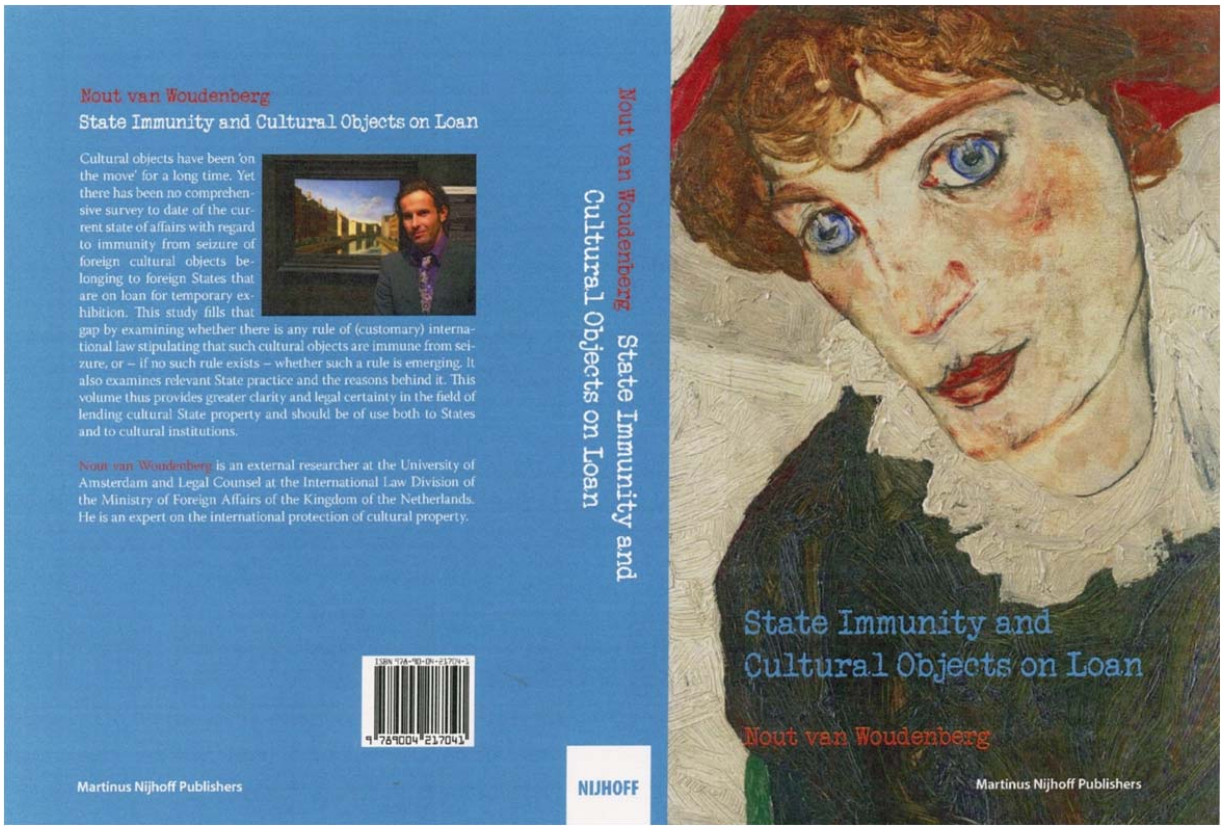
STATE IMMUNITY AND CULTURAL OBJECTS ON LOAN [1]



PART 1: Are cultural objects belonging to foreign States while on loan immune from seizure on the basis of customary international law?

Introduction

It is safe to say that borrowing and lending cultural objects is not a new phenomenon. [2] 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.

During the course of time, 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.

In 2004 a convention on jurisdictional immunities of States and their property had been established under auspices of the United Nations, addressing, among other things, immunity for cultural State property on loan. That convention, however, has not yet entered into force. I thus considered it necessary 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. [3] And so I did: I investigated 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. And if such a rule does not yet exist, is it emerging? And if such a rule does exist, what are its limitations? In the autumn of 2011, I finalized my study, and later in this presentation, I will share my conclusions with you. It is my aim that my study can provide more clarity and legal certainty in the field of lending and borrowing cultural State property.

What is immunity from seizure?

[4] 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', it needs to be emphasized that I use this term in an overall meaning. All forms of seizure are supposed to be included in this term, such as attachment, execution, sequestration, forfeiture, requisition, foreclosure, replevin, detinue, *etc*.

[5] I prefer the following description of 'immunity from seizure' for the purpose of my presentation: [5a] "The legal guarantee that cultural objects on temporary loan from another State will be protected against any form of seizure during the loan period." [5b] This description originates from the 2006 'Action Plan for the EU Promotion of Museum Collection Mobility and Loan Standards'.

[6] *Why may someone wish to seize a cultural object on loan?*

[7] In practice there appear to be two main situations in which someone may wish to seize a cultural object that is temporarily on loan. [7a] 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.

[7b] 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. [7c] For instance, in the context of a criminal investigation, law enforcement officers may wish to seize certain cultural objects in order to preserve evidence. [7d] 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.

Let me give examples of the two first situations as described above.

[8] A typical example of the first category regards the painting *The Dance* painted by Matisse in 1909. In 1918, the painting (together with many of other cultural objects) had been taken by decree of Lenin and without adequate compensation from Sergei Shchukin, one of the main art collectors at the time in Russia. During the last two decades, this painting has travelled a lot. It has been on exhibitions in Paris, Dusseldorf, Rome, London, and Amsterdam. Heirs of Shchukin (first his daughter, then after her death his grandson) have several times tried to seize the artwork.

That happened, for instance, in France, in 1993. In that year, Centre Pompidou in Paris held a Henri Matisse exhibition, where some 130 paintings by Matisse were exhibited. The paintings came among other places from the State Hermitage Museum in Saint Petersburg (Russia) and the State Pushkin Museum in Moscow. The daughter of the Shchukin took advantage of the presence in France of the works and went to the Paris court, claiming for a sequestration order of 21 works by Matisse, which originally belonged to her father. Reason for the order should be, that the expropriation in 1918 was illegal and contrary to the French order. She asked in her claim the Centre Pompidou to become a depository of the works until the ownership claim would have been settled. Russia claimed State immunity in this case, not only because the 1918 expropriation should be considered a sovereign act (act *jure imperii*), but also because the cultural objects should be considered as public, non-commercial State property and consequently immune from seizure. This approach had been awarded by the court. The daughter filed an appeal, but meanwhile, the exhibition was ended and the works were sent back to Russia.

After this time, the Shchukin heirs filed claims in some other States, such as Italy and the United States of America. According to the grandson of Shchukin, not so much because the heirs wanted the painting back into their ownership, but first and foremost to draw attention to the way Shchukin had been expropriated by the Russian Communist regime in 1918. In their view, the Russian Federation should institute an agreement that reasonably compensates and pays a percentage of the material benefits that have accrued to the State from the exploitation of these expropriated cultural objects. Due to its fame, *The Dance* is often taken as an example.

The second category of cases is much more insecure than the first one, as this category has nothing to do with an ownership dispute, neither necessarily with the cultural object concerned. [9] The *Noga* case in Switzerland illustrates quite well the second situation in which someone may wish to seize cultural objects temporarily on loan:

In November 2005, the Swiss company *Noga* tried to seize a collection of 54 French masterpieces belonging to the Pushkin Museum in Moscow. Among the works were paintings by Renoir, Monet, Manet, Degas, Van Gogh and Gauguin.

The masterpieces had been exhibited from June to November 2005 in Martigny, Switzerland. *Noga* claimed that the Russian Federation owed it hundreds of millions of dollars in alleged debts and compensation. In 1997, a Swedish Arbitration Institute had ruled that the Russian government had to pay *Noga* 63 million US dollars. In order to execute that ruling, *Noga* obtained an order from the court in Wallis authorising the seizure; the paintings were subsequently seized on 13 November 2005 as they were leaving Switzerland to return to Russia. On the initiative of the federal authorities, the Swiss Federal Council ruled on 16 November 2005 that the cultural objects should be allowed to leave the country and should be sent back to the Russian Federation. The ruling of the Swiss Federal Council was based on an article of the Swiss Constitution which allows for "necessary measures to protect national interests" and emphasised that "in international law, national cultural treasures are public property and are not subject to confiscation". The ruling went into immediate effect with no possibility for appeal. But a lot of harm was already done.

[10] Let me give another example, probably even more familiar to you: the so-called *Diag Human* case.

In May 2011, a Viennese District Court ordered the seizure of three cultural objects owned by the Czech Republic and lent to an exhibition in the Austrian National Gallery Belvedere in Vienna. The objects concerned were a painting by the Czech artist Emil Filla, *Two Women* (coming from the Moravian Gallery in Brno), a painting by fellow Czech national Vincenc Benes, *The Dancer* and a sculpture by the Czech artist Otto Gutfreund, called *The Embrace* (both coming from the National Gallery in Prague). The Belvedere was appointed as the court's custodian of the objects.

The background of this case was the following: in the beginning of the 1990s, the company *Diag Human* wanted to trade in blood plasma from Czech transfusion centres, but stated that it failed to do so after the then Czech Minister of Health referred to the company in seemingly negative terms. *Diag Human* started a legal case, asking for compensation from the Czech Republic. In August 2008, *Diag Human* received an arbitral award, ordering the Czech Republic to pay a sum of almost 9 billion Czech crowns to the company. The Czech Republic appealed against this ruling, but there were differences of view on the question whether the appeal was signed by duly authorised Czech officials. According to *Diag Human*, the arbitral decision became final and effective, but the Czech authorities were of the opinion that the legal case was still pending.

On 1 June 2011, the Austrian Ministry of Justice sent an email to the court, originating from the Austrian Ministry of Foreign Affairs. In the email it was said that under customary international law, the Czech Republic was immune from seizure with regard to its three cultural objects, as it regarded property of a State forming part of an exhibition of objects of scientific, cultural or historical interest. The Czech authorities were also of the opinion that the seizure of the cultural objects by the Austrian court was to be considered a breach of international law, as it regarded Czech property with a sovereign, non-commercial purpose.

On 21 June 2011, the Viennese District Court ordered that seizure had to be lifted, on the basis of generally acknowledged rules of international law. Although the 2004 UN Convention on jurisdictional immunities of States and their property had not entered into force, the court was of the opinion that the contents of the convention provided sufficient indications of State practice to assume that a rule of customary international law exists, immunising cultural State property on loan. In the end, the objects returned to the Czech Republic.

On 16 April 2013, the Supreme Court of Austria delivered a judgment stating that indeed the arbitral award had not yet become binding on the parties within the meaning of article V(1)(e) of the New York Convention (United Nations Conference on International Commercial Arbitration on 10 June 1958).

The claims in this category are harder to predict: When loaning objects from a certain State, it is unfeasible to (fully) investigate whether the lending State has unpaid debts and/or whether it would cross the mind of the creditor to try to execute its rights in a foreign State under the jurisdiction of that State.

[11] *Why can immunity from seizure be desirable?*
Basically, the reason for providing cultural objects with immunity from seizure is to prevent cultural objects on loan from being used as [12] '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. Cultural objects can break the ice of misunderstandings and can be the first steps in new bilateral ties. [13] 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.

[14] *Customary international law*

Since I examined 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.

[15] 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, [16] "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 lending 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. [17] 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. [18] 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. 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. For that reason, I visited many countries, such as the Russian Federation, United States of America, Israel, and many European States. I also used different questionaires, which were sent to States as Canada, Australia, some Latin-American States, as well as some African and Arabic States.

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' for international art loans.

[19] *2004 UN Convention on Jurisdictional Immunities of States and Their Property*

I already referred to the recently adopted global legal instrument on State immunity: the UN Convention on Jurisdictional Immunities of States and Their Property. On 2 December 2004, the UN General Assembly adopted the convention by consensus. However, until now, the Convention has not yet entered into force.

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 (also called immunity from execution), 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 commercial property. Consequently, 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). [20] The relevant article, Article 21, aims to secure the protection for certain specific categories of 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, and especially the cultural category, has neither been disputed during the negotiations. 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.

In my view, 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.

[21] *What is a State and what is State property?*

When we speak about a State, we should ask ourselves for a moment what is meant by that. Different national and international legal instruments each follow their own approach in regard to the definition of a State, and some have a more, and some a less inclusive definition.

With regard to a State museum, it may not be all that simple to state whether it is generally included within a definition of a State or not. Under most existing legislations, a State museum does not fall within the definition of a State. But 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.

[22] 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.

[23] *Conclusions*

I have almost reached the end of my presentation. What did I conclude on the basis of my investigations? [24] First of all, it occurred to me that in recent years, there is a growing State practice pointing towards protection against the seizure of cultural objects on loan belonging to foreign States. [25] Many States consider cultural objects belonging to foreign States and on temporary loan as State property in use or intended for use for government non-commercial purposes and already for that reason immune from measures of constraint.

[25a] They sometimes count on the general rule of customary international law that State property in use or intended for use for government non-commercial purposes is immune from measures of constraint, [25b] but a considerable number of States also count on the existence of a ***specific rule*** of international law immunising cultural State property on loan.

[26] With regard to the existence of such a separate specific rule of customary international law, I would come to the conclusion that indeed 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 only applies to cultural objects in use or intended for use by the State for government non-commercial purposes, so the objects should, for instance, not be placed or intended to be placed on sale. I would say that the rule applies not only to State-owned property, but also to property in possession or control of a State.

[27] *Is there cultural State property which does not fall under immunity under customary international law?*

It became clear to me that 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.

[28] I have stated earlier, that in order to be considered as a rule of customary law, a rule needs to be based, among other things, on a widespread, representative and virtually uniform practice of States. It is not necessary that a rule is entirely accepted worldwide, but the practice should reflect wide acceptance among the States particularly involved in the relevant activity.

With regard to some categories of cultural State property, this wide, virtually uniform acceptance is absent. [29] The first category regards cultural objects plundered during armed conflict. The plunder of cultural objects during armed conflict is nowadays quite generally 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. Based on my study, I would say that, generally speaking, the main sentiment among States is indeed that such objects should not deserve protection. [30] 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. And currently in the United States of America, draft legislation is under assessment of the Senate which would make it impossible for cultural property illicitly taken during the Holocaust to enjoy immunity.

[31] 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 outcome is more or less the same. Although here we are not confronted with a so-called *jus cogens* norm and neither with the immense harm doing during armed conflict, it became clear to me during my investigations that there is no uniform, even sometimes contrary State practice in this regard: 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. [32]

[33] PART 2: State Immunity and Cultural Objects on Loan – State Practice

This part will be dedicated to the opinion of States, as well as legislation of States in regard to State immunity for cultural objects on loan. Although the Netherlands will be mentioned in this part, I do refer to my different presentation on the Netherlands in regard to State immunity for cultural objects on loan.

Opinions of States

I will first refer to some opinions of several of the important States in the field of international art loans on the question whether cultural State property on loan is immune from seizure under international law.

Within the European Union, the promotion of the mobility of collections is regarded as a key issue since the beginning of the millennium. Some years ago, an Expert Working Group 'Mobility of Collections' has been established under auspices of the European Commission. One of the subgroups of this Expert Working Group dealt with immunity from seizure. In 2009, the subgroup sent an enquiry of to all (at that time) 27 Member States of the European Union.

[34] The most relevant question of the enquiry in regard to this presentation 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?" In answering that question, 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. [35] 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: [36] 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 fact that the other half of the EU Member States did not answer the aforementioned question to the affirmative does not mean that they had a different opinion. As a matter of fact, only Sweden answered at that time the aforementioned question with a straightforward "no". (Later, the Swedish Legal Counsel informed me that they had misunderstood the question.)

Many states did not have a firm opinion, or said that they doubted whether a rule of customary international law had already sufficiently developed.

[37] I did not mention ***Austria*** in my listing. Austria 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 earlier mentioned 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". Austria also stated that it is in the self-interest of a State especially to protect cultural heritage against measures of constraint. Based on a similar motive, also property that is the subject of scientific, cultural or historical exhibitions enjoys protection, Austria stated in October 2005.

In June 2011, the Austrian Ministry of Foreign Affairs, competent in questions concerning immunity and international law, argued before the Austrian court 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 Article 21 of the 2004 UN Convention, with its protected categories, can be considered as the reflection of a rule of customary international law. Representatives of the ***Czech Republic*** were of the same opinion. [When I spoke with the former Legal Adviser of the Austrian Ministry of Foreign Affairs, he explained to me that either the aforementioned question in the enquiry was not sufficiently clear, or that the Austrian authorities misinterpreted the question, and emphasized that Austria already at that time was of the opinion that under customary international law, cultural State property on loan is immune from seizure.]

With regard to ***German***y, it is interesting to mention that in 2010 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 sovereign, governmental purpose, and that these objects fell under the general principles of State immunity.

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 seizure 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 should be seen as a codification of customary international law.

The Ministry of Foreign Affairs of the ***Russian Federation*** has stated 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 *Noga* case), 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 ***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. It is interesting to mention that the National Iranian-American Council called Article 21 of the UN Convention (protecting cultural State property on loan) the reflection of the international consensus on the treatment of cultural property in domestic litigation.

[38] *Legislation of States*

In 1965, [38a] the ***United States*** was the first country ever to enact immunity from seizure legislation. Several underlying constituent States have legislation as well, to name New York, Rhode Island and Texas. [38b] ***France*** was the first State within the Europe in 1994, followed by [38c] ***Germany*** (1999), [38d] ***Austria*** (2003), [38e] ***Belgium*** (2004) and [38f] ***Switzerland*** (2005). [38g] ***Liechtenstein*** and the ***United Kingdom*** enacted legislation in 2007. [38h] ***Finland*** and the ***Czech Republic*** followed in 2011. [38i] ***Hungary*** was the last one in the row and adopted legislation in 2012. Also, [38j] ***the Netherlands*** has immunity from seizure legislation, although not specifically referring to cultural objects but to State owned objects intended for public service (which could include cultural objects as well – we will assess this further during our discussions in part 3). [38k] In ***Poland*** and ***Italy***, discussions are ongoing.

[39] ***Israel*** has enacted legislation in 2007. ***Canada*** does not have a federal immunity from seizure Act which is specially addressed towards cultural objects, but five provinces adopted immunity legislation in the late 1970's and the early 1980's: British Columbia, Ontario, Quebec, Alberta and Manitoba.

Japan enacted immunity legislation for cultural State property in 2010, in order to implement the 2004 UN Convention, and for other cultural property in 2011. ***Australia*** established its immunity from seizure and suit legislation in 2013. Also the ***territory of Taiwan*** has its own immunity legislation for cultural objects on loan. (There were some rumours that also Korea enacted legislation, but it turned out that that is not the case.)

[40] Why did States enact legislation? Most (European) States do not face problems when concluding international art loans and do not see the need for the enactment of specific legislation, while several States are of the opinion that the matter is already covered by customary international law. On the other hand, 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. But with the exception of Belgium, the legislation of these States protects more than cultural property belonging to foreign States, namely also privately owned cultural objects, 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 of the wishes of *other* States, those States enacting legislation wanted to show that objects of the lending States would in any event be safe in their jurisdiction. But generally the borrowing States also felt themselves that they had a legal obligation to protect the objects, as in general, States are of the opinion that cultural objects on loan and belonging to foreign States deserve protection.

When comparing the existing legislations of the various European States, it can be concluded that there is no uniformity. Although most of the legislations of the European States in this chapter protect against all forms of seizure, not every legislation is as comprehensive. The French and Belgian laws protect only cultural State property, whereas the German, Austrian, Swiss, Liechtenstein, Finnish and Hungarian legislation covers also privately owned cultural objects on loan. Also with regard to return obligations to States of origin (not being the lending State) there are differences. The Belgian and British immunity does not apply in case of international or European obligations which would be at odds with that immunity.

The same goes for the Finnish and Hungarian legislation. The German, Austrian and Swiss approach is somewhat complex: in case a return guarantee has not yet been issued to the lending State (or institution), obligations under (if applicable) the 1970 UNESCO Convention or the 1995 Unidroit Convention or Council Directive 93/7/EEC can prevent the issuance of such a return guarantee. However, as soon as a return guarantee has been issued, that guarantee is considered to prevail over return obligations under other instruments. Furthermore, some immunity laws not only seem to provide immunity from seizure, but also (at least to a certain extent) immunity from suit.

[41] Maybe some words in regard to the Czech legislation (please, see also my book "State Immunity and Cultural Objects on Loan, Chapter 9.8). In the beginning of 2011, the Czech Republic and the Russian Federation made concrete plans for an exhibition of collections from the Moscow Kremlin at the Prague Castle. The very first contacts for such an exhibition were already made in October 2009, when the then Czech President Vaclav Klaus paid a visit to Moscow. The central theme of the exhibition should be the life at the Russian tsar's court in the 16th and 17th century. The exhibition was due to be opened by the end of 2011.

However, before that, some legal conditions needed to be fulfilled. Most importantly, the Russian Federation demanded that in order to stage the exhibition, the Czech Republic should have appropriate immunity from seizure legislation in place that would protect the exhibited objects. And as the time was running short, the Czech Legislative acted expeditiously. On 29 April 2011, the Czech Chamber of Deputies passed a bill preventing the seizure of cultural objects on loan from abroad. There was only one reading in the Chamber, which indicates the expeditious nature of the proposal. The bill consisted of a draft amendment to the Act on State Monument Care (Zákon o státni památkové péči / Zákon 20/1987 Sb.). Section 20 of that Act is entitled 'Cultural heritage in relation to foreign States' (Kulturni památky ve vztahu k zahraniči) and the bill inserted a new paragraph 3, with the aim of preventing court injunctions from being applied to loaned cultural objects during the loan:

"An object that has characteristics of cultural heritage according to Section 2.1, that is given on loan to the Czech republic by a foreign State, who has stated that the object is its property, is not subject to any enforcement of law or execution, nor is it subject to a preliminary injunction allowing for the disposition of the object nor the realisation of any enforcement or injunction that would prevent the return of this object to the foreign State."[1]

The original paragraphs 3 and 4 of Section 20 would then become paragraphs 4 and 5. On 4 May 2011 the Upper Chamber also passed the bill. After President Klaus signed the bill, the amendment to the Act on State Monument Care became effective as from 12 May 2011.

[42] *Letters of Comfort*

Within the *European Union*, fourteen Member States issue, or have issued, so-called '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. [43] These States are Cyprus, Estonia, Finland, Greece, Hungary, Italy, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain and the United Kingdom.

[1] "(3) Věc vykazující znaky kulturní památky podle § 2 odst. 1, která byla na území České republiky zapůjčena cizím státem, jenž prohlásil, že tato věc je v jeho vlastnictví, nepodléhá provedení jakéhokoliv výkonu rozhodnutí ani exekuci a předběžným opatřením nelze uložit s takovou věcí nenakládat; nelze ani přijmout jakékoli rozhodnutí nebo opatření, které by bránilo vrácení takové věci tomuto cizímu státu."

Other States also have the possibility to issue such letters, for instance, the Russian Federation and Japan.

[44] *Declaration on Jurisdictional Immunities of State Owned Cultural Property*

In the first part of my presentation, I already referred to the so-called 'Diag Human'-case. That case was the inducement for the authorities of Austria and the Czech Republic to launch an initiative aimed at developing a declaration in support of the recognition of the customary nature of the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) in order to guarantee the immunity of State cultural property on loan. Austria and the Czech Republic asked the Netherlands to join them in the initiative, and the Netherlands decided to respond positively to that request. The declaration was presented at the 46th meeting of the CAHDI, the Committee of Legal Advisers on Public International Law of the Council of Europe (Strasbourg, 16-17 September 2013). On this occasion, it was recalled that this Declaration had been elaborated as a legally non-binding document expressing a common understanding on *opinio juris* on the basic rule that certain kind of State property (cultural property on exhibition) enjoyed jurisdictional immunity.[2]

[2] See: http://www.coe.int/en/web/cahdi/cahdi/-/asset_publisher/ym6zfUP2IxDn/content/declaration-on-jurisdictional-immunities-of-state-owned-cultural-property?redirect=%2Fen%2Fweb%2Fcahdi%2Fcahdi&inheritRedirect=true

The signatories of the declaration express their desire to strengthen the international cooperation in the field of culture, their recognition that the exchange of cultural property significantly contributes to the mutual understanding of nations, and declare to be resolved to promote the mobility of State-owned cultural property through temporary cross border loans for public display. The signatories felt the need to reaffirm the international legal framework applicable to State-owned cultural property on public display in another State on the basis of the customary international law on State immunity, as codified in the 2004 UN Convention.

[45] The substantive part of the declaration reads:
"In accordance with customary international law as codified in the Convention

- property of a State forming part of its cultural heritage or its archives or forming part of an exhibition of objects of scientific, cultural or historical interest, and not placed or intended to be placed on sale cannot be subject to any measure of constraint, such as attachment, arrest or execution, in another State; and

- therefore, such measures of constraint can only be taken if immunity is expressly waived for a clearly specified property by the competent national authorities of the State owning the property or if the property has been allocated or earmarked by that State for the satisfaction of the claim which is the object of the proceeding concerned."

[46] So far, the declaration has not only been signed by Austria, the Czech Republic and the Netherlands, but also by: Latvia, Slovakia, Georgia, Romania, Estonia, Albania, the French Republic, Armenia, Belgium, Belarus, Luxembourg, Ireland and recently by the Russian Federation (listed in order of signing). Several other States have indicated that they consider also signing the declaration. [47]

[48] PART 3: Description of the situation in the Netherlands in regard to immunity from seizure for cultural objects on loan

Netherlands' view on a role of customary law

It is established judicial practice to treat cultural goods of a foreign State that are in the Netherlands temporarily for an exhibition as goods intended for public service.

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.

[49] In the 'enquiry addressed to each Member State concerning immunity from seizure of cultural objects on temporary loan', initiated by the European Union Expert Working Group on Mobility of Collections (subgroup 'Immunity from Seizure') the Netherlands answered on 24 April 2009:

"Based on (customary) international law, the Netherlands considers cultural property of foreign States as 'goods intended for public service', as long as they do not have a clearly commercial goal (*e.g.* offered for sale). Also on the basis of (customary) international law, the Netherlands considers that property as immune from measures of constraint. This has been reflected in national legislation as well […]. And it is also the reason why in its letter of comfort […] the Netherlands refers to the corresponding rules in the 2004 UN Convention on Jurisdictional Immunities of States and their Property, although the Netherlands has not yet ratified the Convention […]."

As I will refer to later, each time Dutch authorities issue a guarantor's declaration (also known as letter of comfort) with regard to immunity from seizure for cultural objects on loan, an explanatory letter is attached to this declaration. In that letter, it is stated among other things:

"It is established judicial practice to treat cultural objects of a foreign State that are in the Netherlands temporarily for an exhibition as goods intended for public service. Support for this practice can be found in international law. Article 21 of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property explicitly states 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' should be considered goods intended for public service. When the Convention was drafted, there was no controversy whatsoever among the States Parties concerning this matter. Consequently, it may be explicitly assumed that this is an applicable rule of international law."

In court cases in the Netherlands, the State of the Netherlands declared that even though the 2004 UN Convention has not yet entered into force, the provisions included therein concerning immunity from execution do offer an important guideline in answering the question whether immunity from execution should be enjoyed. The 2004 UN Convention offers an important clue in putting the current standard of views on the immunity from execution into perspective, according to the State of the Netherlands. Articles 18 to 21 of the 2004 UN Convention show that in principle measures of constraint are not allowed where State property is concerned save certain exceptions.

[50] *Legislation in the Netherlands*

The Netherlands has a rather interesting legislative system concerning immunity for States and their property. The combination of provisions contained in the Act on General Provisions of Kingdom Legislation, the Code of Civil Procedure and the Court Bailiffs Act gives a fairly overlapping protection, whereby it is of course always the judiciary which has the last say when it comes to the judicial interpretation of these provisions; whatever notification the Executive can give, the final ruling is always up to the judiciary.

[51] Code of Civil Procedure

The Netherlands has two relevant Articles in its Code of Civil Procedure which state that "goods intended for public service may not be seized". Article 436 of the Code of Civil Procedure regards post-judgment measures of constraint, whereas Article 703 regards pre-judgment measures of constraint. As stated, it is established practice to treat cultural objects of a foreign State that are in the Netherlands temporarily for an exhibition as goods intended for public service. For the protection under the Code of Civil Procedure, it is not by definition necessary that the objects concerned are State property. [52] Decisive is whether the objects are intended for public service. Thus also objects belonging to a museum, but intended for public service, can fall under the protection of the Code of Civil Procedure.

The Articles 436 and 703 of the Code of Civil Procedure have been originally enacted for domestic purposes. Yet their scope has in practice been extended to cover foreign public property, not just State-owned but all property intended for public service (*publicis usibus destinata*). Courts in the Netherlands ruled that neither the text nor the scope [of Articles 436 and 703] leads to the conclusion that the protection should be limited to Dutch public service; it regards to public service by foreign States as well.

[53] Act on General Provisions of Kingdom Legislation

In addition to the provisions of the Code of Civil Procedure, and with reference to the Dutch view as just expressed, Section 13a of the Act on General Provisions of Kingdom Legislation applies. That section contains a very general directive for the Judicial Branch, *viz.*: "The jurisdiction of the courts and the execution of judicial decisions and deeds are subject to the exceptions recognised in international law." It is thus recognised that under conventional and customary international law certain persons or institutions cannot be made defendants in proceedings in Dutch courts and certain property cannot be made the subject of enforcement proceedings. This applies, according to the Dutch government, to cultural property of a foreign State that is temporarily on loan for an exhibition. The aforementioned exception does not apply to property that serves a commercial purpose in that it is placed or intended to be placed on sale.

Article 13a of the Act on General Provisions of Kingdom Legislation was already introduced in 1917. A conflict between the Judicial and the Executive Branch in regard to State immunity was the reason for introducing this provision.

The Rotterdam District Court had awarded a claim, whereby a Dutch plaintiff was seeking compensation for damages sustained in Belgium as a result of action undertaken by the German State during World War I and intended the seizure of German State-owned railway carriages. The Minister of Justice communicated that he considered the verdict contrary to international law and that he wanted to prevent the enforcement of the verdict on the objects which were on Dutch territory but belonged to the German State. In order to prevent that judgments would be contrary to applicable rules of international law as much as possible, which judgments consequently could be executed by bailiffs, and to accomplish that eventually the Executive Branch could intervene in order to prevent execution, the government initiated this draft legislation in January 1917, which became law on 26 April 1917.

[54] Court Bailiffs Act

In the unlikely event that a cultural object of a foreign State is at risk of seizure, Section 3a of the Court Bailiffs Act applies. That section empowers the State to intervene if it considers that the service of a notification of seizure would be contrary to the obligations of the Netherlands under international law. And as we have seen, the Netherlands considers it an obligation under international law to protect cultural State property on loan against seizure.

[55] Under this Section 3a, a bailiff who is instructed to perform an official act shall immediately notify the Minister of Justice if he has reason to believe that performing the seizure might be incompatible with the Netherlands' obligations under international law. In turn, the Minister may notify a bailiff that an act of seizure which the bailiff is planning to perform is incompatible with the Netherlands' obligations under international law. When preparing this notification, the Minister of Justice will consult the International Law Division of the Ministry of Foreign Affairs as to whether or not the act of seizure in question would be in breach of international law. The advice of the Ministry of Foreign Affairs in these matters is usually followed. The consequence of the notification is that the bailiff is no longer competent in performing the act.

Although it is the intent of the law that, because of the obligation to inform, the Minister has the chance to act timely in order to prevent seizures which would be contrary to international law, one cannot exclude that situations could occur where prevention is not possible, for example because the minister was not informed beforehand of the seizure. In the unlikely event that State property has already been seized, the seizure must be cancelled and its consequences be reversed on the basis of the Minister’s notice.

[56] Due to the aforementioned legislation and judicial practice in the Netherlands, the risk of property forming part of the cultural heritage of a foreign State being subject to seizure in the Netherlands is minimal.

There is, however, one important exception to the aforementioned rule. 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. 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.

What one should keep in mind at all times, is that whatever notification the Executive can give, the final ruling is always up to the judiciary. The Judicial Branch, however, concedes that when interpreting and applying customary international law in particular, the courts should take into account the fact that the government, as the representative of the State in dealings with other States, also helps sculpting the law by disseminating its views on what the law is.

[57] *Guarantor's Declarations*

Since the beginning of the 21st century, the Netherlands issues so-called 'Guarantor's Declarations', which are actually letters of comfort. From a legal point of view, 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 (in this case, the Netherlands) will do everything in their power to prevent or stop that. Approximately forty such declarations are issued by the Dutch Government each year and mostly requested by the Russian Federation, but also by the United States, Turkey, Germany and one or more other States. The Ministry of Foreign Affairs is currently charged with issuing such declarations.

It took several steps to come to the current phrasing of the declaration. There have been regular and ongoing contacts between the Russian and the Dutch authorities on this topic, as the Russian Federation is the biggest lender of cultural objects to the Netherlands (for instance, to the Hermitage Amsterdam Museum, which could be considered a spinoff of the Hermitage Museum in Saint Petersburg). Although several other States developed legislation following a Russian request, Russia still seems to be at ease with the Dutch system. Perhaps, this has to do with the fact that the overall majority of Russian cultural objects that travel

around the world is owned by the State itself, and therefore has a high level of protection in the Dutch system, as I just explained.

Currently, the declaration has the following form and content:

> "On behalf of the Government of the Kingdom of the Netherlands, and with reference to Article [X] of the loan agreement between [name Dutch museum or institution] and the [name foreign museum or institution], concerning the loan of art objects for the purpose of [name and data of the exhibition], the Minister of Foreign Affairs herewith declares as follows.
>
> In accordance with international law and with the laws and regulations of the Netherlands, the Government of the Netherlands will do everything that is legally within its power to ensure that the art objects loaned by [name foreign museum or institution] to the [name Dutch museum or institution] for the period [data] shall not be encumbered at any time while they are located on Dutch territory.
>
> For the purposes of this loan, the following also applies. In the event that it transpires from the loan agreement that the items concerned are the property of [name of the State concerned], the Government of the Netherlands will follow the rule as currently reflected in the 2004 UN Convention on Jurisdictional Immunities of States and their Property. In consequence, the Government of the Kingdom of the Netherlands will consider these items to be State property, which as such enjoy immunity from measures of constraint. In this regard, the Dutch Code of Civil Procedure (Articles 436 and 703),

> the General Legislative Provisions Act[3] (Section 13a), and the Court Bailiffs Act (Section 3a) are also applicable."

Recently, the Ministry of Foreign Affairs has decided to apply restrictions to the provision of Guarantor's Declaration for cultural objects on loan that are privately owned. As just stated, our jurisdictional immunity (and legislation) is limited to cultural State property. While this includes property of organs of the State, and of municipalities or federal units, jurisdictional immunity does not apply to privately-owned objects. The domestic law of the Netherlands offers no means of preventing the seizure of privately-owned objects; a Guarantor's Declaration, which only confirms the applicable legal regime, will therefore not provide any means of protection against such seizure.

Until recently, most cultural objects on loan to museums in the Kingdom of the Netherlands, and for which the Ministry of Foreign Affairs issued a guarantor's declaration, were State owned. Only about 10% of the cultural objects on loan were privately owned. The Ministry of Foreign Affairs used to issue guarantor's declarations for the small number of privately-owned cultural objects on loan as well, since the risk of these declarations actually being invoked was limited given the small number of objects concerned.

[3] In English, the Dutch 'Wet Algemene Bepalingen' is also sometimes translated as General Legislative Provisions Act instead of the Act on General Provisions on Kingdom Legislation.

However, the number of privately-owned cultural objects on loan, in relation to the number of State-owned cultural objects, has now risen dramatically. At present, about 70% of the objects for which a guarantor's declaration is requested are in fact privately owned. Issuing declarations for such objects constitutes an unacceptable risk for the Ministry.

While a guarantor's declaration states that the government will do whatever is legally possible to prevent seizure, the possibility cannot be excluded that a private owner of a cultural object on loan may invoke such a declaration when her/his property is seized. Strictly speaking, the government may then initiate summary proceedings against the seizing party, even when it is obvious that the government would lose such proceedings.

In view of the above, the Ministry of Foreign Affairs has decided to restrict the issuance of guarantor's declarations to state-owned cultural property on loan for the purpose of an exhibition and not intended for sale. Declarations of this nature will no longer be issued for privately-owned cultural objects.

[58] Each time when a declaration is issued, the Dutch authorities attach an explanatory letter to that declaration. In that letter, reference is made to the existing Dutch legislation with regard to State immunity and to the fact that the Netherlands considers it established judicial practice to treat cultural objects of a foreign State that are in the Netherlands temporarily for an exhibition as goods intended for public service, and as such immune from seizure. [59]

[60] PART 4: A future convention for all cultural property on loan?

Introduction

International lending and borrowing of objects for public display and scientific research is essential. Loans of objects have become particularly significant as tighter budgets and stricter ethical requirements have restricted purchases of objects by museums and other institutions. A serious inhibition on such exchange and circulation is the vulnerability of lent objects to claims in courts or by (other) authorities of the receiving country to which the objects have been temporarily relocated for cultural, educational or scientific purposes. These claims may result in seizure of objects for return or restitution to either local or foreign claimants.

[61] Earlier today, I have concluded that a relatively young rule of customary international law exists, stating that cultural objects belonging to foreign States and on temporary loan for an exhibition are immune from seizure (although I identified some imported limitations). If the 2004 UN Convention enters into force, there will be also a rule of treaty law that protects cultural State property on loan against seizure. However, also privately owned cultural objects can be very important for international exhibitions, research, etc.

Moreover, the ownership of more and more cultural objects is being transferred from State owned, to owned by private foundations. 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 be the proper way out. Such a convention may provide more legal security, but -of course- also raises new questions such as a possible overlap or discrepancy with the 2004 UN Convention.

ILA initiative

[62] During the 2010 Conference of the International Law Association (ILA) in The Hague, and thereafter at an intersessional meeting in Kohunlich, Mexico in October 2011, the Cultural Heritage Law Committee of the ILA decided to take up the topic of immunity from seizure and suit for cultural objects on loan. At that time, I have been asked to write a discussion paper together with Prof. Th.M. de Boer, a Private International Law Professor at Amsterdam University, which paper has been assessed and discussed during the 2012 ILA Conference in Sofia. During that Sofia Conference, it was decided that the Committee would draft a Convention on immunity from seizure for cultural objects on loan and I have been asked to take up that task as Special Rapporteur, together with the Chair of the Cultural Heritage Law Committee, Prof. James Nafziger. [63] The Committee decided to follow a so-called “inclusive approach”.

This means that the draft should regard not only immunity from seizure, but also immunity from suit (with a kind of 'opt out'-clause, however). Moreover, the draft not only focuses on cultural objects 'on loan', but on cultural objects temporary present in another State for cultural, educational or scientific purposes. Not only cultural State property but also privately owned property will be covered.

In sum, the draft convention should respond to an important problem involving international loans of cultural objects for scientific, cultural or educational purposes, especially for temporary exhibits. [64] The fundamental purpose of the instrument, which is intended for eventual adoption by an international or regional organization and ratification of it by States, had to be to protect the integrity of international loans and thereby encourage their role in promoting cross-cultural understanding.

And indeed, the convention, as approved by the ILA in April 2014, provides for immunity from suit and seizure of (all) cultural objects which are temporarily present in a receiving State for cultural, educational or scientific purposes, unless the cultural object is placed or intended to be placed on sale, or the cultural object is owned, possessed or otherwise controlled by the receiving State or a physical or legal person resident in the receiving State.

[65] The convention expresses the conviction that immunity from seizure can prevent cultural objects temporarily abroad for cultural, educational or scientific purposes from being subject to trade, ownership or other disputes, and that immunity from seizure facilitates the mobility of cultural objects and overcomes the reluctance of lenders to send their cultural objects into a foreign jurisdictions where they might be subject to some form of judicial seizures.

[66] Therefore, Article 3 of the convention, one of the core Articles, states that objects which are temporarily present in a receiving State for cultural, educational or scientific purposes shall enjoy immunity from seizure in that State. No order that prevents or may prevent the return of the cultural object to the sending State shall be issued in the receiving State.

However, the preamble of the convention emphasizes that immunity from seizure should only suspend a claimant's ability to be granted a particular form of relief for a strictly limited period of time and expresses the conviction that the granting of immunity under this convention should not facilitate the cross-border movement of cultural property that may have been stolen, looted, or otherwise acquired in an illicit manner.

[67] Article 4, paragraph 1, states that the temporary presence of the cultural objects in the receiving State for cultural, educational or scientific purposes shall not form the basis for any legal process in the receiving State. An article regarding exemption from suit was considered necessary, as the jurisdiction of civil courts can be based on the mere presence of property in the forum State. With this provision, we as drafters of the convention aimed to prevent a situation which occurred in the US in the *Malewicz*-case. In that case, plaintiffs were able to use the window of opportunity afforded by a cultural exhibition of works of art by Malevitz as the jurisdictional hook for their claims. That resulted in considerable fear of some museums to give works of art on loan to US-institutions, and to uncertainty as to how far-reaching or limited the US Public Notice on cultural significance, which was an important precondition to immunity, would be in practice. In other words: the international mobility of cultural objects was considerably threatened.

[68] Although immunity can be considered as a starting point, it is considered important that the granting of immunity under the convention should not be a means of facilitating the cross-border movement of cultural objects that have been illegally exported, stolen, looted or acquired illicitly (I already stated this).

For that reason, Article 5 of the convention states that immunity from seizure or suit does not apply in cases where the receiving State is bound by conflicting obligations under international or regional law, for example, EU-law. No explicit reference to court orders has been made because practices of incorporating or transposing international law into the domestic order vary widely among States. However, in several States a court order may be required in order to give effect to an obligation under international or regional law. The United Kingdom Tribunals, Courts and Enforcement Act 2007, Article 135(1) has served as a source of inspiration for this article.

[69] Although immunity in the context of loans is a temporary measure, it may also suspend a claimant's ability to be granted a particular form of relief. In order to provide some kind of balance, it is considered necessary that the receiving State and the sending State, jointly or separately, exercise due diligence in order to determine or confirm the provenance of a cultural object subject to a prospective loan. Consequently, no transfers should take place between a sending State and a receiving State where the provenance of an object cannot be established.

The principle of due diligence has been drawn particularly from United Kingdom legislation (Tribunal Courts and Enforcement Act 2007, Part 6, Sections 134 to 138), as well as the 2004 Code of Ethics of the International Council of Museums (ICOM). The 2004 ICOM Code of Ethics 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."

Under Article 2.3
"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."

Article 3.6 of the Code requires museums to verify the terms of export. The Code of Ethics states that museums should refrain from exhibiting objects which have been illegally exported or are of doubtful provenance.

The convention should be considered as a "minimum standard". According to the convention, States Parties are entitled to take further measures in accordance with their municipal law to secure the effective implementation of the convention within their respective jurisdictions, provided such measures are consistent with the provisions of the convention. Such measures could include, for example, a requirement on a borrowing institution to ensure that public notice is given of the details and ownership of any cultural object prior to its transfer to the receiving state. Moreover, any State Party may enter into agreements with one or more other State Parties, with a view to improving the application of the convention in their mutual relations.

[70] The adoption by the ILA of this convention in 2014 finalized a four year process. At the same time, however, it should be considered as a new starting point. That is why ILA Resolution 3/2014 requests the Secretary-General of the ILA to forward a copy of the Final Report, including the convention to the United Nations Secretary General, the Secretary General of UNESCO, the Hague Conference of Private International Law, COJUR (Comité Juridique)/EU, CAHDI (Committee of Legal Advisers on Public International Law)/ Council of Europe and other appropriate international and regional organizations, such as, for instance, ICOM.

If one of these organizations, or perhaps another, takes up the convention and initiates intergovernmental negotiations based on this convention, the outlook is promising for global endorsement of immunity from suit and seizure for cultural objects temporarily abroad for cultural, educational or scientific purposes. However, unfortunately, so far the afore mentioned institutions have given no response yet. [71]