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SOVEREIGN IMMUNITY AND THE ENFORCEMENT OF  
INTERNATIONAL CULTURAL PROPERTY LAW

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## **Abstract**

The present paper examines the intersection of the law of State immunity and cultural property issues. The primary interest in undertaking this investigation lies in the fact that, while immunity from seizure and other measures of constraint aims to protect and further the cultural and educational function of State cultural heritage property, immunity from jurisdiction (understood *stricto sensu* as immunity from suit) may bar legitimate restitution claims brought by individuals who have been unlawfully dispossessed of cultural objects. Therefore, a clear-cut and comprehensive solution to the problems raised by the expanding litigation in this area is not forthcoming. Customary and treaty obligations in the field of cultural heritage, such as the duty to return stolen cultural objects, are inconclusive in that regard and stand in the background as the reference materials guiding the analysis. What seems most needed is instead a wide-ranging balancing exercise that takes into account all of the values, interests and circumstances at stake in art-and-immunity cases. Obviously, this assumes that State immunity for *jure imperii* acts, such as the expropriation of property in times of armed conflict, should not be regarded as a dogma of contemporary international law. On the contrary, it is submitted that factors such as the alternative remedies available to dispossessed individuals or the commission of egregious breaches of human rights by the defendant State may well have a bearing on the enjoyment of sovereign immunity.

## **Keywords**

cultural heritage property – State immunity from jurisdiction – State immunity from execution – expropriation – United States terrorism exception to sovereign immunity – human rights – UN Convention on Jurisdictional Immunities of States and Their Property

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# SOVEREIGN IMMUNITY AND THE ENFORCEMENT OF INTERNATIONAL CULTURAL PROPERTY LAW

*Riccardo Pavoni\**

## I. Introduction

There exists an ambivalent relationship between the law of State immunity and the enforcement of international cultural property law. On the one hand, immunity from *execution* generally fosters the special values associated with artworks belonging to the cultural heritage of States by shielding them from seizure, attachment and similar measures of constraint when they are located on the territory of other States, especially when they are on loan to foreign museums and educational institutions. On the other hand, immunity from *jurisdiction* (understood *stricto sensu* as immunity from suit) may bar restitution claims brought by individuals who have been unlawfully dispossessed of cultural objects that are in the hands of foreign sovereigns. This is liable to occur when a court determines that proceedings against foreign States for the recovery of cultural property involve *jure imperii* activities, i.e. activities which are a manifestation of sovereign authority, as such exempt from the jurisdiction of forum States. A comparable result may ensue from the application of the act of State doctrine so as to dismiss a restitution suit on the merits, by arguing that the adjudication of the case would require a review of the validity of foreign legislative, governmental or judicial acts. Under this perspective, immunity rules may hamper, rather than promote, the effective enforcement of cultural property law as it pertains to the restitution of wrongfully taken art objects.

If these propositions appear rather straightforward, the vicissitudes of cultural goods and the dynamics of art markets are rarely so, with the consequent emergence of disparate legal situations which cannot easily be subsumed within the above scheme and call instead for a balancing of the interests and values underlying the cases at hand and the applicable norms. Fortunately, a substantial practice concerning art-and-immunity disputes has blossomed, particularly in the United States of America (US), which offers several examples of the situations at stake and justifies a systematic appraisal of this area of the law, hitherto fairly undeveloped and largely theoretical. A key development now comes from the recent judgment of the International Court of Justice (ICJ) in *Jurisdictional Immunities of the State*.<sup>1</sup> This decision does not deal directly with the issues examined in this article, but it makes important findings, for instance on the maintenance of immunity despite the commission of grave crimes and on the inapplicability of any balancing exercise in the field of State immunity, that will be recalled in the following sections.

Although judicial practice relating to art-and-immunity cases is growing, it appears necessary to test the indications emerging therefrom against the effective enforcement of international cultural heritage obligations. Indeed, it will be apparent that, in approaching such disputes, judicial bodies normally sidestep any discussion of the consistency of their findings with international norms aimed at the protection of cultural property. The usual approach is to focus exclusively on the relevant immunity rules, with no consideration of the special features which distinguish these cases.

It is useful, then, to recall that most significant in the context of the existing practice concerning art and immunity from *jurisdiction* are the prohibition of misappropriation of artworks by means of direct or indirect coercion (such as in armed conflicts) and the corresponding obligation to return such

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\* A revised and updated version of this working paper will be published as a chapter in F Francioni and J Gordley (eds), *Enforcing International Cultural Heritage Law* (Oxford University Press, forthcoming 2013).

<sup>1</sup> *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (3 February 2012).

artworks to their rightful owners. These are well-entrenched norms of contemporary international cultural heritage law, embodied in customary and treaty rules.<sup>2</sup> However, several manifestations of practice remain problematic, for instance because they refer to States which were not involved in the original unlawful takings, or because they concern non-coercive peacetime transactions, where the applicable legal framework is only made up of treaties, essentially the 1970 UNESCO Convention<sup>3</sup> and the 1995 UNIDROIT Convention,<sup>4</sup> and thus reflects the latter's weaknesses and inherent limitations.

As for the cases about art and immunity from *execution*, the pertinent norm, arguably considered of a customary character,<sup>5</sup> has instead evolved within the law of State immunity and prescribes that State cultural property is immune from enforcement proceedings, of whatever form and extent, instituted in another State. This norm serves the interest of the effective enforcement of cultural heritage law by recognizing the intrinsic value of cultural objects, ensuring respect for the integrity of the cultural patrimony of States and sustaining the educational function of cultural property for humanity through the promotion of transnational exchanges and loans. Even here, however, it is appropriate to differentiate the various situations under which the principle of immunity from seizure for cultural property may be called into question. It seems, in other words, warranted to draw distinctions based on the claim upon which the judgment sought to be enforced against cultural property was obtained. There may be countervailing factors in the recognition of enforcement immunity for cultural objects, such as the existence of legitimate restitution claims or the violation of human rights by the foreign State owning or possessing the objects.

Section II discusses the law and practice about State immunity from jurisdiction in proceedings involving cultural objects, while section III focuses on immunity from execution for State cultural property. Section IV offers some concluding remarks.

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<sup>2</sup> The prohibition of misappropriations and looting is unquestionably of a customary nature, while the duty of restitution at least arguably so, see F Francioni, 'Au delà des traités: l'émergence d'un nouveau droit coutumier pour la protection du patrimoine culturel' 111 *Revue générale de droit international public* 19 (2007), 27-30.

<sup>3</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, 14 November 1970, in force 24 April 1972.

<sup>4</sup> UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Rome, 24 June 1995, in force 1 July 1998.

<sup>5</sup> A Gattini, 'The International Customary Law Nature of Immunity from Measures of Constraint for State Cultural Property on Loan' in I Buffard, J Crawford, A Pellet, and S Wittich (eds), *International Law between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff, Leiden/Boston 2008) 421.

## **II. Should Sovereign Immunity from Jurisdiction Be Granted in Art-Recovery Suits?**

There are several ways for overcoming a defence based on sovereign immunity in suits brought against foreign States for the recovery of cultural property. Plaintiffs may either invoke treaties imposing a duty of restitution alleged to prevail over inconsistent customary immunity rules, or they may rely upon norms internal to the law of State immunity. In the former case, the most relevant treaty is certainly the 1995 UNIDROIT Convention which, unlike the 1970 UNESCO Convention,<sup>6</sup> foresees an unconditional duty of restitution of stolen cultural property<sup>7</sup> actionable by means of proceedings instituted by dispossessed individuals. However, the absence of a treaty clause subordinating the rules on State immunity to its obligations,<sup>8</sup> as well as the thin number of States parties,<sup>9</sup> make the UNIDROIT Convention an uncertain means for determining the state of the law in this area, also considering the shortage of pertinent practice.

A discourse centred on the rules internal to the law of State immunity is more interesting. In principle, suits for the recovery of artworks may be accommodated within certain generally recognized exceptions to State immunity.

### ***A. The Property and Commercial Activity Exceptions***

First of all, the exception relating to claims over ‘ownership, possession or use of property’ seems most relevant for our purposes. According to the UN Convention on Jurisdictional Immunities of States and Their Property (UNCIS),<sup>10</sup> it covers proceedings involving: (i) the rights or interests of States in, or their possession or use of, immovable property situated in the State of the forum; (ii) the rights or interests of States in movable or immovable property arising by way of succession, gift or *bona vacantia*; and (iii) the rights or interests of States in the administration of property.

There is no doubt that, pursuant to this exception, ‘property’ includes ‘cultural property’, thereby making many art-related disputes amenable to its very broad formulation. It should be noted that the limitation consisting in the presence of the disputed property in the territory of the forum State is only foreseen for the first situation recalled above, i.e. proceedings generally involving rights or interests in immovable property that cannot be subsumed within the other two, more specific cases envisaged by the exception. Indeed, claims about purported successions or gifts may be brought against States even when cultural objects are abroad. For instance, Austria’s assertion that the Klimt’s paintings at issue in the *Altmann* case<sup>11</sup> were bequeathed to the Austrian Gallery (where they were still located at the time

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<sup>6</sup> As is well-known, the restitution obligation envisaged by the 1970 UNESCO Convention only covers property stolen from museums and religious or public monuments and institutions. Crucially, such obligation is to be carried out pursuant to interstate/diplomatic requests (Art 7). States parties are also bound ‘to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners’ (Art 13(c)), but only to the extent this is ‘consistent with the laws of each State’ (*ibid*, first sentence). Such laws may well include immunity statutes or provisions governing the incorporation of customary rules on immunity in domestic legal systems.

<sup>7</sup> Art 3(1).

<sup>8</sup> To the contrary, Art 13(1) of the UNIDROIT Convention contains a savings clause granting precedence to any other legally binding international instrument ‘which contains provisions on matters governed’ by the Convention, ‘unless a contrary declaration is made by the States bound by such instrument’. These instruments may well include the 1972 European Convention on State Immunity (ECSI), which however has been ratified by 8 States only, and more importantly, the 2004 UN Convention on Jurisdictional Immunities of States and Their Property (UNCIS). Having been ratified by 13 States only as of 1 October 2012, the UNCIS is not yet in force. It shall enter into force after ratification by 30 States.

<sup>9</sup> As of 1 October 2012, there are 33 States parties to the UNIDROIT Convention.

<sup>10</sup> Art 13. Cf also Arts 9-10 ECSI.

<sup>11</sup> *Altmann v Republic of Austria* 317 F. 3d 954 (9th Cir. 2002, per Wardlaw CJ), 541 US 677, 43 ILM 1425 (S. Ct. 2004, per Stevens J).

of the dispute), either by virtue of the will of the original owner or as a result of post-World War II (WWII) donations by the heirs, would potentially be covered by this exception.<sup>12</sup> While the classes of art-recovery disputes thus permitted may still appear narrow, the third sweeping clause in Article 13(c) UNCSI, i.e. that relating to claims over the *administration* of property by States,<sup>13</sup> minimizes this concern.

Unfortunately, there is no court decision showing whether and why any distinction should be made in the application of the property exception to cultural objects. On the contrary, interesting indications emerge from the practice relating to the most classic exception to State immunity, i.e. the commercial activity exception. Whenever art-recovery suits arise from commercial transactions entered into by foreign States, such as contracts for the sale, purchase, bailment, insurance or loan of State cultural property, it may be argued that that exception applies. This seems correct especially in view of the widely accepted primary test for establishing ‘commerciality’, i.e. the *nature* of the transaction at stake, as opposed to the subjective test of the *purpose* or  *motive* behind the transaction.<sup>14</sup> Accordingly, for a foreign State’s claim to immunity in art-recovery suits to succeed, it is not sufficient to rely upon the not-for-profit, scientific, cultural, educational or otherwise public/*jure imperii* purposes sought to be realized when engaging in art-related commercial activities.

This line of argumentation has been canvassed by certain US courts, although essentially<sup>15</sup> in the context of the ‘commercial activity’ nexus required by the expropriation exception laid down in the 1976 Foreign Sovereign Immunities Act (FSIA).<sup>16</sup> Faced with a claim for the return of 84 paintings and drawings brought by the heirs of the Russian abstract artist Malewicz against the City of Amsterdam’s Stedelijk Museum,<sup>17</sup> the Columbia District Court ruled that a sovereign’s loan of artwork to foreign institutions for exhibition purposes had to be considered a commercial transaction. Judge Collyer significantly held: ‘There is nothing “sovereign” about the act of lending art pieces, even though the pieces themselves might belong to a sovereign’.<sup>18</sup> This finding was greatly facilitated by the US court approach to the distinction between *jure imperii* and *jure privatorum* acts, pursuant to which the former are simply actions that only a State may perform. Therefore, insofar as art loans may also be executed by private museums and similar entities, they constitute commercial activity, with the obvious corollary that they are not in principle covered by sovereign immunity. The City of Amsterdam’s argument that the loan at issue was intended for eminently educational and cultural

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<sup>12</sup> However, in the US this exception is narrower than in the UNCSI, as the condition of the location of the property on US territory is stipulated for any kind of dispute amenable to its terms, see section 1605(a)(4) of the Foreign Sovereign Immunities Act (FSIA), 28 USC 1330, 1602-1611.

<sup>13</sup> By way of *example*, Art 13(c) singles out claims concerning trust property, the estate of a bankrupt or the property of a company in the event of its winding up.

<sup>14</sup> See section 1603(d) FSIA. Art 2(2) UNCSI is instead rather inconclusive on the point.

<sup>15</sup> In a little-noticed – yet pioneering – case, a US district court unhesitatingly assumed jurisdiction on the basis of the commercial activity exception over a claim for damages arising from the expropriation of property, including cultural property, by *post-Communist* Russia in 1994, *Magness v Russian Federation*, 54 F. Supp. 2d 700 (S.D. Tex. 1999, per Hittner DJ). The Russian authorities had confiscated the property at issue, i.e. an historical piano factory containing a vast amount of antiquities and renamed the ‘Red October Piano Factory’, on the grounds that it constituted a national treasure. They had subsequently engaged in a host of commercial activities involving the property, such as – most strikingly – its lease for commercial purposes or sales of associated antiquities, as well as the solicitation of US tourism to Russian cultural sites or the organization in the US of exhibitions of antiquities of ‘like kind and character’ vis-à-vis the expropriated items, *ibid*, 703-705. See further on this case, section III.B.3 below.

<sup>16</sup> The expropriation exception is discussed below at section II.B.

<sup>17</sup> *Malewicz v City of Amsterdam* 362 F. Supp. 2d 298 (DDC 2005, per Collyer DJ).

<sup>18</sup> *Ibid*, 314.

*purposes* was easily dismissed by recalling that, according to the FSIA, only the nature of the activity is relevant for establishing commerciality.<sup>19</sup>

Judge Collyer's perspective on transactions involving cultural property is confirmed by her further ruling in the *Malewicz* case, where she rejected the application of the act of State doctrine to the City of Amsterdam's allegedly fraudulent and bad faith acquisition of the disputed paintings in 1956. She found that no official/*jure imperii* act of State was accomplished by the City:

[A]ny private person or entity could have purchased the paintings for display in a public or private museum... In other words, there was nothing *sovereign* about the City's acquisition of the Malewicz paintings, other than that it was performed by a sovereign entity.<sup>20</sup>

The *de Csepel* case<sup>21</sup> provides another example of this US jurisprudence. It involves an action seeking the return of at least 40 works of art, i.e. a portion of the so-called Herzog Collection, that were seized by Hungary and Nazi Germany during WWII and are currently housed by several agencies of Hungary, such as the Museum of Fine Arts in Budapest, the Hungarian National Gallery, and the Budapest University of Technology and Economics. One of the claims advanced by the heirs of Baron Herzog is a typical commercial claim: they assert breaches of a series of contracts for bailment of the disputed property allegedly concluded with the defendants in the aftermath of WWII, and accordingly rely upon the FSIA's commercial activity exception.<sup>22</sup> While in the first decision on the case the import of these bailment contracts for the question of jurisdiction was not addressed on grounds of judicial economy,<sup>23</sup> their purported existence did have an impact on Judge Huvelle's analysis of the act of State doctrine:

Plaintiffs allege that they entered into a series of bailment agreements with defendants... and that defendants have breached these bailments by refusing to return the property. The actions challenged by plaintiffs, therefore, are not "sovereign acts", but rather *commercial* acts that could be committed by any private university or museum. Such "purely commercial" acts do not require deference under the act of state doctrine.<sup>24</sup>

These may be taken as rather straightforward applications of the commercial activity exception to sovereign immunity in the realm of cultural property disputes. From the perspective of cultural heritage law, there may be a host of objections to considering State transactions involving artistic treasures as just another 'purely commercial' matter. The substantive point, however, is that, under the appropriate circumstances, this classic exception may pave the way for legitimate claims for the restitution of property that has been wrongfully taken from their rightful owners by State actors.

This does not mean that any situation in which States currently possess property that at some point in time had been the subject of private transactions, either legal or illegal, would justify art-recovery claims to proceed and overcome pleas of sovereign immunity. In principle, immunity does not bar art-restitution suits brought on the basis of the commercial activity exception only when commercial

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<sup>19</sup> *Ibid* (also discussing potential breach of loan agreement resulting from the transfer of lesser artworks than promised, as a situation that would not attract immunity). See also *Cassirer v Kingdom of Spain* 616 F.3d 1019, 49 ILM 1492 (9th Cir. 2010, per Rymer CJ): 'It is clear that activity need not be motivated by profit to be commercial for purposes of the FSIA... [T]he commercial character of an activity depends on its nature rather than its purpose. Thus, it does not matter that the Foundation's activities are undertaken on behalf of a non-profit museum to further its cultural mission', *ibid*, 1498.

<sup>20</sup> *Malewicz v City of Amsterdam* 517 F. Supp. 2d 322 (DDC 2007, per Collyer DJ), 339 (emphasis in the original).

<sup>21</sup> *De Csepel v Republic of Hungary* 808 F. Supp. 2d 113 (DDC 2011, per Huvelle DJ).

<sup>22</sup> For background information see *ibid*, 135-137; for details on the plaintiff's claim in question, see Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss the Complaint, 38-42, document available at [www.commartrecovery.org/sites/default/files/MemoLawOpp.pdf](http://www.commartrecovery.org/sites/default/files/MemoLawOpp.pdf).

<sup>23</sup> *De Csepel*, n 21 above, 133 n 4. The Court had already asserted jurisdiction pursuant to the FSIA's expropriation exception, see section II.B below.

<sup>24</sup> *De Csepel*, n 21 above, 142-143 (emphasis in the original).

transactions constitute the very subject-matter of the claim and relief sought. It does not suffice for such transactions to lie at the origins of the dispute. This is well illustrated by one of the few known (non-American) judicial decisions squarely involving immunity from jurisdiction in cultural-property restitution proceedings.

In *Italian State v X*,<sup>25</sup> the Swiss Federal Tribunal granted immunity to Italy in respect of a restitution claim brought by an individual asserting ownership over a set of historic stone tablets that had been handed over to the Italian authorities to serve as evidence in criminal proceedings, pursuant to a request under the 1959 European Convention on Mutual Assistance in Criminal Matters (ECMACM). Italy had not fulfilled its duty to return such evidence to Switzerland ‘as soon as possible’, as prescribed by Article 6(2) ECMACM. However, it can be evinced from the decision that the disputed archaeological pieces had in the first place been unlawfully exported to Switzerland and eventually acquired by the plaintiff, contrary to Article 826(2) of the Italian Civil Code, which vests the Italian State with exclusive title over excavated cultural objects. Thus, the plaintiff could understandably speak of an ‘astute manoeuvre’<sup>26</sup> set in motion by Italy in order to regain possession and title over the tablets without the inconvenience of bringing suit in Switzerland.

The Federal Tribunal afforded immunity because Italy was not relying on a property right arising from *jure privatorum* activities, but rather from ‘its public law legislation protecting objects of historical and archaeological value’;<sup>27</sup> hence, the case concerned a claim ‘formulated by the Italian State in the exercise of its sovereign powers (*jure imperii*)’.<sup>28</sup> The Tribunal further denied that this implied an impermissible *application* of foreign public law.<sup>29</sup> It finally excluded that Italy was in violation of the ECMACM and that therefore immunity ought to be withdrawn on that account.<sup>30</sup>

The substantive conclusion reached by the Tribunal may be shared, although its reasoning is questionable. Immunity seems warranted in this case because the latter’s immediate subject-matter is the failure to return cultural property by a State that had used that property as evidence in criminal proceedings, and not wrongful acts committed in the context of commercial activities. The disputed Italian governmental determination taken in the context of judicial activities is by definition an expression of sovereign authority. That the property at issue had been previously the subject of contractual arrangements and transfers of ownership<sup>31</sup> is irrelevant. The same applies to the subsequent Italian conduct evidencing the intention to (re)appropriate the property in accordance with Italian law. But the Swiss Federal Tribunal’s position that immunity was the automatic consequence of reliance on national cultural heritage laws goes too far. This would imply granting immunity in any case where a foreign sovereign seeks to justify its retention of artworks on the basis of the alleged necessity to comply with those laws, regardless of the circumstances under which the objects were acquired or entered the national territory.<sup>32</sup>

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<sup>25</sup> *Italian State v X and Court of Appeal of the Canton of the City of Basle* 82 ILR 24 (English translation), 42 *Annuaire suisse de droit international* 60 (1986) (French translation) (Swiss Federal Tribunal, 6 February 1985).

<sup>26</sup> *Ibid.*, 28, para 5b.

<sup>27</sup> *Ibid.*, 26, para 4a.

<sup>28</sup> *Ibid.*

<sup>29</sup> ‘[T]he distinction between acts *jure imperii* and *jure gestionis*... cannot be applied without taking account of foreign public law’, *ibid.*, 27, para 4b.

<sup>30</sup> According to the Tribunal, a breach of the ECMACM would only result from Italy’s refusal to return the property *upon a specific request* from the Swiss authorities, *ibid.*, 29, para 5c. Although this part of the decision is rather unclear, it can be read as a further confirmation of the point made above, text accompanying nn 6-9, i.e. that (customary) immunity may not be granted when the breach of a treaty, such as the ECMACM, is at issue.

<sup>31</sup> With no participation of Italian authorities and indeed in breach of Italian law.

<sup>32</sup> Although involving a situation which is somewhat the reverse of the cases discussed here, i.e. a claim by a foreign State for the recovery of antiquities in the possession of a private art gallery, several observations made by the English Court of Appeal in its *Barakat Galleries* decision are of utmost interest also in our context. The Court excluded that a State’s

### ***B. The Expropriation Exception in the US FSIA***

The most interesting practice in the field of State immunity in art-recovery suits has arisen in the US as a result of the application of a norm that is peculiar to the US legal system, namely the expropriation or takings exception to sovereign immunity under section 1605(a)(3) FSIA. This reads:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case... in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

We are witnessing an expanding jurisprudence applying this exception to art-restitution claims that seek redress for State misappropriations of cultural property which, more or less patently, are amenable to the notion of a taking in violation of international law. Most importantly, this jurisprudence relates to unsettled cases dating back to infamously known historical instances of systematic, large-scale and blatantly discriminatory deprivation of artworks, such as the Nazi Germany and Bolshevik Russia eras of plunder and nationalization of property. This is the upshot of the 2004 milestone decision of the US Supreme Court in *Altmann*,<sup>33</sup> which determined that the FSIA applied retroactively so as to cover State conduct pre-dating its enactment in 1976, including conduct carried out before the US adoption of the restrictive doctrine of sovereign immunity with the 1952 Tate Letter.<sup>34</sup>

*Altmann*, a Nazi-era case, has so far been most significantly followed up by *Chabad*<sup>35</sup> (expropriation and looting of historical and religious books and manuscripts by Russia at different times starting with the October Revolution); *Cassirer*<sup>36</sup> (Nazi confiscation of a Pissarro painting); *de Csepel*<sup>37</sup> (Nazi Hungary's expropriation of a large amount of art objects comprising the Herzog Collection); and *Malewicz*<sup>38</sup> (1950s' acquisition by the Netherlands of Abstract-art paintings and drawings left behind by their author/owner when fleeing Stalinist- and Nazi-eras' persecution). This jurisprudence has been widely commented upon especially by American scholars, who have sought to balance its meritorious effect of paving the way for redress for past wrongs with the need to respect the function of, and

(Contd.)

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assertions of title to property pursuant to its cultural heritage laws had necessarily to be regarded as a *jure imperii* exercise of sovereign authority, *Government of the Islamic Republic of Iran v The Barakat Galleries* [2007] EWCA Civ 1374 (per Lord Phillips of Worth Matravers CJ, para 149 ('[Iran] asserts a claim based upon title to antiquities which form part of Iran's national heritage... This is a patrimonial claim, not a claim to enforce a public law or to assert sovereign rights'), see also *ibid*, paras 114 and 126. On the facts of the case, this finding paved the way for the acceptance of Iran's right to recovery of the antiquities, but in immunity disputes it may well work out as an argument to defeat an immunity claim generically grounded upon reliance on States' patrimony legislation.

<sup>33</sup> *Altmann*, n 11 above.

<sup>34</sup> Letter of Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney General Philip B. Perlman, 19 May 1952, reprinted in 26 Dep't State Bull. 984 (1952) and in *Alfred Dunhill of London, Inc. v Republic of Cuba* 425 US 682, 711-15 app. 2 (S. Ct. 1976)

<sup>35</sup> *Agudas Chasidei Chabad v Russian Federation* 466 F. Supp. 2d 6 (DDC 2006, per Lamberth CJ), 528 F.3d 934 (DC Cir. 2008, per Williams SCJ). For detailed information on this complex dispute and its background, see MJ Bazyler and SM Gerber, 'Chabad v. Russian Federation: A Case Study in the Use of American Courts to Recover Looted Cultural Property' 17 *IJCP* 361 (2010).

<sup>36</sup> *Cassirer*, n 19 above.

<sup>37</sup> *De Csepel*, n 21 above.

<sup>38</sup> *Malewicz*, nn 17 and 20 above.

values inherent in, immunity rules when applied to cultural heritage issues.<sup>39</sup> It will be sufficient here to recapitulate the salient features of these decisions.

First of all, it should be pointed out that, for US courts, an expropriation contrary to international law is a broad concept, which covers any State deprivation of property rights, either directly or indirectly and carried out either for a non-public purpose or for a public purpose but without payment of prompt, fair and adequate compensation. An important condition is that the targeted individuals must not be nationals of the expropriating State at the time of the taking. This hurdle has been easily defeated for Jewish-owned cultural objects expropriated under Nazi rule, by emphasizing that Nazi laws and Nazi-occupied countries' laws had stripped Jews of their citizenship rights.<sup>40</sup>

Second, as the presence of the disputed property in the US is only required under the first clause of section 1605(a)(3), the denial of immunity in the cases at hand have most prominently resulted from reliance on the second clause of that provision, which merely presupposes that the property be 'owned or operated by an agency or instrumentality of the foreign state', such as a museum or cultural institution. Thus, the expropriation exception is well capable of reaching art located abroad, provided the 'commerciality' condition recalled below is satisfied. However, the *Malewicz* litigation demonstrates that also the first clause may successfully be invoked in our context. This may occur when suit is filed while the contested objects are present in the US in the context of a temporary loan for cultural purposes by a foreign museum *and* even if they are protected from seizure by a US Government decision under the 1965 Immunity from Seizure Act (IFSA).<sup>41</sup> In other words, in such a case a loan may constitute a valuable occasion to ambush 'tainted' cultural property. Despite all arguments against the propriety of such a procedure,<sup>42</sup> Judge Collyer, in the 2005 decision in *Malewicz*, persuasively took the view that immunity from seizure was not a bar to proceedings seeking restitution of the property; immunity only prohibited the taking of measures of constraint against the disputed art, which should therefore leave US territory unimpeded, but cannot cause dismissal of the restitution suit.<sup>43</sup>

Third, the commercial activity nexus set out by the expropriation exception has also not represented a major obstacle to the expansion of the case law at hand. This is the consequence of the 'nature test'

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<sup>39</sup> See especially LF Redman, 'The Foreign Sovereign Immunities Act: Using a "Shield" Statute as a "Sword" for Obtaining Federal Jurisdiction in Art and Antiquities Cases' 31 *Fordham ILJ* 781 (2008) (depicting art and antiquities claims as the 'hottest new investment opportunity' (781) and a likely 'tobacco litigation of this decade' (*ibid*)); CA Caprio, 'Artwork, Cultural Heritage Property, and the Foreign Sovereign Immunities Act' 13 *IJCP* 285 (2006) (one of the first pieces seeking to systematically appraise both the US cases now at issue and those concerning immunity of cultural property from execution examined at section III.B below); C DeFrancia, 'Sovereign Immunity and Restitution: The American Experience' (Fall/Winter 2010) *Cultural Heritage & Arts Review* 32. As for non-American scholars, a comprehensive survey and appraisal of (*inter alia*) the US case law in question is included in the recent monograph by N van Woudenberg, *State Immunity and Cultural Objects on Loan* (Martinus Nijhoff, Leiden/Boston 2012), 107-200.

<sup>40</sup> *Cassirer v Kingdom of Spain* 461 F. Supp. 2d 1157 (CD Cal. 2006), 1165-1166; *de Csepel*, n 21 above, 130; for another example of a decision showing the attitude of US courts of downplaying the nationality requirement at issue, see *Chabad*, n 35 above, 943.

<sup>41</sup> 22 USC 2459. See further below at sections III.A and III.B.3.

<sup>42</sup> See e.g. Caprio, n 39 above, 293-294, 303. Although much-discussed, the proposed amendment to the FSIA currently tabled with the US Congress is particularly narrow, as it seems to only foreclose cases similar to the *Malewicz* situation (i.e. artwork present in the US *in connection with* a commercial activity in the US). The amendment would indeed only prohibit considering as 'commercial activity' under the expropriation exception loans of artworks to the US protected by the IFSA. It would not halt litigation along the lines of the *Altmann* and *Cassirer* decisions, in which a connection between the property at issue and commercial activity in the US is not required (see nn 44-45 below and associated text) and IFSA protection is irrelevant because the art is located abroad. The bill in question was introduced in the US Congress on 20 March 2012, Bill S. 2212, Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, available at [www.govtrack.us/congress/bills/112/s2212/text](http://www.govtrack.us/congress/bills/112/s2212/text); see 'Dispute Over Bill on Borrowed Art', *New York Times*, 22 May 2012 (New York edn). The heated debates on the bill relate to its savings clause for Nazi-era claims only.

<sup>43</sup> *Malewicz*, n 17 above, 309-312.

applied to the notion of ‘commerciality’, which implies that cultural and educational activities are not spared from the scope of the notion. In addition, the second clause of section 1605(a)(3) does not prescribe any particular connection between the disputed property and the commercial activity in the US by the foreign agency or instrumentality. For instance, the following have been considered relevant activities triggering the requirement in question: (i) publication of a museum’s guidebook including the contested paintings and advertisement of the museum’s initiatives in the US (*Altmann*); (ii) contracts between foreign entities and US companies for joint publications and sales, as well as for duplication and sale of the former’s exhibited materials (*Chabad*); (iii) shipping gift shop items to US purchasers, or showing a program filmed at a museum on Iberia flights between Spain and the US, or the maintenance of a museum’s website available to US citizens to buy admission tickets and view the collection (*Cassirer*); (iv) loans of art to museums in the US, promotion of US tourism, sales of books covering the disputed paintings through the Internet, as well as a foreign university’s participation in student exchange programs with the US, including the Fulbright Program (*de Csepel*). By contrast, the ‘commerciality’ condition under the first clause of section 1605(a)(3) requires a ‘substantial contact’<sup>44</sup> with the US, as well as a degree of connection between the contested property and the commercial activity. But in the 2007 *Malewicz* decision even this more demanding test was deemed as fulfilled by an art loan agreement that had yielded non-negligible fees to the foreign museum and required the presence of the museum’s officials in the US for safety and supervision purposes.<sup>45</sup>

Fourth, prior exhaustion of domestic remedies in the State pleading immunity (or in the State responsible for the taking) has not been regarded as a condition on the exercise of jurisdiction pursuant to the expropriation exception. While in *Malewicz* and *Chabad* this alleged requirement was rejected on grounds of inadequacy of the foreign remedies,<sup>46</sup> in *Cassirer* the Ninth Circuit Court of Appeals ruled in general terms that exhaustion was *not* mandated by the FSIA, even though it could be considered at the stage of the merits on a prudential or discretionary basis.<sup>47</sup> The defendant State’s insistence that exhaustion was dictated by international law as a prerequisite for the State of nationality’s espousal of individual claims arising from takings of property was found unpersuasive, insofar as, first, this only concerned interstate dispute settlement processes and not actions before domestic courts by private individuals, and second, the FSIA had not however incorporated that prerequisite.<sup>48</sup>

Despite the ICJ *Jurisdictional Immunities* judgment’s flat dismissal of an alternative-remedy argument or a balancing exercise in the area of State immunity,<sup>49</sup> I remain convinced that the availability of

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<sup>44</sup> See section 1603(e) FSIA: ‘A “commercial activity carried on in the United States by a foreign state” means commercial activity carried on by such state and having substantial contact with the United States’.

<sup>45</sup> *Malewicz*, n 20 above, 332-333.

<sup>46</sup> *Malewicz*, n 17 above, 306-308, and n 20 above, 333-335 (inadequacy due to applicability of statutes of limitations under Dutch law); *Chabad*, n 35 above, 948-950 (inadequacy for the recovery of part of the Chabad Collection of the potential remedy set out in the Russian Law on Cultural Valuables Displaced to the USSR as a Result of the Second World War and Located on the Territory of the Russian Federation, Federal Law No 64-FZ of 15 April 1998 as subsequently amended, English translation in 17 IJCP 413 (2010), see particularly Art 19(2) which authorizes transfer of cultural property constituting family heirlooms to representatives of the family upon the latter’s payment of its value as well as reimbursement of the costs of its identification, expert appraisal, storage, and so on; the latter requirement is in line with the core provision of the Law pursuant to which title to artworks confiscated by the Soviet Red Army at the end of WWII is, with a few exceptions, vested in the Russian Federation, Art 6(1); ‘obviously Russia’s mere willingness to *sell* the plaintiff’s property back to it could not remedy the alleged wrong’, *Chabad*, *ibid*, 949-950, emphasis in the original).

<sup>47</sup> *Cassirer*, n 19 above, 1499-1501.

<sup>48</sup> *Chabad*, n 35 above, 949; *Cassirer*, n 19 above, 1504 n 26.

<sup>49</sup> *Jurisdictional Immunities of the State*, n 1 above, paras 101-102 (no State practice about, and inappropriateness of, purported limitation of State immunity grounded on availability of effective alternative means of redress), and 106 (‘Immunity cannot... be made dependant upon the outcome of a balancing exercise of the specific circumstances of each case to be conducted by the national court before which immunity is claim’); *contra*, see *ibid*, dissenting opinion of Judge

alternative forums, including in the State claiming immunity, that might be able to provide access to justice and relief should be seen as a key factor when seeking to reconcile the antagonist values at play in immunity cases involving the violation of individual rights.<sup>50</sup> However, this perspective does not seem viable in the US legal system. Indeed, a crucial feature of US practice in the field of sovereign immunity is that US courts perceive the FSIA as a self-contained piece of legislation, essentially exempt from external dictates and pressures, and are accordingly most faithful to its wording read in the light of US legal doctrines and materials. This point is clearly discernible also in the following development arising from the case law at stake.

As first declared by the Ninth Circuit Court of Appeals in *Cassirer* with a decision that the US Supreme Court has refused to review,<sup>51</sup> the expropriation exception applies to any defendant State currently possessing the disputed property, irrespective of whether the artworks were originally taken by another State with no complicity whatsoever by the former State.<sup>52</sup> Putting it simply, defendant and taker need not be the same in art-restitution suits under section 1605(a)(3). This is clearly the most far-reaching conclusion arrived at in the art-restitution case law involving foreign States, one greatly expanding the possibilities to recover illegally seized art objects that have traversed various transactions and passages of title before ending up in the hands of a *prima facie* innocent sovereign. In a remarkable dissenting opinion appended to the *Cassirer* appeal decision, Judge Gould forcefully stated the conviction, based inter alia on ‘history and reason and comity’,<sup>53</sup> that immunity should only be denied to the States actually responsible for expropriatory actions. This was deemed in line with the international law criteria for attributing conduct under the law of State responsibility, i.e. that an expropriation of alien property can be considered an act of a State only when the latter has failed to take preventive or punitive measures to avoid or suppress it, which would clearly not be the case with Spain’s conduct in the case at hand.<sup>54</sup> By contrast, the Court’s majority considered the foregoing argument only pertinent as a defence at the merits stage, where Spain’s potential good faith could be thoroughly investigated.<sup>55</sup> The chief elements militating in favour of this conclusion were again the plain language and legislative history of the FSIA. Regardless of international law, the Court found additional support on the common-law’s rejection of the *a non domino* rule, namely the ‘familiar notion that a purchaser cannot get good title if property has been stolen at any place along the line’.<sup>56</sup>

Judge Gould sarcastically asked in his dissenting opinion: ‘The question is, in enacting § 1605(a)(3), did Congress mean to so infringe international law in its very provision finding violation of

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Yusuf, paras 4-11, 20, 29, 42, 51-59, and B Conforti, ‘The Judgment of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity’ 21 Italian Yearbook of International Law 135 (2011), 138-141.

<sup>50</sup> R Pavoni, ‘Human Rights and the Immunities of Foreign States and International Organizations’ in E de Wet and J Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (OUP, Oxford 2012) 71, 74-77, 83-98.

<sup>51</sup> On 27 June 2011, the Supreme Court denied *certiorari* in the *Cassirer* case, 131 S. Ct. 3057 (2011). For a first follow-up application of the *Cassirer* principle, see *de Csepel*, n 21 above, 130 (alternatively dismissing Hungary’s reliance on the Hungarian nationality of the victims of the Herzog Collection’s seizure on the grounds that Nazi Germany took part in the latter). By contrast, the *Cassirer* ruling was unhelpful to the plaintiff in *Orkin v Swiss Confederation* 2011 US App. LEXIS 20639 (2nd Cir. 12 October 2011). This case concerned a claim for the restitution of a van Gogh drawing sold in 1933, allegedly under duress, to a Swiss collector by the plaintiff’s great-grandmother, and currently housed by a Swiss museum. The Court of Appeals refused to assert jurisdiction on the basis of the expropriation exception. It distinguished *Cassirer* as a decision still requiring that the original taking be carried out by a foreign State or with its complicity, and not by a private individual in a private capacity as in the case at hand. This should not be taken as a setback for the *Altmann/Cassirer* jurisprudence, but rather as an obvious application of the notion of an expropriation in violation of international law (in principle, States are not internationally responsible for the wrongful acts of private parties).

<sup>52</sup> *Cassirer*, n 19 above, 1497-1498.

<sup>53</sup> *Ibid*, per Gould CJ dissenting joined by Kozinski Chief Judge, 1507.

<sup>54</sup> *Ibid*.

<sup>55</sup> *Ibid*, 1498.

<sup>56</sup> *Ibid*, 1502 n 14.

international law a basis for waiver of sovereign immunity?’<sup>57</sup> Quite apart from the consistency of the dissent’s observations with international law, the answer to that question must emphatically be ‘yes’: the US Congress might have well intended to ignore international law *altogether* when introducing the expropriation exception. The dissent fails to mention, not only that sovereign immunity issues are normally examined by US courts through the lens of domestic legislation and as a matter of *grace and comity*,<sup>58</sup> but more particularly that that exception is unique to the US.<sup>59</sup> It instead constitutes a key element for scholars<sup>60</sup> seeking confirmations of the evolution of the law into a system where human rights and the prohibition of international crimes take precedence over *jure imperii* acts, such as a taking of property by State actors.<sup>61</sup> Regrettably, in *Jurisdictional Immunities of the State*,<sup>62</sup> the ICJ entirely failed to consider the US *Altmann* jurisprudence, although (or *because*) it would have significantly supported the Italian theses of the priority of human rights over State immunity and of the loss of immunity when territorial torts committed in armed conflict are at stake.<sup>63</sup>

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<sup>57</sup> *Ibid.*, per Gould CJ dissenting joined by Kozinski Chief Judge, 1507.

<sup>58</sup> See *Altmann* (S. Ct. 2004), n 11 above, 1431: ‘But the principal purpose of foreign sovereign immunity has never been to permit foreign states... to shape their conduct in reliance on the promise of future immunity from suit in United States courts. Rather, such immunity reflects current political realities and relationships, and aims to give foreign states... some present “protection from the inconvenience of suit as a gesture of comity” (quoting *Dole Food Co. v Patrickson*, 538 US 468, 479); *Malewicz*, n 17 above, 304: ‘foreign sovereign immunity will be deemed waived (or, more precisely, the comity of recognizing foreign sovereignty will not be extended)...’.

<sup>59</sup> H Fox, *The Law of State Immunity* (2nd edn OUP, Oxford 2008), 372 (‘[I]n giving a remedy for State takings of property contrary to international law the US Act goes beyond any recognized position under international law’). See also *ibid.*, 350, 598.

<sup>60</sup> See e.g. A Bianchi, ‘L’immunité des États et les violations graves des droits de l’homme: la fonction de l’interprète dans la détermination du droit international’ 50 *Revue générale de droit international public* 63 (2004), 68.

<sup>61</sup> US courts are usually reticent or ambiguous with respect to this crucial aspect of the expropriation exception. See however, also for further references, *Garb v Republic of Poland* 440 F.3d 579 (2nd Cir. 2006, per Cabranes CJ), 586-588 (‘Expropriation is a decidedly sovereign – rather than commercial – activity’, *ibid.*, 586).

<sup>62</sup> *Jurisdictional Immunities of the State*, n 1 above.

<sup>63</sup> See R Pavoni, ‘An American Anomaly? On the ICJ’s Selective Reading of United States Practice in *Jurisdictional Immunities of the State*’ 21 *Italian Yearbook of International Law* 143 (2011); C DeFrancia, ‘Introductory Note to U.S. Ninth Circuit Court of Appeals: *Cassirer v. Kingdom of Spain*’ 49 *ILM* 1487 (2010), 1488. In the Italian case law, see *Federal Republic of Germany v Autonomous Prefecture of Vojotia* *International Law in Domestic Courts* (ILDC) 1815 (IT 2011) (Court of Cassation, 20 May 2011 No. 11163), paras 37-40.

### III. Immunity of Cultural Property from Execution: An Absolute Rule?

There is a growing consensus on the existence of an international customary rule affording immunity from seizure and similar measures of constraint to art objects that are part of the cultural heritage of a State, when they are situated on the territory of another State. The following subsections will examine the most significant manifestations of practice in this area, both at the normative and judicial levels. In doing so, the underlying assumptions must necessarily be distinguished from those that guide the analysis of the problem of immunity from jurisdiction in art-recovery suits. It is well-known that the denial of sovereign-property immunity from execution is considered a greater affront to the dignity and sovereign equality of States as compared to the removal of their immunity from jurisdiction. Diplomatic and political tensions are at their highest when a court allows enforcement measures against foreign sovereign property. Despite the abandonment of a general rule of absolute enforcement immunity, the foregoing conception is still reflected in law and practice, which make clear that the lifting of immunity from jurisdiction by no means implies that the resulting judgment may be unconditionally executed against the property of the defendant State.<sup>64</sup> Likewise, enforcement immunity contemplates a few essential exceptions frequently surrounded by a host of requirements that make successful completion of execution proceedings against foreign States a rare and unlikely outcome. The basic principle is that property in use or intended for use for government/*jure imperii* purposes is exempt from enforcement proceedings.

Accordingly, immunity of cultural heritage property from measures of constraint may be regarded as an obvious and indispensable rule. That property by definition appears inextricably linked to the fulfilment of sovereign purposes. Furthermore, immunity does not only cover artistic objects *per se*, but more generally any property by which a State pursues cultural and educational activities, such as museums and cultural institutions. The ICJ judgment in *Jurisdictional Immunities of the State* vigorously supported this perspective. The Court unhesitatingly found that Italy breached international law by allowing a measure of constraint (i.e. a legal charge, *ipoteca giudiziale*) against Villa Vigoni, a German property located near Lake Como and made available at no cost to a private association which turned it into an Italian-German centre for European excellence in the fields of research, science, culture and education.<sup>65</sup>

Yet the practice reviewed below and the necessity to differentiate the circumstances under which cultural property has come under attack from judgments' creditors warrant a closer look at this problem. At the outset, it is necessary again to point out that the rule exempting cultural property from measures of constraint may well be derogated from by way of treaties allowing the taking of such measures. For instance, in the *Odyssey Marine Exploration* case, before concluding that a Spanish shipwreck fulfilling the notion of underwater cultural heritage was immune from arrest, US courts enquired as to whether certain treaties dictated otherwise.<sup>66</sup> At the international level, this problem

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<sup>64</sup> For a restatement of the implications of these principles, see *Jurisdictional Immunities of the State*, n 1 above, paras 113-114.

<sup>65</sup> *Ibid*, paras 118-120. The jurisprudence of the European Court of Human Rights supports this approach, see especially *Kalogeropoulou and others v Greece and Germany* Appl No 59021/00 (12 December 2002), where the Court ruled that the Greek Government's refusal to authorize the enforcement of a judgment awarding damages to the victims of the Distomo massacre against German property located in Greece, including the Goethe Institute in Athens, was compatible with international law and the European Convention on Human Rights.

<sup>66</sup> *Odyssey Marine Exploration v The Unidentified Shipwrecked Vessel* 657 F.3d 1159 (11th Cir. 2011, per Black CJ), 1176-1178. The claimants invoked Art 9 of the 1958 Geneva Convention on the High Seas (affording immunity to warships on the high seas only if they are used on government non-commercial service) and the 1926 Brussels Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels; see also Arts 32 and 95-96 of the UN Convention on the Law of the Sea. The question was one of coordination between the FSIA and international agreements (cf. section 1609 FSIA: 'Subject to existing international agreements...'), and not between international norms *inter se*.

concerns again the coordination between the rules on State immunity and treaties aimed at the restitution of unlawfully exported or stolen cultural property, such as especially the UNIDROIT Convention. The stakes are higher as compared to immunity from jurisdiction, because they do not simply involve the permissibility of restitution proceedings notwithstanding immunity rules. They have to do with the power of a court to order the seizure or confiscation of art objects located in the forum jurisdiction and their consequent transfer to the rightful owners. It is not a question of title, but of material apprehension of purportedly immune property. Technically, the relationship between the allegedly customary rule on the immunity of artworks from enforcement and cultural property treaties is not amenable to unequivocal solutions according to general principles of international law.<sup>67</sup> I am inclined to think that, in view of the prominent place acquired in the international society by the fight against illicit trafficking of cultural objects and pursuant to a fair balance of the interests in question, a State is entitled, save special countervailing factors, to give precedence to its treaty restitution obligations.<sup>68</sup>

Nevertheless, the shortage of jurisprudence on the interplay between cultural property treaties and immunity rules, as well as certain features of the UNIDROIT Convention (e.g. its non-retrospective scope),<sup>69</sup> imply that the law and practice on the problem at issue has emerged from instruments and cases strictly addressing the scope and limits of State immunity from execution.

#### ***A. Antiseizure Legislation and the UNCSI's Cultural Property Exception***

The basic rule in the field of State immunity from execution stipulates that the property of a foreign State located in the territory of another State cannot be subjected to attachment, arrest and comparable measures,<sup>70</sup> unless the property is used or intended for use by the former State for commercial purposes.<sup>71</sup> As cultural objects protected under State patrimony legislation seem by definition extraneous to the commercial property exception, it may be assumed that they should never be targeted with enforcement measures when sent abroad for scientific or educational purposes, either on a long- or short-term basis. However, this assumption must be tested against the modern expansion of State laws establishing procedures for granting immunity from seizure to artworks entering the national territory under loan agreements. These laws testify that States are not persuaded that their

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Moreover, it involved treaty rules specifically concerned with issues of immunity, and not cultural property treaties without immunity provisions. It would be most interesting to see whether US courts are prepared to apply the savings clause in section 1609 to art-restitution treaties to which the US is a party.

<sup>67</sup> See, also for further references, Gattini, n 5 above, 437-439 (pointing to the possibility to regard the rule against seizure of cultural heritage property as a 'customary *lex specialis*', *ibid*, 438).

<sup>68</sup> This seems the choice retained by the United Kingdom as part of the art-antiseizure rules enacted in the 2007 Tribunals, Courts and Enforcement Act. Section 135(1) thereof reads: 'While an object is protected under this section it may not be seized..., unless (a) it is seized... by virtue of an order made by a court in the United Kingdom, and (b) the court is required to make the order under... any international treaty'. However, for the time being, these treaties do not include the UNIDROIT Convention, which the United Kingdom has not ratified.

<sup>69</sup> Art 10 UNIDROIT Convention. See also n 8 above and accompanying text.

<sup>70</sup> As in the area of immunity from jurisdiction, it is always possible that a foreign State waives its enforcement immunity, for instance by an arbitration agreement or a written declaration before the courts of the forum State, see e.g. Arts 18(a) and 19(a) UNCSI, and section 1610(a)(1) FSIA. The earmarking or allocation of property for the satisfaction of particular claims by a foreign State as per Arts 18(b) and 19(b) UNCSI may also be seen as a form of (implicit) waiver.

<sup>71</sup> See Art 19(c) UNCSI and section 1610(a) FSIA. Importantly, in the UNCSI this general exception to State immunity for 'commercial property' is only provided for *post-judgment* measures of constraint, and not for interim or conservatory measures such as a seizure prior to the entry of judgment (so called pre-judgment measures of constraint). In the latter case, immunity is only lifted upon waiver by the foreign State, cf Art 18 UNCSI. Arguably, this exclusion of non-consensual pre-judgment measures of constraint does *not* reflect customary international law. For instance, section 1610(d)(2) FSIA allows pre-judgment attachments of State commercial property, provided 'the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction'.

cultural property will unconditionally be afforded immunity by the courts of other States on the grounds of its *jure imperii* character. Accordingly, a growing trend consists in the withholding of loans to foreign institutions by art-lending States, unless the cultural objects in question are specifically and officially accorded immunity.

The US with the 1965 IFSA has been a forerunner in this area. IFSA provides that, whenever art objects are imported into the US on a non-profit basis for temporary exhibition or display by any US cultural or educational institution, a prior government decision may immunize such objects from ‘any judicial process... having the effect of *depriving such institution... of [their] custody or control*’.<sup>72</sup> The requirements for granting immunity are the cultural significance of the artworks and the national interest in having them exhibited within the US. The US example has increasingly been followed. At least ten more countries have enacted immunity from seizure legislation.<sup>73</sup> Unsurprisingly, these are developed countries with high stakes in cross-national exchanges of art.<sup>74</sup>

In this context, the UNCSI is a breakthrough. Unlike existing international instruments<sup>75</sup> and national statutes relating to State immunity,<sup>76</sup> the UNCSI singles out artworks as a category of property to be considered in use for non-commercial purposes, thus immune from execution. Pursuant to Article 21(1) UNCSI, this absolute presumption of immunity applies to: ‘(d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale’; and ‘(e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale’.

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<sup>72</sup> 22 USC 2459(a), emphasis added.

<sup>73</sup> In chronological order according to the year of enactment of the relevant legislation, these countries are: Canada (with various provincial statutes starting with the Manitoba IFSA 1976), Australia (1986), France (1994), Ireland (1994), Germany (1999), Austria (2003), Belgium (2004), Switzerland (2005), Israel (2007), and the United Kingdom (2007). For an overview, see Gattini, n 5 above, 425-430. For a detailed account of Canadian laws, see D Getz, ‘The History of Canadian Immunity from Seizure Legislation’ 18 IJCP 201 (2011).

<sup>74</sup> Glaringly absent from the countries listed in the previous note is Italy, which has therefore been exposed to embarrassing incidents in relation to artworks sent on loan by foreign museums. Most prominently, a motion seeking the seizure of Matisse’s masterpiece ‘La Danse’ was filed with the Tribunal of Rome in June 2000 by Marc Delocque-Fourcaud, while the painting was on loan from Russia for an exhibition hosting various Hermitage Museum’s artworks. Delocque-Fourcaud is the heir of the famous art patron Sergei Shchukin, whose invaluable art collection was nationalized by the Bolsheviks in the aftermath of the 1918 Russian Revolution. His motion for the seizure of ‘La Danse’ prompted the latter’s immediate ‘repatriation’ at the insistence of the Hermitage authorities, and irrespective of an agreement according to which the masterpiece had to be sent to Milan for another exhibition at the Brera art gallery. Given the departure of the painting from Italian territory, the Tribunal of Rome dismissed the motion on 21 July 2000; see ‘Matisse, la « Danse » contesa torna all’Ermitage’, *Il Corriere della Sera*, 13 June 2000, 35; ‘La Danse fugge ed evita il sequestro’, *La Repubblica*, 14 June 2000, 52. Since then, it appears that Russia is particularly wary of art loans to Italy; for the telling example of a 2008 Venice’s exhibition dedicated to Titian which did not include two Hermitage paintings, see Gattini, n 5 above, 421. For the hitherto unsuccessful antiseizure legislative initiatives tabled in the Italian Parliament, see M Frigo, ‘Protection of Cultural Property on Loan – Anti-Seizure and State Immunity Laws: An Italian Perspective’ 14 *Art Antiquity and Law* 49 (2009/1).

<sup>75</sup> An exception is the 1991 Basel Resolution of the *Institut de droit international* on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement, available at [www.idi-iii.org/idiE/resolutionsE/1991\\_bal\\_03\\_en.PDF](http://www.idi-iii.org/idiE/resolutionsE/1991_bal_03_en.PDF). Art 4(2)(d) of the Resolution specifically considers ‘property identified as part of the cultural heritage of the State, or of its archives, and not placed or intended to be placed on sale’ as immune from enforcement measures.

<sup>76</sup> The only exceptions are constituted by recent laws which attest to the impact of the UNCSI’s provisions. These are Japan’s Act on the Civil Jurisdiction with respect to a Foreign State (Act No 24 of 24 April 2009), which exempts cultural heritage property and exhibits of a scientific, cultural or historical significance from enforcement proceedings (Art 18(2)(iii)(a) and (b)) (this Act essentially reproduces the UNCSI, which Japan has ratified on 11 May 2010); and Canada’s ‘terrorism amendment’ to the State Immunity Act enacted by the Justice for Victims of Terrorism Act (Part I of the Safe Streets and Communities Act, Bill C-10, 13 March 2012), which *generally* allows measures of constraint against the property of States supporters of terrorism, ‘other than property that has cultural or historical value’ (section 12(1)(d)).

There is a certain degree of overlapping between the two clauses above,<sup>77</sup> but the important point is that the inclusion of cultural heritage property in this provision aims at foreclosing ‘any presumption or implication of consent to measures of constraint’<sup>78</sup> against it, as well as ‘any interpretation’<sup>79</sup> to the effect that it is commercial property. With a significant limitation: cultural property must not be (or intended to be) on sale at the time it is threatened by enforcement measures, for instance when they are on loan to a foreign country for exhibition purposes, *or* when they have been or will be on loan to yet other countries. There is however a substantial difference between this limitation and the approach taken in the *Malewicz* case,<sup>80</sup> according to which art-related activities – such as art loans – are commercial transactions, regardless of their cultural purposes and of the cultural importance of the objects at stake. True, that case was about immunity from jurisdiction but, as shown below, this US court attitude towards the issue of commerciality and cultural property finds reflection also in the practice regarding immunity from execution.

The UNCSI is thus a chiefly significant piece of practice for the progressive crystallization of a customary rule exempting cultural heritage property from enforcement measures. It may diminish the relevance of existing antiseizure legislation, while at the same time providing similar protection for artworks located in States without such legislation or however not covered by it. Yet the current prospects for the UNCSI’s entry into force are uncertain. Moreover, certain key players in art transactions, as the US and the United Kingdom, are unlikely to ratify the UNCSI, at least in the short term, because this would require a major overhaul of their immunity statutes. These countries may alternatively consider amending such statutes in order to introduce the specific cultural property exception to immunity from execution as laid down in the UNCSI.

For the time being, practice shows that, both in the latter category of countries and elsewhere, art objects are not a priori and under any circumstances excluded from measures of constraint.

### ***B. Cases Involving Attempted Execution against Cultural Property***

Although in a few cases measures of constraint have actually been taken against cultural heritage property, such execution proceedings have ultimately failed and the property in question has thus not been transferred to the applicants. The existing practice can be conveniently distinguished according to the claim underlying the judgment sought to be executed against art objects.

#### **1. Breach of Contractual Obligations**

A first situation is that of the attempted enforcement against cultural property of damages awarded for breach of contractual or investment obligations. Here, the underlying claim is unrelated to the property targeted with attachment requests. The widely-known *NOGA/Pushkin Museum Paintings* case belongs to this category. It involved a motion for the seizure of 54 paintings of French Masters, such as Cézanne, Gauguin and Corot, that were on loan for an exhibition in Switzerland from the Pushkin State Art Museum of Moscow. The paintings were not protected under the Swiss antiseizure rules,<sup>81</sup>

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<sup>77</sup> On this and other controversial aspects arising from the UNCSI’s provision at issue read in the context of its drafting history, see Gattini, n 5 above, 430-437.

<sup>78</sup> Commentaries of the International Law Commission to the 1991 Draft Articles on Jurisdictional Immunities of States and Their Property (1991-II/2) Yearbook of the International Law Commission 13, 58.

<sup>79</sup> *Ibid.*

<sup>80</sup> See text accompanying nn 18-20 and 45 above.

<sup>81</sup> Arts 10-13 of the *Loi fédérale sur le transfert international des biens culturels*, 20 June 2003, in force 1 June 2005. The delayed entry into force of this law was due to the necessity of implementing regulations, which were adopted with the *Ordonnance sur le transfert international des biens culturels*, 13 April 2005. The exhibition at issue was held from 17 June to 13 November 2005 at the Gianadda Foundation in Martigny.

which were not effective when the loan agreement was negotiated. The request had been filed by NOGA, a Swiss company to which, in 1997, the Stockholm Court of Arbitration had awarded millions of US dollars as compensation for damage resulting from Russia's repudiation of contracts for the supply of goods.<sup>82</sup> On 11 November 2005, the motion was granted and the paintings seized upon a decision of the competent Swiss authorities, i.e. the Martigny Office for Debt Enforcement (*Office des poursuites*). After a series of alternate decisions and venturous circumstances,<sup>83</sup> the *impasse* was overcome and the paintings departed for Russia thanks to the decisive intervention of the Swiss Executive. The Public International Law Directorate of the Swiss Ministry of Foreign Affairs had tried to persuade the competent authorities to unseize the paintings, on the grounds that cultural heritage property fulfilled sovereign functions and was therefore immune from execution *as attested to by the UNCSI*.<sup>84</sup> When this advice proved unable to halt the procedure, the Swiss *Conseil fédéral* stepped in and adopted an unappealable decision imposing the immediate release of the paintings. The decision was based on the Swiss Constitution's provision<sup>85</sup> empowering the Executive to take measures to safeguard the national interest and was succinctly motivated as follows: 'Conformément au droit international public, les biens culturels d'un Etat font partie du patrimoine public, qui est par principe insaisissable'.<sup>86</sup>

Two lessons may be taken from this case. First, it is a major example of the impact of the UNCSI's cultural property exception to immunity from execution, a treaty that at the time<sup>87</sup> had not been ratified by Switzerland (and was however not in force). Second, it testifies that the concern with, and stakes on, the protection of cultural heritage property in the context of art loans are so prominent that States' Executives are prepared to exercise all of their powers so as to thwart even judicial or similar proceedings endangering that protection. It should be recalled that, although Executives' involvement or interference in judicial matters is a frequent occurrence in the field of State immunity at large, this raises acute problems of constitutional legality (at least) in countries such as Switzerland.

The *NOGA* affair has set an influential precedent in international law. Lately, it has been explicitly endorsed in Austria by the courts and authorities dealing with the very similar *Diag Human* case, which involved the attempted execution upon cultural property on loan of damages awarded to an investor against the Czech Republic.<sup>88</sup> Two arbitral rulings had found the latter State responsible for the disruption of a blood plasma joint venture deal with a Czech-Swiss businessman and his company (*Diag Human*). The company was ultimately awarded near 9 million Czech crowns in damages. When in early 2011 the Czech Republic lent to the Austrian National Gallery Belvedere three artworks (two paintings by Filla and Beneš, and a sculpture by Gutfreund) for the purposes of an exhibition, *Diag Human* applied to a district court in Vienna for the recognition of the arbitral award and the seizure of the cultural property displayed at Belvedere. The Czech Republic had been imprudent in not conditioning the loan to the release of an immunity guarantee under the Austrian antiseizure legislation. As in the *NOGA* case, the Viennese Court at first ordered the seizure of the artworks, but soon after it overturned the decision by accepting the submissions of the defendant State *and* the

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<sup>82</sup> For further background information, see Gattini, n 5 above, 422 n 4; Fox, n 59 above, 653-655.

<sup>83</sup> Including the Swiss police's diversion of the trucks transporting the paintings and the latter's subsequent storage in the Geneva Airport duty-free area. For a detailed account, see *Office des poursuites et faillites du district de Martigny v Compagnie Noga d'importation et d'exportation SA*, No 5A.334/2007/frs (Swiss Federal Tribunal, 29 January 2008).

<sup>84</sup> Cf *ibid*, para A.b.

<sup>85</sup> Art 184(3) of the Swiss Constitution provides: 'When the safeguard of the interests of the country so require, the Federal Government may issue ordinances and orders. Ordinances have to be limited in time'.

<sup>86</sup> Decision of 16 November 2005, available at [www.admin.ch/cp/f/437b71c6\\_1@fwsrv.html](http://www.admin.ch/cp/f/437b71c6_1@fwsrv.html).

<sup>87</sup> Switzerland ratified the UNCSI on 16 April 2010.

<sup>88</sup> For more detail, see van Woudenberg, n 39 above, 302-305.

Austrian Ministry of Foreign Affairs.<sup>89</sup> This paved the way for the return of the cultural objects to the Czech Republic, which occurred on 22 November 2011.

The essential position of the Viennese Court (and Austria's Executive) was again that State cultural property on loan is shielded from enforcement proceedings by a customary rule of international law *and* that this rule is codified by the UNCSI.<sup>90</sup> This provides further evidence of the remarkable impact of the UNCSI's cultural property exception on the attitude of States. Although it is not in force, that exception is increasingly applied by States as a matter of customary law. Yet the latter conclusion has been reached in disputes concerning contractual breaches and transactions wholly unconnected to the cultural objects sought to be attached.

One may only speculate as to whether the approach of the Swiss and Austrian authorities would have been any different had the cases above involved claims arising from serious violations of human rights or cultural objects expropriations committed by the foreign-State judgment debtor.

## 2. Gross Violations of Human Rights and the US Terrorism Exception

In a second situation, execution against State cultural property may be attempted by creditors of judgments awarding damages for gross violations of human rights that are (again) unconnected to the property. Although unrelated to the property, the underlying claim is here certainly more significant than in the preceding situation, as it calls into question fundamental tenets of modern constitutions and international law. As is well-known, the *Ferrini* jurisprudence<sup>91</sup> of the Italian Supreme Court had posited that sovereign immunity for *jure imperii* acts is lost when the plaintiff's cause of action concerns serious breaches of human rights and humanitarian law, also in view of the *jus cogens* status of the norms in question. A setback for the further expansion of this jurisprudence arises from the ICJ judgment in *Jurisdictional Immunities of the State*, which found that under current customary law State immunity for *jure imperii* conducts remains in place, regardless of the gravity of the violations and/or *jus cogens* nature of the obligations at issue.<sup>92</sup> For present purposes, it should be noted that the vicissitudes surrounding the attempted execution against the Villa Vigoni Italian-German cultural centre of a Greek judgment awarding damages to the victims of a Nazi WWII massacre make one think that Italian courts were even prepared to extend the above jurisprudence to immunity from execution (i.e. to allow measures of constraint against sovereign property that serves *jure imperii* functions, such as in principle cultural property).<sup>93</sup>

In this context, significant insights are provided by a much-discussed<sup>94</sup> US case triggered by the terrorism exception to sovereign immunity laid down in section 1605A FSIA.<sup>95</sup> In *Rubin*, the plaintiffs

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<sup>89</sup> *Diag Human v Czech Republic*, Case No 72 E 1855/11 z-20 (District Court of Vienna, 21 June 2011). A challenge of this decision before the Court of Appeals in Vienna was entirely unsuccessful, as the Court dismissed the case for lack of jurisdiction (decision of 18 November 2011).

<sup>90</sup> Austria ratified the UNCSI on 14 September 2006.

<sup>91</sup> *Ferrini v Germany* 87 *Rivista di diritto internazionale* 539 (2004), English translation in *ILDC* 19 (IT 2004), 128 *ILR* 659 (Court of Cassation, 11 March 2004 No 5044).

<sup>92</sup> *Jurisdictional Immunities of the State*, n 1 above, paras 91 and 97.

<sup>93</sup> See text accompanying n 65 above.

<sup>94</sup> See e.g. D Curavic, 'Compensating Victims of Terrorism or Frustrating Cultural Diplomacy? The Unintended Consequences of the Foreign Sovereign Immunities Act's Terrorism Provisions' 43 *Cornell ILJ* 381 (2010); Caprio, n 39 above, 294-302.

<sup>95</sup> This section denies immunity 'in any case... in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act...'. The defendant State must have been designated as a State sponsor of terrorism by the US Department of State and the claimant must be a US national, a member of its armed forces, or a US

are survivors or relatives of victims of a 1997 suicide bombing in Jerusalem organized by Hamas with the complicity of Iran. They obtained a judgment awarding compensatory damages against Iran in the amount of approximately \$ 71 million.<sup>96</sup> In the face of Iran's refusal to honour this judgment, the plaintiffs relentlessly chased after Iranian attachable assets located in the US. They eventually identified various collections of Persian antiquities held by a number of US museums and cultural institutions and mounted a legal battle to recover their damages against them. In particular, they lodged motions for writs of attachment in Massachusetts and Illinois. In the former case, they are seeking execution against Persian artifacts housed by the Museum of Fine Arts in Boston and several Harvard University museums, while in the latter case they are applying to attach two collections held on long-term academic loan by the University of Chicago's Oriental Institute (i.e. the Persepolis Fortification Texts and the Chogha Mish Collection), as well as a third group of antiquities (known as the Herzfeld Collection) in Chicago's Field Museum of Natural History which the Museum purchased in 1945 from the German archaeologist Ernst Herzfeld.<sup>97</sup>

The striking point emerging from the host of decisions already made by the courts in the *Rubin* litigation is the absence of any pronouncement to the effect that the artworks at stake should be exempt from execution proceedings by definition, in view of their inherent quality as heritage property fulfilling sovereign purposes and the common interest of humanity. True, US courts abide by the letter of the FSIA and this does *not* expressly foreclose attachment of cultural property.<sup>98</sup> Nor does it foreclose attachment of non-commercial property in any circumstances.<sup>99</sup> The *Rubin* plaintiffs have so far relied on the commercial property exception set out in section 1610(a)(7) FSIA, according to which

The property in the United States of a foreign state, ... used for a commercial activity in the United States, shall not be immune from attachment..., if the judgment relates to a claim for which the foreign state is not immune under [the terrorism exception], regardless of whether the property is or was involved with the act upon which the claim is based.

The plaintiffs argued that the selling of books and academic publications in the US resulting from research on the Persian antiquities by the museums and the Oriental Institute constituted commercial activity. The district courts were only able to defeat this argument by pointing out that only the activities of foreign States themselves were relevant for the purposes of this exception, not those of other entities (i.e., the above institutions).<sup>100</sup> However, and most importantly, the Massachusetts District Court<sup>101</sup> denied immunity from attachment for the Museum of Fine Arts' and Harvard's

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employee or contractor (section 1605A(a)(2)(A)(i)(ii)). The State Department currently lists Cuba, Iran, Sudan, and Syria as States sponsors of terrorism.

<sup>96</sup> *Campuzano v Iran* 281 F. Supp. 2d 258 (DDC 2003).

<sup>97</sup> For a variety of reasons, the antiquities at stake have not and could not be granted protection from seizure under the IFSA. In the first place, their acquisition predates the enactment of the latter. Secondly, Iran's ownership title over most of them is contested by the museums. As for the case of the Oriental Institute, even assuming IFSA's applicability *ratione temporis*, the latter would not in any event cover long-term loans for academic purposes.

<sup>98</sup> The categories of property specifically exempted from attachment under section 1611 FSIA are basically the assets of foreign central banks or monetary authorities and property of a military character.

<sup>99</sup> Crucially, *any* property of agencies and instrumentalities of foreign States, such as museums and similar cultural institutions, is subject to execution of judgments concerning claims arising from the most important exceptions to immunity from jurisdiction, section 1610(b) FSIA. The same applies to judgments resulting from the terrorism exception recalled in the text, subsequent to amendments to the FSIA passed in 2008 in order to expand the possibilities of recovery of damages for victims of State-sponsored terrorism, cf section 1610(f)(g) and section 1605A(g) FSIA.

<sup>100</sup> For the Illinois litigation, see *Rubin v Iran* 349 F. Supp. 2d 1108 (N.D. Ill. 2004); for the Massachusetts litigation, see *Rubin v Iran* 456 F. Supp. 2d 228 (D. Mass. 2006). This holding did not persuade the plaintiffs to give up the argument at stake: they are insisting that the institutions possessing the antiquities may be regarded as agents of Iran, by undertaking commercial use of the artifacts (also) on Iran's behalf. This strategy has however been hindered by the rejection of discovery requests addressed to the institutions for the purpose of investigating the profits generated by the sale of publications and any arrangement about the associated royalties, cf Caprio, n 39 above, 295.

<sup>101</sup> *Rubin v Iran*, *ibid* (D. Mass. 2006), *affirmed* 541 F. Supp. 2d 416 (D. Mass. 2008).

Persian antiquities on the grounds that they were Iranian ‘blocked assets’ according to the 2002 Terrorism Risk Insurance Act (TRIA).<sup>102</sup> TRIA makes such assets subject to execution in satisfaction of judgments against terrorist States. This is a perfect example of a US court engaging in a formalistic interpretation of a terrorism-related piece of legislation setting at naught the sovereign-property immunities provided by the FSIA, all without any effort at sparing cultural heritage property from the reach of such legislation.

Most recently,<sup>103</sup> the same US court managed to dismiss *on the merits* the motion for attachment filed by the *Rubin* plaintiffs, when it ruled that the latter had not demonstrated that the antiquities at issue belonged to Iran. With a telegraphic opinion, Judge O’Toole found that the applicable Iranian laws did not automatically vest ownership on excavated antiquities in the State of Iran. The fact that those excavations took the form of open looting at ancient sites such as Persepolis, with ensuing illicit exportation of the recovered materials, did not alter his conclusion.<sup>104</sup> The Judge relied on the English decisions in *Barakat Galleries* for the proposition that the Iranian laws at stake did not confer title to excavated objects on Iran. This is at best an unfortunate example of transjudicial dialogue. The English Court of Appeal did not take a definite position on the legal effect of the laws relevant to the *Rubin* litigation. It considered them unclear and however irrelevant,<sup>105</sup> because a subsequent Iranian law<sup>106</sup> had evidently established the principle of State ownership of unrecovered antiquities. More generally, the *Barakat Galleries* appeal judgment is duly noted for its sensitivity toward the international legal framework aimed at countering the illicit trafficking in cultural objects, which was considered a crucial public policy reason for recognizing Iran’s right to the restitution of the disputed property.<sup>107</sup> This stands in marked contrast to the US *Rubin* decisions. The 2011 opinion by Judge O’Toole, rather than an accurate statement of the law, is thus best regarded as an exit strategy to avoid the dangers of privatization and commercial dispersion of very significant Persian antiquities.<sup>108</sup>

At any rate, while waiting for the next stages in the *Rubin/Persian Collections* saga,<sup>109</sup> this litigation may also be seen under a different light. Arguably, it suggests that, whenever particularly important societal and legal imperatives are at stake (e.g. redress for human rights violations resulting from terrorist activities),<sup>110</sup> certain legislatures and courts may be inclined to accord priority to those

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<sup>102</sup> Pub. L. No. 107-297, 116 Stat. 2322, Title II, section 201(a), codified at 28 USC 1610 (note). The blocking of Iranian assets in the US goes back to the decisions taken in the aftermath of the 1979 Tehran hostage crisis. Despite subsequent developments leading to the unfreezing of most Iranian assets, ‘contested assets’ remain blocked under US legislation. The Massachusetts District Court found indeed that the Persian antiquities at stake fulfilled that definition because title over them was disputed, *Rubin, ibid.*

<sup>103</sup> *Rubin v Iran* 810 F. Supp. 2d 402 (D. Mass. 2011, per O’Toole, Jr. DJ).

<sup>104</sup> *Ibid*, 404-406.

<sup>105</sup> *Iran v The Barakat Galleries*, n 32 above, para 62. See also *ibid*, para 165.

<sup>106</sup> Legal Bill Regarding Prevention of Unauthorised Excavations and Diggings, 17 May 1979. This Bill was probably considered inapplicable on the facts of the *Rubin* case because of its non-retrospective effect. It only deals with antiquities that have not yet been recovered as of the date of its enactment. This was at least the interpretation of the English Court of Appeal, see *Iran v The Barakat Galleries, ibid*, para 111.

<sup>107</sup> *Iran v The Barakat Galleries, ibid*, paras 151-163.

<sup>108</sup> Admittedly, the Judge’s opinion was facilitated by the absence of claims of ownership by Iran, which has not yet appeared in the Massachusetts’ litigation.

<sup>109</sup> The saga is far from approaching a close. As to the Illinois litigation, see recently, *Rubin v Iran* 637 F.3d 783 (7th Cir. 2011, per Sykes CJ) (striking down decisions of the district court that had declared that Iran alone could plead its immunity and had granted, upon appearance of Iran in the litigation, a plaintiff’s request for the discovery of all Iranian-owned assets in the US).

<sup>110</sup> This is intended as a general remark, and not as a broad defence of the FSIA’s terrorism exception. The shortcomings of the exception are well-known, both in terms of legal coherence (i.e. reliance on targeted State Department determinations, limitation of standing to US nationals or employees) and capability to bring effective relief. On the latter

imperatives over otherwise sacrosanct immunity principles, such as the one affording enforcement immunity to cultural property.

### 3. Expropriation

This brings us to the third situation where attachment of State cultural property may be attempted, i.e. when an individual holds a judgment against a foreign State which has unlawfully expropriated her/his cultural objects. Unlike the previous situations, there exists in this case a close connection between the underlying claim and the property sought to be attached. Therefore, the imposition of measures of constraint may appear more reasonable and supported by the international norms outlawing illicit appropriations of cultural property and mandating its restitution to the rightful owners. Yet this situation is subject to several variations, the unifying element of which is the foreign State's established responsibility for art expropriation suffered by the judgment holder.<sup>111</sup>

The simplest hypothesis is where an individual seeks to attach the very same cultural objects that she/he owned before they were confiscated by State authorities. The *Prince of Liechtenstein* litigation over the painting *Der Grosse Kalkofen* by the seventeenth-century Flemish artist Pieter van Laer was a case of first impression in that respect. In 1991, the Cologne Regional Court (*Landgericht*) ordered the seizure of the painting when it was on loan for an exhibition at the Wallraf-Richartz Museum from the Brno Historical Monuments Office in the Czech Republic.<sup>112</sup> The order granted a request lodged by Prince Hans-Adam II of Liechtenstein, whose late father had been the owner of the work of art until it was confiscated by the former Czechoslovakia in 1946. However, the proceedings brought by the Prince for the recovery of the painting on the occasion of its loan to the Cologne museum were unsuccessful, as all German courts denied jurisdiction pursuant to a clause in the 1952/1954 Settlement Convention which bars any objections by Germany to confiscations of German external assets carried out by the WWII Allied countries for war reparation purposes.<sup>113</sup> The painting was thus returned to the Cologne Municipality and eventually to the Czech authorities upon an order of the Cologne Regional Court of 9 June 1998. An application to the European Court of Human Rights by the Prince failed, as the Court unanimously ruled that Germany had not breached the applicant's right of access to justice and right to property.<sup>114</sup>

This is a quite exceptional piece of practice where a *pre-trial* seizure of cultural property has been ordered by a domestic court and maintained for about seven and a half years, before returning the artwork to the institution that had lent it for exhibition purposes. Notably, the lawsuit by the Prince was dismissed for reasons that have nothing to do with the purportedly immune status of the painting. Immunity issues were never considered by the courts, save a rapid reference in Judge Ress's concurring opinion to the ECtHR judgment where he highlighted the desirability of reviewing this

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aspect, see most tellingly, *In Re: Islamic Republic of Iran Terrorism Litigation* 659 F. Supp. 2d 31 (DDC 2009, per Lamberth CJ).

<sup>111</sup> Additionally, the foreign State's responsibility may be invoked in a claim of expropriation that has yet to be adjudicated on the merits. In this case, the discussion concerns the possibility to obtain pre-judgment measures of constraint against artworks. Though rather exceptional, this is exactly the situation occurring in the following case considered in the text.

<sup>112</sup> *Prince of Liechtenstein v Municipality of Cologne* (Cologne Regional Court, 11 November 1991). On 17 December 1991, when the exhibition ended, the painting was handed over to a bailiff. For background information, see A Gattini, 'A Trojan Horse for Sudeten Claims?' 13 EJIL 513 (2002). See also B Fassbender, 'Prince of Liechtenstein v Federal Supreme Court' 93 AJIL 215 (1999).

<sup>113</sup> Art 3 of Chapter 6 of the Convention on the Settlement of Matters Arising out of the War and the Occupation, 26 May 1952, as amended by Schedule IV to the Protocol on the Termination of the Occupation Regime, 23 October 1954.

<sup>114</sup> *Prince Hans-Adam II of Liechtenstein v Germany* Appl No 42527/98 (12 July 2001). The case also prompted proceedings before the ICJ, which however found that it did not have jurisdiction to entertain the application, *Certain Property (Liechtenstein v Germany)* (2005) ICJ Reports 6 (10 February 2005).

type of cases in the light of the public interest in international art exhibitions.<sup>115</sup> Obviously, the painting at stake was not protected in accordance with antiseizure legislation, which indeed Germany hurried up to pass in the aftermath of the *Prince of Liechtenstein* case.<sup>116</sup> Consequently, this litigation arguably shows that a cultural-property immunity defence does not *per se* necessarily bar execution proceedings targeting the expropriated artworks that form the basis of a restitution claim.

What about attempted attachments of cultural property other than that which was illegally expropriated? This question may conveniently be addressed by reference to US practice, in view of ongoing developments within that jurisdiction. At first glance and given the possibilities offered by the FSIA, it may be submitted that any artwork that receives protection under the IFSA is thereby shielded from execution measures, regardless of the claim underlying the suit. This has been affirmed in *Malewicz* with respect to the very paintings which were allegedly misappropriated by the foreign State<sup>117</sup> and would thus *a fortiori* appear to be valid for cultural property that was not the subject of the expropriation at issue. Judge Collyer held in *Malewicz* that, in general, when IFSA protection has been granted,

a litigant with a claim against a foreign sovereign may *not* seize that sovereign's property that is in this country on a cultural exchange and the litigant may *not* serve the receiving museum with judicial process to interfere in any way with the physical custody or control of the artworks.<sup>118</sup>

Nevertheless, the *Chabad* case offers a spectacular example of outstanding uncertainties in this field. In July 2010, the Columbia District Court finally established that the applicant's religious books and archival materials had been expropriated by Russia<sup>119</sup> and simultaneously ordered the defendant State

to surrender to the United States Embassy in Moscow or to the duly appointed representatives of Plaintiff Agudas Chasidei Chabad of United States the complete collection of religious books, manuscripts, documents and things that comprise the 'Library' and the 'Archive' presently being held by the Defendants at the Russian State Library and the Russian State Military Archive or elsewhere...<sup>120</sup>

Russia has expressed its resolve to not comply with this order. Most importantly, in early 2011 it has declared that it will since refrain from lending artworks to US institutions for fear that they will be subjected to enforcement measures in satisfaction of the *Chabad* decision.<sup>121</sup> In this context, the plaintiff asked the Columbia District Court to grant a motion seeking a *generic* permission to pursue execution of Russian assets in the US, as well as a motion requesting the imposition of monetary sanctions (so-called civil contempt sanctions) against the defendant for failure to abide by the July 2010 Order. In July 2011,<sup>122</sup> the Court denied the second motion on the grounds that Russia should be afforded a further possibility to show cause why sanctions should not be imposed, and be notified accordingly. Instead, the first motion was granted. The Court determined that plaintiff may now apply for attachment of specific Russian property as the procedural requirements in the FSIA have been fulfilled.<sup>123</sup> Faced with the intervention of the US Executive conveying grave concern over the

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<sup>115</sup> *Prince Hans-Adam II of Liechtenstein v Germany*, *ibid*, concurring opinion of Judge Ress joined by Judge Zupančič.

<sup>116</sup> By way of a 1999 amendment to the Act on Cultural Property Protection, see Art 20 of the *Gesetz zum Schutz deutschen Kulturgutes gegen Abwanderung*.

<sup>117</sup> *Malewicz*, n 17 above, 310 ('It is undisputed that the Malewicz Heirs could not seek to seize the artwork while it was in this country under a grant of [antiseizure] immunity').

<sup>118</sup> *Ibid*, 311 (emphasis in the original).

<sup>119</sup> *Agudas Chasidei Chabad v Russian Federation* 729 F. Supp. 2d 141 (DDC 2010, per Lamberth CJ). This was a default judgment since Russia had previously withdrawn from the litigation.

<sup>120</sup> *Agudas Chasidei Chabad v Russian Federation*, Order and Judgment (DDC 30 July 2010, per Lamberth CJ).

<sup>121</sup> See 'Dispute Derails Art Loans from Russia', *New York Times*, 2 February 2011.

<sup>122</sup> *Agudas Chasidei Chabad v Russian Federation* 798 F. Supp. 2d 260 (DDC 2011, per Lamberth CJ).

<sup>123</sup> Cf sect 1610(c) FSIA.

disruption of cultural exchanges with Russia that may ensue from the order sought by the plaintiff, Judge Lamberth replied that these were ‘imagined problems’.<sup>124</sup> According to the Judge, Russian artworks covered by a grant of immunity under the IFSA would not absolutely be affected by the order, which only generically paves the way for execution proceedings, without prejudging the legality of any specific attachment eventually pursued.<sup>125</sup> Moreover, upon request from the plaintiff, the Judge accepted to include in his order a stipulation to the effect that ‘Plaintiff shall not enforce the default judgment in this action by seeking to attach or execute against any art or object of cultural significance which has been granted protection under [the IFSA]’.<sup>126</sup> But was this stipulation necessary? Probably yes, as the relationship between the FSIA’s exceptions to immunity from execution and the IFSA has not yet been conclusively determined by the courts. Judge Lamberth was thus wise to point out that

the Court is unwilling to conclude that Russia’s concerns about the safety of its own cultural objects [are] entirely unfounded, given prior – albeit unsuccessful – attempts to attach [IFSA-protected] objects in at least one other case in satisfaction of a FSIA judgment... While the Court is eager to provide whatever assurances to Moscow are necessary to encourage full future exchanges of art and artifacts between the United States and Russia,... the Court is not imbued with the authority to pre-judge any potential attachment that might occur.<sup>127</sup>

The case referred to in the foregoing passage is *Magness v Russia*. This earlier case shows yet another most interesting variation on the theme discussed in the present subsection. A Texan district court had established that in 1994 the plaintiffs’ property in St. Petersburg, including an historical piano factory and a host of associated antiquities, had unlawfully been confiscated by Russian authorities.<sup>128</sup> Instead of restitution, plaintiffs sought pecuniary compensation, which that court awarded in the amount of nearly \$ 235 million. The judgment holders attempted execution in Alabama, where Russian cultural objects of ‘like kind and character’<sup>129</sup> vis-à-vis those expropriated were stationed as part of an itinerant exhibit (‘Nicholas and Alexandra: The Last Imperial Family of Tsarist Russia’) scheduled to visit various US cities. Such objects comprised the Golden Coronation Carriage (circa 1793), the Grand Piano of Empress Alexandra Feodorova (circa 1898), and the Miniature Copy of Imperial Regalia by Faberge Jewels (circa 1899-1900).<sup>130</sup> Judge Butler denied the writ of execution on the grounds that the exhibit at issue had been granted protection under IFSA pursuant to a 1998 governmental determination to that effect.<sup>131</sup> The Judge seemed to conceive IFSA as a *lex specialis* vis-à-vis the FSIA.<sup>132</sup> The plaintiffs, however, sought to challenge the 1998 governmental decision by pointing out that the exhibit and related antiquities, despite the decision’s declarations, were used for commercial purposes. The Judge rejected the argument by relying on the need to pay due deference to the Executive’s determinations.<sup>133</sup> This is a very controversial finding when seen in the context of post-FSIA immunity case law. It is well-known that one of the main objectives in enacting the FSIA was to

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<sup>124</sup> *Chabad*, n 122 above, 271.

<sup>125</sup> *Ibid*, 270-271.

<sup>126</sup> *Ibid*, 266, 272.

<sup>127</sup> *Ibid*, 272 n 3.

<sup>128</sup> *Magness*, n 15 above.

<sup>129</sup> *Ibid*, 703.

<sup>130</sup> *Magness v Russian Federation* 84 F.Supp. 2d 1357 (S.D. Ala. 2000, per Butler CJ), 1358.

<sup>131</sup> *Ibid*, 1360.

<sup>132</sup> *Ibid*, 1359.

<sup>133</sup> *Ibid*, 1360 (‘In view of the fact that an agency’s determination is entitled to deference... this Court will not attempt to go behind that determination and, thus, put in jeopardy the Exhibition which was originally brought into this country in reliance on such a determination’).

depoliticize immunity disputes by entrusting the courts with the exclusive and independent authority to render decisions in this area.<sup>134</sup>

It is difficult not to consider with the utmost attention the claim advanced by the *Magness* plaintiffs. Not only were they arbitrarily deprived of their cultural property. They also had to endure the mocking occurrence of antique objects, some of which were *similar in all respects* to those that were confiscated from them, travelling around the US, i.e. their country of nationality. The *Magness* decision confirms that the relationship between the unlawful expropriation of artworks and enforcement immunity for cultural property (even if protected from seizure) is an unsettled matter.<sup>135</sup> It will be unsurprising to witness further cases where creditors of judgments recognizing their title to cultural property that was illegally expropriated will attempt to attach yet other art objects in the possession of foreign States.

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<sup>134</sup> See e.g. section 1602 FSIA. Admittedly, the debate over the degree of deference due to the US Executive's opinions in matters of State immunity has been revamped by ambiguous statements contained in the Supreme Court's decision in *Altmann*, n 11 above, 1433, 1435 n 23 (majority), and 1450-1452 (per Kennedy J dissenting). For a very important decision (also) in our context, which grants deference to the Executive's submissions on sovereign immunity, see *Whiteman v Dorotheum GMBH & Co. KG* 431 F.3d 57 (2nd Cir. 2005, per Cabranes CJ).

<sup>135</sup> It is telling that, in the context of an essay mostly criticizing the current US trend towards removing immunity in art-related suits, Caprio proposed a cultural-property exception amending the FSIA's enforcement immunity rules that would be without prejudice to attachment against artworks – *including those protected under IFSA* – that are 'found to be the rightful possession of another through a claim of ownership', Caprio, n 39 above, 305. See n 42 above on the ongoing US Congress's discussion of a bill that, unlike Caprio's proposal, aims to amend the expropriation exception to immunity from *jurisdiction*.

#### **IV. Conclusion**

The intersection of the law of State immunity and cultural property issues raises profound dilemmas that are well illustrated in the stunning concluding passage of Judge Lamberth's 2011 opinion in Chabad:

The Court hopes that today's opinion will help facilitate a return to business as usual in the sharing of artifacts and history between nations that is crucial to the promotion of cross-cultural understanding in a global world, that the ability to attach and execute property not otherwise subject to immunity under FSIA or any other federal statute may aid plaintiff in its pursuit of the return of the lost Library and Archive containing the cultural heritage and history of the Chasidim movement, and that the show cause order may prompt Russia to rethink its decision to retain items of immense historical and religious significance, seized during times of great crisis and in violation of international law, in warehouses rather than return them to their rightful owners.

The unimpeded cross-national sharing of cultural artifacts for educational and scientific purposes and the respect for property that is part of States' cultural heritage compete with individual claims for redress for spoliations carried out in breach of human rights and international law. A clear-cut, all-encompassing answer to the existing dilemmas is not forthcoming. Equally, a perspective based on cultural human rights is inconclusive. Again, the Chabad case exemplifies this point: if, for the sake of a collective right to culture, one was to defend Russia's immunity from jurisdiction and the absolute protection of its cultural objects from the spectre of enforcement measures, this would inevitably run against the Chasidim organization's members' right to enjoy religious heritage property essential for their religious beliefs and practice. It would also condone cultural crimes and blatantly discriminatory acts perpetrated in times of armed conflict.

In the foregoing excerpt, Judge Lamberth pointed to the possibility of the plaintiff attaching Russian property, other than cultural objects, in satisfaction of the underlying judgment. Surely, this may be a non-negligible consideration in cases such as NOGA and Rubin where the primary claim is unconnected to cultural property deprivation. In such a situation, a line of equilibrium could arguably be to allow execution against artworks as a last resort, when all other efforts at recovering a judgment debt have proven unsuccessful. But in the Chabad case the threat of attaching non-cultural assets (either in the US or elsewhere upon recognition of the judgment) must fundamentally serve the purpose of exerting pressure to achieve the ultimate aim of restitution of the looted art.

In this context, it appears necessary to take issue with the frequent argument that litigation before domestic courts against foreign States in cases involving egregious breaches of human rights, such as those inherent in most of the cases reviewed in this article, would be a misconceived tool to bring about effective relief for the victims without jeopardizing the pacific relations among States. It would instead upset those relations and corrupt the principles governing the law of State immunity. Regardless of one's views on this question of international law and policy, that argument misses the broader picture. It fails to consider that in these cases the denial of sovereign immunity may fulfil the function of urging States to come back to the negotiating table and accept means to settle past accounts that are alternative to litigation in foreign courts instigated by unredressed victims of wrongful actions. It is also for this reason that I support the thesis that, in such situations, immunity may be lifted when alternative remedies are, or have reasonably been proven, unavailable to wronged individuals.

Significant examples coming from the art-and-immunity practice discussed in this essay encourage that perspective. As is well-known, *Altmann* was finally resolved through binding arbitration agreed upon by the parties to the dispute. Similarly, an out-of-court settlement was reached in *Malewicz* and five of the claimed paintings were transferred to Malewicz's heirs. It is crystal clear that, in the absence of the US courts' bold assertions of jurisdiction over these cases, the latter would have remained instances of unredressed wrongs.

