordered that seizure of cultural objects belonging to a foreign State and temporarily on loan would be impermissible, as the objects served a purpose jure imperii, and that these objects fell under the general principles of State immunity. On the basis of general rules of international law measures of constraint against the property of a foreign State were deemed not to be allowed, as long as these objects served a public purpose. This judgment confirmed earlier judgments of Berlin courts (of 2002 and 2010). It can also be concluded that the Berlin Court of Appeals was quite convinced of its view, as the court did not consider it necessary to refer a question to the German Federal Constitutional Court on whether cultural objects of foreign States were immune on the basis of customary international law. The Berlin court was of the view that this was sufficiently clear. No serious doubts have been revealed by foreign or international courts or academics, according to the Berlin court.\textsuperscript{21}

While France considers a cultural object belonging to a foreign State and loaned by that State for a public exhibition as having a non-commercial character by definition, it appears to rely rather on its own specific immunity from seizure legislation for cultural objects on loan,\textsuperscript{22} than on a possible, but, in French eyes, uncertain rule of customary international law. However, based on its State practice, and having in mind its legal conviction that cultural State property on loan should be immune from seizure, it is my opinion that France nevertheless contributes to the establishment of a rule of customary international law.

The French request for immunity from seizure legislation or regulations from Israel as well as from the United Arabic Emirates is illustrative for the fact that France does not count on a rule of customary international law. In order for an exhibition to take place that aimed at tracing the story of cultural objects looted by the Nazis in France during World War II, France seemingly made the condition to Israel that the Israeli immunity from seizure legislation would be in place. And in the negotiations leading to the 2007 Agreement between France and the United Arabic Emirates, France made the condition that the bilateral agreement would state that all items loaned to the ‘Louvre Abu Dhabi’ would be immune from seizure. The

\textsuperscript{21} See supra, Ch. 9.2.3. It should be concluded that the reference of the Berlin Court of Appeals to the general principles of international law also included references to customary international law. After all, the court came to the conclusion that the immunity for cultural objects on loan was covered by the general principles of international law, and as the court had no doubts with regard to this, referral to the Federal Constitutional Court (in order to get an answer whether there was immunity on the basis of customary international law) was considered unnecessary.

\textsuperscript{22} The Act limits coverage to cultural objects that are State property and loaned to French public entities. Private property is not covered.
Emirates needed to take all necessary measures in order to guarantee this immunity, according to the agreement. These French demands may also have been influenced by the fact that possibly not only cultural State property would be loaned, but also objects belonging to private institutions, and that a rule of customary international law would not extend to those objects. However, with regard to the objects for the Israeli exhibition, France served at that time as a custodian of the objects, and if the line of the 2004 UN Convention was followed (to which France -but not Israel- is a Signatory State), then custodianship should be sufficient for the objects to fall under the protection of State immunity.

In 2011, the Czech Republic amended its Act on State Monument Care with the aim of preventing court injunctions from being applied to borrowed cultural objects during the loan.\(^\text{23}\)

*Sweden* does not count on a possible rule of customary international law. Sweden was actually the only State that simply said “no” in reply to the enquiry of the subgroup ‘Immunity from Seizure’.\(^\text{24}\) However, Sweden did ratify the 2004 UN Convention. Thus, although Sweden does not consider it a rule of customary international law that cultural objects belonging to foreign States and on temporary loan are immune from seizure, it does support the same provision in the 2004 UN Convention, including the interpretation given in Article 21.

*Italy* did not give an opinion on whether it counts on the existence of a rule of customary international law. But it seems, that this is primarily due to the fact that Italy does not want to risk that such a rule would be too extensive. Italy attaches great importance to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. As many cultural objects have been illegally exported out of Italy, and Italy is regularly a ‘country of origin’ within the meaning of the 1970 UNESCO Convention, Italy seems to be concerned that any opinion with regard to a possible rule of customary international law with regard to immunity from seizure for cultural objects on loan might undermine Italy's position as ‘country of origin’ under the 1970 UNESCO Convention. It fears that such a rule of customary international law could set aside the obligation of borrowing States to return objects to the requesting States of origin (not being the lending State). I shall come back to this in a moment.

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\(^{23}\) See *supra*, Ch. 9.8.

\(^{24}\) It, however, never objected to the consideration of other States that a rule of customary law exists.
Switzerland made it very clear that it considers cultural objects belonging to foreign States and temporarily on loan as objects with a sovereign, public purpose and immune from measures of constraint on the basis of customary international law.\textsuperscript{25} This became evident during the Noga case of November 2005. In the press message of the Swiss Federal Ministry of Foreign Affairs of 16 November 2005 it has been stated in a very clear way: “Cultural goods of States are, based on international law, to be considered as public property, which can as a matter of principle not be subject to measures of constraint.” No opposing or rejecting reactions have been given by any other State to this.

Moreover, when ratifying the 2004 UN Convention, the Swiss authorities stated that the Federal Court had determined that the convention had codified the general principles of international law in the field of State immunity and that the convention should be seen as a codification of customary international law.\textsuperscript{26}

Liechtenstein enacted immunity from seizure legislation on 23 November 2007.\textsuperscript{27} It applies to all cultural objects brought from abroad into Liechtenstein for the purpose of a public exhibition.

In the spring of 2011, the Ministry of Foreign Affairs of the Russian Federation, competent in this matter, was vocal towards the author in its opinion that the 2004 UN Convention is a reflection of the current state of affairs with regard to State immunity and that it reflects customary international law, and consequently that cultural State property on loan must be considered as goods intended for government non-commercial purposes on the basis of a rule of customary international law.\textsuperscript{28} Already in 2005, when confronted with the seizure of its own cultural objects on loan in Switzerland, the Russian Federation firmly stated towards the Swiss authorities that on the basis of customary international law, these objects were protected against seizure, as it concerned objects with a sovereign, public purpose.\textsuperscript{29} Its own legislation, however, does not (yet) make a distinction between State property with a sovereign, public purpose, and State property with a commercial purpose. All State property

\textsuperscript{25} See supra, Ch. 9.5.
\textsuperscript{26} See supra, Ch. 3.3.1, n. 79.
\textsuperscript{27} See supra, Ch. 9.6.
\textsuperscript{28} However, several other Russian State entities rather count on their own Russian legislation.
\textsuperscript{29} See supra, Ch. 9.5.1 and Ch. 9.11.
is immune according to the relevant articles in the Civil Procedural Code and the Arbitration
Procedural Code, unless the foreign State has waived its immunity.\textsuperscript{30} The Russian Federation
did sign the 2004 UN Convention on Jurisdictional Immunities of States and Their Property,
which convention does (in Articles 19 and 21) make the distinction between different kinds of
State property, depending on the purpose of the property.

The fact that the Russian Federation demands immunity from seizure guarantees from
borrowing States has nothing to do with uncertainty about the existence of a rule of customary
international law, but with the conditions as set forth in Article 30 of the Russian Law on
Export and Import of Cultural Property.

Counting on its own legislation is what the \textit{United States} is doing. The United States
considers it an obligation to immunise cultural objects belonging to foreign States or foreign
institutions against seizure and to facilitate cultural exchanges between States. However,
regardless of the belief that it is necessary to protect these objects against seizure, the US
authorities do not merely wish to rely on a possible rule of customary international law. Also,
the US does not see cultural objects belonging to foreign States by definition as governmental,
non-commercial, goods. In case the act (thus, the loan) should be considered as a commercial
transaction (because it could likewise be performed by private individuals), then the objects
involved in that transaction are by definition considered as commercial objects. For State-
owned cultural objects to be considered as goods intended for public service, it is necessary
that the art loan also is considered as an act \textit{jure imperii}.\textsuperscript{31}

Although the United States does not want to rely on a rule of customary international law
immunising cultural objects belonging to foreign States and on temporary loan from seizure,
its State practice as well as its belief in a legal obligation contributes to the formation of such
a rule.

The federal authorities of \textit{Canada} do not seem to have an explicit opinion with regard to the
question whether immunity from seizure of cultural State property on loan is covered by a
rule of customary international law. But having in mind that five of the Canadian provinces

\textsuperscript{30} The Russian judiciary meanwhile does make a distinction between governmental and commercial State
property. Cultural objects have so far not been in the focus of the Russian Judicial Branch.
\textsuperscript{31} Interview with legal representatives of the US State Department, 8 December 2010.
enacted immunity from seizure legislation, that there are no dissenting sounds within Canada, and that the federal Canadian authorities refused to act upon Jordanian and Palestinian seizure requests, it can be regarded that Canadian State practice supports the immunity from seizure for cultural objects on loan.

Australia would not like to count on a rule of customary international law providing immunity for cultural objects on loan. Whether cultural objects belonging to a foreign State will be granted immunity from measures of constraint, will be considered on a case-by-case basis depending on the circumstances under which the objects will be in Australia. When considering this, Australia does not assess as such whether the relevant cultural objects are specifically in use or intended for use by the State for other than government non-commercial purposes, but whether the conditions of the Australian Foreign States Immunities Act are fulfilled. It thus simply and solely counts on its own legislation.

Japan enacted State immunity legislation in order to implement the 2004 UN Convention. Pursuant to that legislation, cultural State property on loan with a scientific, cultural or historical significance may not be considered as property in use or intended for use for other than government non-commercial purposes. In order to immunise also cultural objects belonging to non-State actors, Japan enacted specific immunity from seizure legislation in 2011. It may be concluded that Japan is in the vanguard when immunising cultural objects on loan and actively contributing to the establishment of a rule of customary international law.

The territory of Taiwan enacted immunity legislation in 1992, stating that cultural objects from foreign States or Mainland China that have been approved for exhibition by the competent central-government authority shall not be subject to litigation or attached by legal action during their delivery, preservation, or exhibition.

The specific immunity legislation of Israel, enacted in 2007, does not only provide immunity from measures of constraint for cultural objects on loan belonging to foreign public institutions, but first and foremost immunity from suit, as it prevents claimants from seeking any redress in Israeli courts if the Minister of Justice concludes that an adequate procedure

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32 See supra, Ch. 10.1.7.
33 See supra, Ch. 10.1.5.
exists outside of Israel. The Israeli authorities do not seek refuge in a rule of customary international law immunising cultural State property on loan, but rather count on their own immunity legislation.

On 26 October 2004, the representative of the Islamic Republic of Iran stated before the Sixth (Legal) Committee of the UN General Assembly that the (at that time still draft) UN Convention “reflects the customary international law pertaining to immunity of States and their property.” In 2010, the Iranian authorities, in the person of the Vice-President of the Islamic Republic of Iran and the Director General of the Iranian judiciary, have expressed that they regard international loans of cultural objects belonging to foreign States as covered by Article 5 of the 2004 United Nations Convention on Jurisdictional Immunities and their Property, which article states that a State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State.

Within the European Union, fourteen Member States issue, or have issued, ‘letters of comfort’, viz. Cyprus, Estonia, Finland, Greece, Hungary, Italy, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain and the United Kingdom. Other States also have the possibility to issue such letters, for instance the Russian Federation and Japan. As a rule, such a ‘letter of comfort’ cannot be considered as ‘hard law’, contrary to immunity from seizure legislation, but merely as a reassurance to the lender and as a commitment of effort that in case an attempt to seize the objects would be made, the authorities of the borrowing State will do everything in their power to prevent or stop that.

We have seen that also by means of interventions in legal proceedings, States can express their opinion with regard to immunity from seizure for cultural objects. We have seen that, for instance, in the United States, where cultural objects belonging to foreign States have been the

34 See supra, Ch. 10.1.1.3.
35 See supra, Ch. 10.1.2.
36 Subject to the provisions of the 2004 UN Convention.
37 See supra, Ch. 6.3, n. 46.
38 The United Kingdom stopped issuing these letters at ministerial level when its specific immunity from seizure legislation entered into force.
39 And indeed, when I put the question to several States, these States replied that they did not consider these ‘letters of comfort’ as a unilateral act; they did not consider these letters as an international legal obligation established by them. Although there does not exist a generally accepted or uniform definition of unilateral acts in international law, it may be taken that with an unilateral act a State creates international legal obligations by its own conduct to which the State concerned consents to be bound.
focus in different court cases, the US authorities were very vocal in expressing that these cultural objects should be immune from seizure.\footnote{The US authorities even went one step further, by stating that a temporary exhibition should not be the hook for bringing foreign States before the US court.} In Austria we saw the same in the Diag Human case.

The 2004 UN Convention was signed (but not ratified or yet acceded to) by Belgium, China, the Czech Republic, Denmark, East-Timor, Estonia, Finland, France, Iceland, India, Madagascar, Morocco, Mexico, Paraguay, the Russian Federation, Senegal, Sierra Leone, Slovakia and the United Kingdom and ratified or acceded to by Austria, Iran, Japan, Kazakhstan, Lebanon, Norway, Portugal, Romania, Saudi-Arabia, Sweden and Switzerland. Pursuant to Article 18 of the 1969 Vienna Convention on the Law of Treaties, those States are obliged to refrain from acts which would defeat the object and purpose of the convention, including Part IV on measures of constraint, as long as the convention has not yet entered into force for them. The United States, Canada, Argentina, the United Kingdom, Israel, Pakistan, Singapore, Japan, Australia, and South Africa enacted general State immunity legislation, reflecting the restrictive doctrine of State immunity. With the exception of Japan, none of these legislations refer to cultural State property on loan. A reason may be that all this legislation, with the exception of Japan and Israel, is of a relatively early date. As we saw supra, some of these States subsequently enacted specific immunity from seizure legislation for cultural objects on loan.

12.2.3 The ratio behind the State practice

What we have seen, is that some States which accept the existence of a rule of customary international law have also enacted specified immunity from seizure legislation. Examples are Belgium, Switzerland, the United Kingdom and Finland. With the exception of Belgium, the legislation of these States protects more than cultural property belonging to foreign States, so that may be a reason for the legislation. A likely reason for enacting legislation may also have been, that because different other States did not wish to rely on a rule of customary international law, those States enacting legislation wanted to show that objects of the lending States would in any event be safe in their jurisdiction. Belgium, for instance, stated that it did not want to lose the opportunity of offering high ranking and important exhibitions to the
public, knowing that foreign States and national and foreign museums do not always take ‘vague notions’ as immunity under customary international law for granted. Also Austria had the experience that potential lending institutions did not wish to rely on a ‘vague’ notion of customary international law, but wished an explicit statement in Austrian legislation which needed to be followed by the Austrian judiciary.

Likewise we can say that also when States do not wish to rely on a possible rule of customary international law, they still see the obligation and necessity to protect foreign owned cultural objects. A State like Germany, which - as stated supra - doubts whether a rule with regard to immunity from seizure for cultural objects on loan has already been developed, is, however, of the view that cultural objects of foreign States, temporarily in its territory because of an exhibition, should be immune from seizure. As a consequence it developed legislation to that effect. It was of the view that there was a legal obligation to protect those cultural objects.

Other States are also convinced of the necessity to protect cultural objects on loan, and do this in different forms and formats, as the EU subgroup ‘Immunity from Seizure’ concluded in its final report. Some States enacted their own specific immunity from seizure legislation, some States count solely on a rule of customary international law, and some States issue guarantor’s declarations in the form of so-called ‘letters of comfort’. A combination of these options is possible. But, whatever approach States have chosen, the security, legal and otherwise, of international art loans has become a central issue for all of them.

But where does the conviction that cultural objects must be protected against seizure come from? The belief that a legal obligation exists? Pragmatism? Maybe even reasons which have to do with commerce?

As we saw supra in Chapter 4, the United States was the first State to introduce immunity from seizure protection for cultural objects in 1965. The direct occasion for the legislation was a firm request made by the Soviet Union on the occasion of a loan of cultural objects to the University of Richmond. The legislative history of the legislation indicates a congressional determination to promote and increase the number of temporary loan

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42 Dualist States may also enact legislation in order to implement rules of international law in their domestic legal 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 proprio motu the possible existence of a rule of international law, as well as its limitations.
exhibitions of cultural objects, particularly from States with which the United States has had hostile or volatile relations. So, the primary goal of the legislation was to encourage and assist cultural exchange with other States. And, of course, the United States wanted to be considered as a safe haven for international art loans. But it did not end there. The US authorities have in practice assured in their contacts that they would support the actual application of the federal anti-seizure legislation and would intervene for the purpose of asserting immunity in the event this would be contested in court by means of concrete seizure attempts. And indeed, when contested in court, the US Executive Branch made interventions in order to emphasise the importance of the immunity. Also from my conversations with the US State Department, it became clear to me that the US authorities indeed see a legal obligation to protect cultural objects belonging to foreign States or foreign institutions against seizure and to facilitate cultural exchanges between States. The US authorities see this obligation as even more comprehensive, namely also as an obligation to provide immunity from suit in case of borrowed cultural objects. However, regardless of the legal conviction that it is necessary to protect against seizure, we saw that the US authorities did not wish to rely on a possible rule of customary international law.

In France, the direct inducement for enacting legislation was the Shchukin case before the court in Paris. The French authorities wanted to be completely sure that such cases would not occur again and saw a legal obligation to enhance the protection. In Germany the most concrete motivation for the elaboration of the legislation was an exhibition from Taiwan, already planned in 1992 and held from November 2003 until February 2004. The Taiwanese lenders feared that without a legal return guarantee, they might be exposed to possible action by the Chinese Government ending in the transportation of the objects to Beijing. In Austria, the introduction of anti-seizure legislation was a direct consequence of the confiscation in 1998 of two paintings by Egon Schiele from the collection of the Leopold Museum in Vienna, which were on temporary loan to an exhibition in New York. The Austrian authorities feared that foreign lenders would possibly hesitate to give cultural objects on loan to Austrian museums, being afraid that as a matter of reciprocity Austria would seize those objects as well. This situation had a negative impact on the Austrian museums and Austria therefore explicitly decided to enact legislation stating that foreign cultural objects would be immune from measures of constraint. In Belgium, Europalia Russia, an art festival that took place in Brussels in 2005, was the direct inducement for renewed immunity legislation, as the Russian Federation demanded more guarantees in order to be sure that cultural objects from Russia
could not be seized. In the United Kingdom, the entering into force of its specific immunity from seizure legislation has been speeded up, in order to make sure that an exhibition of Russian State-owned cultural objects would be able to take place. In the Czech Republic, legislation has been enacted in order to host an exhibition of Russian treasures from the Kremlin. And in Israel, legislation has been enacted in response to French demands.

This may give the impression, that all these legislations have been enacted in reaction to wishes, demands or fears from foreign States. However, we have also seen that several States have enacted legislation, or are in the process of enacting legislation, although there were apparently no outside forces urging such legislation. And we have seen that some States which enacted legislation, motivated by the demands of other States, went further than the apparent wishes of the demanding States or than the protection international law would provide. The German, Austrian and Swiss legislation, for instance, can be regarded as going further than mere immunity from seizure, as no third party rights can be invoked, as soon as the return commitment has been issued.

Moreover, we have seen that there are States which did not enact legislation, but still believe (on the basis of customary international law, or by giving effect to the object and purpose of the 2004 UN Convention) that cultural objects belonging to foreign States and temporarily on loan must be protected against seizure.

As already stated supra, in Chapter 2, it may be very difficult and largely theoretical to strictly separate elements of State practice and legal conviction, as quite often the same act reflects both practice and legal conviction. But based on my investigations, I have the impression that the practice of States in the field of my study is primarily based on a combination of both legal belief and pragmatism in order to be seen as a ‘trustful and safe haven’.

12.3 Academic opinions

43 See supra, Ch. 2.5, n. 65.
In literature, there is no uniform view on whether a rule of customary international law with regard to immunity for cultural objects belonging to foreign States and on temporary loan is in existence. Some voices state that such a rule is non-existent, other voices clearly incline towards a rule of customary international law and there are voices which are somewhat more careful in making a pertinent conclusion.\(^{44}\)

Eva Wiesinger has argued that Article 21 of the 2004 UN Convention could not be seen as a codification of customary international law as regards to immunity from measures of constraint, since new categories of State property were introduced which were immune from measures of constraint.\(^{45}\)

Isabel Kühl stated in 2004 that under general international law there is, despite opposing approaches in the literature, no immunity for loans.\(^{46}\)

Sabine Boos has expressed the opinion that there is not yet a general rule of international law upon which a State can rely with regard to immunity from seizure for cultural objects on loan. The current state of affairs of international law is too uncertain in that field, according to Boos. Concrete domestic legislation containing a legally binding return guarantee would give more security. At the same time she argued that the decision to support the international mobility of collections by means of a return guarantee is not so much based upon an international legal obligation, but more on political considerations by the States concerned.\(^{47}\)

Andreas Fischer-Lescano has stated that those objects which belong to the core functions of a State are protected by immunity. \textit{Prima facie}, cultural objects do not belong to those core functions. Also, Fischer-Lescano is of the opinion that a rule of customary international law holding that cultural objects belonging to foreign States are immune from seizure does not exist.\(^{48}\)

\(^{44}\) Some writers have a tendency to state that the first three categories of Article 21(1) can be considered as rules of customary international law, whereas the categories under (d) and (e) as now need to be considered as “only” treaty law, according to those writers.


\(^{47}\) Sabine Boos, \textit{Kulturgut als Gegenstand der grenzüberschreitenden Leihverkehrs [Cultural property as object of international art loans]}, Berlin 2006, pp. 239-241.

\(^{48}\) Andreas Fischer-Lescano, \textit{Ausnahmen vom Grundsatz der Staatenimmunität im Erkenntnis- und Vollstreckungsverfahren [Exceptions to the principle of State immunity with regard to jurisdiction and
In her assessment of Article 21(1) of the 2004 UN Convention, Hazel Fox stated that where the presence of the cultural objects is restricted to their temporary public exhibition, State practice seems more favourable to conferment of immunity. She referred, *inter alia*, to the Swiss *Noga* case of 2005\(^{49}\) as well as to US practice.\(^{50}\) When I had an interview with her in the autumn of 2009, she stated that she was not convinced that a rule of customary law had meanwhile been established. Probably one could speak of an emerging rule of customary law, not, however, of a yet developed one. Reason for this, according to Fox, is that there is yet insufficient uniform State practice, as well as the fact that the legislations of subsequent States, providing immunity from seizure for cultural objects temporarily borrowed for an exhibition are quite different in respect of the level of protection they are offering.

Gerhard Hafner\(^{51}\) used the words *status nascendi* and would go along with those, who argue that a rule of customary international law is emerging. In recent years, State practice is growing, and this State practice is generally pointing towards the protection against measures of constraint of cultural objects on loan belonging to foreign States. However, as States seem not all too certain whether a rule of customary international law already exists, one has to admit that such a rule is not yet firmly established, according to Hafner.

Kerstin Asmuss and Robert Peters argued that lately two main approaches can be identified: on the one hand, an increasing number of domestic legal instruments aiming at providing legally binding return commitments, and on the other hand, the derivation of immunity from measures of constraint of cultural objects from the general rules of international law.\(^{52}\)

\(^{49}\) “In 2004 the Ministry of External Affairs of Switzerland expressed a view that the cultural property of a State on exhibition was to be treated as immune and a court order on the application of the Swiss trading company NOGA for the seizure of paintings from Moscow’s Pushkin Museum sent to Switzerland for the purpose of exhibition was defeated by the Swiss Foreign Ministry ordering their release so that the paintings could be returned to Russia.”


\(^{51}\) In an interview with the author in October 2010.

Kevin Chamberlain concluded that there seems to be a growing acceptance under international law that the cultural property of a State should not be subject to measures of constraint.\textsuperscript{53}

Burkhard Heß considered the listing in Article 21(1) “acceptable”. “This is particularly the case for the ban on enforcement against embassy accounts with mixed (sovereign and non-sovereign) purposes, and for the prohibition of enforcement against archives or art objects of the defendant State that happen to be at exhibitions.”\textsuperscript{54}

August Reinisch has expressed the view that all five categories of Article 21(1) should be considered as property with a public purpose and has also pointed towards the growing amount of State practice regarding immunity from seizure for cultural objects on loan belonging to foreign States.\textsuperscript{55} He is of the opinion that one cannot yet firmly speak about an established rule of customary international law immunising cultural State property on loan, but the situation is growing towards that assumption.

In line with one of the remarks made by Reinisch, Th.M. de Boer assumed that in the Netherlands all five categories of Article 21(1) would qualify as goods intended for public purpose, although he was not aware of any Dutch case law with regard to cultural objects on loan.\textsuperscript{56}

According to Jérôme Candrian, the 2004 UN Convention does not constitute a concretisation of customary law in all of its provisions, but is it not disputed that this is the case with regard to immunity from measures of constraint for cultural property belonging to the State, whose status as sovereign property was affirmed at the outset of the negotiations and, meanwhile, has been confirmed by case law, national legislation and works of codification of scientific


\textsuperscript{55} This was done in an interview with the author in October 2010.

\textsuperscript{56} Azeta v. Japan Collahuasi Resources and the State of the Netherlands, Dutch Supreme Court, 11 July 2008, with annotation by Th.M. de Boer, Nederlandse Jurisprudentie; uitspraken in burgerlijke en strafzaken [Dutch Jurisprudence; rulings in civil and penal cases], 2010, No. 42, pp. 5176-5187, at p. 5186, para. 3.
institutions. Cultural property belonging to a State, loaned for the purpose of an exhibition in a foreign museum, forms as a matter of fact part of its eminent sovereign tasks.  

Kerstin Odendahl argued that the analysis of State practice and State conviction shows that the immunity from seizure of cultural objects belonging to foreign States can be considered as reflecting a new rule of customary international law. This can not only be deduced from the acts of the States themselves, but also from the lack of protests received from other States towards their handling. When, for instance, in November 2005 Switzerland stated that under international law, national cultural treasures are public property and not subject to seizure, no other State protested against this statement. On the contrary, in general, other States act likewise, as pointed out by Odendahl.  

In June 2011, Odendahl argued in a presentation that the fact that the 2004 UN Convention has been adopted by consensus gives food to the thought that the content of the convention reflects customary international law. In relation to the fact that State property with a purpose jure imperii enjoys immunity from measures of constraint under customary international law, she subsequently raised the question whether cultural objects belonging to foreign States and temporary on loan abroad should be considered as goods intended for governmental, non-commercial purposes. On the basis of an investigation into State practice and opinio juris of States, Odendahl has come not only to the conclusion that this is indeed the case, but also that it reflects a rule of customary international law.

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59 Kerstin Odendahl, ‘Die völkerrechtliche Vollstreckungsimmunität von Kulturgütern’ [The immunity from measures of constraint for cultural objects under international law], Presentation Art and Law Seminar, Faculty of Law, University of Basel, Switzerland, 17 June 2011. Andrew Dickinson argued that given the fact that so many States participated in drafting the 2004 UN Convention, it can be considered as representing a powerful statement of international thinking in this area. See: Andrew Dickinson, ‘State Immunity and State-Owned Enterprises’, Clifford Chance London, December 2008.
60 She especially refers to Article 19(c) jo. Article 21(1)(d) and (e).
61 “Im Ergebnis ist daher festzuhalten, dass staatliche Kulturgüter, die zu Ausstellungszwecken ins Ausland gegeben werden, eine hoheitliche Aufgabe erfüllen und demnach Vollstreckungs-immunität geniessen. Eine solche Regel ist mittlerweile Bestandteil des geltenden Völkerbewohnheitsrechts.”
In 2005, Matthias Weller spoke about a “yet inchoate concept of immunity for artworks on loan under public international law”, but he also said that immunity for cultural objects on loan can be considered as a rule of customary international law: “This rule protects artworks that a state has loaned to an exhibition in a foreign state for the purpose de iure imperii of cultural exchange as a contribution of fostering friendly foreign relations. Such immunity is grounded in the generally acknowledged principle in international law that sovereign immunity exists in enforcement measures where property is used by a state for purposes de iure imperii.” And: “[...] one may consider that loaned artwork is in the forum State for the purpose of cultural exchange between States – a purpose de iure imperii, protected from seizure by customary international law”.

Five years later, he expressed the firm opinion that “[i]t seems possible by now to assume a rule of customary international law granting immunity for works of art or cultural property by foreign States to exhibitions in the host State if the exhibition serves the purpose of cultural representation by the foreign State”. So, that is a precondition according to Weller: the exhibition needs to serve a public purpose. In case a loan serves the cultural exchange and mutual understanding between States, or intends to promote the cultural heritage of a State, then the loan can be considered as having a public purpose, and consequently the cultural objects would be immune from measures of constraint. However, in case the loan is led by financial and commercial aspects (with the aim of making profit), then the purpose of the loan is one \textit{jure gestionis}, and consequently, the cultural objects involved would not be entitled to immunity from measures of constraint, according to Weller.

Andrea Gattini has stated that among the classical categories of State property used for governmental or public purposes, the International Law Commission unsurprisingly also identified cultural property. He has the impression that it would be too optimistic to confirm that the mere existence of immunity from seizure legislation in different States presupposes

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63 Ibid., at pp. 1023-1024.
64 Ibid., at p. 1012.
the existence of an analogous rule of customary international law of immunity of State-owned cultural objects on loan. Rather, most domestic anti-seizure legislation seems to be inspired by both an underlying *opinio juris* of immunity and a considerable uncertainty about its limits. And while the immunity from seizure legislation undoubtedly signals a general tendency towards the recognition of immunity from seizure of cultural objects, at least equally relevant argumentation could be drawn from the nature itself of the objects in question, which is increasingly understood by most States as a constitutive part of their identity, according to Gattini, thereby referring to the inherent public purpose of the objects.

It is fair to conclude that, although there is no uniformity of views, the majority of academic opinions expressed tend to accept the existence of a rule of customary international law or the emergence of such a rule. Possibly because of the growing amount of State practice in the recent years, it is my impression that the number of supporters and subscribers of such a rule is slowly but steadily growing.

### 12.4 Primary conclusions

Based on what I wrote so far, several conclusions can be drawn with regard to the protection under international law of cultural objects belonging to foreign States while on temporary loan.

The exchange of cultural property is an internationally recognised goal. As we saw in Chapter 1, there are different international agreements which promote the mobility of collections. Cultural exchanges support mutual understanding between States and immunity from seizure without doubt contributes to this exchange of cultural property and collection mobility. In Chapter 6 we saw that the promotion of the mobility of collections is a key issue within the European Union since 2003.

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69 Kerstin Odendahl stated: “The vast majority of authors dealing with this question answered the question regarding the existence of a corresponding rule of customary international law in the affirmative.” [“Die weitaus überwiegende Mehrheit der Autoren, die sich mit dieser Frage befassen, bejaht die Existenz einer entsprechenden völkerrechtlichen Regel.”] See: Kerstin Odendahl, ‘Die völkerrechtliche Vollstreckungsimmunität von Kulturgütern’ [The immunity from measures of constraint for cultural objects under international law], *Presentation Art and Law Seminar*, Faculty of Law, University of Basel, Switzerland, 17 June 2011.
We have seen that the issue of immunity from seizure for travelling cultural objects has only relatively recently become a real concern for States and museums and that the relevant legislation in various States is fairly new. Also, the number of States with State practice in the form of specific immunity from seizure legislation is relatively small, although slowly growing. In Chapter 2, I already drew the conclusion that it is possible for a rule of customary international law with regard to immunity from seizure to be developed and established within a limited timeframe, as well as between a limited number of States. It is not necessary for a rule of customary international law, holding that cultural objects belonging to foreign States and on temporary loan are immune from seizure, to be accepted worldwide or be entirely uncontested. Even practice followed by a very small number of States can create a rule of customary law if there is no practice conflicting with the rule.

Andreas Fischer-Lescano stated, correctly in my view, that in order to assess what kind of international State practice exists, supported by the legal belief of the international community of States, both existing and draft codifications should be taken into account.\(^70\) Article 21(1)(e) of the 2004 UN Convention mentions “property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale” as a category of “property of a State [that] shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes”. With regard to Article 21(1)(e) of the 2004 UN Convention, the gist of that provision has not been disputed in the International Law Commission, nor in the UNGA Sixth (Legal) Committee. That does not only mean that the international community of States agreed with the interpretation contained in it (or at least was not against it), but it could also be a hint towards the possible existence of a rule of customary international law. Furthermore, several States have explicitly stated that they consider the rule as reflected in Article 21(1)(e) as a rule of customary international law, whereas also various States signed or ratified the 2004 UN Convention (without making a reservation to this article), thereby supporting the gist of it.

States seem to attach importance to immunity from seizure with regard to cultural objects belonging to foreign States temporarily borrowed. Also, they act accordingly, by providing

\(^{70}\) “Um zu beurteilen welche völkerrechtliche Praxis aktuell existiert, die von einer gefestigten Rechtsmeinung der Völkerrechtsgemeinschaft getragen wird, sollen zunächst sowohl bestehende als auch entworfene internationale Kodifikationsarbeiten dargestellt werden.” See: op. cit. n. 48 (Fischer-Lescano), at p. 13.
‘letters of comfort’ and/or by establishing immunity legislation. It seems that the reason for this legislation is twofold: on the one hand, States simply do not wish to risk any acts of seizure, so they try to act as pragmatically as possible. This implies safeguarding one’s position as a State by ensuring that one is considered to be a safe and attractive location for international art loans. On the other hand, it is my impression that States also act this way because they feel there is a legal obligation to do so. However, in practice, it can be seen that some States feel not comfortable to rely on ‘vague notions’ as a ‘general immunity guarantee’ or a possible rule of customary international law.

If certain States doubt whether such a rule is already in existence, or do not wish to rely on it, that does not negate the existence of such a rule. Those States do not object to such a rule (no States have openly dissented), but are just not sure whether it has already been developed sufficiently. There is a grain of truth in the remark made by Gerhard Hafner: if States seem not all too sure whether a rule of customary international law already exists, one has to admit that such a rule is not yet firmly established.71

On the whole, I come to the conclusion that a relatively young rule of customary international law is in existence holding that cultural objects belonging to foreign States and on temporary loan for an exhibition are immune from seizure, although the rule is not yet firmly established or well defined in all its aspects.72 Contrary State practice could therefore put this rule at stake again, but supporting State practice can make it stronger.

What kind of cultural State property would be protected under this rule?

The cultural objects are to be in use or intended for use by a State for government non-commercial purposes;73 exhibits for industrial or commercial purposes are not covered by the rule and the property should not be placed, or intended to be placed on sale.

71 Interview with Gerhard Hafner by the author. Vienna, 18 October 2010.
72 See also: op. cit. n. 58 (Odendahl), at p. 1183: “Da die Immunität entliehener staatlicher ausländischer Kulturguter noch eine junge völkerrechtliche Regel darstellt, sind ihre genauen Konturen, d.h. ihre Grenzen aber auch ihre Potentiale, noch nicht klar definiert.” [“Since the immunity for cultural objects on loan, belonging to foreign States, represents a still young rule of international law, the precise contours, i.e. the limitations but also the potential are not yet clearly defined.”] The fact that sometimes lending States or lending institutions request an immunity guarantee to the borrowing State or borrowing institution may be an indication that not all States seem too certain whether a rule of customary international law already effectively exists.
73 As I already showed supra, Article 21(1)(e) of the 2004 UN Convention sought to prevent any interpretation to the effect 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 was in fact property specifically in use or intended for use by
As a matter of fact, most State immunity legislation protects State property that has a public, or government non-commercial, purpose, but generally provides property of separate State entities or instrumentalities with a lesser degree of protection. Relevant questions are therefore: what is a State, and what is considered as State property?

In most State immunity legislations a separate State entity does not fall within the definition of a State. We saw that in Australia a separate entity is generally treated as a foreign State for most purposes of immunity from jurisdiction, but is not treated as a foreign State for the purpose of enforcement of judgments. Under the State immunity legislations of the United Kingdom, Pakistan, Singapore and South Africa the reference to a foreign State includes references to the sovereign or other head of State in that foreign State in his public capacity, the government of that foreign State and any department of that government. A separate entity which is distinct from the executive organs of the government of the State and capable of suing or being sued is not included in the reference to a State. Under the Foreign States Immunity Law of Israel, a foreign State includes a political unit within a federal State, the governmental agencies of a foreign state, official functionaries representing such a State in performing their function, as well as a separate entity, although immunity from seizure in general does not apply to property of a separate entity. In the United States we saw that under circumstances a separate State entity does fall within the definition of a State, but that the threshold for seizing objects belonging to State entities is lower than for seizing property belonging to the State as such. In Canada, an agency of a foreign State is included in the definition of a foreign State, whereby such an agency is described as any legal entity that is an organ of the foreign State but that is separate from the foreign State. In Japan, a foreign State includes an agency or instrumentality of the foreign State or other entities that are entitled to perform and are actually performing acts in the exercise of sovereign authority of the foreign State.

The 2004 UN Convention contains a broad definition of the term State and also includes agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State. With regard to a State museum, it may not be all that simple to state whether it is included

State for commercial non-governmental purposes.

74 Unless it regards property of a central bank.
within that definition of a State or not. In principle, State museums have a legal personality, independent from the State, and are capable of suing or being sued. The decisive question is then, whether the State museum is performing acts *jure imperii* or *jure gestionis*. We have seen in this study, that on the one hand art loans do have the earmarks of a commercial transaction; an art loan is an act which can be performed by an individual private person. Thus, according to its nature, an art loan should be regarded as an act *jure gestionis*. On the other hand, we have seen that there may be reasons to attach a public purpose to the art loan, as States have committed themselves to supporting the exchange of cultural objects through international legal instruments. Indeed, it seems quite plausible that lending and borrowing States act with a public, non-commercial, aim, for instance mutual understanding for each other’s (cultural) history or re-establishment of bilateral diplomatic relations. It could thus indeed very well be stated that the nature of the art loan would be an act *jure gestionis*, whereas the purpose of the art loan could be one *jure imperii*. However, we also saw that in determining whether an act is to be considered as *jure imperii* or *jure gestionis*, in most jurisdictions solely or primarily the nature of the act has to be taken into account. And that would then mean that an art loan is considered to be an act *jure gestionis* and that the State museum performing this act does not fall within the definition of a State. In the end, it may be possible that it is up to national courts to consider whether in an actual case an act should be considered as an act *jure imperii* or *jure gestionis* and whether an organ or entity can be considered as falling under the definition of a State.

It is thus fair to say, as I also concluded in Chapter 1.7, that there is not one single definition for a State. Different national and international legal instruments each follow their own approach. With regard to the rule of customary international law stating that cultural objects belonging to foreign States are immune from seizure while on temporary loan for an exhibition, some differentiation may therefore in practice take place in the application of the rule, depending on the definition of a State used for the purposes of the rule.

However, if an entity, such as a State museum, cannot be considered as included within the definition of a State, that does not mean that the cultural objects housed in that State museum are subject to seizure by definition. After all, in my view, the immunised State property would be broader than solely property that is *owned* by a State. In Chapter 3, we saw that in the 2004

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75 Some academics indeed put emphasis on the purpose of the act.
UN Convention property *owned* by the State and property *in its possession or control* would most probably be covered by the immunity provisions, although the exact scope has not yet been determined in practice. Based on my investigation, notably my assessment of the ILC deliberations and my conversation with Gerhard Hafner, it would be fair to say that in any case property that is State-owned or of which the State serves as a custodian or has a right of disposal would fall under the immunity. When would we be able to speak of a relationship between the objects concerned and the State as custodian (or as having a right of disposal)? In any case, the State should be able to exercise certain rights and should have a legal authority to do so; the property should be in the possession of the State or else the State should have possibilities and capacities of determining the use of the objects. For instance, it should not be possible for the State to sell the objects, but it should be possible for the State to determine whether the objects could be loaned or not. In any case the exact limitations have not been properly established yet.

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

Moreover, what we saw in practice is that States which enacted specific immunity legislation for cultural objects on loan generally wanted to protect a broader range of cultural property than solely property belonging to a State. The French, Belgian and Israeli Acts protect only cultural State property, whereas the US, the UK, German, Austrian, Swiss, Liechtenstein, Finnish, Japanese and Taiwanese legislation (as well as the Italian and Hungarian draft legislation) applies also to privately-owned cultural objects on loan. And the Dutch immunity

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76 Who, as I already stated *supra*, in Ch. 3, n. 131, after the end of his term in the ILC was appointed Chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property that elaborated the final text of the 2004 UN Convention.

77 A custodian has been defined as a person entrusted with guarding or maintaining a property. See: http://dictionary.reference.com/browse/custodian.

78 I already used these terms in Ch. 3.3.4 *supra*.
legislation makes property which is not considered as State property eligible for protection, as long as the property is intended for public services. Based on those experiences, I am of the opinion that for the purpose of the rule of customary international law the term State property should not be interpreted from a strict point of view.

This brings me to the following conclusions:

- Under customary international law, State property in use or intended for use for government non-commercial purposes is immune from measures of constraint.
- Article 21 of the 2004 UN Convention seeks to prevent any interpretation to the effect that property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale would be considered as property specifically in use or intended for use by State for commercial non-governmental purposes.
- Many States consider cultural objects belonging to foreign States and on temporary loan indeed as falling under the notion of State property in use or intended for use for government non-commercial purposes and hence already immune from measures of constraint. Those States which do not follow that path have either State immunity legislation that does not make a difference between different categories of State property (for instance the Russian Federation) or rather rely on the approach and criteria in their own legislation (for instance Australia and the United States).
- In recent years, there is a growing State practice pointing towards protection against measures of constraint of cultural objects on loan belonging to foreign States.
- With regard to the existence of a separate specific rule of customary international law, I would come to the conclusion that a relatively young rule of customary international law exists, although not yet firmly established or well defined in all its aspects, to the effect that cultural objects belonging to foreign States while on temporary loan for an exhibition are immune from seizure.
- The rule applies to cultural objects in use or intended for use by the State for government non-commercial purposes. The exhibition to which the objects are loaned should be of a non-commercial nature. Hence, exhibits for industrial or commercial purposes are not covered by the rule and the property should not be placed, or intended to be placed on sale.
Some differentiation may in practice occur with regard to the application of the rule, depending on the definition of a State used by the borrowing State for the purposes of the rule.

Cultural objects which are owned, possessed or controlled by a State would fall under the rule.

12.5 Some possible limitations

After having drawn these conclusions, some further questions as to the exact scope of the rule of customary international law must be examined, i.e., what would be the limitations of such a rule? And what kind of seizure would be prevented under that rule? Only civil seizure, or also seizure based on criminal legislation?

12.5.1 Cultural objects which have been the subject of a serious breach of an obligation arising under a peremptory norm of general international law, or which are already subject to return obligations under international or European law

Several States made clear remarks with regard to stolen, looted or illegally exported cultural objects. While enacting its own, rather comprehensive, legislation, Germany made clear that cultural objects which belonged to Germany and had been taken in the aftermath of World War II to the Soviet Union by the Red Army could never fall under its immunity from seizure legislation. Poland argued that cultural objects taken from Poland during and in the aftermath of World War II could never fall under a rule of customary international law protecting cultural objects from seizure. Italy has a similar way of thinking: as we saw, Italy wants to exclude that a possible rule of customary international law would be interpreted as encompassing cultural objects which were illegally acquired and of which Italy is the State of origin. And I would conclude on the basis of my investigations that in general, the prevailing sentiment is that illicitly acquired cultural objects should not deserve protection. It needs to be said, however, that in several States the view has been expressed that both the art exhibits

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79 When I refer to return obligations in Chapter 12.5 and 12.6, I refer to obligations to return to another State not being the lending State.
themselves and the publicity surrounding them are fundamental contributors towards the recovery of illicitly acquired cultural objects by increasing the chance that rightful owners might be alerted to the whereabouts of their displaced objects. Fear of seizure may drive such objects underground, making the resolution of ownership claims much more difficult. With that in mind, Israel, in collaboration with France, organised an exhibition of cultural objects, misappropriated during World War II and located in France. Prima facie evidence that an object was stolen from Jews by the Nazis, their agents or their collaborators, can prevent the granting of immunity in Israel. However, although Israel did not want to give the impression that cultural objects illegally acquired during the Holocaust deserve protection, it allowed the exhibition and provided immunity for the exhibited objects, as it was said that this would provide the chance to expose expropriated art, thus enabling people to identify assets from their family and to make a claim in the country where the objects are normally housed.

Cultural objects which have been the subject of a serious breach of an obligation arising under a peremptory norm of general international law

With regard to cultural objects which have been taken during armed conflict, one has to keep in mind that since the end of the 19th century, international agreements have been addressing the protection of cultural property from seizure during such armed conflict. The First Hague Peace Conference of 1899 resulted in the Convention with respect to the Laws and Customs of War on Land. Article 56 of the annexed Regulations respecting the Laws and Customs of War on Land states:

“The property of the communes, that of religious, charitable, and educational institutions, and those of arts and science, even when State property, shall be treated as private property. All seizure of, and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings.”

Article 53 reads:

“An army of occupation can only take possession of the cash, funds, and property liable to requisition belonging strictly to the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property of the State which may be used for military operations […]”

80 See supra, Ch. 10.1.1.2.
81 The Hague, 29 July 1899, to be found at: http://avalon.law.yale.edu/19th_century/hague02.asp#art56.
It is fair to conclude that cultural objects fall outside of this category of property “which may be used for military operations”.

The Second Hague Peace Conference in 1907 (which followed the first Hague Peace Conference of 1899) resulted in the 1907 Convention respecting the Laws and Customs of War on Land. Annexed to it are the Regulations concerning the Laws and Customs of War on Land. Article 56 provides for a fairly equal text as contained in the 1899 Regulations and prohibits the seizure, destruction or willful damage of works of art and science, and provides that those responsible for such acts be prosecuted. Also Article 53 of these regulations is fairly equal to Article 53 the 1899 Regulations.

The regulations do not contain an obligation to return the objects to the State from which the objects were taken.

The (First) Protocol to the UNESCO Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict aims to prevent the export of cultural property from occupied territory and provides for the return of such property to the territory of the State from which it was removed (see also supra, Chapter 11.1.1). It can therefore be necessary for a State Party to take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory.

All these provisions may now be regarded as having become part of customary law. The International Committee of the Red Cross (ICRC) identified certain rules of customary international law with regard to protection of cultural property in its highly estimated customary law study. The applicable rules refer back to either the Hague Regulations of 1907 or the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Seizure, theft, pillage or misappropriation of cultural objects is prohibited

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82 The Hague, 18 October 1907, to be found at: http://avalon.law.yale.edu/20th_century/hague04.asp.
83 Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Volume I, Rules, Volume II, Practice (two parts), Cambridge, 2005. According to ICRC, the purpose of the study was to determine which rules of International Humanitarian Law (IHL) are part of customary international law and therefore applicable to all parties to a conflict, regardless of whether or not they have ratified the treaties containing the same or similar rules. The study identified 161 rules.
84 Rule 38: “Each party to the conflict must respect cultural property: A) Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives. B) Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.”
and illicit export should be prevented by the occupying power; illicitly exported property should be returned to the authorities of the occupied territory.

States which do not comply with these rules of international law can be accused of committing an internationally wrongful act. The articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts\(^{85}\) state that “[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State”\(^{86}\) and that “every internationally wrongful act of a State entails the international responsibility of that State”.\(^{87}\) According to Article 31(1), “[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”\(^{88}\) The primary form of reparation is restitution\(^{89}\) and thus, in this case, the return of the object. If this is not possible,\(^{90}\) other forms of reparation become relevant.

In case of a serious breach\(^{91}\) of an obligation arising under a peremptory norm of general international law,\(^{92}\) States are to cooperate to bring such a serious breach to an end through

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\(^{85}\) In resolution UN Doc. A/RES/56/83 of 12 December 2001, the UN General Assembly took note of the articles and commended them to the attention of governments without prejudice to the question of their future adoption or other appropriate action. The articles can be found at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

\(^{86}\) Article 1.

\(^{87}\) Article 1.

\(^{88}\) Moreover, according to Article 30, “[t]he State responsible for the internationally wrongful act is under an obligation:

(a) to cease that act, if it is continuing;

(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.”

\(^{89}\) Article 34: “Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination […].” In order to fulfil the condition of ‘full reparation’ it may be possible that the restitution alone of an object is not sufficient, for instance in case the wrongful act has caused additional damage.

\(^{90}\) For example in case of destruction of the object.

\(^{91}\) According to Article 40(2) of the ILC articles, “[a] breach […] is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.” The ILC Commentaries to the ‘Draft articles on Responsibility of States for Internationally Wrongful Acts’ state that the word ‘serious’ “signifies that a certain order of magnitude of violation is necessary in order not to trivialize the breach […].”’ ‘Gross’ refers to the intensity of the violation or its effects, whereby ‘systematic’ means that the violation would have to be carried out in an organised and deliberate manner. “Factors which may establish the seriousness of a violation would
lawful means. "No State shall recognize as lawful a situation created by [such a serious breach], nor render aid or assistance in maintaining that situation." It is in my view fair to say that the obligation to refrain from the taking of cultural objects during armed conflict has become so fundamental, that it can be considered as a ‘peremptory norm of general international law’ and that non-compliance can be seen as a ‘serious breach’. Under the Rome Statute of the International Criminal Court, “[…] appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” is considered a war crime. The same goes for “destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war” or “pillaging a town or place”. Unlawful appropriation, seizure or pillage of cultural property during armed conflict can be considered as contained within these provisions. In my view, this means that the community of States is bound to cooperate in order to bring this situation of unlawfulness to an end and not to recognise such a situation created by a serious breach as lawful, nor contributing to the maintenance of it. It can be argued that cultural objects that have been taken during armed conflict may not be eligible to immunity, as this would leave an unlawful situation intact.


92 “[A] peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”, according to article 53 of the Vienna Convention of the Law of Treaties. See also supra, Ch. 11, n. 160, where I refer to a peremptory norm of general international law as a jus cogens norm. The ILC Commentaries to the Draft articles on Responsibility of States for Internationally Wrongful Acts mention that it is generally agreed that the prohibition of aggression is to be regarded as peremptory. The same goes for the prohibition against racial discrimination. The examples given are not exhaustive. See: Ibid., paras 4, 6.

93 See Article 40 jo. 41.

94 Article 41(2). The ILC states in its commentaries that this obligation not to recognise the situation as lawful “refers to the obligation of collective non-recognition by the international community as a whole of the legality of situations resulting directly from serious breaches in the sense of article 40.” See: op. cit. n. 91, p. 114, para. 5.

95 The taking, for instance, of cultural objects during and as a result of World War II can be considered as both ‘gross’ and ‘systematic’. See also: Peter Charles Choharis, ‘U.S. Courts and the International Law of Expropriation: Toward a New Model for Breach of Contract’, Southern California Law Review, 2006, Vol. 80, Issue 1, pp. 1-88, at pp. 4-5: “[…] there is a strong, nearly universal consensus that outright, uncompensated seizure of property once practiced by the Nazis [Choharis refers to Altmann v. Austria], communist states [Choharis refers to the taking of the assets of an US bank by Cuba], and some developing nations constitutes a violation of international law.”

96 Adopted 17 July 1998, 2187 UNTS 90.

97 Article 8(2)(a)(iv).

98 Article 8(2)(b)(xiii).

99 Article 8(2)(b)(xvi).
With regard to such cultural objects illicitly acquired during armed conflict, I would say that generally, the prevailing sentiment is indeed that such objects should not deserve protection. After all, although not legally but certainly morally binding, many States subscribed to the Washington Principles, the Vilnius Declaration or the Terezin Declaration. Several States established Restitution or Spoliation Committees in order to restitute cultural objects to heirs of World War II victims. Moreover, immunity from seizure for cultural objects taken during armed conflict would in my view contravene the general principle of international law that the community of States has to cooperate in order to bring a situation created by means of a serious breach of an obligation arising under a peremptory norm of general international law to an end and not to recognise the situation created as lawful, nor contributing to the maintenance of it.

_Cultural objects subject to return obligations under international or European law_

In my study, I referred several times to the term ‘State of origin’. This term has often been used in relation to the 1970 UNESCO Convention. For Member States of the European Union Council Directive 93/7/EEC is applicable as well. And finally the 1995 Unidroit Convention may be of importance, although this convention is not broadly ratified. What is the approach of States when it comes to the relationship between immunity from seizure and these return obligations under international and European law which might be at odds with immunity? It is clear that different States have a different approach with regard to the question whether immunity from seizure or the return obligations would apply.

The Belgian protection in the form of immunity does not apply in case under international or European law an object must be returned to a claiming State, not being the lending State. The United Kingdom and Finland follow the same approach. We have to keep in mind that these three States were already of the opinion that a rule of customary international law exists, to the effect that cultural objects belonging to foreign States are immune from seizure while on

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100 When I refer to armed conflict, I refer to armed conflicts of the 20th and 21st century, as the first international legally binding agreement in this regard originates from 1899.
101 Op. cit. supra, Ch. 11.1.6. In this regard, it is also relevant to refer to the 2004 ICOM Code of Ethics, which sets minimum standards of professional practice and performance for museums and its staff. Article 2.2 states that “no object or specimen should be acquired by […] loan […] unless the acquiring museum is satisfied that a valid title is held.” Article 2.3 goes on by stating that “every effort must be made before acquisition to ensure that any object or specimen offered for […] loan […] has not been illegally obtained in or exported from, its country of origin or any intermediate country in which it might have been owned legally. Due diligence in this regard should establish the full history of the item from discovery or production.” That is of course also relevant for the other category of cultural objects referred to in this Chapter 12.5.1: cultural objects subject to return obligations under international or European law.
loan to another State for a temporary exhibition. As a consequence, either these other obligations under international or European law would prevail over such a rule of customary international law, or such a rule of customary international law would not extend to cultural objects which must be returned to a country of origin pursuant to an obligation under international or European law. The Italian and Hungarian approach is similar: Italy states in its draft legislation that all foreign objects which are not subject to international conventions and agreements signed by the Italian State, or applicable European Community provisions, shall be exempt from seizure. And in Hungary, the immunity would be without prejudice to international legal obligations. The German, Austrian\textsuperscript{102} and Swiss approach is somewhat complex: in case a return guarantee has not yet been issued to the lending State (or institution), return obligations under international law can prevent the issuance of such a return guarantee. According to Germany, that would be the case in regard to cultural objects taken by the Soviet army in the aftermath of World War II. However, as soon as a return guarantee has been issued, that guarantee is considered to prevail over the return obligations as foreseen under international law.\textsuperscript{103} In the United States, in cases where the immunity from seizure under the Federal Immunity from Seizure Act applies, the US legislation implementing the 1970 UNESCO Convention is not applicable. Consequently, in case the 1965 immunity statute applies, the United States may not be in a position to secure the restitution of cultural property to a requesting State under Article 7 of the convention. This is thus a choice in favour of immunity from seizure on the basis of its own legislation.\textsuperscript{104} It may, however, not be concluded therefrom that the United States is of the opinion that illicitly acquired cultural objects should be untouchable. When immunity from seizure has been granted on US State, not federal, level to a cultural object, and thereafter it turns out that under federal US legislation (the National Stolen Property Act) the object should be considered as stolen, the immunity from seizure can be set aside. In case immunity from seizure would have been provided on a federal level, then there would be a conflict of provisions between two federal Acts (viz. the Federal Immunity from Seizure Act and the National Stolen Property Act). The same goes for a possible conflict of provisions between the Foreign Sovereign Immunities Act (which also gives exceptions to immunity from measures of constraint) and the Federal Immunity from Seizure Act. I recall here, that Section 1605(a)(3) of the Foreign Sovereign Immunities Act contains the so-called ‘takings

\textsuperscript{102} Austria is not a party to the 1970 UNESCO Convention.

\textsuperscript{103} Which in my view may lead to an internationally wrongful act.

\textsuperscript{104} And may result in an internationally wrongful act.
exception’ or ‘expropriation exception’, where, under certain conditions, immunity does not apply with regard to property taken in violation of international law. Finally, it is worth mentioning that the immunity legislation of the State of Texas states explicitly that the immunity for cultural objects on loan does not apply if theft of the cultural object from its owner is alleged and found proven by a court.

Although I have to admit that the States mentioned supra only form a limited part of the whole community of States, most of them do belong to the group of States which is most involved in the lending and borrowing of cultural objects. Having in mind, as referred to supra, in Chapter 2, that the International Court of Justice paid specific attention to the involvement of “States whose interests are specially affected”, I consider it necessary to pay special attention to the approaches of these States.

What could the above mean? Could it mean that an unlimited rule of customary international law immunising cultural State property on loan from seizure coexists with a possible conflicting return obligation under public international law, such as the obligation to return to a State of origin? Or should the rule of customary international law be considered as more limited, in the sense that the rule does not apply to cultural objects which are subject to international or European return obligations? In the latter case, there would be no conflict with the rule of customary international law and the obligation under international law to return the object concerned to the State of origin.

A rule of treaty law and a rule of customary international law can coexist. In the Nicaragua case, the International Court of Justice held that if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty law and on that of customary international law, these norms retain a separate existence. A rule of customary international law immunising certain categories of State property from measures of constraint remains applicable after the entry into force of the 2004 UN Convention. Such a rule is not necessarily equal in content to the

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105 The Congress, in the legislative history of the Act, defined the term ‘taken in violation of international law’ as “a nationalization or expropriation of property without payment of the prompt, adequate and effective compensation required by international law” or “takings which are arbitrary or discriminatory in nature”. The taking in violation of international law can occur both in the event of armed conflict and in time of peace.

106 See supra, Ch. 2.1.


108 Ibid., pp. 14, 95.
rule of treaty law. Behaviour of States (such as State practice or dissenting opinions) can make the rule subject to limitations. Therefore, deviation is possible, in the sense that, for instance, a rule of treaty law has an unlimited scope, whereas at the same time the rule of customary international law is more limited because of the lack of uniform State practice.

It is clear from my assessment that there is no uniform, even sometimes contrary State practice with regard to the relationship between immunity from seizure for cultural objects on loan and the obligation to return these to the lending State on the one hand, and return obligations under international or European law on the other. 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, or as to whether immunity from seizure for cultural objects on loan extends to objects which are subject to other international or European return obligations. Some states are of the opinion that in case a return obligation to the State of origin exists under international or European law, the cultural objects concerned cannot be eligible for immunity, whereas other States are of the opinion that in such a situation the immunity remains untouched.

Supra, in Chapter 2, I have shown that for the formation of a rule of customary international law, it is necessary that the practice of States is ‘virtually uniform’. With regard to cultural objects which are already subject to return obligations under international or European law, no ‘virtually uniform’ State practice can be identified. Moreover, State practice protecting these objects is not based on a legal conviction. For instance, in Germany, Austria and Switzerland no third party claims (including claims by States of origin) are possible as soon as a return guarantee has been issued for cultural objects on loan, in order to qualify as reliable partners for the lending States or institutions in the international world of art loans. I would therefore come to the conclusion that a rule of customary international law does not extend to those cultural objects which are already subject to other return obligations under international or European law. I am not saying that these objects cannot be eligible for protection by definition, I am solely stating that under customary international law, immunity from seizure does in my view not extend to these objects.

12.5.2 Immunity from seizure: only in civil or also in criminal proceedings?
With regard to the question whether immunity from seizure for cultural objects on loan would only apply in civil proceedings or also in criminal proceedings no clear-cut answer can be given.

It was generally understood during the negotiations that the 2004 UN Convention does not cover criminal proceedings. This restriction was already made in the 1991 commentary and the General Assembly explicitly agreed with that interpretation in its resolution adopting the convention. Consequently, Part IV of the convention, regarding immunity from measures of constraint, applies only to civil proceedings and thus the protection given in the convention to property (of a State) forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale does not extend to criminal proceedings. The State immunity legislation of the United Kingdom, Canada, Pakistan, Singapore, Australia and South Africa explicitly states that its substantive provisions do not apply to criminal proceedings or prosecution. Also the general immunity from seizure provisions in the Dutch legislation only cover civil proceedings.

The legislations of the European States covering immunity from seizure for cultural objects on loan, however, generally protect against all forms of seizure, whether civil or criminal (with the exception of France). The protection given in the UK Tribunals, Courts and Enforcement Act, for instance, is intended to exclude any form of seizure or detention of an object which has been lent to an exhibition in the United Kingdom, either by a claimant to the object, a creditor, or any law enforcement authority and no matter whether seizure has been ordered in a criminal or a civil procedure. Most other specially enacted legislation does not even specify that with so many words. Also the US Federal Immunity from Seizure Act protects against all forms of seizure. The same goes for the New York State statute, although there has been a period that the immunity only applied to civil proceedings. And also Israeli legislation and the legislation of the five Canadian provinces are all-encompassing.

When it comes to State practice, most of the cases that have been dealt with are within the civil law sphere. If there is an ownership dispute over a cultural object on loan, or if a claimant is of the opinion that the owner of the cultural object on loan owes a debt (not necessarily related to the object) to the claimant, we are dealing with civil law disputes, even if one of the parties in the dispute is a State. That could be different if the owner of the cultural object is faced with criminal charges as the object is allegedly stolen, or if in the
context of a criminal investigation law enforcement officers want to seize certain cultural objects in order to preserve evidence. But when it comes to such criminal proceedings, there is hardly State practice to discover.

Based on the above, I would tend to say that the rule of customary international law immunising cultural objects belonging to a foreign State from seizure while on loan for a temporary exhibition would only apply to seizure in civil proceedings. I am not arguing that immunity from seizure for cultural State property on loan is not applicable in criminal proceedings by definition; I solely state that the rule of *customary* international law does not extend to criminal proceedings, due to lack of virtually uniform State practice.

### 12.6 Supplementary conclusions

Based on the above, I come to the following conclusions, supplementary to the conclusions which I have drawn *supra* in Chapter 12.4:

- The security, legal and otherwise, of international art loans has become a central issue for States. But although States want to immunise cultural objects on loan, they also want to prevent and to combat illicit acquisition or unlawful removal of cultural objects and strive for the return to the State of origin.
- The rule of customary international law stating that cultural objects belonging to foreign States are immune from seizure while on temporary loan for an exhibition does not extend to those cultural objects which have been the subject of a serious breach of an obligation arising under a peremptory norm of general international law, or which are already subject to return obligations under international or European law.
- Moreover, a rule of customary international law immunising cultural State property on loan from seizure applies only to seizure in civil proceedings.

That brings me to the end of my study. I came to the conclusion that a relatively young rule of customary international law exists, to the extent that cultural objects belonging to foreign States and on temporary loan for an exhibition are immune from seizure. However, this rule is not yet firmly established or well defined in all its aspects, and the rule has certain limitations.
As I already stated supra, in Chapter 3, I have to admit that cultural State property on loan cannot be considered to be one of those ‘classical’ categories of protected objects, such as military property, diplomatic property or property of the central bank of a State. But the fact that cultural objects can be important for the identity of a State, the fact that cultural objects may help to understand the culture, history and development of a State, as well as the fact that cultural objects can be used as a means in the promotion of international cultural exchanges (codified in several international agreements) and the strengthening of bilateral or multilateral diplomatic relations, makes it fair to consider these cultural objects on loan as an additional category of immunised State property.

The fact that immunity from seizure does not only apply to cultural objects on loan owned by a State, but also to objects possessed or controlled by a State, can make the application of the rule in practice somewhat complicated. As not solely objects owned by a State can serve as a means to promote mutual understanding between States and the respective populations, it is applauded that immunity covers a broader category of objects than solely those subject to State ownership. However, it may be necessary to determine on a case by case basis whether a cultural institution should be considered as falling under the notion of a State (which will mostly not be the case), and whether in the actual situation it is the State which either owns, possesses or controls the objects concerned. As a result, it may be possible that loans between lending and borrowing institutions have to be considered differently, with regard to possible immunity. After all, a cultural institution can house objects which are owned by a State, a State may be able to exercise control over other objects, and some objects may not have a link with the State at all. A future global convention on immunity from seizure for all kinds of cultural property on loan, regardless whether it regards State property or private property, may solve such a situation. The International Law Association is currently assessing whether such a convention may possibly be viable, however, the assessment is still in its embryonic stage. A convention like that may provide more legal security, but also raises new questions such as a possible overlap or discrepancy with the 2004 UN Convention.

I have concluded that a rule of customary international law does not extend to cultural objects which have been the subject of a serious breach of an obligation arising under a peremptory norm of general international law, or which are already subject to return obligations under international or European law. This is generally satisfactory to me, but I need to make some remarks. The plunder of cultural objects during armed conflict is to be considered as a serious
breach of an obligation arising under a peremptory norm of general international law. States are obliged to refrain from recognising such a situation as lawful and should not assist in the maintenance of that situation or its consequences. The provision of immunity for such illicitly taken objects would be at odds with this obligation. It is therefore justified that a rule of customary international law would not extend to such objects. In regard to cultural objects which are subject to return obligations under the 1970 UNESCO Convention, the 1995 Unidroit Convention, or Council Directive 93/7/EEC, the situation is somewhat different and less strict. Here, we are not confronted with a rule of _jus cogens_ which should be respected in any event; derogation is possible. As a matter of fact, several States provide these cultural objects with immunity, however mostly not through international agreements, but by means of national legislation. Other States, however, excluded cultural objects subject to international or European return obligations from the protection provided by immunity. It is purely based on the fact that I noted a lack of necessary virtually uniform State practice that I had to conclude that a rule of customary international law does not apply to these cultural objects. As soon as the 2004 UN Convention enters into force, these objects will be protected by Article 21 of the convention (provided that the States concerned have become party to the convention).