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How to cite

CHECHI, Alessandro. State Immunity, Property Rights, and Cultural Objects on Loan. In: International Journal of Cultural Property, 2015, vol. 22, n° 2-3, p. 279–299. doi: 10.1017/S0940739115000211

This publication URL: https://archive-ouverte.unige.ch/unige:101372
Publication DOI: 10.1017/S0940739115000211

International Journal of Cultural Property (2015) 22:279–299. Printed in the USA.

doi:10.1017/S0940739115000211

State Immunity, Property Rights, and Cultural Objects on Loan

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Abstract: In the art field the centuries-old concepts of property and state immunity are interwoven in an ambivalent relationship. Immunity rules may constitute a shield for the works of art that have been temporarily sent abroad for exhibition purposes. The obverse of the same coin is that the same rules may thwart the legal actions filed by individuals against foreign states to retrieve art objects lost in the past as a result or in connection with grave violations of human rights and humanitarian law. This article examines this conundrum and argues that the relationship between property rights and immunity rules should be reconceptualised and aligned with the values and priorities of the international community, such as the protection of human rights, the reparation of massive and violent crimes and the respect for cultural heritage.

INTRODUCTION

The painting Christ Carrying the Cross was painted in 1538 by Renaissance master Girolamo Romanino. It depicts Christ, crowned with thorns, carrying the cross while being dragged along by a rope. In 1998, the Italian Government bought this painting from a private owner and hung it in the famed Pinacoteca di Brera, a government-run museum in Milan. A few years later this work of art was caught up in a curious struggle that originated from its turbulent past. In effect, in 1941 the painting was confiscated by Nazi-controlled French authorities from Federico Gentili di Giuseppe—an Italian of Jewish descent living in Paris—and then sold at auction together with other works. Seemingly unaware of the work's history and of the Gentili heirs' attempts to recover the family collection, in 2011 the Pinacoteca sent the Romanino painting to the Mary Brogan Museum of Tallahassee in the

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United States (US) for an exhibition. Having been informed of the loan of the Romanino, the Gentili heirs triggered an investigation that involved Interpol, the US Immigration and Customs Enforcement and the Attorney's offices. This investigation led to the seizure of the painting and to its return to the Gentilis in 2012.[1] Three reasons lie behind the smooth resolution of the case. The first is that the 1941 auction was annulled by the Court of Appeal of Paris[2]—which thus confirmed that Federico Gentili di Giuseppe remained the true owner of the painting. Second, Italian authorities did not subject the loan of the work to the release of an immunity guarantee under the US Immunity from Judicial Seizure Act.[3] This act, which was adopted in 1965 to promote international cultural exchanges, gives immunity from seizure to foreign-owned artworks while on loan in the US for non-profit exhibitions. Third, no action was taken either by the Italian Government or the Pinacoteca when they were alerted of their right to challenge the seizure of the painting.

While the case of Christ Carrying the Cross inspired this article, it is not about the restitution of art stolen by the Nazis. Rather, this article examines the interface between two legal concepts that have had a central importance in this case: property and state immunity. The notion of property denotes the idea of private ownership, that is, legal entitlement to exclusive possession of an object. Additionally, the same concept can be used to refer to the assets—such as land, ships, companies, goods, rights, and interests—that are owned by states (or by their agencies or instrumentalities). On the other hand, the doctrine of state immunity provides that a state is entitled, as a matter of international law, to immunity from the jurisdiction of foreign domestic courts in respect of acts of an inherently sovereign nature (immunity from jurisdiction). By the same token, it provides that state-owned property located in a foreign country cannot be subject to measures of constraint—such as attachment, arrest or execution—unless that property is in use or is intended for use for an activity pursuing commercial purposes (immunity from execution).

This article examines the relationship between property and state immunity with respect to a specific category of cultural assets—state-owned artworks on loan to foreign museums for exhibition purposes—and in connection to a particular type of claim—restitution grounded on the removal of such cultural objects as a result of or in connection with grave violations of international law. This analysis is carried out by focusing on the doctrine, the practice of states, the treaties adopted under the auspices of the United Nations Educational, Scientific, and Cultural Organization (UNESCO), and the recent developments concerning the law on state immunity—including the adoption of the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCSI),[4] and the judgment of the International Court of Justice (ICJ) in the *Jurisdictional Immunities of the State* case.[5] This article points out that in the context of international art loans the concepts of property and state immunity are interwoven in an ambivalent relationship. More particularly, it emphasizes that the prerogatives that sovereign states enjoy under the rules on immunity may be at odds with existing human

rights and cultural heritage norms. Then, the focus of this article moves to consider the arguments that have been put forward by advocates and commentators in relation to the restitution proceedings under consideration to assert either that domestic courts should sidestep the procedural plea of immunity, or to berate a state's legislature for declining to abrogate the norms that require domestic courts to grant immunity to foreign states. It will be demonstrated, however, that various obstacles militate against the success of restitution claims over disputed artifacts on loan. Under these circumstances, the final part of this paper sketches possible culture-sensitive courses of action for claimants of wrongfully removed art objects.

LOOKING AT PROPERTY

Definitions

As a legal term, property includes private and public property. The former notion refers to the entitlement of natural and legal persons to an object—whether movable or immovable, tangible or intangible—and to the fact that they have substantial domination over such an object. Indeed, domestic property law confers rights to proprietors in the form of an ability to acquire, possess, use, alienate, destroy, and dispose of an object. As such, property can be viewed as a bundle of rights. However, the concept of private property is not to be identified only with physical possession. Further reflection shows that an ownership right entails a relation not between an owner and a thing, but rather between the owner and other individuals in reference to that thing. In effect, the essence of private property is the right to exclude others.[6] These arguments allow the recollection that the right to property is one of the fundamental human rights that can be invoked by individuals, firms, and other private actors against states' interference. On the other hand, the term public property refers to state-owned assets and originates from the virtually unlimited and exclusive state's power to legislate on the distribution and management of resources that are situated on the national territory. Thus, public property is equal to control and is closely linked with sovereignty and the construction and regulation of social structures.[7]

Having illustrated the dual dimension of the core idea of property, it is worth pausing to look at the notion of "cultural property." But what is it? National heritage legislation employs a wide variety of definitions, ranging from the use of very general language to the specific designation of what is protected according to criteria that relate to historical, scientific, or artistic values or interests, to the age, or certain periods, or styles. Likewise, international treaties do not rely on a unique definition. The 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 UNESCO Convention) defines cultural property to include immovable as well as movable property "of great importance to the cultural heritage of every people." It then goes on to provide a non-exhaustive list of categories including religious and secular monuments and archaeological sites.

For the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention) the term cultural property means "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science." In addition, that property must fall within one of the categories listed in Article 1.[8]

Various scholars have criticized the use of the concept of "property" with regard to art objects. Patty Gerstenblith pointed out that the terms "culture" and "property" are "potentially conflicting elements." The reason is that the former term "describes the relationship between a group and the objects it holds important," while the latter centers "on legal rights of individuals to possession of objects."[9] Likewise, others scholars have emphasized that property "focuses on the utility of markets [...] and commodities," whereas the term culture refers to "interests that are sometimes inexplicable in market terms."[10] Furthermore, the use of the term property with regard to art objects has been criticized as it emphasizes private ownership as well as the exclusive sovereign interests of the territorial state at the expenses of the cultural—intangible—aspects of art objects. In other words, the term property carries an implicit choice and ordering of the importance of values.[11] In the words of Edward Rothstein, "the very notion of cultural property is narrow and flawed" because it "illuminates neither the particular culture involved nor its relationship to a current political entity. It may be useful as a metaphor, but it has been more commonly used to consolidate [...] state control."[12]

The expression "cultural property" has been "corrected" by the concept of "cultural heritage."[13] In effect, the latter notion was introduced to transcend the limits of the former. The objective was to transform cultural manifestations into a collective interest with a view of heightening legal protection and reflecting the sentiment that everybody is affected if great works of art are locked away from public display, stolen, smuggled, destroyed, or vandalized. Hence, the term "heritage" symbolizes different characteristics and relationships between objects and peoples than the term "property" does. It also reminds us of ancient civilizations as well as traditions, customs, and achievements that have been inherited from the past.[14] In sum, the shift from "property" to "heritage" indicates that the legal framework governing property was insufficient to preserve and take full account of the interests and values associated with monuments and art objects.[15] Nevertheless, the term "cultural heritage" should be regarded as including—rather than replacing—the term "cultural property."[16]

Domestic Law and the Ownership of Art Objects

Property rights are created and defined by domestic law—albeit not exclusively, as we shall see. In effect, the constitution of virtually every state recognizes the right of natural and legal persons to own property, although the precise formulation of the right varies to some extent.[17] Moreover, almost all states have enacted specific

legislation providing more protective and less trade-oriented rules for art objects than the regimes normally applied to ordinary goods. These laws may pursue various functions such as: (i) defining the limits and extent of state property; (ii) controlling the alienation of materials through provisions regulating the right of state pre-emption; (iii) regulating the exportation or the location within the state of artifacts belonging to the national heritage through their registration with one or more inventories; and (iv) imposing limits on the use of privately-owned cultural assets. Hence, state authorities have the power to circumscribe (or expropriate) individual property rights. The aim underlying this interventionist policy is to preserve the national patrimony, this being an essential value, the protection and promotion of which are incumbent on the public authorities.

It is worth taking a closer look to the state legislation adopted to fight against illicit trafficking of movable cultural materials. Although these national laws vary between countries, they tend to take two forms. First, there are the patrimony laws that provide that ownership of certain categories of cultural objects is vested *ipso iure* in the state. Consequently, the role of the state is not that of the guardian or custodian on behalf of the real owners, but that of exclusive owner. This means that the person removing an antiquity without permission is a thief and that such antiquity is stolen property. Second, there are the norms prohibiting or restricting the export of cultural materials. In contrast to patrimony laws, export controls do not affect the title to objects because their fundamental purpose is to prevent the outflow of artworks and antiquities that are important to the national patrimony. Export controls apply not only to artifacts inscribed in the state patrimony, but also to objects that are in private ownership. The distinction between patrimony laws and export regulations is critical because only the former category enjoys extraterritorial effect. As posited by John Merryman, "[i]t is an established principle of private international law that nations will judicially enforce foreign private law right."[18] Such rights include the ownership rights conferred to the state by domestic laws.[19] This is due to the fact that theft is universally recognized as a crime.[20] On the contrary, a state is not obliged to recognize and enforce the export regulations of another state. In other words, although a country can legitimately enact export control laws, it cannot create an international obligation for other nations to recognize and enforce those measures.[21]

These law-based property rights are routinely relied on in proceedings concerning the recovery of art objects: (i) stolen from a private or public collection; (ii) expropriated by government authorities in breach of existing rules; (iii) exported from the country of origin in contravention of export rules; or (iv) pillaged during armed conflicts or occupation.

International Law and the Ownership of Art Objects

Due to the pervasive nature of international law and the advent of treaties in the fields of human rights, foreign investment and cultural heritage, today national

property regimes—and hence the property rights of private actors—are increasingly affected by international law.[22] These regional and international instruments include: (i) the human rights conventions that recognize the right to property,[23] and the rights that allow individuals to act in the protection of such a right, such as the right of access to justice (which is encompassed by the international human right to fair trial)[24] and the right to an effective remedy;[25] (ii) the bilateral investment treaties stipulated under the ICSID system,[26] which aim at reducing the uncertainty for foreign investors about the destiny of their assets and entitlements in the host state; and (iii) the cultural heritage treaties adopted under the auspices of UNESCO that deal with the issue of illicit trafficking. More specifically, these latter treaties call on states to cooperate with a view to: (i) respecting the ownership rights created by the domestic law of the states from which cultural objects have been wrongfully removed;[27] (ii) preventing and fighting against theft, pillage, misappropriation, or illicit exportation of art materials owned by states or private actors;[28] (iii) preserving the integrity of every country's national patrimony, including the archaeological heritage, whether situated on land[29] or underwater;[30] and (iv) securing the restitution of stolen or illicitly exported cultural objects.[31] Various domestic courts and international bodies have (re-)interpreted the nature and scope of the right to property contained in cultural heritage and human rights treaties.[32]

It follows that the historical impenetrability of national property regimes has come to an end.[33] Today the domestic laws regulating the property rights of individuals, business, and other private actors are affected by international law in that it: (i) creates property rights;[34] (ii) protects property rights stemming from municipal law; (iii) establishes uniform standards to coordinate or harmonize property rights created under national law; and (iv) restricts or prohibits property rights authorized under municipal law.[35]

LOOKING AT STATE IMMUNITY

Definitions and Legal Bases

The principle of state immunity is a basic precept of customary international law that grows out of the doctrines of sovereignty and equality of states.[36] It can be regarded as a legally binding organizational principle developed to prevent foreign courts from interfering with the exclusive state authority as recognized by international law.[37] At one time, immunity was absolute as proceedings against foreign states were inadmissible without their consent.[38] Yet, the judicial activism of some national courts marked a gradual shift from an absolute theory of immunity to a narrower rule providing for a restrictive (or relative) immunity. Under this restrictive theory, a state is immune from the jurisdiction of foreign domestic courts in respect of claims arising out of governmental activities (*jure imperii*); it is not immune, however, from the exercise of such jurisdiction in respect of

claims arising out of activities of a kind carried on by private persons (*jure gestionis*). Immunity from enforcement is granted on the basis of the same rationale: state property located in the territory of another state can be subject to measures of constraint where the property in question is in use for an activity not pursuing government non-commercial purposes. Moreover, it must be emphasized that states can waive at any time the defense of sovereign immunity and that the rules governing immunity from jurisdiction and immunity from execution are dissimilar: immunity from suit aims to shield states from being sued by impeding the initiation of legal proceedings in the forum state, whereas immunity from execution is meant to protect state property from pre- or post-measures of constraint. Furthermore, immunity rules must be applied separately: even if a state is not immune from the jurisdiction of a foreign court, it does not mean *ipso facto* that its property can be the subject of measures of constraint on the territory of the forum state or on that of a third state.[39] The reason of this difference is that the "[e]nforcement against State property constitutes a greater interference with a State's freedom to manage its own affairs and to pursue its public purposes that does the pronouncement of a judgment by a national court of another State".[40]

Besides international customary law, the rules on state immunity have been codified in the UNCSI. This treaty lays down a general rule—that a state has immunity, for itself and its property, from the jurisdiction of other states' courts—and provides a number of (exhaustive) exceptions to it, thereby drawing a line between those situations in which a state may properly claim immunity and those in which immunity cannot be granted.

As for immunity from execution, the UNCSI provides that neither pre-judgment (Article 18) nor post-judgment (Article 19) measures of constraint can be taken against state property. Specifically, Article 19 provides that no measures can be taken "against property of a State unless […] (a) the State has expressly consented to the taking of such measures […]; or (b) the State has allocated or earmarked property for the satisfaction of the claim […]; or (c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum […]".[41] In contrast to Article 19, Article 18 contains no "commercial use" exception. Thus, pre-judgment measures of constraints are prohibited against state property unless and to the extent that the state "has expressly consented to the taking of such measures" or "has allocated or earmarked property for the satisfaction of the claim […]."[42]

UNCSI Article 21(1) lists five categories of state-owned property that by their very nature should be taken to be in use or intended for use for governmental purposes within the meaning of Article 19(c). Thus Article 21(1) prohibits the taking of post-judgment measures of constraint against specific categories of property, unless the state has expressly consented to the taking of such measures in accordance with Article 19(a) or has allocated or earmarked the property in accordance with Article 19(b). The following two categories are relevant for the purposes of the

present study: "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,"[43] and "property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale."[44] Apart from the obvious fact that Article 21(1)(e) has a greater practical import in relation to movable—rather than immovable—artworks on loan, it must be stressed that these norms apply only provided that these categories of cultural materials form part of the cultural heritage of a State and are "not placed or intended to be placed on sale." This means that Article 21(1)(e) applies to the items sent abroad on loan for inclusion in exhibitions even if the public pays to view and notwithstanding the fact that the loan itself entails a profit or compensation for the lending state. On the contrary, this provision does not apply to the objects exhibited at art fairs designed to promote sales.[45] In sum, Article 21(1)(e) ensures that states involved in art restitution cases in foreign countries do not risk to lose their sovereign powers over a fundamental component of their history and identity.[46]

The follow-up question is how to determine which property forms part of the cultural patrimony of a state. The obvious answer is that this should be determined by the relevant legislation of that state. However, it has been pointed out that the term "property of a State' as used in Article 21(1)(e) should be interpreted broadly, so as to encompass property merely possessed or controlled by a state. The reason is that many items in public collections are held by the state even though they are owned by private owners. However, it can be argued that art objects on loan can be immune from enforcement measures under UNCSI provided that the lending state proves that it has a valid legal title to lend an object under domestic legislation.[47]

In the judgment *Jurisdictional Immunities of the State*, the ICJ held that the commercial use exception of Article 19(c) reflects customary international law. Instead, the court did not dwell on the status of Article 21. It has been submitted, however, that the rule embodied in Articles 21(1)(d) and 21(1)(e) does not belong to customary international law because it is quite "novel"—even if state practice with respect to the legal protection of cultural exhibits on loan has developed in the past years.[48]

Domestic Anti-Seizure Statutes

Various states have passed legislation granting immunity from seizure to objects temporarily on loan from foreign states or state museums for exhibition purposes. These anti-seizure laws ensure that art objects will be returned to the lender without legal hindrance when the loan period expires.[49] As such, these statutes have a twofold effect: (i) preventing the seizure of loaned artworks by the courts of the borrowing state for reasons extraneous to the loan agreement; and (ii) facilitating inter-state cultural exchanges by defeating the reluctance of museums and collectors to loan their artworks to foreign jurisdictions.

Noticeably, states have passed anti-seizure laws mainly in response to court cases triggered by attempted seizures.[50] In practice, there appear to be two main scenarios. The first occurs when individuals bring ownership action in the borrowing state based on the theft of artworks from their ancestors and on the inability of any later alienation to extinguish the original title. When claimants are states, the action is based on the breach of domestic patrimony laws. The second scenario—which will not be examined here—arises where a creditor of the lender, having obtained a judgment against him, seeks to seize the lender's assets situated in the borrowing state to secure satisfaction of the judgment.[51] In both scenarios, claims are filed in the borrowing state because action or enforcement are not available in the lender state. For instance, this is the case when the laws of lending states favor the good faith purchaser of stolen artworks over the victims of theft.[52]

The enactment of anti-seizure statutes demonstrates that states are not persuaded that the courts of other states will unconditionally afford immunity to their cultural heritage items on loan on the grounds of their *jure imperii* character. In other words, the customary law principle of state immunity is considered as an insufficient doctrine to assure that art objects protected under state patrimony legislation will not be subject to enforcement measures while on loan in the borrower's jurisdiction.[53] One reason for this mistrust has to do with the fact that legislation can be more easily ascertained and enforced than customary international law. Another reason is that it is not clear whether a loan of state-owned art can be considered as an act *jure imperii* or *jure gestionis*. At one level, it can be argued that the loan of art objects constitutes a non-commercial transaction. The main reason is that art loans can be seen as state acts aimed at fostering cultural exchange and hence the mutual understanding between states. Under this approach artworks on loan would be immune from seizure. At another level, it cannot be denied that art loans also have the earmarks of commercial acts. These can be performed by states and private entities alike and habitually entail compensation by direct monetary payment and the sale of tickets and souvenirs.[54] Consequently, from this point of view state-owned artifacts on loan would not be immune from seizure by virtue of the doctrine of sovereign immunity.[55]

In this respect, the UNCSI is a breakthrough. As said, this Convention singles out art objects on loan as a category of property to be considered in use for non-commercial transactions (Article 21(1)(e)). However, it must be noted that Article 2(1)(c) UNCSI provides a broad definition of "commercial transaction",[56] whereas Article 2(2) states that in determining whether a contract or transaction is a "commercial transaction" under Article 2(1)(c) "reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction." Obviously, the application of either the nature criterion or the purpose criterion can lead to different results. Indeed, it can be submitted that an art loan is by nature an

act *jure gestionis*, whereas the purpose of the loan of state-owned art objects is one *jure imperii*. Therefore, application of the purpose criterion will result in a much more extensive immunity for a state than the application of the nature criterion.

THE AMBIVALENT RELATIONSHIP BETWEEN PROPERTY AND IMMUNITY RULES

Against the background of the analysis set out in the preceding sections it becomes clear that, when it comes to restitution claims over artifacts on loan abroad for temporary exhibitions, the concepts of property and immunity are interwoven in an ambivalent relationship. On the one hand, international law (whether custom or treaty) and anti-seizure domestic statutes may constitute a shield for publicly-owned works of art.[57] On the other hand, the application of immunity rules may have the effect of thwarting legal actions filed by individual claimants to recover artifacts lost as a result of theft or other forms of dispossession that are in the hands of foreign states.[58]

This dual effect derives from the functioning of immunity rules. As a plea preceding the commencement of merits proceedings, jurisdictional immunity bars legal action against a state if the court concerned establishes that this would impinge upon *jure imperii* activities. Immunity from seizure ensures that state-owned artworks in use or intended for use in governmental transactions or for non-commercial purposes located in a foreign state are spared from measures of constraint. In both cases immunity is granted by the courts of the forum state regardless of whether the objects concerned were taken from the original owners through unlawful means.

Such an ambivalent relationship may engender clashes between individual property rights and immunity rules, which in turn can give rise to three obvious and upsetting consequences. First, the property rights of individual claimants remain unprotected when disputed artifacts in the hands of a foreign state are privileged under the doctrine of sovereign immunity or anti-seizure statutes. Second, the granting of jurisdictional immunity to a foreign state deprives petitioners of their rights of access to justice and to an effective remedy. Third, immunity rules can conflict with the international legal instruments deployed to curb the illicit art trade. By way of examples, domestic anti-seizure statutes can clash with the obligations requiring states to return wrongfully removed art objects contained in the First Protocol to the 1954 UNESCO Convention or the 1970 UNESCO Convention.[59] These consequences are particularly painful for the claimants seeking to recover property lost in situations of persecution and victimization, such as the removal of treasures from indigenous peoples during colonial times,[60] the expropriations ordered by the Soviet Government in the aftermath of the Russian Revolution, the mass looting of Jewish art collections orchestrated by the Nazi regime in the years 1933–1945, and the Russian takings during the Second World War. In particular, the Nazi looting was unprecedented not only for its magnitude, but also

for the infliction of death, torture, and forced labor that accompanied the displacement of artworks.

HIGH HOPES AND DISMAYING REALITY

The opponents of the grant of sovereign immunity in restitution cases concerning state-owned artifacts on loan that were allegedly removed in connection with situations of persecution and victimization have resorted to various arguments in support of their contention: (i) that there is evidence that the requested objects were removed illegitimately from the patrimony of the claimant; (ii) that the conduct that led to the removal cannot be considered a sovereign act and, as such, it constitutes an exception to the obligation on the judges of the forum state to accord immunity to the defendant state; (iii) that the forum state's grant of immunity to a foreign state constitutes a violation by the forum state of the internationally guaranteed rights of access to a court and to an effective remedy; (iv) that there is a "cultural context" where the disputed objects can meaningfully return—such as the patrimony of a natural or legal person—which testify to the intimate connection between the underlying claim, the spoliation, and the art object at stake; (v) that the forum state's grant of immunity in the cases under consideration weakens the enforcement of the international legal instruments deployed to curb the illicit art trade; and (vi) that it is morally undesirable to employ the procedural plea of state immunity as a means of safeguarding the commitment to art mobility because this results in preventing the victims of wrongful taking of property by state actors from having their day in court.

All in all, these arguments point to the necessity to understand the circumstances under which cultural objects have been lost and are being claimed back as well as to differentiate the interest in redressing past injustice from the interest in the exchange of works of art and antiquities.[61] In this respect, the opponents of state immunity argue that the sharing of cultural artifacts among nations, albeit important to the welfare of states, should not trump the enforcement of the law and the reparation of past injustice. Put it another way, they maintain that states and holding institutions should cease to profit from disputed art objects under the pretexts of enriching the cultural life of all peoples and contributing to the cultural dialogue among nations. Moreover, the point of view under examination underscores that the granting of immunity regardless of the facts surrounding the removal of an object corresponds to condoning, albeit indirectly, the illegality of discriminatory or criminal dispossession. With regard to Nazi looting, Norman Palmer affirmed that "[t]o deny a Holocaust survivor access to justice is an austere and arguably disproportionate response to the administrative, economic and cultural concerns of lenders and borrowers, however legitimate those concerns. […]." He then added that "[n]ot every observer would regard the public interest in promoting international exhibitions, reassuring lenders that works will be returned and reducing the costs of tracking title, as justifying such denial".[62] Finally, the

arguments raised by the opponents of state immunity reflect the fact that the prohibition of misappropriation and the corresponding duty of restitution have acquired a prominent place in the international arena and have become components of the right to take part in cultural life.[63]

The reality, however, is different. As a matter of fact, it is only in a minority of national jurisdictions that claims over wrongfully removed artworks on loan from foreign states stand any real chance of overcoming the jurisdictional immunity of the defendant state.[64] Indeed, the arguments deployed against state immunity have to date fared poorly in domestic and international courts.[65] Additionally, should a claimant overcome the obstacle posed by the defendant state's immunity from jurisdiction, other hurdles stand in the way of recovering disputed art objects: problems of proof, questions of domestic and international law going to the merits,[66] and issues of private international law. Next, where the plaintiff obtains a favorable judgment, its enforcement against the assets of the defendant state may be precluded by the immunity from execution.[67] As said, Article 21(1) UNCSI prohibits the taking of post-judgment measures of constraint against state-owned cultural objects, even if the defendant state was not entitled to jurisdictional immunity, unless such objects are "placed or intended to be placed on sale." Moreover, when it comes to assets of the defendant state held in the territory of the defendant state or in a third state, there is the problem that the courts of that other state may refuse to give effect to a foreign judgment obtained in what they view to be violation of international law.[68]

Nevertheless, it is worth considering a few manifestations of the recent international practice that in the long run might have an impact on the discussion over the content, limitation, and development of international and domestic immunity rules with respect to art objects lost as a result of or in connection with human rights violations and now owned by states and state-controlled collecting institutions.

The first element relates to the ICJ judgment in the case *Jurisdictional Immunities of the State*. In its analysis of the customary international law applicable in respect of state immunity, the ICJ assessed a wealth of legislative, judicial, and diplomatic materials. Regrettably, it failed to consider a number of cases that would have supported the Italian thesis of the priority of human rights over state immunity.[69] Specifically, the ICJ disregarded the jurisprudence whereby US courts asserted jurisdiction over acts of expropriation and looting carried out by military forces in the context of armed conflicts. The most well-known is the *Altmann* case.[70]

The second instance of international practice concerns the implementation of the *Jurisdictional Immunities of the State* judgment. Since its delivery in February 2012, various Italian tribunals promptly complied with the obligation to execute this judgment. However, in October 2014, the Italian Constitutional Court established that the customary rule granting immunity to states for *jure imperii* acts amounting to crimes against humanity and war crimes—as interpreted by the ICJ—was incompatible with the fundamental human rights enshrined in the Italian Constitution.[71] Specifically, the Constitutional Court quashed the domestic

provisions that compelled Italian courts to abide by the ICJ Judgment—and hence to decline jurisdiction in all cases in which damages are sought for international crimes committed by the Third Reich on Italian territory—on the grounds that these violated the guarantee of access to a court, a supreme principle of the Italian Constitution.

Third, it should be mentioned that a number of anti-seizure statutes recognize derogations to sovereign immunity in order to give precedence to the restitution obligations set out in international cultural heritage instruments. In effect, these statutes make the grant of immunity by governmental authorities conditional on verification by the borrower, and demonstration by the lender, in regard to the legal provenance of every loaned object.[72] These exceptions seek to avoid state legislation being used as a vehicle to facilitate the cross-border movement of objects with a nefarious past.[73]

Finally, it is interesting to mention the "Draft Convention on Immunity from Suit and Seizure for Cultural Objects Temporarily Abroad for Cultural, Educational or Scientific Purposes" adopted in May 2014 by the Cultural Heritage Committee of the International Law Association[74]—even though the resolutions of this non-governmental organization cannot be equated to the practice of states or international organizations. The professed purpose of this document is to protect the integrity of international loans. Nevertheless, it recognizes that immunity rules can interfere with the individual rights of access to court and relief. Just as the domestic statutes mentioned above, this Draft Convention contains some clauses that aim to strike a balance between the interests of the stakeholders involved. Article 5 establishes that the rules on immunity from seizure or suit do not apply in cases where the receiving state is bound by conflicting obligations under (cultural heritage) international or regional instruments. Article 7 contains a due diligence requirement. According to this, the lending and borrowing states must, jointly or separately, exercise due diligence in establishing or confirming the licit provenance of every item of the prospected loan.[75]

CONCLUSION

The foregoing analysis has demonstrated that public exhibitions expose art to the public and, inevitably, to the scrutiny of potential claimants. In addition, it has shown that the doctrine of state immunity—in its dual form of immunity from jurisdiction and immunity from execution—represents a formidable hurdle for petitioners seeking the recovery of wrongfully removed art objects in the jurisdictions where artifacts are exhibited on the occasion of temporary international loans. Under these circumstances, there remain only a few possible courses of action for victims of spoliations and their heirs. First, claimants that decide to seek justice in the borrowing state can content themselves with a form of redress alternative to restitution. In effect, the immunity rules currently in force in many countries do not protect the borrower from claims not involving the attachment

of the object, such as damages for conversion or monetary restitution on grounds of unjust enrichment.[76] Admittedly, the possibility that these types of lawsuits are filed may convince borrowing institutions—but also lenders—to exclude disputed pieces from the loan agreement. Second, claimants can focus their efforts towards the state that owns the disputed property, which is often the entity responsible for the unlawful taking from which restitution demands originate. Thus this avenue can be elected regardless of whether the requested object is sent abroad for an international loan. In this case, claimants can try to persuade states holding contested art to negotiate a win-win solution—which can be defined as a consensual, creative, and mutually satisfactory settlement based on ethical and political concerns, fairness, and common sense, rather than on strict legal interpretation[77]—in order to facilitate the proper allocation of disputed artworks and to reconcile the interests and the (property) rights of the parties involved with the interest in the international exchange of art. Although the requested state may refuse to deaccession items of public property, it may accord—again—a form of redress alternative to restitution, such as "satisfaction."[78] For instance, claimants can obtain that the objects at stake are accompanied by a signage setting forth the names of the dispossessed owners and the circumstances of the removal.[79] Although negligible in comparison with full and unconditional restitution, this form of reparation entails an important consequence: it completes the experience of museum-goers as it makes it possible to present to them the ties that existed between a given work of art and a family heritage. This is relevant because cultural objects cannot be defined solely by their physical characteristics. As this type of property are inherently tied to the life of human beings, the values ascribed to them—be they educational, historical, scientific, cultural, aesthetic, or financial—are "relational" in the sense that they cannot be divorced from the meanings placed upon them by individuals and communities.[80]

ENDNOTES

1. The artwork was sold at auction in June 2012 for $4.56 million. Italy had paid 670 million Italian Lira for it (about €350.000!). Mike Boehm, "Italy in Unfamiliar Role in Seizure of 'Christ Carrying the Cross,'" *Los Angeles Times*, 24 April 2012, http://articles.latimes.com/2012/apr/24/entertainment/la-et-italian-painting-20120424 (accessed 14 August 2015).

2. Christiane Gentili di Giuseppe et al. v. Musée du Louvre, Court of Appeal of Paris, 1st Division, Section A, 2 June 1999, No. 1998/19209. Following this judgment the Gentilis obtained the restitution of other artworks. See: Anne Laure Bandle, Alessandro Chechi, and Marc-André Renold, "Case Five Italian Paintings—Gentili di Giuseppe Heirs v. Musée du Louvre and France," Platform ArThemis, Art-Law Centre, University of Geneva, http://unige.ch/art-adr; and Laetitia Nicolazzi, Alessandro Chechi, and Marc-André Renold, "Affaire Buste d'un jeune garçon—Héritiers Gentili di Giuseppe et Art Institute de Chicago," Platform ArThemis, Art-Law Centre, University of Geneva, http://unige.ch/art-adr.

3. 22 U.S.C. § 2459.

4. 2 December 2004, 44 ILM 801 (2005), not yet in force.

5. Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012 (*hereafter* Jurisdictional Immunities of the State). This case was brought by Germany

against Italy and relates to several Italian courts' rulings (starting with *Ferrini v. Germany*, Court of Cassation, No. 5044, 11 March 2004) to the effect that Germany could not rely on state immunity as a bar to actions for damages in respect of violations of human rights and humanitarian law committed by German armed forces on Italian territory during the Second World War. The ICJ found that Italy had violated the international custom on state immunity vis-à-vis Germany because, *inter alia*, Italian courts exercised jurisdiction in tort proceedings against Germany and took measures of constraint against Villa Vigoni, a German property situated in Italy.

6. Sprankling 2014, 206.

7. Sganga 2014, 772; and Cohen 1927.

8. Article 2 of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995 UNIDROIT Convention) covers the same categories identified by the 1970 UNESCO Convention, but does not include the designation requirement.

9. Gerstenblith 1995, 567.

10. Carpenter, Katyal, and Riley 2009, 1046.

11. Fincham 2011, 646.

12. Edward Rothstein, "Antiquities, the World Is Your Homeland," *The New York Times*, 27 May 2008, http://www.nytimes.com/2008/05/27/arts/design/27conn.html?_r=1&pagewanted=all (accessed 14 August 2015).

13. Francioni 2007.

14. Fincham 2011, 669.

15. Ibid., 644–45.

16. Blake 2000, 66.

17. Sprankling 2014, 213.

18. Merryman 2001, 58. The author warns that, although this rule is universally recognized, it is subject to the national rules protecting good faith purchasers.

19. Kaye 1999, 80.

20. Merryman 1995, 18–19.

21. For a critical analysis of the rule on non-enforceability of export restrictions, see Gordley 2013.

22. Sprankling 2014, 3, 21; and Sganga 2014. Of course, international law rules can have an impact on the right to property of private actors only if implemented by states through legislative, judicial, or administrative measures. Sprankling 2014, 41.

23. These include the European Convention on Human Rights (Article 1 of Protocol No. 1); the American Convention on Human Rights (Article 21); and the African Charter of Human and Peoples' Rights (Article 14). See also Article 17 of the Universal Declaration of Human Rights.

24. These include the European Convention on Human Rights (Article 6); and the International Covenant on Civil and Political Rights (Article 14).

25. These include the European Convention on Human Rights (Article 13); the American Convention on Human Rights (Article 25); and the International Covenant on Civil and Political Rights (Article 2(3)).

26. International Centre for Settlement of Investment Disputes (ICSID), which is based on the ICSID Convention of 1965.

27. Under the 1970 UNESCO Convention and the 1995 UNIDROIT Convention the States Parties commit to recognize and enforce the respective property rights, also by setting aside—if necessary—the domestic norms that hinder the restitution of wrongfully removed cultural objects. Article 3(1) of the 1995 UNIDROIT Convention asserts the general principle of the restitution of stolen objects, regardless of their public or private origin. This categorical provision nullifies the domestic rules that allow *bona fide* purchasers to acquire good title once the applicable limitation period has run. Under Article 5 of the 1995 UNIDROIT Convention, the ownership title that a good faith purchaser holds under national law is invalidated, the possessor only remains entitled to receive a fair and reasonable compensation.

28. The 1954 UNESCO Convention and its Protocols reiterate a key "juridical fiction" that can be traced back to Article 56 of the Regulations annexed to the Hague Convention of 1907.

This fiction exists in the declaration that cultural objects, even when owned by the state, "shall be treated as private property." This means that state-owned museums, monuments, cultural institutions, and the artifacts contained therein are to be considered as neutral and should be respected and protected by the belligerents as established by the laws or customs of war. See International Committee of the Red Cross, Customary International Humanitarian Law Database, Rule 40 ("Respect for Cultural Property") and Rule 51 ("Public and Private Property in Occupied Territory"), https://www.icrc.org/customary-ihl/eng/docs/v1_rul (accessed 14 August 2015).

29. Article 3(2) of the 1995 UNIDROIT Convention provides that unlawfully excavated objects are regarded as having been stolen.

30. Virtually all states admit that ship owners do not lose title to a vessel when it sinks – unless it has been subject to some form of lawful expropriation or has been abandoned. In effect, many maritime states have asserted rights even in respect to centuries old sunken vessels. See Dromgoole 2013, 99, 102. See also the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage.

31. The remedy of restitution can be regarded as one key component of ownership. Gambaro 2013, 137.

32. The European Court of Human Rights (ECtHR) has decided a few cases on the right to property as set out in Article 1 of Protocol No. 1 of the European Convention on Human Rights: Torno v. Italy (Application No. 61781/08, Decision of 23 September 2014), Kopecky v. Slovakia (Application No. 44912/98, Judgment of 28 September 2004), Prince Hans-Adam II of Liechtenstein v. Germany (Application No. 42527/98, Judgment of 12 July 2001), and Beyeler v. Italy (Application No. 33202/1996, Judgment of 5 January 2000). Regarding the cultural relevance of property rights for indigenous peoples see Inter-American Court of Human Rights, Awas Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua, 31 August 2001, Series C No. 79. Other human rights bodies have implemented the provisions of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights that relate to property (such as the right to an adequate standard of living and the right to housing) even if these treaties do not contain provisions explicitly dedicated to property rights.

33. Sganga 2014.

34. For instance, the ECtHR has rejected a formalistic interpretation of the concepts of "property" and "possession" that would circumscribe their subject matters within the borders set by national laws. On the contrary, the Court has broadened the range of subject matters of proprietary interests by defining "proprietary" certain entitlements even if these were not classified as such under domestic law. For some examples see Sganga 2014, 776.

35. For instance, international investment law has an impact on the content of property rights through the doctrine of direct and indirect expropriation. Additionally, the recourse to arbitration as forum for the resolution of disputes detaches the settlement from the interpretation and application of the property law of the host state. For some examples see ibid., 779–83. Sprankling 2014, 41.

36. Jurisdictional Immunities of the State, para. 57.

37. Van Alebeeck 2008, 67, 73.

38. This is demonstrated by the case *Telkes v. Hungarian National Museum* (265 NYAD 192, 197-198, 1st Dept. 1942), where the plaintiff attempted to attach property of the Hungarian Museum as security. The action was dismissed by a New York court on the grounds that the museum, as an agent of the Hungarian State, could not be subject to US jurisdiction under the doctrine of absolute immunity.

39. Jurisdictional Immunities of the State, para. 113.

40. Fox 2008, 604.

41. Article 19(c) also provides that post-judgment measures of constraint may be taken against the property of a state as such only if the proceeding on the merits was against that state at such. Brown and O'Keefe 2014a, 324.

42. Article 18(a); Article 18(b).

43. Article 21(1)(d).

44. Article 21(1)(e).

45. Brown and O'Keefe 2014b, 344–45.

46. On this relationship see Jakubowski 2013, 8. To this it must be added that legal decisions from England (*Iran v. Barakat Galleries* [2009] QB 22; [2007] EWCA Civ. 1374), Ireland (*Webb v. Ireland* [1988] IR 353), Italy (*Associazione nazionale Italia Nostra Onlus v. Ministero per i beni e le attività culturali*, Consiglio di Stato, No. 3154, 23 June 2008), and the United States (*United States v. Frederick Schultz*, 333 F.3d 393, 2nd Cir. 2003, and *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg at al*., 717 F.Supp., 1374 (S.D. Ind. 1989), aff'd, 917 F.2d 278 (7th Cir. 1990)) testify to the principle that every nation should be treated as the owner of representative artifacts. Palmer 2011, 7.

47. Brown and O'Keefe 2014b, 344–45.

48. Ibid., 347. On the customary law nature of the immunity from seizure of state-owned art objects on temporary loan in foreign jurisdictions, see also van Woudenberg 2012, 434–44; Pavoni 2013, 97; and Gattini 2008.

49. For instance, the US Immunity from Judicial Seizure Act provides that, whenever an art object of cultural significance is imported into the United States on a non-profit basis for temporary exhibition, and whenever there is a national interest in such an exhibition, a prior governmental decision may immunize such an object from "any judicial process" having the effect of depriving the borrowing institution of custody or control. 22 U.S.C. § 2459(a).

50. For instance, the laws in the United States and United Kingdom stemmed from pressure by Russia to protect property nationalized after the Russian Revolution or taken during and after the Second World War. Kaye 2010, 336.

51. See the cases 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), and Diag Human v. Czech Republic (Case No. 72 E 1855/11 z-20, District Court of Vienna, 21 June 2011). See van Woudenberg 2012, 310 and 302, respectively.

52. Palmer 2011, 5–6; and Kaye 2010, 353.

53. Pavoni 2013, 95.

54. Judge Collyer of the Columbia District Court ruled that a state's loan of artworks to foreign museums for exhibition purposes had to be considered a commercial transaction because there is "nothing 'sovereign' about the act of lending art pieces, even though the pieces themselves might belong to a sovereign." Malewicz v. City of Amsterdam, 362 F.Supp.2d 298 (D.D.C. 2005).

55. Van Woudenberg 2012, 63–65, and the various authors cited therein.

56. Article 2(1)(c) states that "commercial transaction" means: "(i) any commercial contract or transaction for the sale of goods or supply of services; (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction; (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons."

57. In the *Rubin* case the plaintiffs were survivors or relatives of victims of a 1997 suicide bombing in Jerusalem organized by Hamas with the alleged complicity of Iran. Having obtained a default judgment against Iran, including compensatory and punitive damages, the plaintiffs sought to execute the judgment by attaching several antiquities owned by Iran but in the possession of the Boston Museum of Fine Arts and Harvard University, either to persuade Iran to pay damages or to forfeit the artifacts and sell them at auction. In 2013, a Court of Appeals of Massachussets held that the antiquities were immune from attachment and execution. Rubin et al. v. Iran, No. 11–2144, 2013.

58. See for example United States v. Portrait of Wally, 105 F. Supp. 2d 288 (S.D.N.Y. 2000); 2002 US Dist. LEXIS 6445, 11 April 2002; 663 F. Supp. 2d 232 (S.D.N.Y. 2009); and Shchukin v. le Centre National d'Art et de Culture Georges Pompidou et al. (TGI, 1eme Ch., 1 Sect., 16 July 1993). See van Woudenberg 2012, 184 and 282, respectively.

59. On this issue see van Woudenberg 2012, 367–408.

60. However, there are no examples—to the knowledge of the present author—where the immunity defense has been used to defeat this type of restitution claim.

61. Kaye 2010, 351.

62. Palmer 2011, 23.

63. See UN Committee on Economic, Social and Cultural Rights, General Comment No. 21 on the Right of everyone to take part in cultural life, Article 15, paragraph 1(a), of the International Covenant on Economic, Social and Cultural Rights.

64. See van Woudenberg 2012, and footnotes 70, 72, and the corresponding text.

65. It suffices to recall that in *Jurisdictional Immunities of the State* the ICJ ruled that the plea of state immunity for acts and property serving *jure imperii* purposes remains in place, regardless of the gravity of the violations at issue.

66. For instance, restitution cannot be envisaged where the deaccessioning of artworks from public collections is prohibited by domestic legislation. The reason for this restriction, at least in some civil law systems (e.g. Italy and France), lies in that museum collections belong to the indisposable *domain public*. Similarly, in England, the British Museum and other institutions are subject to statutory bans on disposal. Schönenberger 2009, 161.

67. O'Keefe 2011, 1006, 1035–37.

68. Ibid.

69. Pavoni 2011.

70. Maria Altmann v. Republic of Austria, 142 F.Supp. 2d 1187 (C.D. Cal. 2001), *aff'd*, 317 F.3d 954 (9th Cir. 2002), as amended, 327 F.3d 1246 (9th Cir. 2003), 541 US 677 (2004). The *Altmann* ruling resonated in subsequent cases: Malewicz v. City of Amsterdam, 362 F.Supp.2d 298 (D.D.C. 2005); Cassirer v. Kingdom of Spain and the Thyssen-Bornemisza Collection Foundation, 616 F.3d 1019 (9th Cir. 2009), 2010 WL316970 (9th Cir. 12 August 2010); Agudas Chasidei Chabad v. Russian Federation, 466 F. Supp. 2d 6 (D.D.C. 2006, per Lamberth CJ), 528 F.3d 934 (D.C. Cir. 2008, per Williams SCJ); Orkin v. Swiss Confederation et al., 2011 U.S. App. Lexis 20639 (October 12, 2011) 142 F.Supp. 2d 1187 (C.D. Cal. 2001), *aff'd*, 317 F.3d 954 (9th Cir. 2002), as amended, 327 F.3d 1246 (9th Cir. 2003), 541 US 677 (2004); and de Csepel v. Hungary, 808 F.Supp.2d 113 (2011).

71. Simoncioni and others v. Germany and others, No. 238, 22 October 2014.

72. In Germany, legal actions for recovery, orders of attachment and seizure are inadmissible once the competent authority has issued a "legally binding commitment to return." However, the German statute requires the publication in advance of the information regarding the objects that will be loaned in order to give time for objections to be raised. In Switzerland, the *Loi sur le Transfert des Biens Culturels* (2003) subjects the issuance of a return guarantee to specific conditions, i.e. that "the import of the cultural property is not illicit" and that "no person claims ownership to the cultural property through an objection." The request of a return guarantee is published in the Federal Bulletin in order to allow third parties to make claims. If no objections are raised within 30 days from the publication of the request, any action is precluded as long as the assets are located in Switzerland. In the United Kingdom, the *Tribunals, Courts and Enforcement Act* (2007) seeks to avoid looted or stolen artworks finding their way into the domestic trade via international loans. Article 135(1) establishes that, an object on loan "may not be seized or forfeited […] unless (a) it is seized or forfeited under or by virtue of an order made by a court in the United Kingdom, and (b) the court is required to make the order under, or under provision giving effect to, a Community obligation or any international treaty." See van Woudenberg 2012, 225, 289, 310, respectively.

73. Kaye 2010, 349–51; Forrest 2014, 160; and Palmer 2011, 16–17.

74. See International Law Association, Cultural Heritage Committee 2014. The Draft Convention is intended for eventual adoption by an international or regional organization and it is available at: http://www.ila-hq.org/en/committees/index.cfm/cid/13 (accessed 14 August 2015).

75. Article 7 requires compliance with, at least, the standards contained in the ICOM Code of Ethics. This sets minimum standards of professional practice and performance for museums and staff. For instance, it establishes that museums should refrain from exhibiting objects which have been illegally exported or are of doubtful provenance: "no object or specimen should be acquired by […] loan […] unless the acquiring museum is satisfied that a valid title is held" (Article 2(2)); "every effort must be made before acquisition to ensure that any object or specimen offered for

[…] loan […] has not been illegally obtained in or exported from, its country of origin or any intermediate country in which it might have been owned legally. Due diligence in this regard should establish the full history of the item from discovery or production" (Article 2(3)).

76. Palmer 2011, 13–15; Kaye 2010, 353–54.

77. The variety of solutions that can be achieved through these procedures include outright restitution, loans, donations, co-ownership, the production of replicas, the establishment of forms of inter-state, or inter-institutional cultural cooperation.

78. "Satisfaction" as defined in Article 37 of the Commentaries of the International Law Commission to the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts: "1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation. 2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality […]."

79. See the database *ArThemis* for two examples: Raphael Contel, Giulia Soldan, Alessandro Chechi, "Case Portrait of Wally—United States and Estate of Lea Bondi and Leopold Museum," Platform ArThemis, Art-Law Centre, University of Geneva, http://unige.ch/art-adr; and Anne Laure Bandle, Raphael Contel, Marc-André Renold, "Case Lighthouse with Rotating Beam—Flechtheim Heirs and Kunstmuseum Bonn," Platform ArThemis, Art-Law Centre, University of Geneva, http://unige.ch/art-adr.

80. See Lixinski 2013, 3, and Gillman 2006, 44.

BIBLIOGRAPHY

African Charter of Human and Peoples' Rights, 27 June 1981, 1520 UNTS 217.

American Convention on Human Rights, 22 November 1969, 1144 UNTS 123.

Blake, Janet. 2000. "On Defining the Cultural Heritage." *International and Comparative Law Quarterly* 49, no. 1: 61–85.

Brown, Chester, and Roger O'Keefe. 2014a. "Article 19." In *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, edited by Roger O'Keefe and Christian J. Tams, 308–27. Oxford: Oxford University Press.

———. 2014b. "Article 21." In *The United Nations Convention on Jurisdictional Immunities of States and Their Property. A Commentary*, edited by Roger O'Keefe and Christian J. Tams, 334–47. Oxford: Oxford University Press.

Carpenter, Kristen A., Sonia K. Katyal, and Angela R. Riley. 2009. "In Defense of Property." *Yale Law Journal* 118, no. 6: 1022–25.

Cohen, R. Morris. 1927. "Property and Sovereignty." *The Cornell Law Quarterly* 13, no. 1: 8–30.

Dromgoole, Sarah. 2013. *Underwater Cultural Heritage and International Law*. Cambridge: Cambridge University Press.

European Convention on Human Rights, 4 November 1950, 213 UNTS 221.

Fincham, Derek. 2011. "The Distinctiveness of Property and Heritage." *Penn State Law Review* 115, no. 3: 641–83.

Forrest, Craig. 2014. "Immunity from Seizure and Suit in Australia: The Protection of Cultural Objects on Loan Act 2013." *International Journal of Cultural Property* 21, no. 2: 143–72.

Fox, Hazel. 2008. *The Law of State Immunity*. Oxford: Oxford University Press.

Francioni, Francesco. 2007. "A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage." In *Standard-Setting in UNESCO, Normative Action in Education, Science and Culture*, Vol. 1, edited by A. A. Yusuf, 221–36. Leiden: Martinus Nijhoff and UNESCO Publishing.

Gambaro, Antonio. 2013. "Community, State, Individuals and the Ownership of Cultural Objects." In *The 1970 UNESCO Convention: New Challenges*, edited by Jorge A. Sanchez Cordero, 135–49. Mexico: Instituto de Investigaciones Juridicas.

Gattini, Andrea. 2008. "The International Customary Law Nature of Immunity from Measures of Constraint for State Cultural Property on Loan." In *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner*, edited by Isabelle Buffard, James Crawford, Alain Pellet, and Stephan Wittich, 421–40. Leiden/Boston: Martinus Nijhoff Publishers.

Gerstenblith, Patty. 1995. "Identity and Cultural Property: The Protection of Cultural Property in the United States." *Boston University Law Review* 75, no. 3: 559–688.

Gillman, Derek. 2006. *The Idea of Cultural Heritage*. Leicester: Institute of Art and Law.

Gordley, James. 2013. "The Enforcement of Foreign Law." In *Enforcing Cultural Heritage Law*, edited by Francesco Francioni and James Gordley, 110–24. Oxford: Oxford University Press.

International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.

International Law Association, Cultural Heritage Committee. 2014. "Draft Convention on Immunity from Suit and Seizure for Cultural Objects Temporarily Abroad for Cultural, Educational or Scientific Purposes." Conference Resolution No. 3, Washington, DC, http://www.ila-hq.org/en/committees/index.cfm/cid/13 (accessed 14 August 2015).

Jakubowski, Andrzej. 2013. "Cultural Property under the Threat of Seizure—(Re-)defining the Limits of State Immunity in the Face of International Crimes." *Art Antiquity and Law* 18, no. 1: 7–29.

Kaye, M. Lawrence. 1999. "Art Wars: The Repatriation Battle." *New York University International Journal of Law and Politics* 31, no. 1: 79–94.

———. 2010. "Art Loans and Immunity from Seizure in the United States and the United Kingdom." *International Journal of Cultural Property* 17, no. 2: 335–59.

Lixinski, Lucas. 2013. *Intangible Cultural Heritage in International Law*. Oxford: Oxford University Press.

Merryman, H. John. 1995 "A Licit International Trade in Cultural Objects." *International Journal of Cultural Property* 4, no. 1: 13–60.

———. 2001. "Cultural Property, International Trade and Human Rights." *Cardozo Arts & Entertainment Law Journal* 19, no. 1: 51–67.

O'Keefe, Roger. 2011. "State Immunity and Human Rights: Heads and Walls, Hearts and Minds." *Vanderbilt Journal of Transnational Law* 44, no. 4: 999–1045.

Palmer, Norman. 2011. "Itinerant Art and the Architecture of Immunity from Legal Process: Questions of Policy and Drafting." *Art Antiquity and Law* 16, no. 1: 1–23.

Pavoni, Riccardo. 2011. "An American Anomaly? On the ICJ's Selective Reading of United States Practice in *Jurisdictional Immunities of the State*." *Italian Yearbook of International Law* 21, no. 1: 143–59.

———. 2013. "Sovereign Immunity and the Enforcement of International Cultural Property Law." In *Enforcing Cultural Heritage Law*, edited by Francesco Francioni and James Gordley, 79–109. Oxford: Oxford University Press.

Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907, 18 October 1907, 1 Bevans 631.

Schönenberger, Beat. 2009. *The Restitution of Cultural Assets*. Berne: Stämpfli.

Sganga, Caterina. 2014. "Cracking the Citadel Walls: A Functional Approach to Cosmopolitan Property Models Within and Beyond National Property Regimes." *Cambridge Journal of International and Comparative Law* 3, no. 1: 770–94.

Sprankling, G. John. 2014. *The International Law of Property*. Oxford: Oxford University Press.

UNESCO. "Convention for the Protection of Cultural Property in the Event of Armed Conflict." 14 May 1954, 249 UNTS 240.

———. "Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property." 17 November 1970, 823 UNTS 231.

———. 2002. "Convention on the Protection of the Underwater Cultural Heritage." 2 November 2001, 41 ILM 37.

UNIDROIT. 1995. "Convention on Stolen or Illegally Exported Cultural Objects." 24 June 1995, 34 ILM 1322.

United Nations. 2005. "Convention on Jurisdictional Immunities of States and Their Property." 2 December 2004, 44 ILM 801, not yet in force.

United Nations Committee on Economic, Social and Cultural Rights. General Comment No. 21 on the Right of Everyone to Take Part in Cultural Life, UN Doc. E/C.12/GC21, 21 December 2009.

Universal Declaration of Human Rights, 10 December 1948, UN Doc. A/810 (1948).

Van Alebeeck, Rosanne. 2008. *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*. Oxford: Oxford University Press.

Van Woudenberg, Nout. 2012. *State Immunity and Cultural Objects on Loan*. Leiden/Boston: Martinus Nijhoff Publishers.