State immunity and cultural objects on loan
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Summary

For centuries, cultural objects have been on the move, transported to foreign countries and safely returned to the lending countries. So it is safe to say that borrowing and lending cultural objects is not a new phenomenon. In the beginning of the 1960s, for instance, it had been agreed that Leonardo da Vinci’s masterpiece the *Mona Lisa* would be loaned by France to the United States. Questions ensuing from such an art loan concerned packing, securing, shipping, insuring, handing, *etc*. But there were no concerns about immunity from seizure. Nobody seemed to worry that an individual or a company might think of seizing the painting. However, meanwhile, the issue of immunity from seizure for travelling cultural objects has become more and more a concern for States and museums. This is mainly due to an increasing number of legal disputes over the ownership of cultural objects, particularly as a result of claims made by heirs to those objects expropriated by Communist regimes in Eastern Europe, as well as Holocaust-related claims.

The reason for my study and my central research theme

Before I started with this study, it occurred to me that it was not clear whether States actually knew what the current state of affairs was with regard to immunity from seizure of cultural objects belonging to foreign States while on loan abroad. A convention on jurisdictional immunities of States and their property had been established, addressing, among other things, immunity for cultural State property on loan. That convention, however, has not yet entered into force. I thus decided to investigate whether another rule of international law was already applicable: a rule of customary international law. After all, that rule would be binding upon States, without necessarily becoming a party to a convention. This study therefore investigates whether a rule of customary international law exists, to the effect that cultural objects belonging to foreign States are immune from seizure while on loan to another State for a temporary exhibition. If such a rule does not yet exist, is it emerging? And if such a rule does exist, what are its limitations? In the present study, information until the date of 1 July 2011 has been taken on board. It is the intent that this study will provide more clarity and legal certainty in the field of lending and borrowing cultural State property.

Method of work

I consulted a wide range of sources for this study. Not only did I examine the relevant treaty
law and literature, I also assessed the available relevant case law. Furthermore, I looked into national legislation on State immunity and immunity for cultural objects, enacted by various States, and tried to discover what brought States to enact specific legislation immunising cultural objects on loan from seizure. Also, I looked into the way in which States raised their voices in the deliberations of the International Law Commission while discussing the topic of immunity of States and their property. Regarding those Member States of the European Union which took part in the subgroup ‘Immunity from Seizure’ of the Expert Working Group ‘Mobility of Collections’ under auspices of the European Commission, I followed their oral observations during the meetings of the subgroup. I utilised two questionnaires. One concerned the enquiry of the aforementioned subgroup ‘Immunity from Seizure’ which had been sent to all 27 Member States of the European Union. The most relevant question for my study read: “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 that enquiry had been sent out, I had sent an enquiry to those States which are the most involved in the international lending and borrowing of cultural objects, which have enacted immunity from seizure legislation for cultural objects on loan, or which have been vocal in this matter to a certain extent. Part of these States were EU Member States, so there was a certain overlap. Moreover, I visited several States in order to investigate and discuss the issue in depth ‘on the spot’ and to receive more information regarding the specific situation in that State and the reasons for certain State practice. During those visits I spoke with the people the most involved in the actual lending and borrowing of cultural objects and governmental officials who have competence in the matter of immunity for cultural objects on loan.

**What is immunity from seizure, why may someone wish to seize a cultural object on loan and why can immunity from seizure be desirable?**

The term ‘immunity’ stems from the Latin term ‘immunitas’, which means freedom from taxes or freedom from services. With regard to my use of the term ‘seizure’, every process of attachment, execution, sequestration, forfeiture, requisition, foreclosure, replevin, detinue, etc., should be considered as included in this term. I prefer the following description of ‘immunity from seizure’ for the purpose of this study: “The legal guarantee that cultural
objects on temporary loan from another State will be protected against any form of seizure during the loan period.” This description originates from the 2006 ‘Action Plan for the EU Promotion of Museum Collection Mobility and Loan Standards’.

In practice there appear to be two main situations in which someone may wish to seize a cultural object that is temporarily on loan. First, if there is an ownership dispute over a cultural object on loan. A claimant may attempt to file a claim in the borrowing State and to try to seize the object if he believes that his chances are better, legally speaking, in the State where the cultural object is temporarily on loan, than they are in the State where the object is normally located. Second, if a claimant (an individual or a company) asserts that the owner of the cultural object on loan owes a debt (not necessarily related to the object) to the claimant, and this claimant has doubts regarding the possibility of enforcing a judgment or arbitration award in the State of residence of the owner. But there may be other situations. For instance, in the context of a criminal investigation, law enforcement officers may wish to seize certain cultural objects in order to preserve evidence. Or it may be the case that a third party, such as a carrier handling the cultural objects in connection with the exhibition, could have a lien on the object until he is paid for services provided.

Basically, the reason for providing cultural objects with immunity from seizure is to ensure that cultural objects on loan will not be subject to seizure while in the borrowing State and thereby to prevent cultural objects on loan from being used as ‘hostages’ in trade and/or ownership disputes. Immunity from seizure can serve as a means to overcome the reluctance of lenders to send their cultural objects temporarily abroad.

We also have to keep in mind that many States have committed themselves through international legal instruments to supporting the exchange of cultural objects. It can be said that nowadays there is a well-established and universally shared interest to protect and enhance the international cooperation of museums and other cultural institutions. Moreover, in the literature, links have been made between cultural objects and diplomatic relations: international art loans can symbolise and foster these diplomatic relations. Exhibitions are quite often the first contacts between former ‘enemy’ States. Cultural objects can break the ice of misunderstandings and can be the first steps in new bilateral ties. They are sometimes referred to as ‘good will ambassadors’. Immunity from seizure facilitates inter-State art loans.
That background may serve as a proper explanation why immunity from seizure for cultural State property on loan is understandable.

*Customary international law*

Since in this study I examine the question whether cultural objects belonging to foreign States are immune from seizure on the basis of customary international law while loaned to another State for a temporary exhibition, a short explanation in regard to customary international law cannot be absent. Customary law is one of the various sources of international law, next to, for instance, treaty law. It happens regularly that certain States are not a Party to important conventions. If the rules in those conventions can be considered as customary law, then those States are bound by these rules. Furthermore, there may be areas where a convention does not yet exist. It can thus be important to know whether a rule of customary international law is existing.

In order to be considered as a rule of customary law, a rule needs to be based on a widespread, representative and virtually uniform practice of States, accompanied by the conviction that this practice is accepted as law, often referred to as *opinio juris*. This has been stated several times by the International Court of Justice (ICJ). The ICJ stated as well, that it is not necessary that a rule is entirely accepted worldwide. Practice should reflect wide acceptance among the States particularly involved in the relevant activity. In the words of the ICJ, “States whose interests are specially affected” must belong to those participating in the creation of the rule. The absence of practice by other States does not prevent the creation of a rule of customary law. Thus, in determining whether a rule of customary international law exists with regard to immunity from seizure of loaned cultural objects belonging to foreign States, special attention needs to be paid to those States which are the most active and involved in the field of loaning and borrowing cultural objects for temporary cross-border exhibitions.

In principle, any act or statement by a State from which views about customary law may be inferred can serve as a source or evidence of State practice, as long as it is reasonably recognisable. Examples are judgments, diplomatic correspondence, policy statements, legal advice by governmental legal counsels, rules and regulations, reservations and declarations when signing or ratifying treaties or memoranda of understanding. It is important, even essential, that States act out of a certain legal belief or conviction and that they do not regard their behaviour as merely a political or moral gesture. It may be very difficult and largely
theoretical to strictly separate the elements of practice and legal conviction. Quite often, the
same act reflects both practice and legal conviction. Sometimes, it may be even impossible to
disentangle the two elements. But in order to discover a possible rule customary international
law, it was still necessary for me to investigate whether States are providing immunity from
seizure because they feel there is a legal obligation to do so, or whether they just want to act
as pragmatically as possible. So I assessed the underlying motivation in regard to relevant
State practice.

2004 UN Convention on Jurisdictional Immunities of States and Their Property
For this study, the recently adopted global legal instrument on State immunity is of relevance.
On 2 December 2004, the UN General Assembly adopted without a vote the UN Convention
on Jurisdictional Immunities of States and Their Property. The preamble expressly refers to
State immunity as a principle of customary international law and states that developments in
State practice had been taken into account. Article 5 expresses the basic principle of State
immunity, declaring that a State enjoys immunity, in respect of itself and its property, from
the jurisdiction of the courts of another State subject to the provisions of the convention.
Subsequently, the convention enumerates the proceedings in which State immunity cannot be
invoked. The convention does not cover criminal proceedings.

Part IV of the 2004 UN Convention regards State immunity from seizure. It provides in
general, but subject to certain limitations, for the immunity of a State from all forms of
seizure in respect of its property or property in its possession or control. The term used in this
convention is ‘measures of constraint’, and the convention makes a distinction between pre-
judgment measures of constraint and post-judgment measures of constraint. The rule in regard
to pre-judgment measures of constraint is rather absolute under the convention. With regard to
the question whether property is entitled to post-judgment measures of constraint, it is
important to determine whether the property serves a commercial purpose (in which case no
immunity applies), or whether the property has a sovereign, governmental purpose (which
makes the property entitled to immunity). This part of the convention also contains an article
where State property is listed which shall not be considered as property ‘specifically in use or
intended for use by the State for other than government non-commercial purposes’. Conse-
quently, this property is immune from seizure (unless the State to which the property
belongs has explicitly consented to seizure or has allocated the property for the satisfaction of
the connected claim). The relevant article, Article 21, aims to provide protection for certain
specific categories of property and to prevent any interpretation to the effect that property listed in the article is in fact commercial property. One category of property reads “property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.” State-owned exhibits for industrial or commercial purposes are not covered by this category. It should be borne in mind that the gist of Article 21 has neither been disputed in the International Law Commission, which prepared the 2004 UN Convention during several decades, 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.

I have to admit that cultural State property on loan cannot be considered as 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 a category of protected State property.

What is a State and what is State property?
Different national and international legal instruments each follow their own approach in regard to the definition of a State. Several national State immunity legislations exclude a separate entity from the definition of a State, whereas other State immunity legislations have a more inclusive approach in regard to separate State entities. The 2004 UN Convention contains a broad definition of the term State and includes also 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 within that definition of a State or not. The decisive question may be, whether the State museum is performing a governmental (or sovereign) act (act *jure imperii*) or essentially a commercial act (act *jure gestionis*). On the one hand art loans do have the earmarks of a commercial act, as a ‘commercial act’ is generally described as an act which can also be performed by an individual private person. Thus, according to the nature of the act, an art loan should be
regarded as an act *jure gestionis*. On the other hand, 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 that the purpose of the art loan has to be considered as one *jure imperii*. However, for the determination whether an act is to be considered as *jure imperii* or *jure gestionis*, in most jurisdictions solely or primarily the nature of the act is taken into account. 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 entity can be considered as falling under the definition of a State.

It is thus fair to say, that there is not one single definition of a State. With regard to a possible 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.

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. Immunised State property would be broader than solely property that is *owned* by a State. In the 2004 UN Convention property *owned* by the State and property *in its possession or control* would most likely be covered by the immunity provisions, although the exact scope has not yet been determined in practice. Based on my investigation, 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, it should be possible for the State to exercise certain rights and the State should have the 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 immunity.

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 a rule of customary international law in practice somewhat complicated. As not solely objects owned by a State can serve as a means in the promotion of mutual understanding between States and the respective populations, it has to be applauded in my view that immunity would cover 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, in regard to possible immunity.

Actual practice of States
There is a wide range of State practice with regard to cultural State property on loan. In answering the enquiry of the EU ‘Immunity from Seizure’ subgroup I referred to above, 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. 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. Moreover, it needs to be said that within the European Union, the promotion of the mobility of collections is regarded as a key issue since the beginning of the millennium.

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 for cultural objects on loan.

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. 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 seizure.

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, but can also be inferred from the explanatory report to the specific immunity from seizure legislation for cultural State property on loan. Belgium is a Signatory State to the 2004 UN Convention on Jurisdictional Immunities of States and Their Property.

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, 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 (more about that infra), it is my opinion that France nevertheless contributes to the establishment of a rule of customary international law. France has signed the 2004 UN Convention.
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 judiciary 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. It can 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.

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. However, in October 2005 at the time of the national ratification process of the 2004 UN Convention, Austria stated that “the convention reflects the codification of existing customary international law with regard to State immunity in the field of civil law”. Moreover, Austria stated during its process of ratification that it is in the self-interest of a State especially to protect cultural heritage against seizure. In June 2011, the Austrian Ministry of Foreign Affairs, competent in questions concerning immunity and international law, argued before the Austrian court 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 Article 21 of the 2004 UN Convention can be considered as the reflection of a rule of customary international law.

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.
In 2011, Finland enacted immunity from seizure legislation for cultural objects on loan. 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 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.

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’. It, however, never objected to the consideration of other States that a rule of customary law exists. Moreover, it ratified 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. On the basis of my study, I would conclude 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 removed 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 regarding immunity from seizure for cultural objects on loan might undermine Italy’s position as ‘country of origin’. Since several years, Italy is in the process of enacting immunity from seizure legislation for cultural objects on loan. As Italy is somewhat struggling with the relationship between immunity from seizure and the 1970 UNESCO Convention, the progress made in the enactment of immunity legislation is rather modest.

Switzerland has made very clear in public that it considers cultural objects belonging to foreign States and temporarily on loan as objects with a sovereign purpose and immune from measures of constraint on the basis of customary international law. In November 2005, the Swiss Federal Ministry of Foreign Affairs stated: “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. Switzerland enacted immunity from seizure legislation for cultural objects on loan.

*Liechtenstein* enacted immunity from seizure legislation in November 2007 which applies to all cultural objects brought from abroad into Liechtenstein for the purpose of a public exhibition.

The Ministry of Foreign Affairs of the *Russian Federation*, has stated 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. 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. 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, which demands, *inter alia*, a return guarantee from the borrowing State. The Russian Federation is a Signatory State to the 2004 UN Convention on Jurisdictional Immunities of States and Their Property.

In 1965, the *United States of America* was the first State which enacted immunity from seizure legislation for cultural objects on loan. The United States sees an obligation to immunise cultural objects belonging to foreign States or foreign institutions against seizure and to facilitate cultural exchanges between States. Moreover, when cultural objects belonging to foreign States have been the focus in different court cases, the US authorities were very vocal in expressing towards the judiciary that these cultural objects should be immune from seizure. 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 underlying rule of
customary international law. However, its State practice as well as its belief in a legal obligation makes in my view that the United States contributes to the formation of such a rule.

The federal authorities of 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 enacted immunity from seizure legislation, that there are no dissenting sounds within Canada, and that the federal authorities refused to act upon Jordanian and Palestinian seizure requests when Dead Sea Scrolls were on loan in Toronto, 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 to 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 are in Australia. When considering this, Australia assesses whether the conditions of the Australian Foreign States Immunities Act are fulfilled and 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 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.

In 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 I already addressed *supra*).

Within the *European Union*, fourteen Member States issue, or have issued, ‘letters of comfort’, which are described as written confirmations from a representative of the government that the borrowing State will do everything within its power to safeguard the item from seizure. These States are 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.

The 2004 UN Convention was signed (but not ratified or yet acceded to) by Belgium, China, 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.
I conclude from my study that the security, legal and otherwise, of international art loans has become a central issue for States. In recent years, there is a growing State practice pointing towards protection against seizure of cultural objects on loan belonging to foreign States.

**The ratio behind the State practice**

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?

Some States which already accept the existence of a rule of customary international law have also enacted specific 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. 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. Moreover, a 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.

In the United States the direct occasion for legislation immunising cultural objects on loan 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 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 facilitate 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 with that. 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.
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 *Belgium* Europalia Russia, an art festival that took place in Brussels, 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. Belgium has 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.

In *France* the direct inducement for enacting legislation was the *Shchukin* case before the court in Paris, where the heirs of the Russian art collector Sergei Shchukin (his collection was expropriated at the time of the Bolshevik Revolution in 1918) tried to seize cultural objects loaned to the Pompidou Centre in Paris. The French authorities wanted to be completely sure that such cases would not occur again. The French authorities felt that they had a legal obligation to provide a more adequate protection for cultural objects belonging to foreign States on temporary loan in France, and - based on the experience with the *Shchukin* case - were of the opinion that this legal protection might have been insufficient until that time. Furthermore, France wanted to show the world that it did everything in order to become or to be a safe haven for cultural objects on loan, so an element of pragmatism also played a role. The enactment of the article on immunity from seizure has therefore been motivated by a combination of a feeling of legal obligation and pragmatism.

In *Germany* the most concrete motivation for the elaboration of the legislation was an exhibition from Taiwan, already planned in 1992 and eventually held at the end of 2003. 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 exhibited objects to Beijing. Germany, which 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 belonging to foreign States, temporarily in its territory because of an exhibition, should be immune from seizure. It thus felt a legal obligation to protect those cultural objects. As a consequence it developed legislation to that effect.
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 provision in Austrian legislation which needed to be followed by the Austrian judiciary. The introduction of anti-seizure legislation was a direct consequence of the seizure 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 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. Austria therefore explicitly decided to enact legislation stating that foreign cultural objects would be immune from seizure.

In the Czech Republic legislation has been enacted in order to host an exhibition of Russian treasures from the Kremlin.

In Israel legislation has been enacted in response to French demands. 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 made the condition to Israel that the Israeli immunity from seizure legislation would be in place before the cultural objects concerned could be given on loan to Israel.

This may give the impression, that all these legislations have been enacted in reaction to wishes, demands or fears from foreign States. However, generally the borrowing States also felt that they had a legal obligation to protect the objects. Moreover, several States have enacted legislation, or are in a process of enacting legislation, although there were apparently no outside forces urging such legislation. Finland can serve as an example. Or States enacted legislation in order to implement the 2004 UN Convention, as Japan did. And 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 legislations, 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.

As already stated supra, 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 that cultural State property on loan deserves protection and pragmatism in order to be seen as a ‘trustful and safe haven’.

**Academic opinions**

In the 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. It is, however, fair to conclude that 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.

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

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 (a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted; also called a *jus cogens* norm). Under 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 acquired objects would be at odds with this obligation. Based on my study, I would say that, generally speaking, the main sentiment among States is indeed that such objects should not deserve protection. Although not legally but certainly morally binding, many States subscribed to the 1998 Washington Principles on Holocaust Era Assets, the 2000 Vilnius Declaration on Holocaust Era Looted Cultural Assets or the 2009 Terezin Declaration on Holocaust Era Assets and Related Issues. Moreover, several States established Restitution or Spoliation Committees in order to restitute cultural objects to heirs of World War II victims.

**Cultural objects subject to return obligations under international or European law**
When it comes to the relationship between immunity from seizure for cultural State property on loan on the one hand, and return obligations under the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects, or the Council Directive 93/7/EEC on the return of cultural goods unlawfully removed from the territory of a Member State on the other, the situation is somewhat different and less strict. Here, we are not confronted with a peremptory norm of general international law which should be respected in any event; derogation is possible. It is clear from my assessment that there is no uniform, even sometimes contrary State practice: different States have different opinions (and act differently) 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 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. It is purely based on the fact that I noted a lack of the virtually uniform State practice, necessary for the establishment of a rule of customary international law, that I had to conclude that a rule of customary international law does not apply to these cultural objects.

Criminal proceedings

It was generally understood during the negotiations that the 2004 UN Convention does not cover criminal proceedings. The State immunity legislations of the United Kingdom, Canada, Pakistan, Singapore, Australia and South Africa explicitly state that their 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 specific 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. 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. Also the 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. I would tend to say that a 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 sufficient and virtually uniform State practice.

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, stating that cultural objects belonging to foreign States and 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.

The rule applies not only to State-owned property, but also to property in possession or control of a State.

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 from seizure cultural State property on loan applies only to seizure in civil proceedings.